

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

Thursday, March 27, 2025 5:00 p.m.

Don L. Nay Port Administration Boardroom 3165 Pacific Hwy. San Diego, CA 92101

The meeting will be held in person at the above date, time and location(s). Members of the Board of Directors and members of the public may attend in person. Under certain circumstances, Directors may also attend and participate in the meeting virtually pursuant to the Brown Act (Gov. Code § 54953). As a convenience to the public, Community Power provides a call-in option and internet-based option for members of the public to virtually observe and provide public comments at its meetings. Additional details on in-person and virtual public participation are below. Please note that, in the event of a technical issue causing a disruption in the call-in option or internet-based option, the meeting will continue unless otherwise required by law, such as when a Board Member is attending the meeting virtually pursuant to certain provisions of the Brown Act.

Note: Any member of the public may provide comments to the 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 of Directors as a whole through the Chair. Comments may be provided in one of the following manners:

- 1. Providing oral comments during a meeting. Anyone attending in person desiring to address the Board of Directors is asked to fill out a speaker's slip and present it to the Clerk of the Board. To provide remote 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 to clerkoftheboard@sdcommunitypower.org. Please indicate a specific agenda item when submitting your comment. All written comments received prior to the meeting will be provided to Members of the Board. 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 Members of Board, and be part of the public record.

If you have anything that you wish to be distributed to the Board, please send it to clerkoftheboard@sdcommunitypower.org.

The public may participate using the following remote options:

Teleconference Meeting Webinar https://sdcommunitypower-org.zoom.us/j/94274587066

Telephone (Audio Only) (669) 900-6833 or (346) 248-7799 | Webinar ID: 94274587066

WELCOME

CALL TO ORDER

ROLL CALL

PLEDGE OF ALLEGIANCE

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 provide a comment in either manner described above.

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 Calendar for discussion. A member of the public may comment on any item on the Consent Calendar in either manner described above.

- 1. Approve February 27, 2025, Meeting Minutes
- 2. Receive and File Treasurer's Report for Period Ending January 31, 2025
- 3. Receive and File Update on Programs
- 4. Receive and File Update on Power Services
- 5. Receive and File Update on Customer Operations
- 6. Receive and File Update on Human Resources

- 7. Receive and File Update on Marketing, Public Relations, and Local Government Affairs
- 8. Receive and File Update on Regulatory and Legislative Affairs
- 9. Receive and File Community Advisory Update
- 10. Approve Strategic Plan Goals for FY2026-2028

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.

11. Approve Community Advisory Committee Member for the City of La Mesa

Recommendation: Approve the appointment of Shaun Sumner to the Community Advisory Committee (CAC) for the City of La Mesa.

12. Approve Contract with Power Settlements Consulting and Software, LLC for Professional Services for Energy Trading Risk Management in a not-to-exceed amount of \$4,115,956

Recommendation: Approve a contract with Power Settlements Consulting and Software, LLC ("Power Settlements") with a not-to-exceed amount of \$4,115,956 over the initial term of five years, and a yearly automatic renewal after the initial term, until San Diego Community Power (Community Power) provides a notice of termination, for Energy Trading Risk Management Subscription Software, Update and Support Services, and Hosting Services, and authorize the Chief Executive Officer to execute the contract.

13. Approve Resource Adequacy and TB4 Agreement with Athos Storage, LLC

Recommendation: Approve the proposed 15-year Resource Adequacy and TB4 Agreement with Athos Storage, LLC in substantially final form for a 200 MW (4-hour) battery energy storage facility and authorize the Chief Executive Officer to execute the agreement.

14. Approve Amended and Restated Renewable Power Purchase Agreement with Yellow Pine Solar III, LLC

Recommendation: Approve the proposed Amended and Restated Renewable Power Purchase Agreement with Yellow Pine Solar III, LLC and authorize the Chief Executive Officer to execute the agreement.

15. Approve Amendments to Long-Term Resource Adequacy Agreements with EnerSmart

Recommendation: Approve the four proposed amendments to long-term Resource Adequacy Agreements with EnerSmart's subsidiaries, set up as LLCs for each project, for a total purchase of 10.5 MW of Resource Adequacy (EnerSmart El Cajon BESS LLC 3.0 MW, EnerSmart Imperial Beach BESS LLC 3.0 MW, EnerSmart Mesa Heights BESS LLC 3.0 MW, EnerSmart Chula Vista BESS LLC 1.5 MW), and authorize the Chief Executive Officer to execute the agreements.

16. Approve Energy Consulting Services Agreement with Pacific Energy Advisors, Inc. up to \$775,000 for Energy Consulting Services through March 31, 2029

Recommendation: Approve Energy Consulting Services Agreement with Pacific Energy Advisors, Inc. for up to \$775,000 for Energy Consulting Services through March 31, 2029, and subject to autorenewal at the same monthly rate with 3% annual increases until terminated and authorize the Chief Executive Officer to execute the Agreement in substantially the form attached hereto, with such changes as are approved by the Chief Executive Officer and reviewed and approved as to form by the General Counsel.

CHIEF EXECUTIVE OFFICER REPORT

Community Power Management 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.

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 Community Power business. There is to be no discussion or action taken on comments made by Directors unless authorized by law.

<u>ADJOURNMENT</u>

The San Diego Community Power Board of Directors will adjourn to a regular meeting scheduled on Thursday, April 24, 2025, at 5 pm.

Compliance with the Americans with Disabilities Act

San Diego Community Power 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 clerkoftheboard@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

of the agenda and agenda packet available Copies are 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. Public records, agenda-related documents, can be requested clerkoftheboard@sdcommunitypower.org or by mail to San Diego Community Power, P.O. BOX 12716, San Diego, CA 92112. The documents may also be posted on Community Power's website. Such public records are also available for inspection, by contacting clerkoftheboard@sdcommunitypower.org to arrange an appointment.



SAN DIEGO COMMUNITY POWER (COMMUNITY POWER) BOARD OF DIRECTORS

Don L. Nay Port Administration Boardroom 3165 Pacific Hwy. San Diego, CA 92101

REGULAR MEETING MINUTES

February 27, 2025

WELCOME

CALL TO ORDER

Chair Aguirre called the Community Power Board of Directors regular meeting to order at 5:00 p.m.

ROLL CALL

PRESENT: Chair Aguirre, City of Imperial Beach; Vice Chair Lawson-Remer, County of San

Diego (arrived at 5:27 p.m.); Director Elo-Rivera, City of San Diego (arrived at 5:07 p.m.); Director Inzunza, City of Chula Vista; Director San Antonio, City of Encinitas; Director Suzuki; City of La Mesa (arrived at 5:04 p.m.); and Director

Yamane, City of National City (Via Zoom Teleconference)

ABSENT: None

Staff Present: Chief Executive Officer Burns (via Zoom); Chief Financial Officer Dr.

Washington; Chief Commercial Officer Vosburg; General Counsel Tyagi; Director of Power Contracts Key; Senior Local Development Manager Adam; Director of Finance Manglicmot; Clerk of the Board Hernandez; and Assistant

Clerk of the Board Vences

PLEDGE OF ALLEGIANCE

Chair Aguirre led the Pledge of Allegiance.

SPECIAL PRESENTATIONS AND INTRODUCTIONS

Chair Aguirre acknowledged the Kumeyaay Nation and all the original stewards of the land.

Introduction of New San Diego Community Power Staff

Chair Aguirre welcomed new employees Caryn Lai, Senior Counsel; Stephen Yi, Associate Director of Data Analytics and IT; and Jennine Camara, Director of Portfolio Management to introduce themselves.

Introduction of newly appointed Board members

Chair Aguirre welcomed Directors Marco San Antonio, City of Encinitas and Sean Elo-Rivera, City of San Diego.

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

There were no items added, withdrawn, or reordered on the agenda.

PUBLIC COMMENTS

There were no public comments.

CONSENT CALENDAR

- 1. Approve January 17, 23, and February 7, 2025, Meeting Minutes
- 2. Receive and File Treasurer's Report for Period Ending December 31, 2024
- 3. Receive and File Update on Programs
- 4. Receive and File Update on Power Services
- 5. Receive and File Update on Customer Operations
- 6. Receive and File Update on Human Resources
- 7. Receive and File Update on Marketing, Public Relations, and Local Government Affairs
- 8. Receive and File Update on Regulatory and Legislative Affairs
- Approve Request for Board Member Travel to CalCCA Annual Conference April 28-30, 2025, in Irvine, CA

There were no public comments on Consent Item Nos. 1-9.

Motioned by Director Inzunza and seconded by Director Suzuki to approve Consent Calendar Item Nos. 1 through 9. The motion carried 5/0 by Roll Call Vote as follows:

AYES: Chair Aguirre, Directors Inzunza, San Antonio, Suzuki, and Yamane

NOES: None ABSTAINED: None

ABSENT: Vice Chair Lawson-Remer and Director Elo-Rivera

REGULAR AGENDA

10. Community Advisory Committee Quarterly Report

Community Advisory Committee Chair Vasilakis provided an update on recent activities by the Committee.

There were no public comments on Item No. 10.

The Board received and filed the Community Advisory Committee Quarterly Report.

11. Presentation on Clean Energy Prepayment Financing

Dr. Washington and Mike Berwanger from PFM provided a presentation on Clean Energy Prepayment Financing.

There were no public comments on Item No. 11.

The Board received and filed the Presentation on Clean Energy Prepayment Financing.

12. Adopt Resolution No. 2025-02 to Approve a Designation of Presiding Officer Policy

Ms. Tyagi provided an overview of the proposed Policy.

There were no public comments on Item No. 12.

Motioned by Director Yamane and seconded by Director Inzunza to adopt Resolution No. 2025-02 to approve a Designation of Presiding Officer Policy to set a process for identifying the Director to preside over a Community Power Board of Directors ("Board") meeting in the absence of the Board Chair or Vice Chair and the Committee member to preside over a Community Power Committee meeting, in the absence of the Committee Chair or Vice Chair, if the Committee has appointed a Vice Chair. The motion carried 7/0 by Roll Call Vote as follows:

AYES: Chair Aguirre, Vice Chair Lawson-Remer, Directors Elo-Rivera, Inzunza, San

Antonio, Suzuki, and Yamane

NOES: None ABSTAINED: None ABSENT: None

13. Appointment of a New Member to the Finance and Risk Management Committee

Chair Aguirre requested nominations for the Finance and Risk Management Committee.

Vice-Chair Lawson-Remer nominated Director Inzunza for appointment to the Finance and Risk Management Committee.

There were no public comments on Item No. 13.

Motioned by Vice-Chair Lawson-Remer and seconded by Director Yamane to approve the appointment of Director Inzunza to the Finance and Risk Management Committee to fill the vacancy left by Community Power Board Chair, Paloma Aguirre. The motion carried 7/0 by Roll Call Vote as follows:

AYES: Chair Aguirre, Vice Chair Lawson-Remer, Directors Elo-Rivera, Inzunza, San

Antonio, Suzuki, and Yamane

NOES: None ABSTAINED: None ABSENT: None

14. Amendment of the FY 2024-25 Operating Budget, the FY 2024-25 Capital Budget, and the FY 2025-29 Capital Investment Plan

Dr. Washington and Mr. Manglicmot provided proposed amendments of the FY 2024-25 Operating Budget, the FY 2024-25 Capital Budget, and the FY 2025-29 Capital Investment Plan.

There were no public comments on Item No. 14.

After Board member discussion, questions, and comments, Chair Aguirre motioned and seconded by Director Yamane to approve amending the FY 2024-2025 Operating Budget, the FY 2024-2025 Capital Budget, and the FY 2025-2029 Capital Investment Plan. The motion carried 7/0 by Roll Call Vote as follows:

AYES: Chair Aguirre, Vice Chair Lawson-Remer, Directors Elo-Rivera, Inzunza, San

Antonio, Suzuki, and Yamane

NOES: None ABSTAINED: None ABSENT: None

15. Approve Amended and Restated Energy Storage Service Agreement with Euismod Project I, LLC

Mr. Key presented the Amended and Restated Energy Storage Service Agreement with Euismod Project I, LLC.

There were no public comments on Item No. 15.

After Board member discussion, motioned by Director Yamane and seconded by Vice-Chair Lawson-Remer to approve the Amended and Restated Energy Storage Service Agreement with Euismod Project I, LLC for a 200 MW (8-hour) Battery Energy System Storage (BESS) facility with a 20-year term. The motion carried 7/0 by Roll Call Vote as follows:

AYES: Chair Aguirre, Vice Chair Lawson-Remer, Directors Elo-Rivera, Inzunza, San

Antonio, Suzuki, and Yamane

NOES: None ABSTAINED: None ABSENT: None

16. Approve Energy Storage Service Agreement with North Johnson Energy Center, LLC

Mr. Key presented the Energy Storage Service Agreement with North Johnson Energy Center, LLC.

There were no public comments on Item No. 16.

After Board member discussion, motioned by Director Yamane and seconded by Director Inzunza to approve Energy Storage Service Agreement with North Johnson Energy Center, LLC for a 50 MW/200 MWh, 4-hour battery energy storage facility with a 15-year term. The motion carried 7/0 by Roll Call Vote as follows:

AYES: Chair Aguirre, Vice Chair Lawson-Remer, Directors Elo-Rivera, Inzunza, San

Antonio, Suzuki, and Yamane

NOES: None ABSTAINED: None ABSENT: None

17. Approve Energy Storage Services Agreement Portfolio with Luminia CA DevCo 5, LLC

Mr. Adam presented the Energy Storage Services Agreement Portfolio with Luminia CA DevCo 5, LLC.

There were no public comments on Item No. 17.

Motioned by Director Inzunza and seconded by Director Suzuki to approve Energy Storage Services Agreements (ESSAs) and a Framework Agreement, in substantially final forms, for a Local RFO portfolio with Luminia CA DevCo 5, LLC, for up to 20.6 MW of 4-hr duration battery energy storage systems (BESS) for twenty years and authorize the Chief Executive Officer to execute the agreements. The motion carried 7/0 by Roll Call Vote as follows:

AYES: Chair Aguirre, Vice Chair Lawson-Remer, Directors Elo-Rivera, Inzunza, San

Antonio, Suzuki, and Yamane

NOES: None

ABSTAINED: None ABSENT: None

18. Update on Strategic Planning Goals for FY2026-2028

CEO Burns provided an update on the Strategic Planning Goals for FY2026-2028.

There were no public comments on Item No. 18.

After Board member comments, update on the Strategic Planning Goals for FY2026-2028 was received and filed.

CHIEF EXECUTIVE OFFICER REPORT

CEO Burns reported on Community Power's ongoing efforts and recent activities and events.

DIRECTOR COMMENTS

There were no comments from directors.

<u>ADJOURNMENT</u>

Community Power Board meeting adjourned at 6:30 p.m. to the next regular Board meeting scheduled on Thursday, March 27, 2025, at 5 pm.

Maricela Hernandez, MMC, CPMC Clerk of the Board



SAN DIEGO COMMUNITY POWER Staff Report – Item 2

TO: Board of Directors

FROM: Eric W. Washington, Chief Financial Officer/Treasurer

VIA: Karin Burns, Chief Executive Officer

SUBJECT: Treasurer's Report for Period Ending January 31, 2025

DATE: March 27, 2025

RECOMMENDATION:

Receive and File Treasurer's Report for Period Ending January 31, 2025.

BACKGROUND:

San Diego Community Power (Community Power) maintains its accounting records on a full accrual basis in accordance with Generally Accepted Accounting Principles (GAAP) as applicable to governmental enterprise funds. Community Power has prepared its year-to-date financial statements for the Seventh-month period ended January 31, 2025, along with budgetary comparisons.

In an effort to increase public transparency and in alignment with section 1.a of the Community Power Delegated Contract Authority Policy, Community Power will also report newly executed contracts between \$50,000 and \$125,000 for goods and services in the Treasurer's Report.

Community Power additionally reports monthly metrics during its Board meetings as part of its Update on Back-Office Operations. As part of the Treasurer's Report, certain key metrics related to risk are presented during Finance and Risk Management Committee (FRMC) meetings.

On June 27, 2024, the Community Power Board of Directors (Board) approved the Fiscal Year 2024-25 Operating Budget that included net operating revenues of \$1,177,925,889 total expenses of \$1,143,919,262 and a resulting net position of \$34,006,627. The approved Fiscal Year 2024-25 budget also includes a capital budget to fund 16 projects, totaling 23 active projects during the fiscal year for \$16,434,280.

Subsequently, on February 27, 2025, the Board approved an amendment to the FY 2024-25 Operating Budget to increase total net operating revenues to \$1,221,258,172 and total expenses to \$1,187,090,169, resulting in a net position of \$34,168,003. Additionally, the

Board approved an amendment to the FY 2024-25 Capital Budget to increase total expenses to \$144,212,340 and an amendment to the FY 2025-29 Capital Investment Plan to \$155,910,762.

ANALYSIS AND DISCUSSION:

Financial Results

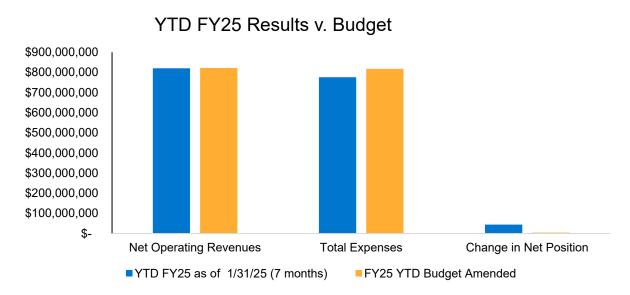
Actual financial results for the period ended January 31, 2025: \$820.5 million in net operating revenues were reported compared to \$822.0 million budgeted for the period. \$776.0 million in total expenses were reported (including \$740.9 million in energy costs) compared to \$817.4 million budgeted for the period (including \$768.8 million budgeted for energy costs). After expenses, Community Power's change in net position of \$44.5 million was reported year-to-date for Fiscal Year 2024-25. The following is a summary of the actual results compared to the Fiscal Year 2024-25 Amended Budget.

Table 1: Budget Comparison Versus Actual Result

Budget Comparison								
		YTD FY25 as of FY25 YTD Budget 31/25 (7 months) Amended				get Variance (\$)	Budget (%)	
Net Operating Revenues	\$	820,521,633	\$	821,999,973	\$	(1,478,340)	100%	
Total Expenses	\$	776,036,841	\$	817,385,000	\$	(41,348,159)	95%	
Change in Net Position	\$	44,484,792	\$	4,614,973	\$	39,869,819	864%	

- Although net operating revenues finished \$1.5 million (or 0.002 percentage points) under the budget, net operating revenues were largely in line with expectations.
- Operating expenses finished \$41.3 million (or 5.0 percentage points) under the budget similarly due to the sale of certain renewable resources and a reclassification of CAISO settlement fees.

Figure 1: Budget Comparison versus Actual Results



For the seven-month period ending January 31, 2025, Community Power contributed \$44,484,792 to its net position compared to the expected contribution of \$4,614,973 per the Fiscal Year 2024-25 budget. Total Community Power reserves at the end of the period were \$361,708,076 based on cash and cash equivalents – unrestricted, and total available liquidity (including lines of credit) was \$574,208,076. Community Power has a total Fiscal Year 2024-25 year-end reserve target of \$556,027,397 which is equivalent to 180-days of total operating expenses as set in Community Power's Reserve Policy and Strategic Goals.

Investment Portfolio Report

Chandler Asset Management manages Community Power's investment portfolio. As of January 31, 2025, the market value was of the portfolio was \$50.6M compared to the \$50.3M market value as December 31, 2024. The rise in market value is reflective of additional accrued interest during the month. The following is a snapshot of overall characteristics of the portfolio.

Portfolio Characteristics	
Average Modified Duration	2.69
Average Coupon	4.12%
Average Purchase YTM	4.38%
Average Market YTM	4.46%
Average Quality*	AA+
Average Final Maturity	3.22
Average Life	2.79

Account Summary					
	End Values as of 12/31/2024	End Values as of 01/31/2025			
Market Value	50,016,509.43	50,282,137.58			
Accrued Interest	320,816.04	339,826.40			
Total Market Value	50,337,325.48	50,621,963.97			
Income Earned	161,197.44	175,411.56			
Cont/WD	15,000,000.00	0.00			
Par	50,631,493.33	50,849,020.54			
Book Value	50,251,512.30	50,412,517.45			
Cost Value	50,216,099.77	50,381,766.52			

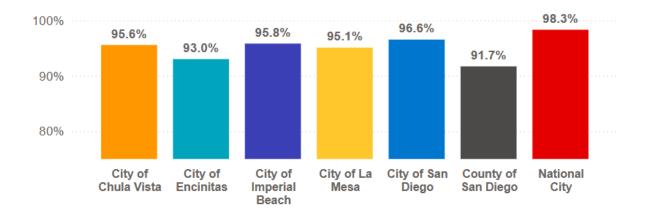
Contract Execution between \$50,000 and \$125,000

In February 2025, Community Power did not execute any contracts between \$50,000 and \$125,000.

Metrics

Figure 2: Participation Rates as of 3/1/2025

Participation by Jurisdiction



Jurisdiction	Service Option Default	Eligible Accounts	Enrolled Accounts	Participation Rate
City of Chula Vista	PowerOn	98,516	94,162	95.6%
City of Encinitas	Power100	28,765	26,760	93.0%
City of Imperial Beach	PowerOn	10,849	10,397	95.8%
City of La Mesa	PowerOn	29,319	27,885	95.1%
City of San Diego	PowerOn	624,183	602,688	96.6%
County of San Diego	PowerOn	190,523	174,743	91.7%
National City	PowerOn	19,347	19,024	98.3%
Total		1,001,502	955,659	95.4%

The Phase 4 mass enrollment process in National City and Unincorporated County of San Diego for Non-Net Energy Metering (NEM) customers was officially completed as of May 2023. The participation rate for Community Power reflects full enrollment of current member agencies. We are reporting on the opt outs and eligible accounts associated with the phase based on those accounts that we have noticed for enrollment on a rolling basis as of the reporting month.

Staff are also presenting the state of Community Power Arrearages related to financial risk for FRMC consideration and for regular review. Arrearages have increased steadily since December 2024 predominantly driven by emergency customer protections for customers affected by the 2024 winter storms and past due summer bills. Additional

metrics can be added by request. The below arrearage data includes Community Power's Receivables aged 120+ Days as of March 1, 2025.

Figure 3: State of Community Power Arrearages as of 3/1/2025

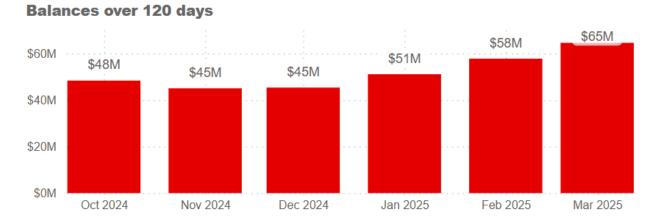
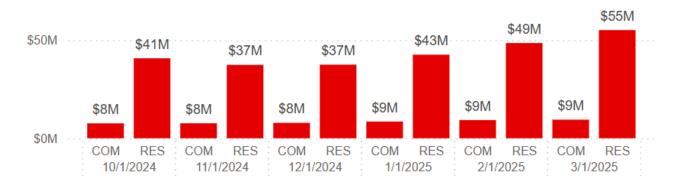


Figure 4: State of Community Power Arrearages Residential vs Commercial as of 3/1/2025

Balances over 120 days - RES vs COM



FISCAL IMPACT:

N/A

COMMITTEE REVIEW:

This item was presented to the Finance and Risk Management Committee at their March 20, 2025, meeting.

ATTACHMENTS:

Attachment A: 2024 Year-to-Date Period Ended January 31, 2025, Financial Statements.

ITEM 2 ATTACHMENT A



ACCOUNTANTS' COMPILATION REPORT

Management San Diego Community Power

Management is responsible for the accompanying financial statements of San Diego Community Power (a California Joint Powers Authority) which comprise the statement of net position as of January 31, 2025, and the related statement of revenues, expenses, and changes in net position, and the statement of cash flows for the seven months then ended in accordance with accounting principles generally accepted in the United States of America. We have performed a compilation engagement in accordance with Statements on Standards for Accounting and Review Services promulgated by the Accounting and Review Services Committee of the AICPA. We did not audit or review the accompanying statements nor were we required to perform any procedures to verify the accuracy or completeness of the information provided by management. Accordingly, we do not express an opinion, conclusion, nor provide any assurance on these financial statements.

Management has elected to omit substantially all of the note disclosures required by accounting principles generally accepted in the United States of America in these interim financial statements. San Diego Community Power's annual audited financial statements include the note disclosures omitted from these interim statements. If the omitted disclosures were included in these financial statements, they might influence the user's conclusions about the Authority's financial position, results of operations, and cash flows. Accordingly, these financial statements are not designed for those who are not informed about such matters.

We are not independent with respect to the Authority because we performed certain accounting services that impaired our independence.

Maher Accountancy

San Rafael, CA March 11, 2025

SAN DIEGO COMMUNITY POWER STATEMENT OF NET POSITION As of January 31, 2025

ASSETS

Current assets	
Cash and cash equivalents - unrestricted	\$ 361,708,076
Cash and cash equivalents - restricted	500,000
Accounts receivable, net of allowance	101,042,137
Accrued revenue	35,954,257
Prepaid expenses	2,632,176
Other receivables	18,211,030
Deposits	9,414,507
Investments	1,938,658
Total current assets	531,400,841
Noncurrent assets	
Cash and cash equivalents - restricted	1,147,000
Investments	47,527,459
Capital assets, net of depreciation and amortization	460,972
Total noncurrent assets	49,135,431
Total assets	580,536,272
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LIABILITIES Current liabilities	
Accrued cost of electricity	122 160 202
•	133,160,393
Accounts payable Other accrued liabilities	5,191,756 1,635,147
State surcharges payable	232,683
Deposits - energy suppliers	3,193,000
Lease liability	435,043
Total current liabilities	143,848,022
Total Carrent nationices	1 13,0 10,022
Noncurrent liabilities	
Deposits - energy suppliers	4,410,450
Total noncurrent liabilities	4,410,450
Total liabilities	148,258,472
NET POSITION	1 (1= 000
Restricted for security collateral	1,647,000
Unrestricted	430,630,800
Total net position	\$ 432,277,800

SAN DIEGO COMMUNITY POWER STATEMENT OF REVENUES, EXPENSES AND CHANGES IN NET POSITION

Seven Months Ended January 31, 2025

OPERATING REVENUES	
Electricity sales, net	\$ 820,041,759
Grant revenue	352,500
Other income	1,218,049
Total operating revenues	821,612,308
OPERATING EXPENSES	
Cost of electricity	742,041,695
Contract services	11,513,181
Staff compensation	9,024,984
Other operating expenses	8,580,580
Depreciation and amortization	298,872
Total operating expenses	771,459,312
Operating income	50,152,996
NON-OPERATING REVENUES (EXPENSES)	
Investment income	7,161,989
Interest expense	(419,567)
Nonoperating revenues (expenses), net	6,742,422
CHANGE IN NET POSITION	56,895,418
Net position at beginning of year	375,382,382
Net position at end of year	\$ 432,277,800

SAN DIEGO COMMUNITY POWER STATEMENT OF CASH FLOWS

Seven Months Ended January 31, 2025

CASH FLOWS FROM OPERATING ACTIVITIES	
Receipts from customers	\$ 864,947,555
Receipts of supplier security deposits	4,917,455
Other operating receipts	1,548,355
Payments to suppliers for electricity	(733,886,202)
Payments for other goods and services	(19,935,816)
Payments for deposits and collateral	(1,920,050)
Payments for staff compensation	(8,656,504)
Payments of state surcharges	(1,822,861)
Net cash provided by operating activities	105,191,932
CASH FLOWS FROM NONCAPITAL FINANCING ACTIVITIES	
Proceeds from bank note	55,500,000
Principal payments - bank note	(55,500,000)
Interest payments	(393,961)
Net cash provided (used) by noncapital	
financing activities	 (393,961)
CASH FLOWS FROM CAPITAL AND RELATED FINANCING ACTIVITIES	
Payments of lease liability	 (359,730)
Net cash used by capital and related financing activities	 (359,730)
CASH FLOWS FROM INVESTING ACTIVITIES	
Investment income received	6,678,251
Purchase of investments	 (49,203,526)
Net cash provided (used) by investing activities	(42,525,275)
Net change in cash and cash equivalents	61,912,966
Cash and cash equivalents at beginning of year	 301,442,110
Cash and cash equivalents at end of year	\$ 363,355,076
Reconciliation to the Statement of Net Position	
Cash and cash equivalents (unrestricted)	\$ 361,708,076
Restricted cash - current	500,000
Restricted cash - noncurrent	1,147,000
Cash and cash equivalents	\$ 363,355,076
NONCASH INVESTING ACTIVITIES	
Unrealized appreciation and timing differences in investment income	\$ 483,738

SAN DIEGO COMMUNITY POWER STATEMENT OF CASH FLOWS (continued) Seven Months Ended January 31, 2025

RECONCILIATION OF OPERATING INCOME TO NET CASH PROVIDED BY OPERATING ACTIVITIES

Operating income		50,152,996
Adjustments to reconcile operating income to net		
cash provided by operating activities		
Depreciation and amortization expense		298,872
(Increase) decrease in:		
Accounts receivable, net		2,470,028
Accrued revenue		40,909,166
Prepaid expenses		32,386,224
Other receivables		(12,101,025)
Deposits		2,747,692
Increase (decrease) in:		
Accrued cost of electricity		(14,955,923)
Accounts payable		183,879
Other accrued liabilities		471,832
State surcharges payable		(296,259)
Deposits - energy suppliers		2,924,450
Net cash provided by operating activities	\$	105,191,932



ACCOUNTANTS' COMPILATION REPORT

Board of Directors San Diego Community Power

Management is responsible for the accompanying operating fund and capital investment program fund budgetary comparison schedules of San Diego Community Power (SDCP), a California Joint Powers Authority, for the seven months ended January 31, 2025 and for determining that the budgetary basis of accounting is an acceptable financial reporting framework. We have performed a compilation engagement in accordance with Statements on Standards for Accounting and Review Services promulgated by the Accounting and Review Services Committee of the AICPA. We did not audit or review the accompanying statement nor were we required to perform any procedures to verify the accuracy or completeness of the information provided by management. Accordingly, we do not express an opinion, a conclusion, nor provide any assurance on this special purpose budgetary comparison statement.

These special purpose statements are prepared in accordance with the budgetary basis of accounting, which is a basis of accounting other than accounting principles generally accepted in the United States of America. This report is intended for the information of the Board of Directors of SDCP.

Management has elected to omit substantially all of the note disclosures required by accounting principles generally accepted in the United States of America in these interim financial statements. SDCP's annual audited financial statements will include the note disclosures omitted from these interim statements. If the omitted disclosures were included in these financial statements, they might influence the user's conclusions about the Authority's financial position, results of operations, and cash flows. Accordingly, these financial statements are not designed for those who are not informed about such matters.

We are not independent with respect to SDCP because we performed certain accounting services that impaired our independence.

Maher Accountancy

San Rafael, CA March 11, 2025

SAN DIEGO COMMUNITY POWER OPERATING FUND BUDGETARY COMPARISON SCHEDULE

Seven Months Ended January 31, 2025

	Year-to-Date			Annual			
	Amended Budget		Actual	Amended Budget Variance (Under) Over	Actual/ Amended Budget %	Amended Budget	Amended Budget Remaining
REVENUES AND OTHER SOURCES							
Gross Ratepayer Revenues	836,641,194	\$	834,648,101	(1,993,093)	100%	1,243,010,863	\$ 408,362,762
Less: Uncollectible Customer Accounts	(14,641,221)		(14,606,342)	34,879	100%	(21,752,690)	(7,146,348)
Grant Revenue	-		352,500	352,500	na	-	(352,500)
Other Income			127,374	127,374	na		(127,374)
Total Revenues and Other Sources	821,999,973		820,521,633	(1,478,340)		1,221,258,173	400,736,540
OPERATING EXPENSES							
Cost of Energy	768,830,780		740,951,020	(27,879,760)	96%	1,116,836,549	375,885,529
Professional Services and Consultants	14,202,041		10,786,578	(3,415,463)	76%	24,346,342	13,559,764
Personnel Costs	10,831,268		9,024,984	(1,806,284)	83%	18,567,895	9,542,911
Marketing and Outreach	1,737,521		1,309,013	(428,508)	75%	2,978,593	1,669,580
General and Administration	2,864,027		1,922,733	(941,294)	67%	4,909,761	2,987,028
Total Operating Expenses	798,465,637		763,994,328	(34,471,309)		1,167,639,140	403,644,812
Operating Income (Loss)	23,534,336		56,527,305	32,992,969		53,619,033	(2,908,272)
NON-OPERATING REVENUES (EXPENSES)							
Investment Income	-		7,161,989	7,161,989	na	-	(7,161,989)
Interest and Related Expenses	(744,333)		(1,029,472)	(285,139)	138%	(1,276,000)	(246,528)
Transfer to Capital Investment Program	(18,175,030)		(18,175,030)	-	100%	(18,175,030)	·
Total Non-Operating Revenues (Expenses)	(18,919,363)		(12,042,513)	6,876,850		(19,451,030)	(7,408,517)
NET CHANGE	\$ 4,614,973	\$	44,484,792	\$ 39,869,819		\$ 34,168,003	\$ (10,316,789)



SAN DIEGO COMMUNITY POWER Staff Report – Item 3

TO: Board of Directors

FROM: Colin Santulli, Director of Programs

VIA: Karin Burns, Chief Executive Officer

SUBJECT: Update on Programs

DATE: March 27, 2025

RECOMMENDATION:

Receive and file update on customer energy programs.

BACKGROUND:

Staff will provide regular updates to the Board of Directors ("Board") regarding the following Community Power customer energy programs: Commercial Programs, Residential Programs, Flexible Load Programs, Solar and Energy Storage Programs, and San Diego Regional Energy Network.

ANALYSIS AND DISCUSSION:

Updates on customer energy programs are detailed below.

Commercial Programs

Commercial Application Assistance Pilot Project

<u>Status and Next Steps</u>: Please refer to <u>Item 3</u> of the February 2025 Board staff report for the most recent update on this pilot project.

Efficient Refrigeration Pilot Project

<u>Status</u>: Staff launched the Efficient Refrigeration pilot program in late February 2025. Participating corner stores can receive up to two energy-efficient refrigerators and freezers and an American Society of Heating, Refrigerating, and Air-Conditioning Engineers ("ASHRAE") Level 1 energy audit at no cost. The pilot expects to serve 24 corner stores throughout Community Power's service territory. Community Power has contracted with Precision NRG to provide refrigeration equipment supplier services and TRC, Inc. to conduct energy audits at stores.

Next Steps: Staff will continue to conduct outreach to enroll stores in the pilot.

FLEXmarket Pilot Project

<u>Status and Next Steps</u>: Please refer to <u>Item 3</u> of the February 2025 Board staff report for the most recent update on this pilot project.

Residential Programs

California Energy Commission ("CEC") Equitable Building Decarbonization Direct Install ("EBD DI") Program

<u>Status:</u> Staff continues negotiations on the Scope of Work within a Memorandum of Understanding ("MOU") between Community Power and the County of LA. Staff had aimed to bring the MOU to the Board for consideration in March but will now bring it for consideration at the April Board meeting. Community Power proposes to work with community-based organizations, via the newly launched Power Network, in our region to help identify homes that can receive no-cost, direct installed decarbonization measures and assist with enabling load flexibility for measures installed in our service territory.

<u>Next Steps:</u> Staff anticipates seeking Board approval of an MOU with the County of LA at the April Boarding meeting.

Flexible Load Programs

Smart Home Flex Pilot Project

<u>Status</u>: The pilot was launched on January 29, 2025, for customers with existing smart thermostats installed in their home. The goal is to enroll 2,000 existing smart thermostats from Ecobee and Google Nest to test the capabilities of Community Power's Distributed Energy Resources Management System ("DERMS"), validate the value stream, and assess customer satisfaction. Customers that are approved and enrolled in the program are eligible to receive a \$50 enrollment incentive per device.

As of March 2025, staff have approved over 1,100 applications, enrolling over 1,400 thermostats – more than 70% of the way towards our 2,000-thermostat goal.

Starting Summer 2025, Community Power will initiate "Smart Flex Events" during times when energy demand and grid stress are anticipated to be high. During a Smart Flex Event, customers will receive a notification and the temperature settings on their smart thermostat will be automatically adjusted to reduce energy usage during the Smart Flex Event and provide customer bill reductions.

<u>Next Steps</u>: Staff is continuing to work with Virtual Peaker to prepare for the Smart Flex Events this summer and add electric heat pump water heaters with built-in smart capability.

EV Flex Connect Pilot Project (formerly Managed Charging Pilot Project)

<u>Status</u>: Staff launched EV Flex Connect, the residential managed charging/V1G pilot project, on February 10, 2025. 1,000 participants will be enrolled over the course of the two-year pilot. The optimized charging schedules created for pilot participants will automatically direct their electric vehicles to charge when energy is cheaper, reducing strain on the electrical grid during peak demand periods and lowering their electricity bills absent participation. EV Flex Connect offers an enrollment incentive of \$50 and a monthly participation incentive of \$5. More than 100 participants were enrolled in the first month of the pilot.

<u>Next Steps</u>: Staff will continue working with Optiwatt on the implementation of EV Flex Connect, initially focusing on increasing participant enrollment.

Solar and Energy Storage Programs

Disadvantaged Communities-Single-Family Affordable Solar Homes ("DAC-SASH") Readiness Pilot Project

<u>Status and Next Steps</u>: Please refer to <u>Item 3</u> of the February 2025 Board staff report for the most recent update on this pilot project.

Net Energy Metering ("NEM") and Net Billing Tariff ("NBT")

<u>Status and Next Steps</u>: Please refer to <u>Item 2</u> of the December 2023 Board staff report for the most recent update on this program.

Solar Battery Savings ("SBS") Program

<u>Status</u> and <u>Next Steps</u>: Please refer to <u>Item 20</u> of the January 2025 Board staff report for the most recent update on this program.

Solar Advantage Program (previously Solar for Our Communities)

<u>Status:</u> Community Power issued its initial Solar Advantage Program (formerly DAC-GT) and Community Solar Green Tariff ("CSGT") RFO on August 25, 2023, soliciting bids for projects sized 500 kW to 20 MW for Solar Advantage and up to 3 MW (no minimum) for CSGT. Staff received ten offers from two developers, four of which were CSGT eligible.

As a result of the Green Access Program ("GAP") Proceeding, these four offers could not proceed under the modified Solar Advantage program. Subsequently, the Commission's June 2024 decision (D.24-05-065) moved all unprocured CSGT capacity to the modified Solar Advantage Program. Four offers fell below the 500-kW threshold and couldn't proceed. The remaining two met cost containment requirements in Resolution E-4999 and satisfied all eligibility criteria.

At the January 2025 Board meeting, Community Power's Board approved a Power Purchase Agreement ("PPA") with Luminia CA DevCo 4, LLC, for 1.7 MW of rooftop and carport canopy photovoltaic ("PV") generation located at retail center in Chula Vista. This first Solar Advantage Program project will provide 100% renewable energy and 20% bill reductions to approximately 750 residential customers over a 20-year term once operational. Community benefits include over \$1.75 MM in property improvements, \$1 MM in local labor wages during construction, commitments to use local labor and prevailing wages, and developer coordination with Chula Vista for community outreach and educational initiatives. Staff filed an Executed PPA Advice Letter for the Luminia project to the California Public Utilities Commission ("CPUC") for approval by February 25, 2025, compliant with CPUC guidelines.

Due to negotiation delays, Community Power was unable to execute a PPA for one of the eligible offers within the 180-day deadline set forth in Resolution E-5246. Staff have submitted an extension request to the CPUC, and negotiations continue to be ongoing with this project.

<u>Next Steps</u>: Staff will track project construction and commissioning of the Luminia project over the next 30 months. Eligible customers will be auto enrolled and receive program benefits in Q3 2027 after the "Guaranteed Commercial Operation Date" on June 30, 2027.

Consistent with direction provided in Resolution E-5246, Community Power is concurrently submitting a request for extension to submit a final PPA associated with this eligible offer.

Staff also will release the second Request for Offers ("RFO") for Solar Advantage Program resources in early April. Subsequential RFOs will be released until SD Community Power's MW allocation for the Solar Advantage Program (20.16 MW total) is fulfilled.

San Diego Regional Energy Network ("SDREN")

SDREN

<u>Status</u>: Staff have continued activities required for the successful launch of SDREN programs. In December 2024, Staff developed a phased schedule to release solicitations for program implementers. The Phase 1 solicitations (administrative, regulatory, and reporting support and cross-cutting sector programs) were released on February 4, 2025, questions were due on February 11, 2025, and responses to questions were posted on Community Power's solicitation webpage on February 19, 2025. The Phase 1 solicitations are planned to close on March 25, 2025. The Phase 2 solicitations (residential and public sector programs) were released on March 6, 2025, questions were due on March 13, 2025, and responses to questions were posted on Community Power's solicitation webpage on March 20, 2025. The Phase 2 solicitations are planned to close on April 24, 2025.

<u>Next Steps</u>: Staff anticipate releasing the Phase 3 solicitation (commercial sector programs) in May 2025 and awarding contracts for the Phase 1 and 2 solicitations by Q3 CY 2025.

FISCAL IMPACT:
N/A
COMMITTEE REVIEW:
N/A
ATTACHMENTS:



SAN DIEGO COMMUNITY POWER Staff Report – Item 4

TO: Board of Directors

FROM: Byron Vosburg, Chief Commercial Officer

VIA: Karin Burns, Chief Executive Officer

SUBJECT: Update on Power Services

DATE: March 27, 2025

RECOMMENDATION:

Recommendation to receive and file update on Power Services.

BACKGROUND:

Staff provides the updates below to the Board of Directors regarding Community Power's power energy procurement activities.

ANALYSIS AND DISCUSSION:

Power Services Staffing

Building out a team of experienced, knowledgeable energy professionals has long been a top priority and allows Community Power not only to solicit, negotiate, and administer contracts for energy supply effectively, but also to monitor market activity, manage risk, bring in-house several activities that have historically been completed by consultants, and to dedicate additional resources to local and distributed energy procurement and development efforts. The Power Services team is now thirteen people strong. The Power Services team has one open position currently, and is excited to continue stable, prudent growth through 2025.

Long-term Renewable Energy Solicitations

As Community Power strives to meet its environmental, financial, and regulatory compliance goals and requirements, long-term power purchase agreements (PPAs) are becoming 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 Community Power 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 Community Power can build its power supply portfolio while also providing power supply cost certainty around which Community Power can develop its pro forma financial model.

Moreover, the California Renewable Portfolio Standard (RPS), as modified in 2015 by Senate Bill 350, requires that Community Power provide 65% of its RPS-required renewable energy from contracts of at least ten years in length. Finally, in California Public Utilities Commission (CPUC) Decision (D.) 21-06-025, the CPUC required each Load Serving Entity (LSE) in California to make significant long-term purchase commitments for resource adequacy from new, incremental generation facilities that will achieve commercial operation during 2023 through 2026 for purposes of "Mid Term Reliability" (MTR). These requirements have been augmented and extended into 2026 and 2027 via CPUC D.23-02-040.

In pursuit of long-term contracts for renewable energy and storage, over the past 24 months, staff have released several Requests for Offers (RFOs) and Requests for Proposals (RFPs). Staff issued an "All-Source RFO" in September 2024 with an emphasis on clean, firm resources to meet MTR requirements and enhance the Community Power portfolio. Staff shortlisted and waitlisted projects in December 2024 using Community Power's Energy Project Evaluation Criteria and has since kicked off negotiations.

Staff remain in negotiations for additional resources that are expected to be online between 2026 and 2029. Staff and the Energy Contracts Working Group (ECWG) evaluate all submissions from solicitations prior to entering negotiations with selected participants. Assuming that staff and shortlisted developer(s) can agree to mutually agreeable contracts consistent with terms authorized by the ECWG, staff then review draft terms with the Community Power Board for approval and authorization to execute the relevant documents.

Local Development

Community Power's rolling Local RFI remains open and, in the last twelve months, has yielded eight Board-approved contracts for local generation and storage facilities. After consultation with the ECWG, Community Power Board of Directors has approved a portfolio of PV PPAs and energy storage and service agreements and is actively negotiating with three local projects submitted to the Local RFI in Q4 2024. Community Power also released an RFO for distributed renewable energy resources (DERs), focusing on a broad range of distribution-level renewable projects within San Diego County. Additional agreements resulting from the RFO are expected and will be presented to the Board when ready. Other ongoing local initiatives include a Feed-in-Tariff Program revamp and expansion, expected in the first half of this year, and continued collaboration with member agency staff and other local agencies to identify strategic opportunities to further infill development.

As Program Administrators of the CPUC's Disadvantaged Communities Green Tariff (DAC-GT) program, Community Power completed its first solicitation last year. The first DAC-GT PPA, with Luminia LLC, a local developer, was presented to and approved by the Board in January with another portfolio of PPAs expected to be presented in Q2.

Community Power's Local RFI and Feed-in Tariff remain open. More information is available about each at the links below:

- https://sdcommunitypower.org/resources/solicitations/
- https://sdcommunitypower.org/programs/feed-in-tariff/

Short-Term RPS Procurement

Community Power staff continues to actively manage its environmental portfolio and closely monitor the market for opportunities to optimize its renewable and carbon-free portfolios. Community Power has recently been evaluating solicitation offers, bilateral offers, and products that meet needs for multiple portfolios – creating greater value for its customers. Community Power will continue to prioritize environmental targets while also ensuring value for our customers.

Market Update

Due to limited resource availability in the broader Western Interconnection, lingering supply chain impacts and long interconnection queues that have delayed development of new-build energy resources, and implementation of tariffs and duties on foreign imports, the market for renewable energy and resource adequacy (RA) resources continues to be exceptionally tight and expensive. Staff are working with developers, industry groups, the CPUC, and CA Governor's Office and legislators to i) develop near-term solutions while also actively procuring short-term energy and capacity products and long-term energy resources to meet Community Power 's portfolio needs practically and cost-effectively, and ii) to establish a portfolio of resources that will provide value to Community Power and California's clean, reliable energy needs into the future.

Near-term California power markets have been on a slight decline due to relatively mild winter weather and light heating demand but remain sensitive to extreme temperatures and unexpected supply shortages.

COMMITTEE REVIEW:
N/A
FISCAL IMPACT:
N/A
ATTACHMENTS:
N/A



SAN DIEGO COMMUNITY POWER Staff Report – Item 5

TO: Board of Directors

FROM: Jack Clark, Chief Operating Officer

Lucas Utouh, Senior Director of Data Analytics and Customer

Operations

VIA: Karin Burns, Chief Executive Officer

SUBJECT: Update on Customer Operations

DATE: March 27, 2025

RECOMMENDATION:

Receive and file an update on various customer operations' initiatives.

BACKGROUND:

Staff will provide regular updates to the Board of Directors centered around tracking customer opt actions (i.e., opt outs, opt ups, opt downs, and re-enrollments) as well as customer engagement metrics. The following is a brief overview of items pertaining to customer operations.

ANALYSIS AND DISCUSSION:

A) Enrollment Update

As of February 24, 2025, Community Power is serving a cumulative total count of **955,659** active accounts.

Customers with newly established accounts or who have moved into a new service address within any and all of our member jurisdictions receive 2 post-enrollment notices through the mail at their mailing address on file within 60 days of their account start date to notify them that they have defaulted to Community Power electric generation service.

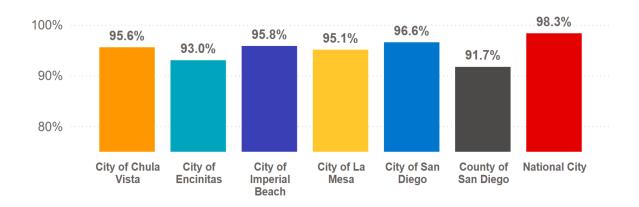
B) Customer Participation Tracking

The below charts summarize customer elections into San Diego Community Power's four (4) available service levels:

Enrolled Participation
Accounts Rate
955,659 95.4%

Participation

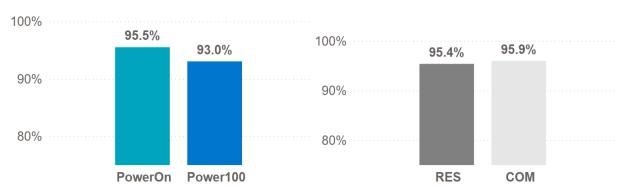
Participation by Jurisdiction



Jurisdiction	Service Option Default	Eligible Accounts	Enrolled Accounts	Participation Rate
City of Chula Vista	PowerOn	98,516	94,162	95.6%
City of Encinitas	Power100	28,765	26,760	93.0%
City of Imperial Beach	PowerOn	10,849	10,397	95.8%
City of La Mesa	PowerOn	29,319	27,885	95.1%
City of San Diego	PowerOn	624,183	602,688	96.6%
County of San Diego	PowerOn	190,523	174,743	91.7%
National City	PowerOn	19,347	19,024	98.3%
Total		1,001,502	955,659	95.4%

Participation by Default Service Option

Residential vs Commercial Participation

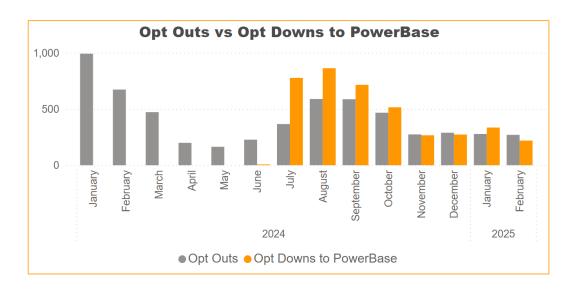


Service Option

PowerBase	PowerOn	Power100	Power100 Green+		
Enrolled 3,682 Participation 0.4%	Enrolled 917,755 Participation 96.0%	Enrolled 34,221 Participation 3.6%	Enrolled 1 Participation 0.0%		

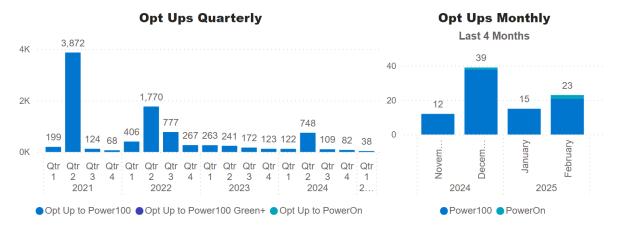
Service Option Enrollment Summary

Jurisdiction	Service Option Default	Enrolled Accounts	Power Base Enrolled	Power Base %	PowerOn Enrolled	PowerOn %	Power 100 Enrolled	Power 100 %	Power100 Green+ Enrolled	Power100 Green+ %
City of Chula Vista	PowerOn	94,162	355	0.4%	92,901	98.7%	906	1.0%		
City of Encinitas	Power100	26,760	136	0.5%	427	1.6%	26,197	97.9%		
City of Imperial Beach	PowerOn	10,397	30	0.3%	10,287	98.9%	80	0.8%		
City of La Mesa	PowerOn	27,885	111	0.4%	27,508	98.6%	266	1.0%		
City of San Diego	PowerOn	602,688	1,914	0.3%	594,823	98.7%	5,950	1.0%	1	0.0%
County of San Diego	PowerOn	174,743	1,094	0.6%	172,859	98.9%	790	0.5%		
National City	PowerOn	19,024	42	0.2%	18,950	99.6%	32	0.2%		
Total		955,659	3,682	0.4%	917,755	96.0%	34,221	3.6%	1	0.0%



Opt Up History

Total Opt Ups	Opt Ups Current*
9,381	8,088



Opt Ups by Jurisdiction

Jurisdiction	2021	2022	2023	2024	2025-1	2025-2	Total
City of Chula Vista	710	175	61	49	2	3	1,000
City of Encinitas	18	1	1	3			23
City of Imperial Beach	60	29	11	6			106
City of La Mesa	155	120	19	12		1	307
City of National City			12	24			36
City of San Diego	3,316	2,895	488	340	11	16	7,066
County of San Diego	4		207	627	2	3	843
Total	4,263	3,220	799	1,061	15	23	9,381

Opt Ups by Customer Class

Customer Class	2021	2022	2023	2024	2025-1	2025-2	Total
Commercial	4,256	296	232	701	2	7	5,494
Residential	7	2,924	567	360	13	16	3,887
Total	4,263	3,220	799	1,061	15	23	9,381

Opt Ups by Method

Opt Method	2021	2022	2023	2024	2025-1	2025-2	Total
CSR	4,232	1,372	301	817	5	9	6,736
IVR	4	85	84	42	1		216
Web	27	1,763	414	202	9	14	2,429
Total	4,263	3,220	799	1,061	15	23	9,381

^{*}Current indicates the account is open with SDG&E and this opt action is their latest opt action

Opt Down History





Opt Downs by Jurisdiction

Jurisdiction	2021	2022	2023	2024	2025-1	2025-2	Total
City of Chula Vista		2	4	286	79	15	386
City of Encinitas	35	429	74	150	13	9	710
City of Imperial Beach		1		31	1	3	36
City of La Mesa		4		106	9	4	123
City of National City				36	3	7	46
City of San Diego		28	13	1,792	155	124	2,112
County of San Diego			6	1,052	75	58	1,191
Total	35	464	97	3,453	335	220	4,604

Opt Downs by Customer Class

Customer Class	2021	2022	2023	2024	2025-1	2025-2	Total
Commercial	34	23	9	508	27	8	609
Residential	1	441	88	2,945	308	212	3,995
Total	35	464	97	3,453	335	220	4,604

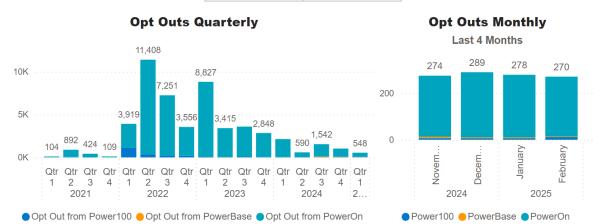
Opt Downs by Method

Opt Method	2021	2022	2023	2024	2025-1	2025-2	Total
CSR	31	311	65	2,560	245	137	3,349
IVR	4	26	3	309	28	36	406
Web		127	29	584	62	47	849
Total	35	464	97	3,453	335	220	4,604

^{*}Current indicates the account is open with SDG&E and this opt action is their latest opt action

Opt Out History

Total Opt Outs	Opt Outs Current*
52,193	45,336



Opt Outs by Jurisdiction

Jurisdiction	2021	2022	2023	2024	2025-1	2025-2	Total
City of Chula Vista	267	3,466	747	412	20	26	4,938
City of Encinitas	66	1,870	230	118	7	11	2,302
City of Imperial Beach	32	343	99	60	1	1	536
City of La Mesa	84	1,269	235	128	10	9	1,735
City of National City			285	75	4	7	371
City of San Diego	1,078	19,185	3,185	1,836	111	131	25,526
County of San Diego	2	1	13,902	2,670	125	85	16,785
Total	1,529	26,134	18,683	5,299	278	270	52,193

Opt Outs by Customer Class

Customer Class	2021	2022	2023	2024	2025-1	2025-2	Total
Commercial	1,492	535	1,686	345	22	16	4,096
Residential	37	25,599	16,997	4,954	256	254	48,097
Total	1,529	26,134	18,683	5,299	278	270	52,193

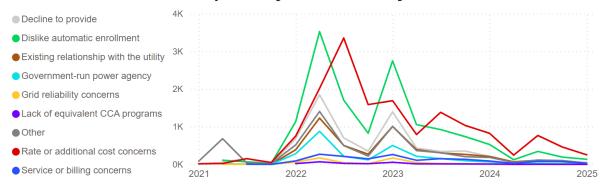
Opt Outs by Method

Opt Method	2021	2022	2023	2024	2025-1	2025-2	Total
CSR	1,104	6,962	4,706	1,653	95	76	14,596
IVR	102	4,886	3,789	1,284	44	41	10,146
Web	323	14,286	10,188	2,362	139	153	27,451
Total	1,529	26,134	18,683	5,299	278	270	52,193

^{*}Current indicates the account is open with SDG&E and this opt action is their latest opt action

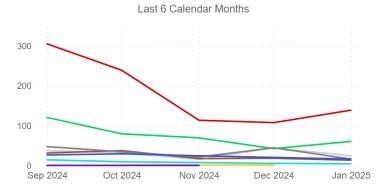
Opt Out Reason Summary

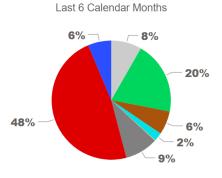
Opt Outs by Reason Quarterly



Opt Outs by Reason Monthly

Opt Out Reason Distribution



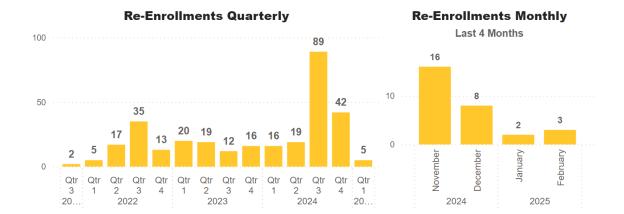


Opt Outs by Reason Table

Opt Out Reason	2021	2022	2023	2024	2025-1	2025-2	Total
Decline to provide	228	3,583	2,519	465	25	27	6,847
Dislike automatic enrollment	203	7,187	5,458	1,188	61	73	14,170
Existing relationship with the utility	2	2,389	1,968	462	14	11	4,846
Government-run power agency	24	1,491	961	129	5	17	2,627
Grid reliability concerns	7	293	252	20		1	573
Lack of equivalent CCA programs		131	90	12		1	234
Other	819	2,636	1,884	453	17	14	5,823
Rate or additional cost concerns	240	7,706	4,897	2,297	139	114	15,393
Service or billing concerns	6	718	654	273	17	12	1,680
Total	1,529	26,134	18,683	5,299	278	270	52,193

Re-Enrollment Requests

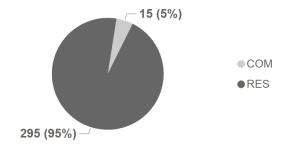
Excludes closed accounts



Re-Enrollments by Jurisdiction

Jurisdiction	Accounts
City of Chula Vista	21
City of Encinitas	25
City of Imperial Beach	3
City of La Mesa	6
City of National City	1
City of San Diego	190
County of San Diego	64
Total	310

Re-Enrollments Residential vs Commercial



D) Contact Center Metrics

10K

As anticipated, call volumes between the month of January and through February 24, 2025, decreased by 29%, as a result of the crossover away from the holiday season where bills generally increase modestly due to holiday lights, cooking etc.

The chart below summarizes contact made by customers into the Contact Center broken down by month:

Contact Center Metrics

Contact Center Call Volume Trends

Last 24 Calendar Months

Last 24 Calendar Months

April Masi June 2 July Rugues Septem Colober on the factor of th

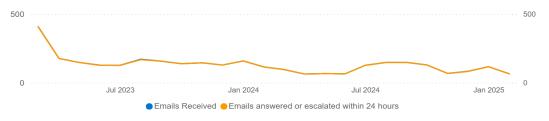
● Total Calls to IVR ● Total Calls Connected to Agents

Interactive Voice Response (IVR) and Service Level Agreement (SLA) Metrics

	2021	2022	2023	2024	2025-1	2025-2	Total
Total Calls to IVR	2,289	47,118	52,977	48,073	3,790	2,679	156,926
Total Calls Connected to Agents	1,401	30,174	34,173	29,332	2,328	1,540	98,948
Avg Seconds to Answer	20.00	11.50	6.75	18.08	8.00	18.00	13.66
Avg Call Duration (Minutes)	8.5	9.8	9.6	9.6	9.1	8.6	9.4
Calls Answered within 60	96.23%	95.50%	97.57%	91.74%	95.34%	89.38%	95.07%
Seconds (75% SLA)							
Abandon Rate	0.57%	0.36%	0.19%	0.72%	0.43%	1.47%	0.47%

Customer Service Email Volume Trends

Last 24 Calendar Months



Customer Service Emails

	2021	2022	2023	2024	2025-1	2025-2	Total
Emails Received	272	2,894	2,116	1,271	117	65	6,735
Emails answered or escalated within 24 hours	257	2,821	2,107	1,270	117	65	6,637
Completion %	94%	96%	100%	100%	100%	100%	98%

San Diego Community Power anticipates the trend of customers calling into the Contact Center's Interactive Voice Response (IVR) system tree and being able to self-serve their opt actions using the recorded prompts as well as utilizing Community Power's website for processing opt actions will continue to account for over 65% of all instances. The remaining portion of customer calls are connected to Customer Service Representatives to answer additional questions, assist with account support, or process opt actions.

As of this latest reporting month, Community Power has 10 Dedicated Customer Service Representatives staffed at the Contact Center and 1 Supervisor. Robust Quality Assurance (QA) procedures are firmly in place to ensure that customers are getting a world-class customer experience when they contact Community Power.

FISCAL IMPACT:	
N/A	
COMMITTEE REVIEW:	
N/A	
ATTACHMENTS:	
N/A	



SAN DIEGO COMMUNITY POWER Staff Report – Item 6

TO: Board of Directors

FROM: Chandra Pugh, Director of People

VIA: Karin Burns, Chief Executive Officer

SUBJECT: Human Resources Update

DATE: March 27, 2025

RECOMMENDATION:

Receive and file update on Human Resources.

BACKGROUND:

Community Power has completed its 2024 Performance Review cycle. Performance reviews are important because they provide valuable feedback to employees, highlighting their strengths and areas for improvement, which helps them develop their careers, align their goals with the company's objectives, and ultimately improve their performance while feeling more engaged and valued within the organization; they also serve as a platform to set clear expectations and identify training needs. We are proud to be an organization that provides consistent and transparent feedback for our staff.

Employee safety remains an important focus as our organization grows. The Community Power Safety Committee attended a CPR / First AID training this month as part of our commitment to equip our employees with the skills to respond quickly and effectively in emergency situations.

We are actively recruiting for the following roles:

Sr. Rates Analyst
Sr. Origination Associate
Procurement Analyst
Strategic Finance Manager
Power Contract Coordinator

ANALYSIS AND DISCUSSION:

N/A

FISCAL IMPACT:	
N/A	
COMMITTEE REVIEW:	
N/A	
ATTACHMENTS:	

N/A



SAN DIEGO COMMUNITY POWER Staff Report – Item 7

TO: Board of Directors

FROM: Jack Clark, Chief Operating Officer

Jen Lebron, Director of Public Affairs

VIA: Karin Burns, Chief Executive Officer

SUBJECT: Update on Public Affairs

DATE: March 27, 2025

RECOMMENDATION:

Receive and file an update on marketing, public relations, and local government affairs activities for San Diego Community Power (Community Power).

BACKGROUND:

Community Power has engaged in a variety of public relations, marketing, community outreach, and local government affairs activities to drive awareness, spark community engagement, and maintain high customer enrollment.

ANALYSIS AND DISCUSSION:

Community Power's Public Affairs Department has been participating in events across our member agencies as it aims to increase general awareness and answer questions in a friendly, helpful manner.

Recent and Upcoming Public Engagement Events

Adams Avenue Business Association

San Diego Regional Chamber of Commerce Sacramento Delegation

San Diego Regional Economic Development Corporation

National City STEAM Collaborative

Chula Vista Community Collaborative

City of San Diego Climate Equity Working Group

Imperial Beach Collaborative

Citizens' Climate Lobby Home Electrification Fair

San Diego Regional Chamber of Commerce 154th Anniversary Celebration

San Diego Green Drinks: Future of Electric Vehicles Panel

San Diego Rescue Mission South County Huddle

National Veteran's Transition Services

San Diego Festival of Science and Engineering

Spring Fling Business Expo

San Diego Women's Week

National City STEAM Collaborative

Chula Vista Sustainability Commission

Chulla Vista Community Collaborative

San Diego 350 Youth Climate Summit

Encinitas State of the City Address

Imperial Beach Collaborative

North Park Farmers Market

Transportation Justice Expo

Olivewood Gardens Clean Energy Project Fundraiser

Startup San Diego First Mondays

South Bay Earth Day

County of San Diego Earth Day Fair

La Mesa Earth Day

Sony Electronics Earth Day

Nature Day at El Toyon Elementary

Roots & Renewal: The Environmental Health Coalition's 45th Anniversary

Spring Valley Day

Ramona Earth Day Festival

South County Economic Development Corporation Economic Summit

Marketing, Communications and Outreach

The 2025 Community Clean Energy Grant cycle launched on February 10 and closed on March 14. The application, vetting and award process for more than \$600,000 in grants will be similar to past years.

The Public Affairs team has been working diligently behind the scenes to support programmatic efforts. It is also ramping up efforts to promote upcoming programs including one that helps customers repair their roofs to be ready for solar installations, and another that will distribute grants to small businesses that would benefit from more efficient refrigerators. The Public Affairs team is working closely with internal and external stakeholders to encourage participation in these programs and leveraging relationships with community partners to amplify our marketing and outreach efforts.

Community Power has continued its efforts to connect with local leaders through meetings and at community events.

The Public Affairs team will continue to develop new strategies, processes and capacity over the next several months to conduct more community outreach, expand marketing and brand awareness efforts, and provide timely, accurate information across multiple channels.

Local Government Affairs

Community Power continues to meet with and work with local governments and tribal nations throughout the greater San Diego region. It has made a concerted effort to reach out to newly elected officials in all seven member agencies to provide education about the organization.

FISCAL IMPACT:	
N/A	
COMMITTEE REVIEW:	
N/A	
ATTACHMENTS:	
N/A	



SAN DIEGO COMMUNITY POWER Staff Report – Item 8

TO: Board of Directors

FROM: Jack Clark, Chief Operating Officer

Laura Fernandez, Director of Regulatory and Legislative Affairs

VIA: Karin Burns, Chief Executive Officer

SUBJECT: Update on Regulatory and Legislative Affairs

DATE: March 27, 2025

RECOMMENDATION:

Receive and file the update on regulatory and legislative affairs.

BACKGROUND:

Staff will provide regular updates to the Board of Directors regarding Community Power's regulatory and legislative engagement.

ANALYSIS AND DISCUSSION:

A) Regulatory Updates

Resource Adequacy

As discussed in the December 2024 regulatory update to the Board of Directors (<u>see page 52 of staff report</u>), on November 4, 2024, the California Public Utilities Commission (CPUC) issued a Scoping Memo and Ruling for Track 3 in the resource adequacy (RA) proceeding. On January 17, 2025, Community Power's trade association, CalCCA, <u>filed several proposals</u> for improving the RA program, including:

- Allow load serving entities (LSE) to transact load obligations on an hourly basis under the Slice-of-Day framework to enable full optimization of RA resources and reduce costs for all LSEs, given hourly load obligation trading;
- Address co-located resources and RA needs, including allowing certain co-located generation to count for storage charging sufficiency requirements or RA requirements for on-site or off-site storage and reevaluating accounting methodologies to allow energy only co-located resources to count as RA; and

 Incorporate the local RA central procurement entity data request process into the existing RA filing process.

CPUC Energy Division hosted a workshop on Track 3 proposals on February 12, 2025, in which several parties, including CalCCA, presented their proposals. On March 3, 2025, twenty-six parties filed opening comments on the Track 3 proposals. <u>CalCCA's comments</u> focused on recommended modifications to CPUC Energy Division's planning reserve margin (PRM) and system waiver proposal, changes to the cure period for deficiencies, hourly transactability, the reliability value of co-located resources, and the unforced capacity (UCAP) counting methodology, among others. Reply Comments were due March 17, 2025.

Power Charge Indifference Adjustment

On February 20, 2024, the CPUC voted to open a new <u>order instituting rulemaking (OIR)</u> on the Power Charge Indifference Adjustment (PCIA) and other matters related to the Energy Resource Recovery Account (ERRA) annual forecast and compliance proceedings, which is the venue that investor-owned utilities (IOU) evaluate recovery of energy procurement costs. The PCIA is a ratemaking element that enacts and ensures indifference to all customers, bundled and unbundled, to avoid cost shifts when load departs the incumbent utility to another load serving entity such as a CCA. Setting the PCIA requires determining the market value of the IOU's portfolio of resources it procured on behalf of departed customers, which relies on Market Price Benchmarks (MPB).

The OIR aims to:

- Consider improvements to existing ERRA and PCIA rules and processes;
- Identify ways to mitigate rate volatility;
- Ensure indifference between bundled and departed customers;
- Provide policy guidance for forecast ratemaking proceedings.

The proceeding (R.25-02-005) will address these issues in two tracks. Track One is focused on possible adjustments to the MPB with a goal of initially addressing MPB-related issues by May 2025 so that the Energy Division can provide revised MPB inputs in time for the October ERRA Updates (for use in 2026 rates). Track 2 will consider additional revisions to ERRA and PCIA rules and processes, including the need for ERRA-specific implementation guidance for resource adequacy program changes, changes to Bundled Procurement Plan directions, processes, and rules, and additional guidance for vintaging resources. Opening Comments are due March 18 and replies due April 2, 2025.

Renewable Customer Generation Programs for Priority Communities

On February 24, Community Power submitted <u>Opening Comments</u> in response to the California Public Utilities Commission's Rulemaking on Customer-Generated

Renewables Programs for Priority Communities. Community Power requests party status in the proceeding and emphasizes its commitment to ensuring equitable access to renewable energy for disadvantaged communities across its service area. Community Power's comments support the extension of the Solar on Multifamily Affordable Housing (SOMAH) program, stresses the importance of maintaining robust consumer protections and alignment with new net billing tariffs to preserve customer value for the Disadvantaged Communities Single-Family Affordable Homes (DAC-SASH) program, and advocates for modernizing Renewable Energy Self-Generation Bill Credit Transfer (RES-BCT) tariff to better serve community-based organizations, local governments, and tribes. Community Power advocates for modernizing RES-BCT to better serve community-based organizations, local governments, and tribes, thereby advancing the State's climate equity goals.

Smart Meter Decision Petition for Modification Requesting SDG&E to Continue to Provide Real-Time Data to Customers

On February 24, Community Power, Clean Energy Alliance (CEA), and Mission:Data jointly filed a <u>Petition for Modification</u> of a Commission decision to clarify that SDG&E must continue to provide its distribution customers with real-time (or near real-time) energy usage data access to SDG&E's Advanced Metering Infrastructure. This decision, which approved SDG&E's discontinuation of funding for ZigBee-based connectivity in its smart meters, is now being challenged because it fails to ensure that customers receive the real-time (or near real-time) energy usage data access while SDG&E transitions from Smart Meter 1.0 devices to Smart Meter 2.0 devices.

B) State Legislative Activities Update

Governor's January Budget Includes Distributed Assets Funding Proposal Community Power Advocated for re: DEBA

As outlined in item 19 of the staff report for the January 23 Board meeting, Community Power led a group of seven other CCAs in drafting and submitting a letter in December to the State's Director of the Department of Finance (DOF) that advocated for funding for the California Energy Commission's (CEC) Distributed Electricity Backup Assets (DEBA) program. The DOF leads in putting together the Governor's annual budget proposals. DEBA was created in 2022 as part of the state's electric Strategic Reliability Reserve to fund clean distributed energy assets that can help with load reduction and in emergency grid scenarios. If funded, DEBA could be a state-level funding avenue that could be pursued for programs like Solar Battery Savings.

There is an update on the status of the funding. The Governor's <u>January budget proposal</u>, as reflected in <u>SB 65 (Wiener)</u> and <u>AB 227 (Gabriel)</u> - identical budget bills – includes \$180 million for DEBA, plus another \$20 million for state administrative costs. This aligns with Community Power's advocacy. Community Power issued a second CCA coalition letter to officially support the Governor's proposal. The Legislature has until June 15 to

adopt the state budget, inclusive of the proposed DEBA funding. The updated coalition letter is attached.

Bill Introduction Deadline and Initial Bill Position

February 21 was the last day legislators could introduce new bills in 2025. Over 2,300 new bills were introduced. Community Power staff are currently reviewing around 150 bills that relate to energy procurement, energy efficiency, customer programs, rate design, affordability, general government issues, and more.

In accordance with the Board approved Legislative & Regulatory Policy Platform, Community Power issued a support letter for SB 540 (Becker), which will allow the California Independent System Operator (CAISO) to operate, and participate in, an independently governed regional organization to operate a day-ahead electricity market available to balancing authority areas in the entire Western United States. This will deliver ratepayer savings, reduce greenhouse gas (GHG) emissions, and enhance grid reliability. It is sponsored by the Coalition of California Utility Employees, the State Association of Electrical Workers, the Environmental Defense Fund, and the Natural Resources Defense Council. It is supported by the California Community Choice Association, among others. Community Power's letter of support is included as an attachment, as is a coalition letter Community Power signed on to. For more information on SB 540 and regional grid integration, please visit CalCCA's website: https://cal-cca.org/pathways-initiative/.

Community Power Joins Coalition of Organizations on a Letter to the Legislature on the Benefits of Energy Efficiency

Community Power was joined by 38 other organizations on the letter, which is included as an attachment. The letter responds to information provided by other stakeholders to the Senate Committee on Energy, Utilities and Communications Committee during their February 19 hearing on affordability issues. The hearing was titled "Addressing Electricity Utility Bill Affordability While Advancing the State's Clean Energy Goals." The President of the California Public Utilities Commission (CPUC) and the Chair of the California Energy Commission testified at the hearing. Both of their agencies also provided reports on affordability. The CPUC's report, issued in response to Governor Newsom's fall 2024 executive order on energy affordability issues (N-5-24), among other things called for repealing energy efficiency programs without cost-effectiveness scores or funding them with non-ratepayer funding sources. The Director of the CPUC's Public Advocates Office also testified at the hearing, calling for the phase out of ratepayer funding of programs that are not cost effective. The Executive Vice President of PG&E and a lawyer representing the California Large Energy Consumers Association also joined in the call for getting rid of ratepayer funding of energy efficiency and customer programs, saying they should be funded from other sources.

The joint letter that Community Power singed onto responds to these criticisms of ratepayer funded energy efficiency programs, like those which will be offered by the San

Diego Regional Energy Network. The letter advises the Senate Committee on Energy, Utilities and Communications that:

- Energy efficiency programs are a small and declining component of customer bills,
- Energy efficiency savings are critical to California's world-leading clean energy transition.
- Statewide the entire energy efficiency portfolio is cost-effective,
- Energy efficiency is critical for grid reliability,
- Many energy efficiency programs are designed to help customers in disadvantage communities, and
- All energy efficiency programs need dependable funding to be successful.

C) Federal Activities Update

Community Power staff continue to monitor Congressional activity as it relates to potential changes to important tax provisions that support Community Power's ability to provide competitive and affordable rates. The tax provisions include the Investment Tax Credit, the Production Tax Credit, the Energy Efficient Home Improvement Credit, the Residential Clean Energy tax credit, and the authority of Community Power to issue tax-exempt revenue bonds. Community Power previously issued a letter on these matters to the San Diego congressional delegation, which was discussed during staff's presentation in the January 23 Board meeting. Seven letters were issued, one to each of the five Congressmembers representing San Diego and one to each of the two U.S. Senators. The content of all seven letters are identical and one is included as an attachment.

FISCAL IMPACT:

N/A

COMMITTEE REVIEW:

N/A

ATTACHMENTS:

- A: Community Power Congressional Letter re Tax Credits
- B: Community Power State Legislative Letter re DEBA
- C: Community Power Letter of Support re SB 540 (Becker)
- D: Coalition Support Letter re SB 540 (Becker)
- E: Coalition Support Letter re Energy Efficiency

ITEM 8 ATTACHMENT A



January 22, 2025

The Honorable Alex Padilla
United States Senator
331 Hart Senate Office Building
Washington, DC 20510

Subject: Protecting Electricity Tax Credits to Benefit San Diego Ratepayers, Regional Economic Development, and Encourage Local Electricity Generation and Storage

Dear Senator Padilla,

San Diego Community Power is the state's second largest community choice aggregator, providing clean, affordable, and reliable electric generation service and customer programs to over 955,000 customer accounts. It was founded to develop a wide range of renewable and energy storage resources, energy efficiency programs, foster regional economic benefits, and promote electric rate stability. SD Community Power is governed by a joint board of elected representatives from the cities of San Diego, La Mesa, Encinitas, Chula Vista, Imperial Beach, National City, and the County of San Diego.

As the 119th Congress works on energy policies, we want to highlight the role that key Inflation Reduction Act (IRA) tax provisions play in maintaining electric reliability and affordability – and promoting regional economic development – in the San Diego region. We urge you to work with your colleagues to protect the ratepayer benefits of the Investment Tax Credit (ITC), the Production Tax Credit (PTC), the Home Energy Efficiency Improvement Credit (HEEIC), and the Residential Clean Energy Credit (RCEC). We also ask that you prevent any retroactive changes to current energy tax credits to honor existing financial commitments and avoid unnecessary shocks to energy markets.

SD Community Power signed eight power purchase agreements (PPAs) in 2024 that presume ITC or PTC benefits. Overall, we are working to bring 1.6 gigawatts (GWs) of renewable energy generation and 1 GW of energy storage online through 2028, enough to power 1.2 million homes. The projects are important for affordability and are important drivers of regional economic development; they have helped create over 2,800 well-paying construction jobs through project-labor agreements and more than 50 permanent jobs.

There are many factors that impact the pricing of these projects, such as high interest rates, inflation, supply chain problems, and electric transmission constraints, all of which have pushed PPA prices up, raising costs for ratepayers. The core provisions of the ITC and PTC, including the prevailing wage incentives, have counteracted these upward cost

pressures, helping SD Community Power invest in reliable, local sources of clean electricity at competitive prices. The energy community and domestic content incentives have also had material and positive impacts on pricing of certain projects.

SD Community Power's Board annually sets the unbundled, retail generation rates for our ratepayers. Last year, due to lower wholesale market prices, the Board was able to reduce rates by an average of 18%, creating savings for San Diego ratepayers. Moving forward, many of our generation and storage projects are expected to come online between now and 2027. Once operational, they will bring increased stability to SD Community Power rates because the PPAs have fixed prices that reduce exposure to wholesale costs, which fluctuate. Looking into the future, SD Community Power expects to have a continued need to procure additional electricity generation and storage projects, and the ITC and PTC will continue to have a key role in keeping costs down.

SD Community Power is also in the process of launching several customer programs to help maintain electric reliability, enhance customer resiliency, and promote ratepayer affordability. SD Community Power's Solar Battery Savings program provides incentives to ratepayers that can be combined with the RCEC to make it affordable to install batteries in homes, allowing ratepayers to better control their peak energy costs. Batteries from the program can be enrolled in a virtual power plant (VPP), which is also capable of aggregating the electric load from other home appliances, like electric heat pumps, which are made more affordable by the HEEIC. These two consumer facing tax credits are critical to maintaining affordability and enhancing SD Community Power's local electricity resource development efforts to maintain electric reliability.

Thank you for considering our input. Please don't hesitate to reach out if there is anything SD Community Power can do to support your efforts to maintain key tax credits that benefit ratepayers.

Sincerely,

Karin Burns

Chief Executive Officer

San Diego Community Power

and Run

ITEM 8 ATTACHMENT B

















February 11, 2024

The Honorable Jesse Gabriel Chair, Assembly Budget Committee 1021 O St, Room 8230 Sacramento, CA 95814 The Honorable Scott Wiener Chair, Senate Budget & Fiscal Review Committee 1021 O St, Room 8620 Sacramento, CA 95814

Subject: Support Funding the California Energy Commission's (CEC) Distributed Electricity Backup Assets (DEBA) Program in The Governor's 2025-26 Budget

Dear Assemblymember Gabriel and Senator Wiener,

We support the inclusion of \$180 million dollars for the Distributed Electricity Backup Assets (DEBA) Program in the Governor's Budget and reflected in Item 3360-101-3228 in SB 65 (Wiener) and AB 227 (Gabriel). We believe this is a crucial step towards supporting ratepayer affordability in California.

Investments in DEBA are more important than ever due to rising electricity costs and the increasing threat of extreme weather events. According to the CPUC's Public Advocates Office, bundled electricity rates have increased between 82% to 110% in the last decade, placing a growing burden on households. At the same time, climate change is causing more frequent and intense weather events that can strain our power grid.

DEBA can help address these challenges by supporting the acquisition of additional clean customer resources that can be enrolled in virtual power plants (VPPs). California's Community Choice Aggregators are at the forefront of building VPPs, which rely on aggregated customer resources – like batteries and thermostats – that are critical to achieving the state's clean energy goals, reducing costs for ratepayers, supporting grid reliability & resilience, and advancing environmental justice through accessible clean energy. By enabling customers to participate in automated dispatch, VPPs can collectively provide capacity through demand reduction at peak hours when energy is most expensive, thereby benefiting all customers.

Investing in DEBA is an investment in a more reliable and affordable energy future for all Californians and we respectfully urge that it be included as part of the final budget agreement. If you have any questions, please contact Amy Costa, at amy@fullmoonstrategies.com.

Sincerely,

Patrick Welch

Senior Legislative Manager San Diego Community Power

Tatrick Welch

Marc Hershman

Director of Government Affairs

Peninsula Clean Energy

Vincent Wiraatmadja

Senior Legislative Manager

MCE

Greg Wade

Chief Executive Officer

Clean Energy Alliance

Mitch Sears

Chief Executive Officer

Valley Clean Energy

Bena Chang

Director of Government & Legislative Affairs

Silicon Valley Clean Energy

Adam Jorge

Senior Decarbonization Policy Manager

Sonoma Clean Power

Scott Green

Scott Green

Senior Gov Affairs Manager

San Jose Clean Energy

CC: Senator Benjamin Allen, Chair, Budget subcommittee 2
Assemblymember Steve Bennett, Chair, Budget subcommittee 4
Joe Stephenshaw, Department of Finance
Chase Hopkins, Office of Assembly Speaker Robert Rivas
Kip Lipper, Office of Senate pro Tempore Mike McGuire

ITEM 8 ATTACHMENT C



February 28, 2025

The Honorable Josh Becker Chair, Senate Committee on Energy, Utilities & Communications 1021 O Street, Suite 3350 Sacramento, CA 95814

RE: SB 540 (Becker & Stern) Independent System Operator: independent regional organization – SUPPORT

Dear Senator Becker,

On behalf of San Diego (SD) Community Power, I write to thank you for your leadership to deliver ratepayer savings, reduce greenhouse gas (GHG) emissions, and to enhance grid reliability. SD Community Power is pleased to support SB 540 (Becker & Stern).

The legislation will allow the California Independent System Operator (CAISO) to operate, and participate in, an independently governed regional organization to operate a day-ahead electricity market available to balancing authority areas in the entire Western United States. Importantly, SB 540 (Becker & Stern):

- Preserve's California's and SD Community Power's ability to make resource choices to meet state and local adopted goals, and which best serve customer needs.
- Includes a transparent governance process that provides equitable representation of the interests of all market participants.
- Includes an appropriate withdrawal protocol in response to potential federal action or other significant changes in market rules or operations detrimental to California ratepayers or that contravene state policy.
- Preserve's California's and SD Community Power's commitment to preserving union work opportunities in the energy sector and keeping jobs in California.

The integrated and independent electricity market envisioned by SB 540 (Becker & Stern) will result in many benefits, including ratepayer savings. A recent study estimates that California could see nearly \$800 million annually in lower system costs, including up to \$471 million to CAISO market participants. The integrated market would provide SD Community Power with another tool to continue to keep downward pressure on generation rates; in 2024, the SD Community Power Board reduced rates on average by 18% and lowered rates by another 2.8% in February of this year.

The bill will also support SD Community Power's goal of deep decarbonization and the state's goal of achieving net-zero GHG emissions by 2045. It is estimated that an independently governed integrated market could help reduce GHG emissions from the electric sector by over 11% and reduce natural gas fired generation by 31%. There is also strong evidence to suggest that the market will enhance grid reliability through more efficient resource dispatch based on a broader market footprint. The market may increase generation available for planning reserve margins by 25% and under the worst-case stress event, could cut the hours of unserved energy in half. This is critical as California and the West continue to experience more frequent and severe weather events.

California already has experience with a real-time energy market known as the Western Energy Imbalance Market (WEIM). It operates under shared market rules that allow the participants to efficiently buy and sell power. The WEIM, which captures about 5% of all wholesale market transactions, has provided CAISO market participants with over \$1 billion in benefits, avoided over 1 million tons of carbon emissions, and has increased grid flexibility by providing access to surplus energy across a broader footprint. The independent governed day-ahead market envisioned by SB 540 (Becker & Stern) will help California realize similar benefits for the other 95% of wholesale electricity transactions.

In closing, we appreciate that SB 540 (Becker & Stern) is the product of deliberative stakeholder engagement through the West-Wide Governance Pathways Initiative. Launch Committee members involved in the process brought stakeholders together from around the West to design market mechanisms that will support a truly independent day-ahead market. We are thankful for their efforts.

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If you have any questions about our position, please contact Amy Costa, at amy@fullmoonstrategies.com.

Sincerely,

Patrick Welch

Senior Legislative Manager

Tatrick Welch

Cc: The Honorable Henry Stern, State Senator, 27th District

2

ITEM 8 ATTACHMENT D





California & Nevada State Association of Electrical Workers















CalChamber



Concerned Scientists

RIVIAN









































March 7, 2025

The Honorable Senator Becker Chairman, Senate Utilities, Energy, and Communications Committee 1021 O Street, Suite 3350 Sacramento, CA 95814

RE: SUPPORT - SB 540 (Becker, Stern) – as introduced February 20, 2025

Dear Senator Becker,

We are writing to express our strong support for SB 540. This bill provides the statutory authorization necessary to implement the Pathways Proposal which would make electricity more affordable for California consumers while protecting California's procurement, environmental, reliability, and other public interest policies.

Developed by a large and diverse set of stakeholders, the Proposal would create a new, independent regional organization that would be solely responsible for setting energy market rules. The California Independent System Operator (CAISO) would continue to operate the markets as it does today, as well as continuing its role in operating the transmission system, transmission system planning, and balancing authority functions. SB 540 ensures the expertise and infrastructure that the CAISO has built is maintained, further protecting investments in current energy markets.

Creating an independent organization responsible for energy market rules would enable more utilities across the West to participate in consolidated electricity markets, making electricity in California more affordable and reliable while also reducing emissions in California.

SB 540 Provides More Affordable Electricity

This legislation, and the consolidated electricity markets it enables, would provide much needed energy affordability benefits to Californians. A new analysis conducted for the California Energy Commission (CEC) determined a West-wide day-ahead market could produce nearly \$800 million in annual cost savings for California customers.¹

SB 540 Improves Electric Reliability

The legislation would enhance the reliability of California's power grid by enabling more efficient and coordinated management of energy supply and demand across the Western region. With better access to shared resources, grid operators will be better equipped to draw on a wider resource pool during peak demand periods, reduce the likelihood of blackouts, and support the

¹ John Tsoukalis, et al., Brattle Group, "<u>Preliminary Day-Ahead Market Impact Study: Impact of Market Footprints on California Customers</u>" (Prepared for California Energy Commission, January 24, 2025).

resilience of the grid in the face of growing challenges such as extreme weather events and climate-driven disruptions.²

SB 540 Increases Use of Clean Energy

A consolidated western energy market will maximize use of existing clean energy generation and enable a faster, more affordable clean energy future. SB 540 makes more clean energy available both in California and around the West by reducing curtailment (deliberately reducing output below what could have been produced), a growing problem for solar and wind power generators in California. The CEC study determined the expanded market would reduce wind and solar curtailment by 10 percent. This improvement would reduce air pollution by displacing other less efficient emitting resources and enhance the financial foundation for clean energy investment and jobs by enabling California to use and sell more of its clean energy.³

With 80% of energy customers in the West now served by utilities with net-zero carbon energy mandates, the demand for clean energy resources will continue to grow. Maximizing use of existing clean generation is the fastest, most affordable way to reduce emissions.

SB 540 Protects Consumers and California Energy Policy

SB 540 would permit CAISO and California investor-owned utilities to participate in the independently governed energy markets only if the new regional organization meets guardrails designed to protect consumers and ensure that California can continue to set its own procurement, environmental, reliability, and other public interest policies. These protections include:

- public interest protections in the corporate documents:
- specific roles and engagement with state regulators and consumer advocate offices including access to market data;
- transparent and accessible operations including an office of public participation;
- independent market analysis and monitoring to protect consumers;
- engagement with states, local power authorities, and federal power marketing agencies to evaluate potential impacts of proposed market rule and tariff changes to state, local, and federal policies; and
- retention of the right to withdraw from the energy markets governed by the new regional organization if participation were no longer in the interests of their customers.

The diverse set of signatories on this letter represent an unprecedented coalition of consumer advocates, organized labor, environmental advocates, clean energy developers, investor-owned

² See Tsoukalis, et al. and Michael Wara, et al., Stanford Climate & Energy Policy Program, "<u>Grid Regionalization in the West: Reliability Benefits from Increased Cooperation in Electricity Markets and Operations</u>"(Prepared for California Energy Commission, January 24, 2025).

³ John Tsoukalis, et al., Brattle Group, "<u>Preliminary Day-Ahead Market Impact Study: Impact of Market Footprints on California Customers</u>" (Prepared for California Energy Commission, January 24, 2025).

SUPPORT - SB 540 (Becker and Stern) - as introduced, February 20, 2025

utilities, public power, and large customers who strongly support SB 540. For all of the above reasons, we support this legislation and request your support.

Sincerely,

Advanced Energy United (AEU)

Amazon

American Clean Power – California (ACP)
CA & NV State Association of Electrical

Workers (IBEW)

CalCCA

California Chamber of Commerce California Environmental Voters California Large Energy Consumers

Association (CLECA)

California State Pipe Trades Council

Ceres

Clean Energy Buyers Association (CEBA)
Coalition of California Utility Employees

(CCUE)

E2 | Environmental Entrepreneurs

EDP Renewables

Environmental Defense Fund (EDF)

Google

Independent Energy Producers Association

(IEPA)

Leap

MCE Community Choice Energy

Microsoft

Mitsubishi Cement Corporation
Natural Resources Defense Council

(NRDC)

Pacific Steel Group (PSG)

Pattern Energy

Rivian

San Diego Community Power Sierra Nevada Brewing Co.

Silicon Valley Leadership Group (SVLG)

Silicon Valley Clean Energy

Solar Energy Industries Association (SEIA)

Union of Concerned Scientists (UCS)

Western Freedom

Western Power Trading Forum (WPTF)
Western Resource Advocates (WRA)
Western States SMART Council

CC: Senator Henry Stern, Co-Author

Members, Senate Utilities, Energy, and Communications Committee

Nidia Bautista, Chief Consultant

Kerry Yoshida, Republican Caucus Consultant

SUPPORT – SB 540 (Becker and Stern) - as introduced, February 20, 2025

Edson Perez Senior Principal

Advanced Energy United (AEU)

Nate Hill

Head of Energy Policy

Amazon

Alexander L. Jackson Executive Director

American Clean Power - California (ACP)

John Doherty

Secretary/Treasurer

CA & NV State Association of Electrical

Workers (IBEW)

Beth Vaughan

Chief Executive Officer

CalCCA

Jonathan Kendrick
Policy Advocate

California Chamber of Commerce

Melissa Romero

Policy Advocacy Director

California Environmental Voters

Christian Lenci

Chair

California Large Energy Consumers

Association (CLECA)

Mike Hartley
Executive Director

California State Pipe Trades Council

Kelly Trombley

Director, State Policy, West

Ceres

Priya Barua

Senior Director of Market & Policy

Innovation

Clean Energy Buyers Association (CEBA)

Hunter Stern

Chair

Coalition of California Utility Employees

(CCUE)

Susan Nedell

Senior Western Advocate

E2 | Environmental Entrepreneurs

Jack Wadleigh

Regulatory Affairs and Market Development

Manager, Western Region

EDP Renewables

Katelyn Roedner Sutter California State Director

Environmental Defense Fund (EDF)

Dylan Sullivan

Head of Energy Market Development, US-

West Google

Jan Smutny-Jones, Esq.

Chief Executive Officer, General Counsel Independent Energy Producers Association

(IEPA)

Collin Smith

Regulatory Affairs Manager

Leap

Dawn Weisz

Chief Executive Officer

MCE Community Choice Energy

Robyn Hines

Sr. Director Government Affairs

Microsoft

SUPPORT – SB 540 (Becker and Stern) - as introduced, February 20, 2025

Austin Marshall President/C.O.O.

Mitsubishi Cement Corporation

Victoria Rome

CA Government Affairs Director Natural Resources Defense Council (NRDC)

Mark Olson

Vice President of Mill Operations Pacific Steel Group (PSG)

Varner Seaman

Director of Government Affairs

Pattern Energy

Coley Girouard

Lead, Energy Market Enablement and Utility

Strategy Rivian

Patrick Welch

Senior Legislative Manager San Diego Community Power

Mandi McKay

Sustainability & Social Impact Officer

Sierra Nevada Brewing Co.

Monica V. Padilla Chief Executive Officer Silicon Valley Clean Energy Laura Wilkinson

SVP, Strategy & External Affairs

Silicon Valley Leadership Group (SVLG)

Stephanie Doyle

California State Affairs Director

Solar Energy Industries Association (SEIA)

Daniel Barad

Western States Policy Manager

Union of Concerned Scientists (UCS)

Kathleen Staks

Executive Director

Western Freedom

Scott Miller

Executive Director

Western Power Trading Forum (WPTF)

Vijay Satyal

Deputy Director, Regional Markets and

Transmission

Western Resource Advocates (WRA)

Dion Abril

Executive Administrator

Western States SMART Council

ITEM 8 ATTACHMENT E

































Central Chapter













SGVCOG























VALLEIO

California







March 11, 2025

The Honorable Josh Becker Chair, Senate Committee on Energy, Utilities and Communications 1021 O Street, Suite 3350 Sacramento, CA 95814

Subject: Joint Comments on Oversight Hearing to Address Electricity Utility Bill Affordability While Advancing the State's Clean Energy Goals: Energy Efficiency Programs are Vital to an Equitable Clean Energy Transition and Maintaining Grid Reliability

Dear Senator Becker,

We, the undersigned organizations, write to thank you for focusing on ratepayer affordability during your first hearing of 2025. Our organizations represent a broad cross section of local governments, community choice aggregators, regional energy networks, businesses, and non-profit organizations that are committed to the state's clean energy transition and who share the concern that unaffordable electric bills could undermine our important efforts to stem the impacts of climate change through clean electricity. We believe the state can and must advance both climate progress and electric affordability for all Californians, and energy efficiency programs are a vital tool for gaining ground in both areas.

Throughout the course of your recent oversight hearing, several stakeholders suggested that bill savings could be achieved by repealing, or otherwise altering, ratepayer-funded energy efficiency programs. To the contrary, we respectfully urge you to consider the vital role that energy efficiency plays in California's clean energy future and in supporting the most marginalized members of our communities, including low- and middle-income households.

This letter provides information that we hope you will find valuable in informing your deliberations on legislative solutions to the ratepayer affordability crisis. We stand ready to work with you to find the appropriate balance of program offerings, as well as opportunities to improve existing programs to better meet today's energy needs.

Energy Efficiency Delivers Important Benefits Including Affordability

The Governor's Executive Order N-5-24 tasked the California Public Utilities Commission (CPUC) and the California Energy Commission (CEC) with, among other things, examining the benefits and costs to ratepayers of programs they oversee that may be unduly adding to rates or whose funding should more appropriately come from a non-ratepayer source. While the CPUC's report states that shifting programs could reduce rates minimally, it also cautions that repealing the programs would eliminate the benefits they provide. The data, as outlined below, actually show that energy efficiency programs provide myriad benefits and that repealing them would undermine affordability and the state's clean energy transition.

- Energy efficiency programs are a small and declining component of customer bills and are not driving up bills or exacerbating the affordability crisis. The CPUC's report in response to Executive Order N-5-24 shows that energy efficiency was 1.5% of revenue collected from ratepayers in 2024.¹ This is down from 2.2% of revenue collected from ratepayers in 2023.² This is because energy efficiency revenues declined slightly while the revenue requirement of the investor-owned utilities (IOUs)³ increased significantly from \$39.6 billion to \$54 billion. According to an independent analysis, energy efficiency program costs to ratepayers decreased by 32% on an inflation adjusted basis over the past 10 years.⁴ California's programs are more cost-effective on a per customer basis than the programs in 39 other states.⁵
- Energy efficiency is critical for California's world-leading clean energy transition. In 2023 alone, energy efficiency programs helped Californians:
 - o Avoid using 11,276 gigawatt-hours (GWh) of electricity,
 - o Avoid using 153,559,891 therms of gas,
 - Shave 1.9 gigawatts (GW of demand, and
 - o Avoid 11,353,046 tons of GHG emissions.
 - Combined, energy efficiency provided enough energy savings and environmental benefits to avoid over 11.3 million tons of GHG emissions, which is equivalent to the annual energy use of over 1.5 million homes.⁶

These results are achievable because California law has long recognized energy efficiency as a key strategy for enacting the state's clean energy goals in an affordable manner. For example, California's loading order calls for energy efficiency as a priority resource to address electric demand, and the Clean Energy and Pollution Reduction Act of 2015 established the goal of doubling energy efficiency savings by 2030. Beyond energy savings, EE programs also provide the training, support and education needed for workers and contractors to advance California's clean energy transition.

• Statewide, energy efficiency is overwhelmingly cost-effective. California's full ecosystem of EE programs is designed to meet both statewide goals and the needs

¹ CPUC, CPUC Response to Executive Order N-5-24, Table A-2, p. 31.

² CPUC, Table 1.1 (revenue requirement) and Table 5.1 (energy efficiency costs) from the 2023 California Electric and Gas Utility Costs Report, https://www.cpuc.ca.gov/-/media/cpuc-website/divisions/office-of-governmental-affairs-division/reports/2024/2023-ab-67-report.pdf.

³ The revenue requirement is the amount of money an IOU must collect from customers to pay for its costs.

⁴ Edward Randolph and Michel Florio, What is Driving Up Electric Rates in California?.

⁵ ACEEE, 2022 State Energy Efficiency Scorecard, available at:

https://www.aceee.org/sites/default/files/pdfs/u2206.pdf, pp. 26 (CA highest for public benefits nationwide), 37-40 (ranked 40th and 24th for highest electric EE and gas EE spending nationwide).

⁶ California Energy and Data Reporting System (CEDARS), 2023 Confirmed Claim Summary.

⁷ Public Utilities Code Section 454.5 and Public Resources Code Section 25310.

of all customers. The CPUC evaluates EE spending and performance at the individual program, portfolio and collective statewide level. Under even the strictest cost-effectiveness tests, including the one referenced by the CPUC in its response to the Executive Order, 8 the statewide suite of EE programs is highly cost-effective. 9

- Energy efficiency is critical for maintaining a stable grid in an era of rapidly increasing demand for electricity. The CEC estimates that total electricity consumption will increase by as much as 74%, and peak demand will increase by as much as 45%, by 2040. Many ratepayer-supported energy efficiency programs help shave peak load through measures that enable demand response and load flexibility measures, making them vital tools for managing this substantial load growth. Importantly, the CEC's load forecasts, which are the basis for electricity procurement, assume at least 1.9 GWs in achievable energy efficiency savings. Without these programs, load serving entities (LSEs) will need to buy an additional 1.9 GW statewide to cover the shortfall, and those costs will be passed on to customers.
- Many energy efficiency programs are designed to provide energy and bill savings to disadvantaged customers and communities. Energy efficiency is one of the only tools customers can use to protect themselves against high rates, and energy efficiency helps to reduce power procurement costs and GHG emissions at the same time. If customers cannot reduce their usage through energy efficiency, they are more at risk of falling behind on their bills and even being disconnected. For example, the Energy Savings Assistance Program (ESA) serves exclusively low-income customers, but a significant portion of the non-income qualified energy efficiency portfolio also serves customers earning less than the area or statewide median income, rural customers, affordable multi-family housing, and small businesses.
- Successful energy efficiency programs depend on reliable, predictable multiyear funding. Funding certainty allows administrators to plan ahead with confidence, which h elps ensure that all customers can participate. It also improves cost-effectiveness by allowing for bulk purchasing, efficient use of administrative resources, and other economies of scale. Sustainable and reliable funding is also essential to support nearly 300,000 energy efficiency jobs and 53,000 EE businesses across California.¹¹ Neither the State General Fund nor the Greenhouse Gas

⁸ CPUC Response to Executive Order N-5-24, pp. 12-13.

⁹ The CPUC measures EE portfolio cost-effectiveness with multiple tests including the Program Administrator Cost (PAC) test and the Total Resource Cost (TRC) test. In 2023, under the PAC test each dollar invested in EE produced \$8 of benefits and under the TRC test each dollar invested in EE avoided \$3 of otherwise necessary electric and gas costs. See, CPUC, CEDARS, 2023 Claims available at:

https://cedars.cpuc.ca.gov/claims/all-confirmed-dashboard/ (2023 Claims, Portfolios, All Sectors).

¹⁰ Peak demand refers to the time when statewide energy usage is highest, typically 4-9pm on summer days, and power is most expensive to supply during this time.

¹¹ E4TheFuture, Energy Efficiency Jobs in America 2023, available at: https://e4thefuture.org/wp-content/uploads/2023/10/Energy-Efficiency-Jobs-in-America-2023.pdf.

Reduction Fund (GGRF) are able to provide the necessary funding certainty to sustain these valuable programs and ensure they remain cost effective.

Revisiting Energy Efficiency Metrics

While we firmly believe in the value of energy efficiency programs, we also recognize that any program can be improved and welcome the opportunity to do so through a fair and deliberative process. As part of its response to Executive Order N-5-24, the CPUC evaluated ratepayer costs and benefits of energy efficiency programs and concluded that opening a new energy efficiency proceeding that focuses on cost-effectiveness in 2025 is the optimal pathway and venue to further reduce ratepayer costs. ¹² We agree with the CPUC that opening a new energy efficiency proceeding is the best course of action to affirm that energy efficiency programs are meeting their intended goals. The CPUC has already committed to opening a new proceeding later this year that will utilize a more modern lens to examine energy efficiency programs. ¹³ The CPUC is also creating a dashboard that will facilitate greater public and legislative oversight by visualizing program impacts. We are confident that the new energy efficiency proceeding is well suited to refine energy efficiency programs consistent with the legislature's commitment to energy affordability.

We look forward to working with you on solutions to the affordability crisis that preserve the state's energy efficiency programs to ensure they can be administered to reduce customer bills, benefit the needlest communities, play a role in supporting the clean energy transition, and help manage the state's growing load.

Sincerely,

Patrick Welch Senior Legislative Manager

San Diego Community Power

Stephanie Chen

Director of Legislative Affairs

MCE

Joseph Desmond
Executive Director
California Efficiency + Demand

Management Council

Merrian Borgeson

Policy Director, California

Climate & Energy Natural Resources

Defense Council (NRDC)

Ayn Craciun

OC Policy Director

Climate Action Campaign

Art Taylor

Chief Strategy & Program Officer Rising Sun Center for Opportunity

¹² CPUC, CPUC Response to Executive Order N-5-24, p. 18.

¹³ CPUC, Decision (D.) 25-01-006, p. 5. The Commission recognized that "energy efficiency programs have evolved significantly since we opened R.13-11-005 in 2013" and that the new proceeding would have a modern focus that ensures "effective oversight of these energy efficiency programs moving forward."

Marisa Creter Executive Director

San Gabriel Valley Council of

Governments

Bernadette Austin

CEO CivicWell

Patricia Cheng Terry
Senior Portfolio Manager

Northern Rural Energy Network

Amy Luna Capelle Executive Director

WAVE - Women for American Values and

Ethics

Roger Lin Senior Attorney

Center for Biological Diversity

Lujuana Medina Division Manager Los Angeles County

Steven Halligan

Regulatory and Legislative Manager Orange County Power Authority

Steven Frisch President

Sierra Business Council

Alejandra Tellez Co-Director 3C-REN

Maika Llorens Gulati Councilmember City of San Rafael Lisa Swanson Policy Chair

Climate Reality Project Orange Co.

Bena Chang

Director of Government and Legislative

Affairs

Silicon Valley Clean Energy

Charles Palmares Councilmember City of Vallejo

Maya Cheav

Land and Health Director

OCEJ

Sneha Ayyagari Policy Director

BEI

Lauren Weston
Executive Director

Acterra: Action for a Healthy Planet

Craig Perkins
Executive Director
The Energy Coalition

Suyama Bodhinayake

Director of Advocacy and Sustainability

AIA Orange County

Ruth Merino

Chair

San Jose Community Energy Advocates

Adam Sweeney Chapter Chair

Climate Reality Project: Silicon Valley

Chapter

Tanya Payyappilly

CEO

Breathe California of the Bay Area, Golden Gate and Central Coast

Amanda Szakats Councilmember

Pleasant Hill City Council

Dr. Kev Abazajian

Chair

Democrats of Greater Irvine

Quyen Vuong Executive Director

International Children Assistance

Network (ICAN)

Demian Hardman-Saldana

Board Chair LGSEC

Scott Green

Senior Gov Affairs Manager San Jose Clean Energy

Kev Abazajian

Chair

Democrats of Greater Irvine

Anne Mohr

Elected Delegate

Assembly District 73 Delegates California Democratic Party

Marc Hershman

Director of Government Affairs

Peninsula Clean Energy

Leslie Alden

Executive Director Act Now Bay Area

Tomas Castro

Co-Leader

CCL OC Central Chapter

Stanley Shaw

President

Environmental Law Society, UC Irvine

School of Law

Greg Wade

CEO

Clean Energy Alliance

Linda Hutchins-Knowles,

Co-Founder & Team Coordinator Mothers Out Front Silicon Valley

Andrew B. Fremier

Executive Director

Association of Bay Area Governments

Jane Elias

Section Director, Energy Programs Bay Area Regional Energy Network

Casey Dailey

Director of Energy & Sustainability

Programs

Western Riverside Council of

Governments

cc: Members, Senate Committee on Energy, Utilities and Communications The Honorable Mike McGuire, Senate President pro Tem



SAN DIEGO COMMUNITY POWER Staff Report – Item 9

TO: Board of Directors

FROM: Jack Clark, Chief Operating Officer

Jen Lebron, Director of Public Affairs

VIA: Karin Burns, Chief Executive Officer

SUBJECT: Community Advisory Committee Monthly Report

DATE: March 27, 2025

RECOMMENDATION:

Receive and file the Community Advisory Committee (CAC) monthly report.

BACKGROUND:

Per Section 5.10.3 of the San Diego Community Power (Community Power) Joint Powers Authority Agreement:

The Board shall establish a Community Advisory Committee comprised of non-Board members. The primary purpose of the Community Advisory Committee shall be to advise the Board of Directors and provide a venue for ongoing citizen support and engagement in the strategic direction, goals, and programs of the Authority.

At the direction of the Board Chair, the CAC provides quarterly presentations to the Board of Directors in the regular agenda (with the most recent one taking place during the February 27, 2025, regular meeting) and monthly reports in the consent agenda. The next quarterly update is expected to take place later this spring. Due to a lack of agenda items, the CAC did not meet in February 2025.

ANALYSIS AND DISCUSSION:

During the March 13, 2025, regular CAC meeting:

 Chair Vasilakis (City of San Diego) welcomed new CAC member Ross Pike (unincorporated San Diego County), new Community Power staff, and led the unanimous approval of the consent agenda, which now includes an update from Power Services, as well as updates on Customer Operations, Marketing, Public Relations and Local Government Affairs, Regulatory and Legislative Affairs, and Programs.

- Community Power CEO Karin Burns provided an update on Strategic Planning Goals for FY2026-2028. CAC members had an opportunity to provide feedback on this process earlier this year via individual briefings and during the meeting members relayed appreciation for their thoughtful inclusion in the process. The CAC unanimously voted to recommend Board approval of the item.
- Members also received a presentation on 2025 Rate Adjustments, as approved by the Board in February. Members asked questions around the assumptions behind each scenario presented to the Board and around reserve targets. Finally, members heard from the 2024 and 2025 cycles of the Community Clean Energy Grant Program, and a member sought clarification on the year-to-year difference in the program budget.
- A committee member shared an announcement regarding a community event. No Board of Directors items were recommended.

As of March 14, 2025, the CAC has two vacancies representing the City of Chula Vista and the City of La Mesa. A recommendation to appoint a member representing the City of La Mesa will be heard at the March 27, 2025, regularly scheduled Board meeting. Members of the public must be residents, community leaders, and/or business owners of the respective jurisdictions and may submit their applications electronically. The vacancies continue to be advertised at meetings, community events, and through Community Power's social media.

FISCAL IMPACT:	
N/A	
COMMITTEE REVIEW:	
N/A	
ATTACHMENTS:	
N/A	



SAN DIEGO COMMUNITY POWER Staff Report – Item 10

TO: Board of Directors

FROM: Karin Burns, Chief Executive Officer

SUBJECT: Approve Strategic Planning Goals for FY 26-28

DATE: March 27, 2025

RECOMMENDATION:

Approval of San Diego Community Power (Community Power) Strategic Plan Goals for FY 26-28.

BACKGROUND:

Community Power developed its first Strategic Plan in Q3 of 2022. For the past 2.5 years the team has been diligently executing that strategic plan. Given the substantial progress made on achieving the goals of that first strategic plan, the growth of customer accounts, and the overall growth of the organization, best practice suggests we develop a strategic plan roughly every 3 years with annual reviews. This year we aim to have the plan goals approved by the Board of Directors in March of 2025 so that it can tie to the annual fiscal year planning, staffing, and overall goal setting processes of the organization.

The strategic planning process for fiscal year 2025 began in September of 2024 with the drafting of a timeline and process – communicated to staff, the CAC and the Board by the end of the calendar year 2024. In September, staff conducted an organization- wide assessment of risks, challenges, and opportunities that are impacting the organization. Subsequently, in October each department then developed its business outlook and preliminary set of goals over the next three-year period (FY 26-28). These, in combination with the risks, challenges and opportunities framework, were then used by the executive team in November during a strategic planning session to further refine and prioritize department and organization level goals. The Directors and Executive team then met in December for a full day strategic offsite to collaborate in the development of shared goals to refine and prioritize them further. In January of 2025 the entire organization held a strategic offsite to discuss and review our departmental and inter-departmental goals, and in February of 2025 we met with members of the CAC in small group discussions to present and seek feedback on the draft strategic goals. Individual Board members were then briefed on the draft goals and were given opportunities to provide staff with their feedback and suggestions. During the regular Board meeting on February 27, 2025, these draft goals were presented to the Board and to the public for feedback, further guidance,

and discussion. During the regular meeting of the Community Advisory Committee on March 13th, committee members moved to recommend the Board approve the Strategic Plan goals at the March 20th regular Board meeting.

ANALYSIS AND DISCUSSION:

The plan goals are being presented to the Board for final review and approval. Community Power staff then expect to finalize the Strategic Plan for FY 2026-28.

FISCAL IMPACT:

N/A

COMMITTEE REVIEW:

At the March 13, 2025, Community Advisory Committee meeting, the CEO presented a final draft for discussion of the strategic goals for FY 26-28. The Community Advisory Committee unanimously recommended Board approval of the FY 26-28 Strategic Plan Goals.

ATTACHMENTS:

A: San Diego Community Power Strategic Plan Goals FY 2026 - FY 2028

ITEM 10 ATTACHMENT A



San Diego Community Power

Strategic Plan Goals FY 2026 – FY 2028





Mission — To provide affordable clean energy and invest in the community to create an equitable and sustainable future for the San Diego region





Vision — To become a global leader and inspire innovative solutions to climate change by powering our communities with 100% affordable clean energy while prioritizing equity and sustainability



Values: The "JIST" of Community Power

Our core values:

- Justice, Equity, Diversity and Inclusion (JEDI)
- Impact
- Integrity
- Innovation
- Servant Leadership
- Togetherness





Updated Strategic Goals





Financial Stability

Practice fiscal strategies to promote long-term organizational sustainability



Goals

- Execute at least 6 clean pre-payment transactions over the next 3 years aimed at generating \$30M of annual savings on power costs
- Obtain a public investment grade credit rating by November 2027
- ✓ Build reserves by \$150M to maintain a reserve target of at least 180 Days Cash On Hand by December 2027
- ✓ Develop Rate Stabilization Reserve of \$70M to mitigate power cost fluctuations and economic downturns
- Continue to enhance and implement financial controls and policies to meet or exceed best practices - including contracting, risk management, and procurement



Energy Portfolio Development

Provide sufficient, reasonably priced, clean electricity to our customers

Goals

- ✓ Develop a clean energy portfolio with renewable content of 100% no later than 2035, with interim targets of 75% by 2027 and 85% by 2030
- ✓ Support development of 1 Gigawatt of local renewable and clean energy capacity by 2035, of which 300 MW will be distributed energy resources (DERs) enabled by Community Power programs, tariffs, and procurement
- ✓ Prudently manage the power portfolio to minimize risk and customer costs
- ✓ Ensure cost-effective compliance with RA and RPS requirements and all other regulatory obligations
- Create high quality local jobs in renewable energy that support healthy families and vibrant communities



Community Program Delivery

Implement energy projects and programs that reduce greenhouse gas emissions, align energy supply and demand, and provide benefits to community stakeholder groups

Goals

- Deliver 150 Megawatts of local capacity from distributed energy resources (DERs) and our Virtual Power Plant (VPP) by 2035, including expansion of the Solar Battery Savings program
- ✓ Launch all San Diego Regional Energy Network (SDREN) programs and make them available to customers by FY 2026
- ✓ Create and implement a program evaluation framework for all programs/pilots by FY 2026
- ✓ Increase program funding opportunities from external sources and internal cost savings



Legislative and Regulatory

Advocate for public policies that advance Community Power organizational priorities



Goals

- ✓ Continuously educate and engage policymakers developing policies to ensure those policies are consistent with Community Power's regulatory and legislative policy platform
- ✓ Sponsor and support legislation consistent with our policy platform, mission, vision, values & needs
- ✓ Advocate for regulatory outcomes and seek to leverage. opportunities consistent with our policy platform, mission, vision, values, and needs
- Continue to actively participate in trade associations, organizations & coalitions of which we are a member to advance our policy platform
- ✓ Identify external funding opportunities & develop a strategic plan to guide our pursuit of opportunities that align with our policy platform, mission, values, & needs 13



Public Affairs

Develop trusted brand reputation to help drive participation in programs and support customer service and retention



Goals

- ✓ Establish Community Power as a trusted public agency that collaborates and engages with other local governments and stakeholders
- ✓ Develop a robust Power Network of local nonprofits to support programs, build community relationships, and reinvest in the communities we serve
- ✓ Increase brand awareness through outreach, education, and strategic communications to help customers understand their energy usage, save money, and utilize customer offerings
- ✓ Develop and execute effective communications & marketing plans to encourage San Diego residents to take advantage of programs they qualify for to enhance their energy efficiency





Ensure high customer retention and satisfaction

Goals

- ✓ Evolve rate strategy to ensure competitiveness, affordability, and fiscal sustainability
- ✓ Develop customer strategies to increase retention and engagement
- ✓ Resolve billing issues with SDG&E that cause customer confusion and complaints
- ✓ Identify options to develop best in class customer service, including a potential energy advisor center
- ✓ Identify ways to help address, resolve, and reduce outstanding arrearages



Human Resources

Ensure excellence by adopting sustainable business practices and fostering a workplace culture of innovation, diversity, transparency and integrity



Goals

- Evolve into a learning organization by Q4 2026, with an emphasis on professional development for our staff and people leaders
- Ensure all employees are formally trained in workplace violence prevention, emergency preparedness and any additional safety meetings annually
- ✓ Hire top talent according to plan and budget; launch internal job board (Q1) and finalize 3-year staffing plan (Q3)
- ✓ Track and ensure 80%+ employee satisfaction through consistent improvement, onboarding survey metrics, and annual baseline surveys
- ✓ Finalize current internship design and launch a successful summer intern program by FY 2027 for local college & community college students interested in the clean energy industry
- ✓ Launch succession planning in FY 26 with E-Team and leadership

100



SAN DIEGO COMMUNITY POWER Staff Report – Item 11

TO: Board of Directors

FROM: Jack Clark, Chief Operating Officer

Jen Lebron, Director of Public Affairs

Xiomalys Crespo, Sr. Community Engagement Manager

VIA: Karin Burns, Chief Executive Officer

SUBJECT: Approve Community Advisory Committee Member for the City of La

Mesa

DATE: March 27, 2025

RECOMMENDATION:

Approve the appointment of Shaun Sumner to the Community Advisory Committee (CAC) for the City of La Mesa.

BACKGROUND:

Per Section 5.10.3 of the San Diego Community Power (Community Power) Joint Powers Authority (JPA) Agreement:

The Board shall establish a Community Advisory Committee comprised of non-Board members. The primary purpose of the Community Advisory Committee shall be to advise the Board of Directors and provide for a venue for ongoing citizen support and engagement in the strategic direction, goals, and programs of the Authority. The Community Advisory Committee is advisory only, and shall not have decision-making authority, nor receive any delegation of authority from the Board of Directors. Each Party may nominate a committee member(s) and the Board shall determine the final selection of committee members, who should represent a diverse cross-section of interests, skills sets, and geographic regions.

ANALYSIS AND DISCUSSION:

At the December 2024 CAC meeting and during the January 2025 new Board Member Orientation, staff announced a CAC vacancy for the City of La Mesa. Since staff has promoted this and other vacancies through Community Power's social media channels and the CAC, as well as directly engaging with staff, advocacy organizations, and the general public during networking and tabling events in all of our member agencies.

Staff worked with Director Suzuki at her behest to advance the application and nomination process for Shaun Sumner. If approved by the Board with a simple majority vote, staff will work with the representative to conduct their oath of office and onboarding prior to the next regularly scheduled CAC meeting on April 10, 2025. Staff will also update Attachment A: CAC Roster and Seat Assignments, which is publicly available through Community Power's website, to include the new representative.

As of the drafting of this report, a seat for the City of Chula Vista remains vacant. Applications for vacant seats remain open until filled.

N/A
COMMITTEE REVIEW

FISCAL IMPACT:

N/A

ATTACHMENTS:

A: CAC Roster and Seat Assignments

ITEM 11 ATTACHMENT A



Community Advisory Committee Roster

Member Agency	Name	Appointed	Current Term	Term Ends
San Diego	Luis Montero-Adams	August 2024	First	2025
	Matthew Vasilakis (Chair)	April 2020	Second	2026
Chula Vista	Anthony Sclafani	July 2022	First	2025
	Vacant	-	-	-
La Mesa	Vacant	-	-	-
	David Harris	April 2020	Second	2026
Encinitas	Gary L. Jahns	April 2020	Second	2025
	Tara Hammond	April 2020	Second	2026
Imperial Beach	Kenneth Hoyt	May 2024	First	2025
	Ilian Sandoval	November 2023	First	2026
County of San Diego (unincorporated)	Peter Andersen	February 2022	First	2025
	Ross Pike	January 2025	First	2027
National City	Aida Castañeda (Secretary)	February 2022	First	2025
	Lawrence Emerson (Vice-Chair)	February 2022	Second	2026

Terms end at the end of every June. Members are subject to two, three-year consecutive terms. They are also subject to CAC Policies and Procedures. Odd seats are displayed in blue.



SAN DIEGO COMMUNITY POWER Staff Report – Item 12

TO: Board of Directors

FROM: Byron Vosburg, Chief Commercial Officer

Kenny Key, Director of Power Contracts

VIA: Karin Burns, Chief Executive Officer

SUBJECT: Approve Contract with Power Settlements Consulting and Software,

LLC for Professional Services for Energy Trading Risk Management in

a not-to-exceed amount of \$4,115,956

DATE: March 27, 2025

RECOMMENDATION:

Approve a contract with Power Settlements Consulting and Software, LLC ("Power Settlements") with a not-to-exceed amount of \$4,115,956 over the initial term of five years, and a yearly automatic renewal after the initial term, until San Diego Community Power (Community Power) provides a notice of termination, for Energy Trading Risk Management Subscription Software, Update and Support Services, and Hosting Services, and authorize the Chief Executive Officer to execute the contract.

BACKGROUND:

As Community Power continues to grow its portfolio of energy contracts and staff its Power Services and Risk teams, it is critical that it has direct access to software and tools to manage its portfolio of energy contracts and the risks associated with its positions. Through a competitive Request For Proposals (RFP) process, Community Power is recommending contracting with Power Settlements to provide Energy Trading Risk Management software.

On January 17, 2024, Community Power issued an RFP for Professional Services for Energy Trading Risk Management (ETRM). The scope of service in the RFP were:

- Main Scope
 - a. Energy Trading Risk Management System
 - b. Deal capture / trade entry along with deal locking functionality
 - c. Portfolio management, reporting, and risk analysis
 - d. Asset management, tracking, and optimization
 - e. Position tracking, management, and reporting

- f. Project Valuation and impacts on portfolio
- g. Risk analysis including counterparty risk management
- h. Market pricing data and integration with third party data vendors
- i. Settlements including AP/AR integration
- j. Pro-Forma Budget integration
- II. Optional Secondary Scope if Proposer has responsive software offerings
 - a. Load forecasting
 - b. Battery optimization and dispatch
 - c. Contract management
 - d. Project valuation at the nodal level

Vendors offering the Main Scope were invited to interview with staff. On March 22, 2024, vendors were shortlisted to advance to a pilot proof-of-concept period for more in-depth evaluation of the proposed software platforms by staff.

After the pilot proof-of-concept period, two vendors were selected by Community Power to move into the contracting phase while the remaining finalists were waitlisted should there be any issues with the primary vendors. Community Power's Board approved the contracts with the primary vendor in August 2024.

ANALYSIS AND DISCUSSION:

After some issues with implementation, Community Power staff recommend entering into a contract with Power Settlements as the Energy Trading Risk Management System vendor. Staff has worked on negotiating the service agreement with Power Settlements that is attached.

Summary of Vendor:

- Power Settlements
 - Founded in 2007
 - Headquartered in Glendale, CA
 - Wholly owned subsidiary of Yes Energy, LLC
 - 40+ employees
 - 50 customers including CleanPower SF and Marin Clean Energy

COMMITTEE REVIEW:

The RFP results and staff recommendations for final vendor selections were reviewed with the Energy Contract Working Group on July 8, 2024, and July 17, 2024.

FISCAL IMPACT:

Community Power estimates no more than \$4,115,956 in expenditures according to the proposed scope and do not exceed thresholds of the vendor contract over the initial 5-year contract term. The proposed costs for ETRM vendors were included in the FY 2024-25 operating budget approved by the Board on June 27, 2024, as well as the budget update approved on February 27, 2025. Community Power expects these contracts to be cost neutral to the approved operating budget based on the approved ETRM vendor budget and savings in other budget items that will result from bringing these services inhouse.

ATTACHMENTS:

A: License and Software Service Agreement for Energy Trading Risk Management Software and Support with Power Settlements Consulting and Software, LLC.

ITEM 12 ATTACHMENT A

LICENSE AND SOFTWARE SERVICES AGREEMENT (NON-EXCLUSIVE)

This LICENSE AND SOFTWARE SERVICES AGREEMENT (this "Agreement") is made and entered into this __ day of March, 2025, by and between Power Settlements Consulting and Software, LLC, a California limited liability company and wholly owned subsidiary of Yes Energy LLC (hereinafter "Power"); and San Diego Community Power, a California joint powers authority (hereinafter "Licensee"). Power and Licensee may be referred to individually as a "Party" and collectively as the "Parties" within this Agreement.

RECITALS

WHEREAS, Licensee and Power are entering into this License and Software Services Agreement (Non-Exclusive) for Licensee's use of the Software and Software services; and

WHEREAS, Power is the owner of all right, title and interest in and to the Software, Documentation, Code, Maintenance Modifications, Enhancements, and related information, including the intellectual property rights embodied therein, which is altogether known as the SettleCore System (collectively the "*Software*") and as further defined in Section 1.1, below; and

WHEREAS, Licensee desires to install and operate the Software pursuant to the rights and licenses granted herein for Licensee's non-exclusive use of the Software, and use of the Documentation and related information for permissible purposes; and

WHEREAS, Licensee desires that Power provide additional daily processing and support and maintenance services to remotely operate the Software as Software Services as further described in <u>Exhibit A</u> (the "*Software Services*"), attached hereto and incorporated by reference herein; and

WHEREAS, Power is willing to grant such rights and licenses under the terms and conditions of this Agreement.

NOW, THEREFORE, the Parties hereto, intending to be legally bound, hereby agree as follows:

Article 1

DEFINITIONS

When used in this Agreement the capitalized terms listed below shall have the following meanings:

- **1.1** *"Software"* means "CAISO SettleCore Software" as such term is defined in <u>Exhibit B</u>, which is attached hereto and incorporated herein by this reference.
- **1.2** "Code" means computer programming code. If not otherwise specified, Code shall include both Object Code and Source Code. Code shall include Maintenance Modifications and

Enhancements thereto if, when, and to the extent that such Maintenance Modifications and/or Enhancements are delivered to Licensee by Power under this Agreement or under any other agreement or arrangement between the Parties.

- 1.3 "Source Code" means code in programming languages such as "C#" and "JavaScript", including all database operations and procedures such as "SQL" and "SQL stored procedures", plus all related development documents such as flow charts, schematics, statements of principles of operations, end-user manuals, architectural standards, and any other specifications that are used to create or that constitute the Software. Source Code shall also include the database tables and their design and layout, which are used by the Software.
- **1.4** "Object Code" means code in machine-readable form generated by compilation of Source Code and contained in a medium that permits it to be operated by Licensee. Object Code shall also include the database and database design and layout provided in the Software.
- 1.5 "Documentation" means user manuals and other written materials that relate to particular Object Code, including materials useful for operation (for example, user guides and training materials). Documentation shall include Maintenance Modifications and Enhancements thereto if, when, and to the extent that such Maintenance Modifications and/or Enhancements are delivered to Licensee by Power under this Agreement or under any other agreement or arrangement between the Parties.
- **1.6** "*Maintenance Modifications*" means modifications, updates, or revisions made by Power to Code or Documentation that correct errors, support new releases of operating systems, or support new models of input-output ("*I/O*") devices with which the Code is designed to operate.
- **1.7 "Enhancements"** means modifications, additions, or substitutions, other than Maintenance Modifications, made by Power to Code or Documentation that accomplish incidental, performance, structural, or functional improvements. Enhancements may consist of Basic Enhancements or Major Enhancements, as defined below:
 - **a.** For purposes of this Agreement, "*Basic Enhancements*" means Enhancements that result from maintenance services or that otherwise accomplish incidental, structural, functional, or performance improvements for which Power generally <u>does not</u> impose a separate charge on Licensee.
 - **b.** For purposes of this Agreement, "*Major Enhancements*" means Enhancements that result in substantial performance, structural, or functional improvements or additions, including substantial redesign or replacement of any parts of the Source Code, for which Power generally <u>does impose</u> a separate charge on Licensee, but which Licensee has the option of rejecting and not receiving the Major Enhancement and such additional charge.
- **1.8** "*Dollars*" means U.S. Dollars.

1.9 "Regular Business Hours" means "Regular Business Hours" as such term is defined in Exhibit A.

Article 2

LICENSE

- **2.1 Grant.** In consideration of the fees payable to Power pursuant to Article 5 hereof, and subject to the terms and conditions of this Agreement, Power hereby grants to Licensee a revocable, non-sublicensable, non-transferable (except in compliance with Section 12.15), non-exclusive limited right and license (the "*License*") to use and operate the Software.
- **2.2 Restrictions.** Licensee agrees to the restrictions on the Software contained in <u>Exhibit C</u>, which is attached hereto and incorporated herein by this reference. Failure to adhere to these restrictions may result in the revocation of the License at the sole reasonable discretion of Power with notice to Licensee.
- 2.3 Feedback. If Licensee or any of its employees or contractors sends or transmits any communications or materials to Power by mail, email, telephone, or otherwise, suggesting or recommending changes to the Software, including without limitation, new features or functionality relating thereto, or any comments, questions, suggestions, or the like ("Feedback"), Power is free to use such Feedback, subject to the confidentiality obligations contained herein, and Licensee hereby assigns to Power on Licensee's behalf, and on behalf of its employees, contractors and/or agents, all right, title, and interest in, any ideas, knowhow, concepts, techniques, or other intellectual property rights contained in the Feedback, for any purpose whatsoever, although Power is not required to use any Feedback.

Article 3

SOFTWARE MAINTENANCE AND SERVICES

- **3.1 Generally.** Power shall perform software maintenance and support and software services as further detailed in Exhibit A.
- **3.2 Licensee RFP.** The Request for Proposals for San Diego Community Power for Professional Services for Energy Trading Risk Management dated as of January 17, 2024 (SDCP No. 24-001) is hereby incorporated herein by reference and made a part hereof (the "*Licensee RFP*"). Power agrees that portions of the contemplated scope of services set forth in Attachment A of the Licensee RFP are included and a part of the Software Services provided hereunder, as mutually agreed by the Parties.

Article 4

RESPONSIBILITIES OF POWER

- 4.1 Control and Payment of Subordinates. The Software Services shall be performed by Power or under its supervision. Power will determine the means, methods and details of performing the Software Services subject to the requirements of this Agreement. Power shall pay all wages, salaries, and other amounts due such personnel in connection with their performance of Software Services under this Agreement and as required by law. Power shall be responsible for all reports and obligations respecting such personnel, including, but not limited to: social security taxes, income tax withholding, unemployment insurance, disability insurance, and workers' compensation insurance.
- 4.2 Schedule of Services. Power shall perform the Software Services expeditiously, within the term of this Agreement, and in accordance with the Schedule of Services set forth in Exhibit E attached hereto. Power represents that it has the professional and technical personnel required to perform the Software Services in conformance with such conditions. In order to facilitate Power's conformance with the Schedule, Licensee shall respond to Power's submittals in a timely manner. Upon request of Licensee, Power shall provide a more detailed schedule of anticipated performance to meet the Schedule of Services.
- **4.3 Substitution of Key Personnel**. Power has represented to Licensee that certain key personnel will perform and coordinate the Software Services under this Agreement. Should one or more of such personnel become unavailable, Power may substitute other personnel of at least equal competence upon written approval of Licensee. As discussed below, Licensee may request removal of any personnel who fail or refuse to perform the Software Services in accordance with Section 4.4.
- Standard of Care; Performance of Employees. Power shall perform all Software 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. Power represents and maintains that it is skilled in the professional calling necessary to perform the Software Services. Power warrants that all employees and sub- contractors shall have sufficient skill and experience to perform the Software Services assigned to them. Power agrees to perform, at its own cost and expense and without reimbursement from Licensee, any services necessary to correct errors or omissions which are caused by Power's failure to comply with the standard of care provided for herein.
- 4.5 Laws and Regulations. Power 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 Software Services, including all Cal/OSHA requirements, and shall give all notices required by law. Power shall be liable for all violations of such laws and regulations in connection with the Software Services. If Power performs any work knowing it to be contrary to such laws, rules and regulations and without giving written notice to Licensee, Power shall be solely responsible for all costs arising therefrom. Power shall

defend, indemnify and hold Licensee, 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.

Article 5

PAYMENTS

5.1 Compensation. Power shall receive compensation for the Software and Software Services as set forth in this Article 5. The total compensation shall not exceed ithout written approval of Licensee's Chief Executive Officer.

- 5.2 Software License Fee. The license fee that is assessed by Power to Licensee for the license of the Software (the "Software License Fee") will <u>not</u> be assessed by Power to Licensee in consideration of the Software Services Fee.
- 5.3 Software Implementation Fee. In consideration of the implementation of the Software, as described in Exhibit E, which is attached hereto and incorporated herein by this reference, Licensee shall pay a Software Implementation Fee which shall be defined and further described in Exhibit E.
- 5.4 Software Services Fee. For the Term of the Agreement and any subsequent extensions to the Term of the Agreement, Licensee shall pay an annual Software Services Fee, which such Software Services Fee shall be defined and further described in Exhibit F, which is attached hereto and incorporated herein by this reference.
- **5.5 Medium of Payment.** All payments due hereunder are payable in U.S. Dollars.
- 5.6 Invoices; Payment Due Dates; Late Fees; Interest.
 - **a.** Invoices. Power shall submit to Licensee an itemized invoice which indicates the amounts due pursuant to Exhibits D, E, F, and G attached hereto. The invoice shall describe the Services provided for the billing period covered by the respective invoice. Licensee shall, within forty-five (45) days of receiving such invoice, review the invoice and pay all approved charged thereon. Invoices shall be issued by Yes Energy LLC to Licensee.
 - **b. Software Implementation Fee.** Licensee shall pay to Power a Software Implementation Fee as described in Section 5.3 with the payment due dates specified in Exhibit E.
 - c. **Software Services Fees.** Licensee shall pay to Power an annual Software Services Fee as described in Section 5.4, with the payment due dates specified in Exhibit F.

d. Hosting Fee. Licensee shall pay to Power a Hosting Fee as described in Section 5.9, with the payment due dates specified in <u>Exhibit G</u>, which is attached hereto and incorporated herein by this reference.



- **5.7 Discount to the Payment.** The Software Services Fee is subject to a discount, which such discount is further described in Exhibit H, which is attached hereto and incorporated herein by this reference.
- 5.8 Travel Costs. When traveling to Licensee's office, Power will charge the actual travel costs incurred without any markup. These fees include but are not limited to airfare, hotel, car rental, taxi service, parking, and a daily per diem for meals and incidentals of not less than \$55 per day. Power will only incur travel related expenses after receiving written approval via email from Licensee for travel to Licensee's office. Licensee will be responsible for the payment of the travel costs within thirty (30) days of being invoiced by Power.
- 5.9 Hosting Fee. For the Term of the Agreement and any subsequent extensions to the Term of the Agreement, Licensee has elected to have the Software installed in an off-premise hosted environment, such as through Microsoft Azure or another hosting provider, and Licensee shall be responsible for payment of an annual fixed fee associated with the hosting costs (the "Hosting Fee"), which such Hosting Fee shall be as further described in Exhibit G. Licensee will use Power's Microsoft Azure, or another hosting provider selected by Power and approved by Licensee, for the hosting services. Licensee will be responsible for payment of all invoices relating to the Hosting Fee within thirty (30) days of being invoiced by Power.
- 5.10 Sales Tax. In the event that a municipal, county, state, or federal instrumentality or agency levies a sales or use tax on software or services provided by Power to Licensee under this Agreement, then Licensee shall be responsible for the payment of all such sales or use taxes. To the extent that sales or use tax on software or services provided by Power to Licensee under this Agreement is levied, if and only if Power collects sales or use tax in the state of the license, then Power will bill same to Licensee and separate out the sales or use tax on the invoice and Licensee will pay the sales or use tax amount to Power, and Power will then remit the same amount to the instrumentality or agency that levies the sales or use tax. If Power is not registered in the state of the license to collect sales or use tax then Licensee will remit the sales or use tax directly to the applicable governmental authority.

Article 6

AUDITS; RECORDS

- **Audit Procedure.** Power may periodically, upon Power's request, with reasonable notice, and at its own expense inspect and audit Licensee's use of the Software under this Agreement at any time during the Term. Licensee shall make available all such equipment, information and personnel, and provide such cooperation and assistance, as may reasonably be requested by Power with respect to such audit. Requests for audit shall not exceed one request every two years.
- **Results of Audit.** If the audit determines that Licensee's use of the Software does not comport with the usage permitted by this Agreement and/or Licensee's obligations under this Agreement, including without limitation the restrictions set forth in Exhibit C, Licensee shall take immediate steps to bring itself into compliance with the Agreement. Licensee's failure to do so will constitute grounds for Power to terminate the Agreement for cause as set forth in Article 9.
- 6.3 Accounting Records. Power shall maintain complete and accurate records with respect to all costs and expenses incurred under this Agreement. All such records shall be clearly identifiable. Power shall allow a representative of Licensee during normal business hours to examine, audit, and make transcripts or copies of such records and any other documents created pursuant to this Agreement. Power 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.

Article 7

CONFIDENTIAL INFORMATION

- 7.1 Confidential Information. The term "Confidential Information" means all information in the possession of and being disclosed by a Party (the "Disclosing Party") pursuant to this Agreement to the other Party (the "Receiving Party"), which has value to the Disclosing Party (or to a third party to whom the Disclosing Party in possession owes a duty of confidentiality), which is not generally known in the industry, and which is known or should be known to the Receiving Party to be of a confidential nature. By example and without limitation, Confidential Information includes any and all information concerning teaching techniques, processes, software, database designs, formulas, trade secrets, inventions, discoveries, improvements, research or development and test results, specifications, data, know-how, formats, marketing plans, business plans, strategies, forecasts, unpublished financial information, budgets, projections, and customer and supplier identities, characteristics, and agreements.
- **7.2 Non-Confidential Information.** Notwithstanding the other provisions of this Agreement, nothing received by Receiving Party from the Disclosing Party will be considered to be Confidential Information if (i) it has been published or is otherwise readily available to the

public other than by a breach of this Agreement; (ii) it is in the possession of Receiving Party at the time of disclosure by Disclosing Party, as reasonably evidenced by a prior or contemporaneous writing; (iii) it has been rightfully received by the Receiving Party from a third party without confidential limitations; or (iv) it has been independently developed by Receiving Party without reference to the Confidential Information and through persons who have not had, either directly or indirectly, access to or knowledge of such Confidential Information, as reasonably evidenced in writing by Receiving Party.

7.3 **Protection of Confidential Information**. During the Term of this Agreement and for five (5) years thereafter, each Party agrees to take all steps reasonably necessary to hold in trust and confidence the Disclosing Party's Confidential Information. Each Party agrees to hold such Confidential Information in strict confidence, and not to disclose it to third parties or to use it in any way, commercially or otherwise, other than as permitted under this Agreement. Except as set forth in Section 7.2, each Party agrees not to allow any unauthorized person access to such Confidential Information, either before or after termination of this Agreement, without the prior written consent of the Disclosing Party and without court order or regulatory requirement. Each Party agrees to limit the disclosure of Confidential Information to employees or independent contractors with a need to know, who have been advised of the confidential nature thereof, and have acknowledged in writing the express obligation to maintain such confidentiality. Receiving Party further agrees to promptly notify the Disclosing Party of any unauthorized use or disclosure of Confidential Information and to take all reasonable steps in cooperation with the Disclosing Party to prevent further unauthorized use or disclosure.

Notwithstanding any other provisions of this Agreement, the Receiving Party's obligations under this Article 7 with respect to any Confidential Information that constitutes a trade secret under any applicable law will continue until such time, if ever, as such Confidential Information ceases to qualify for trade secret protection under one or more such applicable laws other than as a result of any act or omission of the Receiving Party or any of its representatives.

7.4 Compelled Disclosures. If either Party or any of its Representatives is compelled by applicable law or regulatory requirement to disclose any Confidential Information of the other Party then, to the extent permitted by applicable law, Receiving Party shall: (a) promptly, and prior to such disclosure, notify Disclosing Party in writing of such requirement so that Disclosing Party can seek a protective order or other remedy or waive its rights under Section 7.3; and (b) provide reasonable assistance to Disclosing Party in opposing such disclosure or seeking a protective order or other limitations on disclosure. If Disclosing Party waives compliance or, after providing the notice and assistance required under this Section 7.4, Receiving Party remains required by law to disclose any Confidential Information, Receiving Party shall disclose only that portion of the Confidential Information that Receiving Party is legally required to disclose.

Article 8

REPRESENTATIONS AND WARRANTIES

- **8.1 Mutual Representations and Warranties.** Each Party represents, warrants and covenants to the other Party that:
 - (a) it is duly organized, validly existing and in good standing as a corporation or other entity under the laws of the jurisdiction of its incorporation or other organization;
 - (b) it has the full right, power and authority to enter into and perform its obligations and grant the rights, licenses and authorizations it grants and is required to grant under this Agreement;
 - (c) the execution of this Agreement by its representative whose signature is set forth at the end of this Agreement has been duly authorized by all necessary corporate or organizational action of such Party; and
 - (d) when executed and delivered by both Parties, this Agreement will constitute the legal, valid and binding obligation of such Party, enforceable against such Party in accordance with its terms.

8.2 Power's Representations and Warranties.

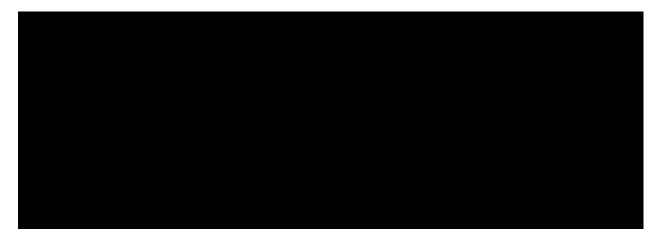
- **a. Right and Authority.** Power represents and warrants that:
 - (i) it is the owner of the Software and Documentation (including all intellectual property rights therein under copyright, patent, trademark, trade secret, and other applicable law);
 - (ii) it has the full and sufficient right and authority to grant the rights and licenses granted herein;
 - (iii) the Software and Documentation have not been published under circumstances that have caused loss of any U.S. copyright therein; and
 - (iv) the Software and Documentation, to the best of Power's knowledge, do not infringe any copyright or other intellectual property right of any third party.
- **b.** Adequacy of Software and Documentation. Power represents and warrants that:
 - (i) the Software and Documentation are and shall be reasonably understandable and reasonably usable by the Licensee's users.
- c. Conformity, Performance, and Compliance. Power represents and warrants that:

- (i) the Software to be delivered by Power hereunder have been prepared in a workmanlike manner and with professional diligence and skill,
- (ii) such Software will reasonably function on the machines and with operating systems for which they are designed, as further explained in <u>Exhibit A</u>, and
- (iii) such Software conform to the specifications and functions relating thereto.
- **8.4. Limitation of Warranties**. Power does not assume any responsibility for any processes performed by Licensee utilizing the Software or the Software Services. Power shall not be deemed to make, or to have made, any express or implied warranties of any kind, character or description, including, but not limited to, fitness for a particular purpose or the warranty of merchantability concerning the Software or the Software Services, except as expressly stated in this Agreement.

Article 9

TERM

- 9.1 Term of Agreement. The initial term ("Initial Term") of this Agreement shall commence on April 1, 2025 ("Effective Date") and shall continue for a period of five (5) years thereafter, unless earlier terminated as provided herein. Subject to Section 9.2, after the end of the Initial Term, and after the end of each subsequent one (1) year period (each, a "Renewal Term"), this Agreement will automatically renew for an additional Renewal Term unless either Party has provided written notice to the other Party at least ninety (90) days prior to the expiration of the then-current Term that the Agreement shall not be automatically renewed. The Initial Term and each Renewal Term collectively make up the "Term" of this Agreement. Except as expressly provided otherwise under this Agreement, all fees provided for under this Agreement are fully earned by Power when due and payable hereunder and are not subject to refund or offset notwithstanding the early termination of this Agreement by either Power or Licensee.
- **Termination.** This Agreement may be terminated upon the occurrence of any of the following events:



- **b.** <u>Termination by Mutual Agreement</u>. Licensee and Power may terminate or modify the terms of this Agreement by written agreement executed by both Parties.
- c. <u>Termination For Cause</u>. In addition to the foregoing, a Party may terminate this Agreement at any time for just cause, herein defined as the occurrence of any of the following:
 - (i) A receiver for a Party is appointed or applied for, or a petition under any bankruptcy chapter is filed by or against a Party, or a Party becomes insolvent or makes an assignment for the benefit of creditors, or is unable to pay its debts as they become due, or, if there is any levy, attachment or similar action that is not vacated or removed by payment or bonding within ten (10) days of such levy or attachment; or
 - (ii) A Party is charged with unethical or illegal practices or acts thereby jeopardizing, in the opinion of the other Party, that other Party's good name and good will; or
 - (iii) A Party fails to perform a material condition or delegation of this Agreement that adversely and substantially affects the interests of the other Party.

Termination For Cause may be affected through written notice to the breaching party, specifically identifying the breach on which termination is based and such termination shall be effective (a) immediately if it is incapable of cure; or (b) if capable of cure, such breach remains uncured thirty (30) days after written notice thereof.

- **d.** Upon early termination for any reason, Licensee shall be refunded on a prorated basis any Software Services Fees pre-paid in advance for services not used as of the date of termination.
- **9.3 Survival.** In the event of the expiration or termination of this Agreement, in whole or in part, the provisions of Articles 7, 8, 10, and 11 shall survive and continue in effect.

Article 10

LIMITATIONS ON LIABILITY

10.1 Exclusion of Consequential Damages, Etc. IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER FOR <u>ANY</u> CONSEQUENTIAL, INDIRECT, SPECIAL, OR INCIDENTAL, PUNITIVE, OR CONSEQUENTIAL DAMAGES ARISING OUT OF OR RELATED TO THIS AGREEMENT, INCLUDING BUT NOT LIMITED TO FAILURES OR LIMITATIONS OF THE SOFTWARE OR SOFTWARE SERVICES, LOSS, DAMAGE, CORRUPTION OR RECOVERY OF DATA, OR BREACH OF

DATA OR SYSTEM SECURITY, OR MICROSOFT AZURE OUTAGES, EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH POTENTIAL DAMAGES, WITHOUT LIMITATION, WHETHER BASED ON CONTRACT, TORT, OR ANY OTHER LEGAL THEORY.



10.3 Intentionally omitted.

Article 11

INDEMNIFICATION

- Indemnification by Licensee. Licensee shall indemnify, defend, and hold harmless Power 11.1 and its officers, directors, shareholders, members, employees, agents, representatives, and customers (collectively, "Power Indemnitee") against all liability, claims, costs, damages, and expenses incurred by Power Indemnitee relating to or arising from a third party claim: (a) that Licensee's use or combination of the Software with any hardware, software, system, network, service or other matter whatsoever that is neither provided by Power nor authorized by Power in this Agreement (including the Documentation), infringes any patent, copyright, trademark, trade secret, or other proprietary right of a third party; (b) based on a breach by Licensee of any representation, warranty, covenant or obligation under this Agreement; (c) based on negligence, abuse, misapplication, misuse or more culpable act or omission (including recklessness or willful misconduct) by or on behalf of Licensee or any of its Representatives with respect to the Software or Documentation or otherwise in connection with this Agreement; or (d) use of the Software or Documentation by or on behalf of Licensee or any of its Representatives that is outside the purpose, scope or manner of use authorized by this Agreement or the Documentation, or in any manner contrary to Power's instructions.
- 11.2 Indemnification by Power. Power shall indemnify, defend, and hold harmless Licensee and its officers, directors, shareholders, members, employees, agents, representatives, and customers (collectively, "Licensee Indemnitee") against all liability, claims, costs, damages, and expenses incurred by Licensee Indemnitee relating to or arising from a third-party claim: (a) that the Software, or any use of the Software in accordance with this Agreement (including the Documentation), infringes any patent, copyright, trademark, trade secret, or other proprietary right of a third party; (b) based on a breach by Power of any representation, warranty, covenant or obligation under this Agreement; or (c) based on negligence, abuse, misapplication, misuse or more culpable act or omission (including recklessness or willful misconduct) by or on behalf of Power or any of its Representatives with respect to the Software or Documentation or otherwise in connection with this

Agreement, including without limitation failure to appropriately service, support, or maintain the Software during the term of this Agreement.

Notwithstanding the foregoing, Power will have no obligation under this Agreement to indemnify or defend a Licensee Indemnitee against an intellectual property infringement claim relating to or arising from: (a) open-source components or other third-party materials; (b) incorporation by the Software of, or combination, operation or use of the Software in or with, any technology (including any software, hardware, firmware, system or network) or service not provided by Power or specified for Licensee's use in the Documentation or this Agreement, unless otherwise expressly permitted by Power in writing; (c) modification, support, or maintenance of the Software other than: (i) by Power in connection with this Agreement; or (ii) with Power's express written authorization and in strict accordance with Power's written directions and specifications; (d) failure to timely implement any Maintenance Release, modification, update or replacement of the Software made available to Licensee by Power; (e) use of the Software after Power's notice to Licensee of such activity's alleged or actual infringement, misappropriation or other violation of a third party's rights; (f) negligence, abuse, misapplication or misuse of the Software or Documentation by or on behalf of Licensee; (g) use of the Software or Documentation by or on behalf of Licensee that is outside the purpose, scope or manner of use authorized by this Agreement or in any manner contrary to Power's instructions; or (h) events or circumstances outside of Power's commercially reasonable control (including any third-party hardware, software or system bugs, defects or malfunctions).

11.3 <u>Indemnification Procedure.</u> Each Party shall promptly notify the other Party in writing of any Action for which such Party believes it is entitled to be indemnified pursuant to Section 11.1 or Section 11.2. The Party seeking indemnification (the "*Indemnitee*") shall cooperate with the other Party (the "*Indemnitor*"). The Indemnitor may in its sole discretion take control of the defense and investigation of such Action and employ counsel of its choice to handle and defend the same. The Indemnitee may participate in and observe the proceedings at its own cost and expense with counsel of its own choosing.

Article 12

MISCELLANEOUS

12.1 Freedom of Action. This Agreement shall not be construed to limit Licensee's right to obtain services or software programs from other sources, nor shall this Agreement be construed to limit Power's right to grant others any further non-exclusive right or license of the Software and Documentation. This Agreement alone establishes the rights, duties, and obligations of Licensee and Power with respect to the subject matter hereof. Licensee shall have no right or interest whatsoever in any software of Power other than the rights and licenses in the Software and Documentation granted herein, whether such software is conceived or developed by Power before, during, or after the course of Power's performance of this Agreement.

- **12.2 Independent Contractor.** With respect to all duties performed by Power pursuant to this Agreement, Power shall be deemed to be an independent contractor.
- 12.3 Rights and Obligations After Notice of Termination. If Power gives notice of termination of this Agreement, or if it becomes known that this Agreement will otherwise terminate in accordance with its provisions, Licensee shall return to Power all Software, Documentation, and other items of property owned by Power forthwith, and upon Licensee's request, Power shall destroy any Confidential Information owned by Licensee, and certify as to its destruction, as soon as commercially reasonable.
- 12.4 Notices. Unless otherwise stated herein, all notices or other communications required or permitted hereunder shall be in writing including email form, and shall be personally delivered including through email or sent by registered or certified mail, postage prepaid, return receipt requested, delivered or sent by overnight courier and shall be deemed received upon the earlier of: (i) If personally delivered or delivered through email, the date of delivery to the address of the person to receive such notice; (ii) If mailed, three (3) business days after the date of posting by the United States post office; and (iii) If sent by overnight courier, when delivered to the specified address.

To Power: Yes Energy, LLC

1877 Broadway, Ste. 606

Boulder, CO 80503

Telephone Number: 303-993-2773

Attn: Pat Benner

Electronic Mail: pat@yesenergy.com

To Licensee: San Diego Community Power

815 E. St., Ste. 12716 San Diego, CA 92101 Attn: Byron Vosburg

Email: bvosburg@SDCommunityPower.org

With a copy to:

Email: Legal@SDCommunityPower.org

Notice of change of address shall be given by written notice in the manner detailed in this section. Rejection or other refusal to accept, or the inability to deliver because of changed address of which no notice was given, shall be deemed to constitute receipt of the notice, demand, request or communication.

- **12.5.** Required Actions of Power and Licensee. Power and Licensee agree to effectuate the intent of this Agreement.
- **12.6** Captions. Any captions to, or headings of, the section or subsections of this Agreement are solely for the convenience of the Parties hereto, are not a part of this Agreement and

- shall not be used for the interpretation or determination of the validity of this Agreement or any provision hereof.
- **12.7 No Obligations to Third Parties.** Except as otherwise expressly provided herein, the execution and delivery of this Agreement shall not be deemed to confer any rights upon, nor obligate any of the Parties hereto, to any person or entity other than the parties hereto.
- **12.8 Amendment**. The terms of this Agreement may not be modified or amended except by an instrument in writing executed by each of the Parties hereto.
- **Waiver.** The waiver or failure to enforce any provision of this Agreement shall not operate as a waiver of any future breach of any such provision or any other provision hereof.
- 12.10 Applicable Law; Venue; Jury Trial. The terms and provisions of this Agreement shall be governed by and construed in accordance with the laws of the State of California, without regard to its conflicts of laws' provisions. Venue shall be in San Diego County. TO THE EXTENT PERMITTED BY APPLICABLE LAW, EACH OF THE PARTIES HERETO HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES THE RIGHT EACH OF THEM MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED HEREON, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT.
- **12.11 Entire Agreement**. This Agreement, including the RECITALS, attachments, and exhibits hereto, supersedes any prior agreements, negotiations and communications, oral or written, and contains the entire agreement between Power and Licensee as to the subject matter hereof. No subsequent agreement, representation or promise made by either Party hereto, or by or to any employee, officer, agent or representative of either Party shall be of any effect unless it is in writing and executed by the Party to be bound thereby.
- **12.12 No Presumption**. Each provision of this Agreement has been independently and freely negotiated by both Parties as if this Agreement were drafted by both Parties. In the event of any ambiguity in this Agreement, the Parties waive any presumption or rule requiring or permitting interpretation of said ambiguity against or in favor of either Party.
- **12.13 Severability**. If any provision of this Agreement is held invalid or unenforceable, the remainder of this Agreement shall nevertheless remain in full force and effect. If any provision is held invalid or unenforceable with respect to particular circumstances, it shall nevertheless remain in full force and effect in all other circumstances.
- **12.14 Attorney's Fees**. If any legal action is taken to enforce the terms of this Agreement by any Party, the prevailing Party shall be entitled to recover reasonable attorney fees and other costs and expenses incurred in connection with that legal action.
- **12.15 Binding on Successors; Assignment**. This Agreement will bind and inure to the benefit of each Party's permitted successors and assigns. Neither Party may assign this Agreement without the advance written consent of the other Party, which shall not be unreasonably

withheld or delayed, except that either Party may assign this Agreement in connection with a merger, reorganization, acquisition or other transfer of all or substantially all of such Party's assets or voting securities. Any attempt to transfer or assign this Agreement except as expressly authorized under this Section will be null and void.

- **12.16 Publicity.** Except for on Power's website, Power shall not use Licensee's name or insignia in any magazine, trade paper, newspaper, television or radio production or other similar medium or without the prior written consent of Licensee.
- 12.17 Prohibited Interests. Power maintains and warrants that it has not employed nor retained any company or person, other than a bona fide employee working solely for Power, to solicit or secure this Agreement. Further, Power 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 Power, any fee, commission, percentage, brokerage fee, gift or other consideration contingent upon or resulting from the award or making of this Agreement..
- 12.18 Equal Opportunity Employment and Subcontracting. Power 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, subcontracting, layoff or termination.
- **12.19 Labor Certification**. By its signature hereunder, Power 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.
- **12.20 Subcontracting**. Power shall not subcontract any portion of the work required by this Agreement, except as expressly stated herein, without prior written approval of Licensee. Subcontracts, if any, shall contain a provision making them subject to all provisions stipulated in this Agreement, including the insurance requirements set forth in Exhibit I.
- **12.21 Insurance**. During the Term, Power shall maintain the insurance coverages and comply with the requirements set forth on attached <u>Exhibit I</u>, which is attached hereto and incorporated herein by this reference.
- 12.22 Force Majeure. In no event shall either Party be liable to the other Party, or be deemed to have breached this Agreement, for any failure or delay in performing its obligations under this Agreement (except for any obligations to make payments), if and to the extent such failure or delay is caused by any circumstances beyond such Party's reasonable control, including but not limited to acts of God, flood, fire, earthquake, other potential disaster(s) or catastrophe(s), such as epidemics, explosion, war, terrorism, invasion, riot or other civil unrest, strikes, labor stoppages or slowdowns or other industrial disturbances, or passage

of law or any action taken by a governmental or public authority, including imposing an embargo.

- **12.23** Counterparts. This Agreement may be executed in multiple counterparts, each of which shall be deemed to be an original, and all such counterparts shall constitute one and the same agreement. This Agreement may be executed via facsimile or electronic transmission.
- **12.24 Exhibits.** The following documents are attached hereto and incorporated into and made a part of this Agreement:

Software Services
Definition of CAISO SettleCore Software
License Restrictions
Reserved
Software Implementation
Software Services Fee
Hosting Fee
Discount to Software Services Fee
Insurance
Service Level Agreement

[Signature Page and Exhibits to Follow]
[Remainder of this Page is Intentionally Blank]

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the day and year first above written.

POWER:	Power Settlements Consulting and Software, LLC, a wholly owned subsidiary of Yes Energy LLC
	By:
	Printed Name: Title:
LICENSEE:	San Diego Community Power
	By:Printed Name: Title:

[Exhibits to Follow]
[Remainder of this Page is Intentionally Blank]

EXHIBIT A – SOFTWARE SERVICES

On the terms and subject to the conditions set forth below, Power and Licensee hereby enter into this Exhibit A – Software Services ("Exhibit A") and agree that this Exhibit A is incorporated into, made subject to, and governed by the provisions of the Agreement. In the event of any conflict, ambiguity, or inconsistency between this Exhibit A and the Agreement or any other document that is part of the Agreement, the terms of this Exhibit A shall control.

Article 1

SOFTWARE SERVICES

For purposes of this Exhibit A, "Regular Business Hours" means from 8:00 a.m. to 6:00 p.m. Pacific Prevailing Time on Regular Business Days. For purposes of this Exhibit A, "Regular Business Days" means all weekdays, excluding federal and Power Recognized Holidays. For purposes of this Exhibit A, "Power Recognized Holidays" shall be New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, Christmas Eve, and Christmas Day.

- **1.1 Software Services.** Power shall provide the following daily Software services to the Licensee on each Regular Business Day:
 - **a.** Ensure that the CAISO ISO Downloader has downloaded the Licensee's CAISO files (or the CAISO files of those entities to which Licensee is assigned as scheduling coordinator by CAISO) (see definition of "CAISO ISO Downloader Module"); and
 - **b.** Communicate, via email or verbally, with a Licensee user that the Software Service has been performed.
- **1.2 Limitation of the CAISO Software Services.** Power shall provide the CAISO Software Services within the following manner:
 - **a.** Power is not required to perform a minimum number of hours to complete the Software Services.
 - **b.** Power shall perform the Software Services, offsite, through a secure connection.
- **1.3 CAISO Software Service Software Maintenance and Support.** Power shall provide the Software Maintenance Software Services, as described below:
 - **a.** Power shall perform all Software Maintenance Modifications for the Licensee, *provided that* Power shall only perform the Software Maintenance Modifications in one production environment.
 - **b.** Power shall deliver to Licensee an updated version of the Software at any time that the relevant ISO initiates a change that impacts existing functionality of one of Licensee's licensed modules of the Software. Enhancements relating to future CAISO market

- changes that affect the existing Software are Basic Enhancements, excluding the introductions of new CAISO markets or other ISO markets or RTO markets or major market changes (e.g., moving from 5-minute settlements to 1-minute settlements).
- c. Power shall deliver to Licensee, when and as prepared by Power in the course of its business, all Basic Enhancements and Maintenance Modifications arising from time to time, for inclusion in the Software. However, Major Enhancements will not be included within the Software or Software Services.
- d. If Licensee reports an error in the functionality of the Software (a "Bug"), and Power verifies the validity of the Bug, Power shall include a Bug fix in a future delivery of the Software to Licensee, on a schedule to be determined in the sole and absolute discretion of Power. Further, from time to time, in the sole and absolute discretion of Power, Power shall issue updated versions of the Software that include Bug fixes for Bugs identified by Power or customers of Power other than Licensee.
- e. Prior to the completion of the initial installation of the Software, remotely or at the Licensee's site, Power shall provide the Licensee with the level of training reasonably required to operate the Software.

Article 2

SUPPORT OBLIGATIONS CLOUD HOSTED DEPLOYMENT

- 2.1 Obligations of the Licensee. The Software will be deployed in an Azure hosted environment that will be maintained by Power. In order for Power to perform the Software Services and for the Software to function as required, the Licensee shall be required to fulfill the following obligations. Failure of the Licensee to meet the obligations below, (1) may result in adverse performance of the Software and Software Services, and (2) shall not relieve the Licensee of any obligations of payment for the Software License Fee and/or Software Services Fees for the Term.
 - **a.** Each client that accesses the server with the Software shall have the following hardware: (1) a processor, which shall be a dual-core processor or a higher version, (2) have a minimum of eight gigabytes of RAM, and (3) a hard drive with at least twenty gigabytes of free space.
 - **b.** Each client that accesses the server with the Software shall have the following software: (1) an operating system that is one of the following: Microsoft Windows 2016 or Windows 10 or higher, (2) the Microsoft .Net Framework version 4.6.1 or a higher version, (3) the Chrome browser, and (4) Microsoft Excel 2007 or higher version.
 - **c.** Licensee shall be responsible for providing a minimum bandwidth of 0.5 Mbps on the connection to the Software at all times.
 - d. Licensee shall be responsible for providing a secure connection to the Azure

environment in which the Software is deployed.

- **e.** Licensee shall be responsible for providing the certificates required by the CAISO to access the files that are downloaded by the SettleCore Software.
- **Support Hours.** Power shall be reasonably available to provide support to Licensee during Regular Business Hours.
 - a. During Regular Business Hours, Power shall be available for Licensee's users via email at
 - **b.** During Regular Business Hours, Power shall be available for Licensee's users via telephone at Power's support phone number

EXHIBIT B – DEFINITION OF CAISO SETTLECORE SOFTWARE

On the terms and subject to the conditions set forth below, Power and Licensee hereby enter into this Exhibit B – Definition of CAISO SettleCore Software ("**Exhibit B**") and agree that this **Exhibit B** is incorporated into, made subject to, and governed by the provisions of the Agreement. In the event of any conflict, ambiguity, or inconsistency between this **Exhibit B** and the Agreement or any other document that is part of the Agreement, the terms of this **Exhibit B** shall control.

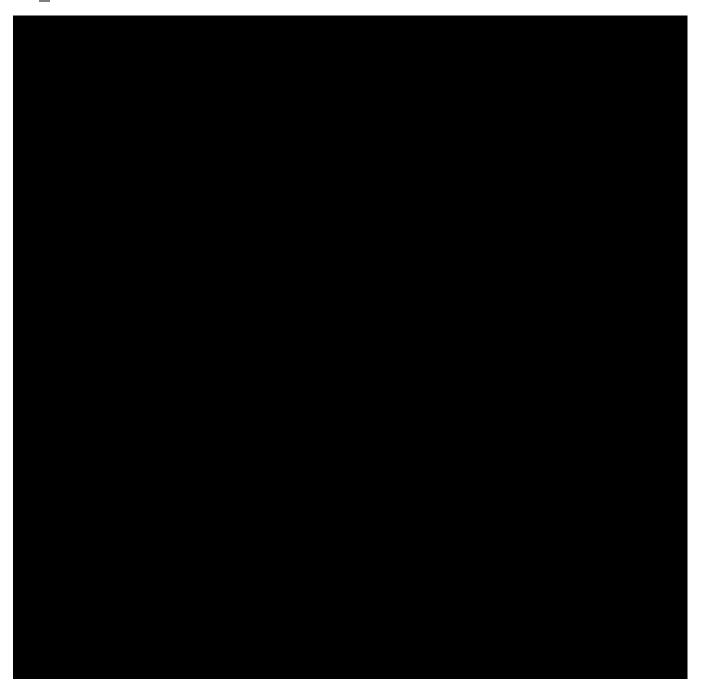






EXHIBIT C – LICENSE RESTRICTIONS

On the terms and subject to the conditions set forth below, Power and Licensee hereby enter into this Exhibit C – License Restrictions ("Exhibit C") and agree that this Exhibit C is incorporated into, made subject to, and governed by the provisions of the Agreement. In the event of any conflict, ambiguity, or inconsistency between this Exhibit C and the Agreement or any other document that is part of the Agreement, the terms of this Exhibit C shall control.

Restrictions. Licensee agrees to the following restrictions on the Software:

- a. Reserved.
- **b**. Licensee may not reproduce or transfer the Software, or any copy, adaptation, transcription, or merged portion thereof, except as expressly permitted in writing by Power. Licensee's rights are non-exclusive and non-assignable. If Licensee transfers possession of any copy, adaptation, transcription, or merged portion of the Software to any other Party, including, but not limited to, a successor in interest of Licensee's business that assumes all of the Licensee's obligations with respect to the Software, the Licensee's rights in the Software are automatically terminated.
- **c.** Reserved.
- d. Licensee does not and will not have or acquire under or in connection with this Agreement any ownership interest in the Software. Power is and will remain the sole and exclusive owner of all right, title, and interest in and to the Software and all modifications, customizations, and enhancements thereof (including ownership of all trade secrets and copyrights pertaining thereto and/or any rights in derivative works or improvements relating thereto), subject only to the rights and privileges expressly granted by Power hereunder.
- e. By accepting delivery of the Software Licensee acknowledges that Power claims and reserves all rights and benefits that are afforded under federal copyright law in the Software.
- f. The Source Code for the Software (and the information therein, excluding all of Licensee's data from the CAISO downloaded by the CAISO ISO Downloader Module into the Software's database(s), to the extent not otherwise apparent in the Object Code and the Documentation) is a trade secret of Power. Licensee is not entitled to receive Source Code, and under no circumstances may Licensee reverse-compile or reverse-assemble the Object Code.
- **g.** Licensee's obligations hereunder remain in effect for as long as it continues to possess or use the Software.
- h. Licensee shall not modify, correct, adapt, translate, enhance or otherwise prepare derivative works or improvements of any Software, nor make any updates to the

database used by the Software, including but not limited to updates to the data, tables, layouts, or schema, as long as the Term of this Agreement is in effect.

- i. Licensee agrees that only employees of the Licensee or Licensee's affiliates, and those contractors of Licensee to whom Power agrees (and Power shall not withhold such agreement unless the contractor is in Direct Competition with Power), shall be permitted to operate the Software and to access the database used by the Software. Any requests to operate the Software, or to access the database used by the Software, by non-employees of the Licensee (including but not limited to consultants or other agents), must be approved by Power in writing (with email being acceptable). For purposes of this section, "Direct Competition" means that the vendor owns and offers for sale its software product or software service that provides substantially similar features or functionality as the Software provides and is provided by the vendor for the same intended use.
- j. Reserved.
- k. Licensee agrees that Licensee's Software users will not share Software accounts with any other individuals. Each Software user shall have their own login and password.
- Licensee agrees that if the Agreement (i) expires, or (ii) is Terminated as further described in Section 9.2 of the Agreement, that the Software license is immediately revoked as of the expiration or termination date, and that the Licensee must permit Power to immediately uninstall the Software, including any and all copies.
- m. Reserved.
- n. Licensee may access its data through either the screens and reports accessible to Software users through the web-browser user interface or through the APIs as described in the Software Documentation.
- Licensee must abide by the terms in the Software Documentation for querying or submitting data using the Software APIs.
- p. Reserved.
- q. Reserved.
- r. Reserved.
- s. Licensee shall use the License only for the benefit of Licensee, in the course of its normal internal business activities, and not in competition with Power.

License and Software Services Agreement Mar 2025

- t. In the event that this Agreement expires or is terminated per the conditions in Section 9.2, or the Licensee fails to pay any fees for a period of 60 days after such fee is due, then Power shall not have any obligation to provide any support or maintenance of the Software to Licensee (including but not limited to Maintenance Modifications, Enhancements, Software Services, and Software Maintenance.
- **u**. Licensee is responsible for providing the CAISO Scheduling Coordinator certificates that the SettleCore ISO Downloader Module will use to download Licensee's CAISO data into the SettleCore System.
- v. Additional Software Services Fees will be required for additional markets, ISOs, or RTOs. The ISO Downloader Module includes the license and fees for only the CAISO market and does not include the CAISO Western EIM market.

EXHIBIT D – RESERVED

EXHIBIT E – SOFTWARE IMPLEMENTATION

On the terms and subject to the conditions set forth below, Power and Licensee hereby enter into this Exhibit E – Software Implementation ("Exhibit E") and agree that this Exhibit E is incorporated into, made subject to, and governed by the provisions of the Agreement. In the event of any conflict, ambiguity, or inconsistency between this Exhibit E and the Agreement or any other document that is part of the Agreement, the terms of this Exhibit E shall control.

Fees for Software Implementation. In consideration of the implementation of the

Software, as described in this Exhibit E, Licensee shall pay to Power
Such Software Implementation Fee shall be due and payable pursuant to the following table:
2. Implementation Approach.
The project approach ampleyed
The project approach employed leverages best practices and lessons learned from Power experiences and history of successful, ontime, and on-budget system deliveries for similar energy companies.

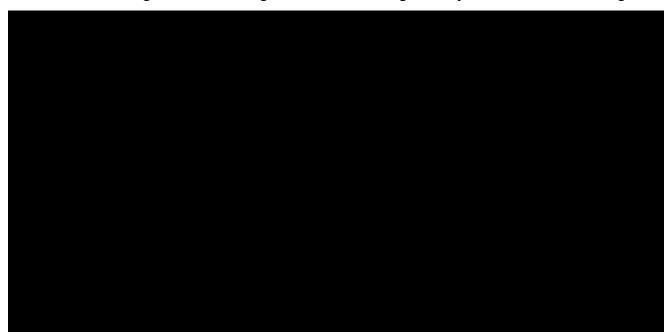
Power will assign a project management lead and assistant to lead this implementation project. The project management leads will be responsible for:

- Project planning
- Timely communications and coordination of work efforts with the Licensee project lead,
- Status reporting,
- Risk assessment, risk mitigation and issue management,
- Managing implementation project schedule and resources,
- Management of vendor project deliverables,
- Management of go-live and post go-live transition to support and maintenance.

License and Software Services Agreement Mar 2025 Page 29 of 44 Licensee should consider appointing an overall project lead from its own staff to interface with Power to help coordinate meetings, coordinate with Licensee's SMEs, review project documentation, coordinate onsite visits, coordinate testing, review/approve vendor milestones/invoices, and to coordinate the implementation/project plan.

Power's approach to managing successful implementation projects is based on regular and open communication between vendor and client. Based on experience delivering projects of the size of the system implementation contemplated herein, Power proposes a schedule of weekly project status meetings throughout the life cycle of the project.

- Conducted via MS Teams (or similar online meeting system),
- Attendees include project management leads as well as key project team members from both Power Settlements and Licensee,
- Agenda covers review of current status for tasks, schedule and deliverables as well as issues and resolution action plan,
- Status detailing discussion and agreed action item assignments provided for each meeting.



Power's project management team will maintain a log of all issues reported and current status throughout the project. The issue log will be shared with Licensee. The project management lead for this project will be the point of contact for any issue escalation from Licensee project management or executive management.

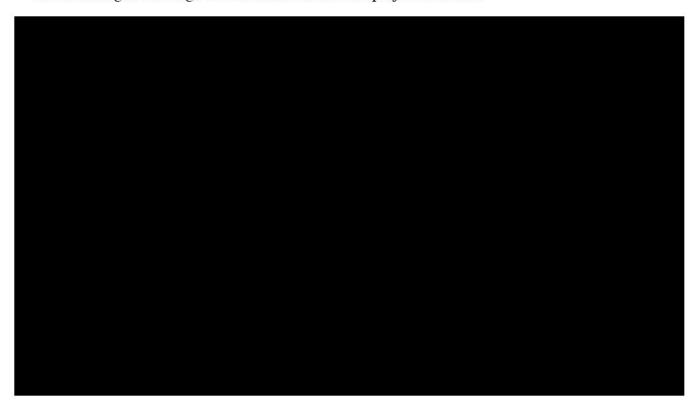
Power reserves the right to engage subcontractors to perform portions of the Software Implementation as necessary. All subcontractors utilized will be qualified and adhere to the same standards, requirements and obligations outlined in this Agreement. Power remains responsible for the performance and compliance of any subcontractors engaged under this Agreement.

OBJECTIVES AND SUMMARY



PROJECT PHASES

The following are the high-level activities within the project schedule.



PROJECT TIMING

Note: The following is a ballpark timeline that is subject to change.



License and Software Services Agreement Mar 2025 Page 31 of 44



POWER SETTLEMENTS DELIVERY TEAM

Power Settlements will use a highly accomplished delivery team on this project.

A primary project manager will be provided by Power as will a technical project lead.

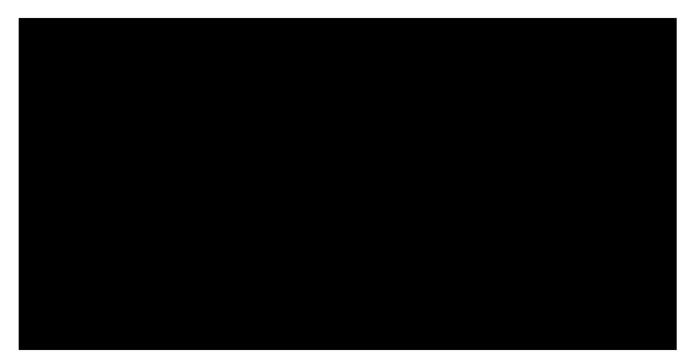
Licensee's Representative. Licensee hereby designates its Director of Power Contracts, or his or her designee, to act as its representative for the performance of this Agreement ("Licensee's Representative"). Licensee's Representative shall have the power to act on behalf of Licensee for all purposes under this Agreement. Power shall not accept direction or orders from any person other than Licensee's Representative, or designee.

Power's Representative. Power hereby designates its Director of Product Management, or his or her designee, to act as its representative for the performance of this Agreement ("Power's Representative"). Power's Representative shall have the power to act on behalf of Power for all purposes under this Agreement. The Power's Representative shall supervise and direct the Software 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 Software Services under this Agreement.

INTEGRATION WITH LICENSEE'S OTHER SYSTEMS

An integral portion of our solution for Licensee includes the integration of the SettleCore System with Licensee's various systems. Power Settlements understands the importance of system integration and has successfully integrated at many customers and will do so to meet Licensee's requirements as described in the specifications provided during the Discovery and Design Phase.

License and Software Services Agreement Mar 2025 Page 32 of 44



LICENSEE's RESPONSIBILITIES

Licensee will be responsible for the following in order to ensure that Power may deliver the Scope of Work.

- Licensee is responsible for assigning a project manager that is involved with weekly meetings and correspondence
- Licensee is responsible for providing enough time for the Licensee users to adequately
 perform during the project, including in requirements scoping (Discovery and Design),
 providing contract formulas, testing, weekly meetings, and daily correspondence
- Licensee is responsible for providing all of the bilateral contract formulas and data

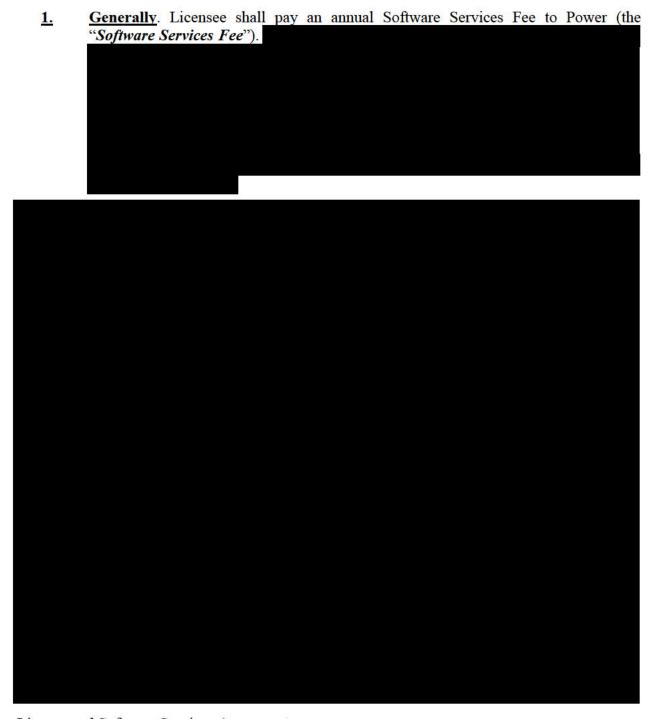
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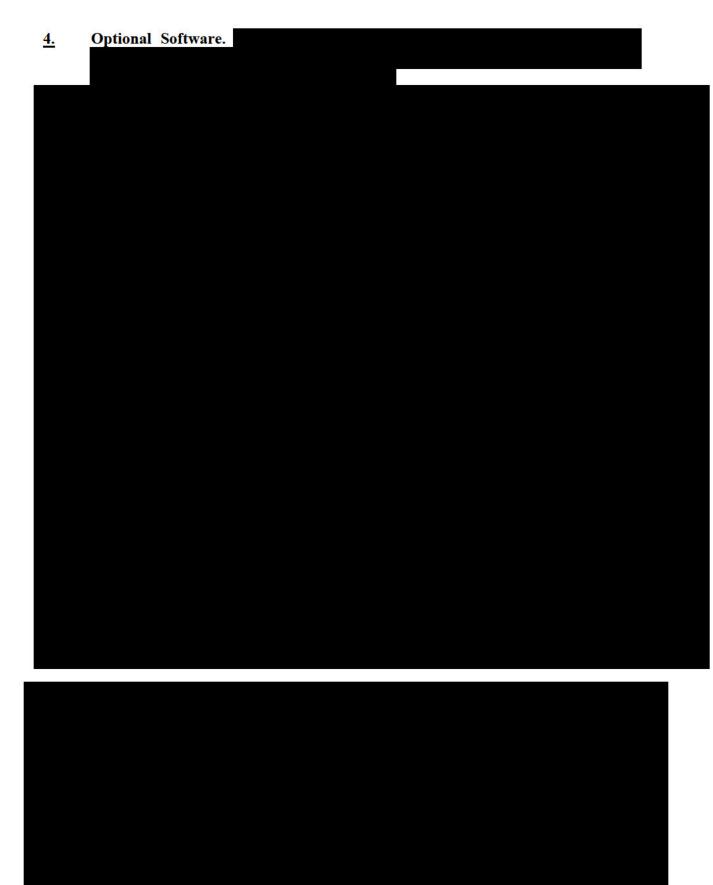
EXHIBIT F – SOFTWARE SERVICES FEE

On the terms and subject to the conditions set forth below, Power and Licensee hereby enter into this Exhibit F – Software Services Fee ("*Exhibit F*") and agree that this <u>Exhibit F</u> is incorporated into, made subject to, and governed by the provisions of the Agreement. In the event of any conflict, ambiguity, or inconsistency between this <u>Exhibit F</u> and the Agreement or any other document that is part of the Agreement, the terms of this <u>Exhibit F</u> shall control.



License and Software Services Agreement Mar 2025 Page 35 of 44





License and Software Services Agreement Mar 2025 Page 37 of 44



EXHIBIT G – HOSTING FEE

On the terms and subject to the conditions set forth below, Power and Licensee hereby enter into this Exhibit G – Hosting Fee ("Exhibit G") and agree that this Exhibit G is incorporated into, made subject to, and governed by the provisions of the Agreement. In the event of any conflict, ambiguity, or inconsistency between this Exhibit G and the Agreement or any other document that is part of the Agreement, the terms of this Exhibit G shall control.



EXHIBIT H – DISCOUNT TO SOFTWARE SERVICES FEE

On the terms and subject to the conditions set forth below, Power and Licensee hereby enter into this Exhibit H – Discount to Software Services Fee (" $Exhibit\ H$ ") and agree that this $Exhibit\ H$ is incorporated into, made subject to, and governed by the provisions of the Agreement. In the event of any conflict, ambiguity, or inconsistency between this $Exhibit\ H$ and the Agreement or any other document that is part of the Agreement, the terms of this $Exhibit\ H$ shall control.

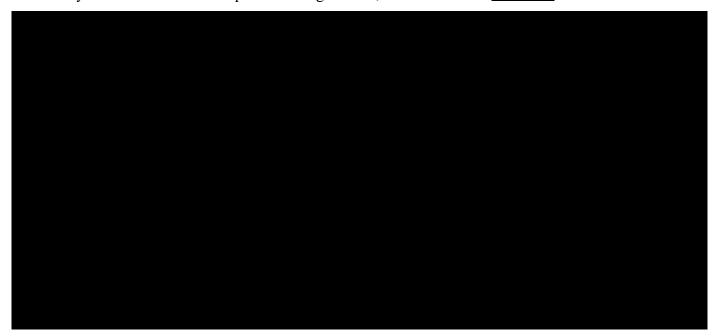


EXHIBIT I – INSURANCE

On the terms and subject to the conditions set forth below, Power and Licensee hereby enter into this Exhibit I – Insurance (" $Exhibit\ I$ ") and agree that this $Exhibit\ I$ is incorporated into, made subject to, and governed by the provisions of the Agreement. In the event of any conflict, ambiguity, or inconsistency between this $Exhibit\ I$ and the Agreement or any other document that is part of the Agreement, the terms of this $Exhibit\ I$ shall control.



EXHIBIT J - SERVICE LEVEL AGREEMENT

On the terms and subject to the conditions set forth below, Power and Licensee hereby enter into this Exhibit J – Service Level Agreement ("Exhibit J") and agree that this Exhibit J is incorporated into, made subject to, and governed by the provisions of the Agreement. In the event of any conflict, ambiguity, or inconsistency between this Exhibit J and the Agreement or any other document that is part of the Agreement, the terms of this Exhibit J shall control.







SAN DIEGO COMMUNITY POWER Staff Report – Item 13

TO: Board of Directors

FROM: Byron Vosburg, Chief Commercial Officer

Andrea Torres, Associate Director of Origination

VIA: Karin Burns, Chief Executive Officer

SUBJECT: Approve Resource Adequacy and TB4 Agreement with Athos Storage,

LLC

DATE: March 27, 2025

RECOMMENDATION:

Approve the proposed 15-year Resource Adequacy and TB4 Agreement with Athos Storage, LLC in substantially final form for a 200 MW (4-hour) battery energy storage facility and authorize the Chief Executive Officer to execute the agreement.

BACKGROUND:

As San Diego Community Power (Community Power) strives to meet its environmental, financial, and regulatory compliance goals and requirements, long-term contracts of at least 10 years in duration are integral components of its energy supply portfolio. Long-term contracts provide renewable generation and clean energy storage facility developers with the certain revenue stream against which they can finance up-front capital requirements, so each long-term contract that Community Power signs with a developing facility will underpin a new, incremental renewable energy project and support the development of energy storage projects to address intermittency from renewable growth. In addition, long-term contracts lock in energy and capacity supply around which Community Power can build its power supply portfolio while also providing power supply cost certainty around which Community Power can develop its pro forma financial model.

The proposed 15-year Resource Adequacy and TB4 agreement ("Agreement") is with Athos Storage, LLC ("Athos"), which is a wholly owned subsidiary of SBE US Holdings One, LLC ("SBE"). This Agreement is for delivered system and flex resource adequacy benefits as well as a financial energy swap. The swap is comprised of a fixed monthly energy settlement rate from Community Power to Athos netted against an energy settlement rate paid by Athos to Community Power based on the sum of the four (4) highest hourly LMPs at CAISO trading hub SP15 in the Day-Ahead Market for such day, minus the sum of the four (4) lowest hourly SP15 LMPs.

ANALYSIS AND DISCUSSION:

This Agreement with Athos originated from an offer Community Power received in late 2023 via its 2023 Request for Information for projects seeking to apply to the CAISO Transmission Planning Process in 2024. That offer resulted in an executed 5-year Resource Adequacy agreement ("RA Agreement") to help prioritize CAISO's allocation of deliverability to the project and secure resource adequacy for Community Power. This RA Agreement was approved at Community Power's July 18, 2024, Board of Directors meeting. The RA Agreement includes provisions in the event Athos Storage is awarded full capacity deliverability status by CAISO, in which case the parties agree to negotiate in good faith for 200 MW of capacity under an energy storage and services agreement ("ESSA"). The execution of an ESSA would result in the expiration of the existing RA Agreement. SBE and Community Power subsequently agreed to negotiate an RA and TB4 contract instead of an ESSA and have reached terms mutually agreeable to both parties. The structure of this Agreement has certain advantages compared to an ESSA, including the diversification of contract structures in Community Power's portfolio, which in turn diversifies the risk profiles associated with any long-term contracts in Community Power's portfolio. In addition, a TB4 structure means that Community Power does not bear the operational risk or administrative costs and burdens associated with ESSAs in large part because Community Power is not scheduling or optimizing the resource in the CAISO market. SBE is responsible for that. Instead, Community Power captures the maximum energy arbitration value over four hours in each day in exchange for a fixed monthly payment.

Below is additional information regarding SBE and the proposed Agreement.

Background on SBE:

- SBE is a California-based solar and storage developer, owning and operating 1.4
 GWac of solar projects in US, including 450 MWac of solar projects operating in
 California with 3 GWac of solar and 4.5 GWac of storage in its California pipeline,
 including the Pelicans Jaw project.
- Founded in 2019, SBE is backed by SoftBank Group Corp. and Ares Climate Infrastructure, allowing SBE to finance 100% of the projects it develops, owns, and operates.
- In December 2023, SBE received "Renewables Deal of the Year" award from Project Finance International (PFI) for reaching financial close on 1.3 GWs of solar projects and being among the first to take advantage of the domestic content adder, a provision in the IRA designed to strengthen America's manufacturing base.
- SBE is sourcing solar modules, trackers, and structural steel domestically for several of its projects.

Contract Overview – Athos

- Project Nameplate Capacity: 200 MW of a larger 402 MW/1,208 MWh (4-hour) lithium-ion battery energy system
- Project location: Riverside County, California
- Guaranteed commercial operation date: January 1, 2027
- Deliverability: Project will have Interim Deliverability Status through until 2030, after which Full Capacity Deliverability Status is expected.
- Contract term: 15 years
- Pricing: Fixed price for RA (based on delivered NQC) and a fixed price for the TB4 swap.
- Community Power would receive financial compensation in the event of seller's failure to successfully achieve certain development milestones as well as seller's failure to meet guaranteed resource adequacy guarantees once the project is operational.

Community Benefits:

- \$200,000 contribution to the community benefits fund within 60 days of commercial operation.
- Project development will bring approximately 45-50 clean-energy jobs during construction and approximately 2 full-time equivalent jobs during operations.
- The project is committed to executing a Project Labor Agreement and will identify the unions involved when the agreement is negotiated.
- The project will be developed at SBE's operating Athos I & II solar projects, minimizing any impacts on the surrounding communities.

COMMITTEE REVIEW:

None

FISCAL IMPACT:

The competitive energy and capacity pricing of the Agreement are confidential, but the long-term purchase of resource adequacy, and energy arbitrage capability will provide Community Power with significant value over the term of this Agreement.

ATTACHMENTS:

A: Resource Adequacy and TB4 Agreement with Athos Storage, LLC (redacted version for commercially sensitive information)

ITEM 13 ATTACHMENT A

RESOURCE ADEQUACY + TB4 AGREEMENT COVER SHEET

A. Parties

Seller: Athos Storage, LLC

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

B. Primary Unit Information

Unit Name:	Athos Power Plant
Location:	Riverside County, CA
CAISO Resource ID:	Not yet assigned; to be provided by Seller prior to start of Delivery Term
Unit SCID:	Not yet assigned; to be provided by Seller prior to start of Delivery Term
Unit NQC:	200 MW (expected)
Unit EFC:	400 MW (expected)
Resource Type:	Battery Energy Storage System
FCR Category (1, 2 or 3):	2
Path 26 (North or South):	South
Local Capacity Area (if any, as of Effective Date):	Not Applicable
Deliverability restrictions, if any, as described in most recent CAISO deliverability assessment:	None (as of the Effective Date)
Run Hour Restrictions	None (as of the Effective Date)

C. RA Product and Attributes

Throughout the Delivery Term, Seller shall provide Buyer with the Designated RA Capacity having the following attributes:
□ RAR Attributes
⊠ RAR Attributes with FCR Attributes
☐ LAR Attributes

CONFIDENTIAL **EXECUTION VERSION** ☐ LAR Attributes with FCR Attributes ☐ FCR Attributes D. Delivery Term The Delivery Term is fifteen (15) Contract Years. E. Contract Quantities Commencing with the earliest date practicable following the Commercial Operation Date Contract Quantities for each Showing Month of the Delivery Term shall be: RAR Attributes: LAR Attributes: FCR Attributes: F. Contract Price ("RA Price") for Product, as measured The Contract Price shall be: (a) by RAR Attributes delivered by Seller, plus (b) ("TB4 Swap Price") of Storage Contract Capacity in consideration of Seller's obligation to pay Buyer the Monthly Energy Settlement Amount pursuant to Section 4.1. G. Seller's Security Amounts Performance Security: H. Milestones Date for Milestone Completion Evidence of Site Control Interconnection Agreement Amendment executed Major equipment procured

Expected Construction Start Date

Interim Deliverability Status Obtained

Full Capacity Deliverability Status obtained

Milestone	Date for Completion
Expected Commercial Operation Date	
Guaranteed Commercial Operation Date	1/1/2027

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EXHIBIT J:

RESOURCE ADEQUACY + TB4 AGREEMENT

This Resource Adequacy + TB4 Agreement ("<u>Agreement</u>") is entered into between **Athos Storage, LLC** ("<u>Seller</u>") and **San Diego Community Power**, a California joint powers authority ("<u>Buyer</u>"), each individually a "<u>Party</u>" and together the "<u>Parties</u>," as of [Date] (the "<u>Effective Date</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, construct, own, and operate the Primary Unit; 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 "Accepted Compliance Costs" has the meaning set forth in Section 13.2(b).
- 1.2 "Affiliate" means, with respect to any person, any other person (other than an individual) that, directly or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control with, such person. For this purpose, "control" means the direct or indirect ownership of fifty percent (50%) or more of the outstanding capital stock or other equity interests having ordinary voting power.
- 1.3 "Agreement" has the meaning set forth in the Preamble.
- "Alternate Capacity" means any Replacement Capacity having at least equivalent RAR Attributes, LAR Attributes and/or FCR Attributes as the Product that would have been provided by the Primary Unit, including the same Slice-of-Day (as that term is defined in the Resource Adequacy Rulings) and related characteristics, and any successor criteria applicable to the Primary Unit; *provided*, if any portion of the Designated RA Capacity that Seller is seeking to replace is Designated RA Capacity having RAR Attributes and no LAR Attributes, and no such RAR capacity is available (such capacity shall also include FCR Attributes if this is a Flexible RA Product), then Seller may replace such portion of the Designated RA Capacity with capacity having RAR Attributes and LAR Attributes (as well as FCR Attributes if this is a Flexible RA Product).
- 1.5 "Applicable Laws" means any law, rule, tariff, regulation, order, decision, judgment, or other legal or regulatory determination by any Governmental Body having jurisdiction or any binding interpretation of the foregoing, as any of them is amended or supplemented from time to time over one or both Parties or this Agreement, including without limitation, the Tariff.

- **1.6** "Availability Incentive Payments" means Availability Incentive Payments as defined in the Tariff.
- 1.7 "Availability Standards" means Availability Standards as defined in the Tariff.
- 1.8 "Bankrupt" means with respect to any entity, such entity (a) files a petition or otherwise commences, authorizes or acquiesces in the commencement of a proceeding or cause of action under any bankruptcy, insolvency, reorganization or similar law, or has any such petition filed or commenced against it and such petition filed or commenced against it is not stayed or dismissed within ninety (90) days thereafter, (b) makes an assignment or any general arrangement for the benefit of creditors, (c) otherwise becomes bankrupt or insolvent (however evidenced), (d) has a liquidator, administrator, receiver, trustee, conservator or similar official appointed with respect to it or any substantial portion of its property or assets, or (e) is generally unable to pay its debts as they fall due.
- **1.9** "Business Day" means any day except a Saturday, Sunday, or a Federal Reserve Bank holiday in California.
- 1.10 "Buyer" has the meaning set forth in the Preamble.
- 1.11 "CAISO" means the California Independent System Operator Corporation or its successor.
- **1.12** "CAISO Control Area" means the Control Area (as defined in the Tariff) that is operated by the CAISO.
- 1.13 "CAISO Controlled Grid" has the meaning set forth in the Tariff.
- 1.14 "Capacity Replacement Price" means (a) the price actually paid for any Replacement Capacity purchased by Buyer pursuant to Section 3.8 hereof, plus costs reasonably incurred by Buyer in purchasing such Replacement Capacity, or (b) absent a purchase of any Replacement Capacity, the market price for such Designated RA Capacity not provided at the Delivery Point. Buyer shall determine such market prices in a commercially reasonable manner.





- 1.17 "CIRA Tool" means the CAISO Customer Interface for Resource Adequacy.
- 1.18 "Claiming Party" has the meaning set forth in Section 3.12.
- 1.19 "Claims" means all third party claims or actions, threatened or filed and, whether groundless, false, fraudulent or otherwise, that directly or indirectly relate to the subject matter of an indemnity, and the resulting losses, damages, expenses, attorneys' fees and court costs, whether incurred by settlement or otherwise, and whether such claims or actions are threatened or filed prior to or after the termination of this Agreement.
- 1.20 "Commercial Operation" has the meaning set forth in Section 16.2(a).
- **1.21** "Commercial Operation Date" means the date on which Commercial Operation is achieved.
- 1.22 "<u>Commercial Operation Delay Damages</u>" means an amount equal to (a) the Performance Security amount required hereunder, divided by (b)
- 1.23 "Compliance Actions" has the meaning set forth in Section 13.2.



- 1.26 "Compliance Expenditure Cap" has the meaning set forth in Section 13.2.
- 1.27 "Compliance Obligation" means the RAR, Local RAR, FCR, and any other resource adequacy or capacity procurement requirements imposed on LSEs by the CPUC pursuant to the Resource Adequacy Rulings, by the CAISO, by the WECC, or by any other Governmental Body having jurisdiction.

- **1.28** "Compliance Showings" means the applicable LSE's compliance with the Resource Adequacy Requirements of the CPUC for an applicable Showing Month.
- 1.29 "Contingent Firm" means Seller shall provide Buyer with the Product from the Primary Unit in the amount of the Contract Quantity. If the Primary Unit is not available to provide the full amount of the Contract Quantity as a result of any reduction of the Contract Quantity of the Primary Unit in accordance with Section 3.1(b) or due to Force Majeure, Seller shall have the option to notify Buyer that either (a) Seller will not provide the portion of the Contract Quantity attributable to such reduction during the period of such non-availability; or (b) Seller will supply Alternate Capacity to fulfill the remainder of the Contract Quantity during such period pursuant to Section 3.1(e). If Seller fails to provide Buyer with the Designated RA Capacity for a Showing Month, then Seller shall be liable for damages or required to indemnify Buyer for penalties or fines pursuant to the terms of Section 3.9 for such Showing Month.
- 1.30 "Confidential Information" has the meaning set forth in Article 11.
- 1.31 "Construction Start" has the meaning set forth in Section 16.1(a).
- 1.32 "Construction Start Date" has the meaning set forth in Section 16.1(a).
- 1.33 "Contract Price" has the meaning set forth in Section F of the Cover Sheet.
- 1.34 "<u>Contract Quantity</u>" means, with respect to any particular Showing Month of the Delivery Term, the amount of Product (in MWs) set forth in Section E of the Cover Sheet, which Seller has agreed to provide to Buyer from the Shown Units for such Showing Month, subject to the terms and conditions of this Agreement
- 1.35 "Contract Year" means a period of twelve (12) consecutive months during the Delivery Term; 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.
- 1.36 "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 a Terminated Transaction; and all reasonable attorneys' fees and expenses incurred by the Non-Defaulting Party in connection with the termination of a Transaction.
- 1.37 "CPUC" means the California Public Utilities Commission or its successor.
- 1.38 "CPUC Filing Guide" means the annual document issued by the CPUC which sets forth the guidelines, requirements and instructions for LSE's to demonstrate compliance with the CPUC's resource adequacy program.

- 1.39 "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.
- 1.40 "Damage Payment"
- 1.41 "Day-Ahead Market" has the meaning set forth in the Tariff.
- 1.42 "<u>Defaulting Party</u>" has the meaning set forth in Section 5.1.
- 1.43 "Delivery Point" has the meaning set forth in Section 3.4.
- 1.44 "<u>Delivery Term</u>" means 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.
- 1.45 "Designated RA Capacity" shall be equal to, with respect to each Showing Month of the Delivery Term, the Contract Quantity of Product for such Showing Month, including the amount of Contract Quantity that Seller has elected to provide Alternate Capacity in accordance with Section 3.1(c),

For avoidance of doubt, "Designated RA Capacity" shall include any and all Alternate Capacity which Seller elects to provide from one or more Replacement Units in accordance with Section 3.1(c).

- 1.46 "Development Cure Period" has the meaning set forth in Section 16.2(c).
- 1.47 "<u>Dispute</u>" has the meaning set forth in Section 17.10(a).
- 1.48 "Dispute Notice" has the meaning set forth in Section 17.10(a).
- 1.49 "Early Termination Date" has the meaning set forth in Section 5.2.
- 1.50 "Effective Date" is the date set forth in the Preamble.
- 1.51 "<u>Effective Flexible Capacity</u>" or "<u>EFC</u>" means the capacity of a resource that can be counted towards an LSE's Flexible Capacity Requirements, as identified from time to time by the Tariff, the Resource Adequacy Rulings, LRA, or other Governmental Body having jurisdiction.
- 1.52 "Emission Reduction Credits" means emission reductions that have been authorized by a local air pollution control district pursuant to California Division 26 Air Resources; Health and Safety Code Sections 40709 and 40709.5, whereby a district has established a system by which all reductions in the emission of air contaminants that are to be used to offset certain future increases in the emission of air contaminants shall be banked prior to use to offset future increases in emissions.

- 1.53 "Environmental Costs" means costs incurred in connection with acquiring and maintaining all environmental permits and licenses for the Primary Unit, and the Primary Unit's compliance with all applicable environmental laws, rules and regulations, including capital costs for pollution mitigation or installation of emissions control equipment required to permit or license the Primary Unit, all operating and maintenance costs for operation of pollution mitigation or control equipment, costs of permit maintenance fees and emission fees as applicable, the costs of all Emission Reduction Credits or Marketable Emission Trading Credits required by any applicable environmental laws, rules, regulations, and permits to operate the Primary Unit, and the costs associated with the disposal and cleanup of Hazardous Substances introduced to the Site, and the decontamination or remediation, on or off the Site, necessitated by the introduction of such Hazardous Substances on the Site.
- **1.54** "EPC Contract" means the Seller's engineering, procurement and construction contract with the EPC Contractor.
- 1.55 "<u>EPC Contractor</u>" means Seller's engineering, procurement and construction contractor or such Person performing those functions.
- 1.56 "<u>Equitable Defenses</u>" means any bankruptcy, insolvency, reorganization and other laws affecting creditors' rights generally, and with regard to equitable remedies, the discretion of the court before which proceedings to obtain same may be pending.
- 1.57 "Event of Default" has the meaning set forth in Section 5.1.
- 1.58 "FCR Attributes" means, with respect to a Resource Adequacy Resource, any and all flexible resource adequacy attributes that can be counted toward an LSE's FCR, as they are identified from time to time by the Resource Adequacy Rulings, the Tariff, an LRA, or other Governmental Body having jurisdiction, exclusive of any LAR Attributes and any RAR Attributes.
- 1.59 "FCR Showings" means the FCR compliance showings (or similar or successor showings) an LSE is required to make to the CPUC (and, to the extent authorized by the CPUC, to the CAISO) pursuant to the Resource Adequacy Rulings and the Tariff, or to an LRA having jurisdiction over the LSE.
- **1.60** "FERC" means the Federal Energy Regulatory Commission or any successor government agency.
- 1.61 "Flexible Capacity Category" has the meaning set forth in the Resource Adequacy Rulings.
- 1.62 "Flexible Capacity Requirements" or "FCR" means the flexible capacity requirements, exclusive of LAR and RAR, established for LSEs by the CPUC pursuant to the Resource Adequacy Rulings, or by an LRA or other Governmental Body having jurisdiction.
- **1.63** "Flexible RA Product" means that the Product includes FCR Attributes, if applicable, as specified in Sections C and E of the Cover Sheet.

- "Force Majeure" means an event or circumstance which delays or prevents a Party from 1.64 performing its obligations under the Agreement, which event or circumstance was not anticipated as of the Effective Date, which is not within the reasonable control of, or the result of the negligence of, the Claiming Party, and which, by the exercise of due diligence, the Claiming Party is unable to overcome or avoid or cause to be avoided despite the exercise of commercially reasonable efforts. A Force Majeure event may include, but is not limited to, an act of God or the elements, such as flooding, lightning, hurricanes, tornadoes, or ice storms; explosion; fire (except to the extent that such fire is caused by the Unit); volcanic eruption; flood; epidemic or pandemic; landslide; mudslide; sabotage; terrorism; earthquake; 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. Force Majeure does not include (i) the loss of Buyer's markets; (ii) Buyer's inability economically to use or resell the Product purchased hereunder; (iii) the loss or failure of Seller's supply (except to the extent due to a Force Majeure); (iv) Seller's ability to sell the Product at a price greater than the Contract Price or (v) events otherwise constituting Force Majeure that prevents Seller from achieving Commercial Operation of the Primary Unit, except to the extent expressly permitted as a Development Cure Period under this Agreement. Neither Party may raise a claim of Force Majeure based in whole or in part on curtailment by a Transmission Provider unless (i) such Party has contracted for firm transmission with a Transmission Provider for the Product to be delivered to or received at the Delivery Point and (ii) such curtailment is due to "force majeure" or "uncontrollable force" or a similar term as defined under the Transmission Provider's tariff; provided, however, that existence of the foregoing factors shall not be sufficient to conclusively or presumptively prove the existence of a Force Majeure absent a showing of other facts and circumstances which in the aggregate with such factors establish that a Force Majeure as defined in the first sentence hereof has occurred.
- 1.65 "Forced Outage" means an unexpected failure of one or more components of the Primary Unit that prevents the Primary Unit from receiving energy from the Point of Interconnection or delivering energy to the Point of Interconnection that is not the result of an Outage or Force Majeure.
- 1.66 "Full Capacity Deliverability Status" or "FCDS" has the meaning set forth in the Tariff.
- **1.67** "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 a Terminated Transaction, determined in a commercially reasonable manner.
- 1.68 "Governmental Approvals" means all authorizations, consents, approvals, waivers, exceptions, variances, filings, permits, orders, licenses, exemptions, notices to and declarations of or with any Governmental Body and shall include those siting and operating permits and licenses, and any of the foregoing under any applicable environmental law, that are required for the use and operation of the Primary Unit.
- 1.69 "Governmental Body" means (a) any federal, state, local, municipal or other government;(b) any governmental, regulatory or administrative agency, commission or other authority

lawfully exercising or entitled to exercise any administrative, executive, judicial, legislative, police, regulatory or taxing authority or power; and (c) any court or governmental tribunal; and (d) CAISO, but in all cases, excludes both Parties.

- 1.70 "Governmental Charges" has the meaning set forth in Section 8.2.
- 1.71 "<u>Guaranteed Commercial Operation Date</u>" is the date set forth in Section H of the Cover Sheet, subject to extension pursuant to Section 16.2(b), but as limited by Section 16.2(d).
- 1.72 "Hazardous Substance" means, collectively, (a) any chemical, material or substance that is listed or regulated under applicable Laws as a "hazardous" or "toxic" substance or waste, or as a "contaminant" or "pollutant" or words of similar import, (b) any petroleum or petroleum products, flammable materials, explosives, radioactive materials, asbestos, urea formaldehyde foam insulation, and transformers or other equipment that contain polychlorinated biphenyls, and (c) any other chemical or other material or substance, exposure to which is prohibited, limited or regulated by any Laws.
- 1.73 "Hold-Back Capacity" has the meaning set forth in Section 3.7(f).
- 1.74 "<u>Interconnection Agreement</u>" means the interconnection agreement entered into by Seller or its Affiliates pursuant to which the Primary Unit and its Interconnection Facilities will be interconnected with the Transmission System during the Delivery Term.
- 1.75 "<u>Interconnection Facilities</u>" means the interconnection facilities, control and protective devices and metering facilities required to connect the Primary Unit with the Transmission System in accordance with the Interconnection Agreement.
- 1.76 "Interest Rate" means, for any date, the lesser of (a) the per annum rate of interest equal to the prime lending rate as may from time to time be published in *The Wall Street Journal* under "Money Rates" on such day (or if not published on such day on the most recent preceding day on which published), plus two percent (2%) and (b) the maximum rate permitted by applicable law.
- 1.77 "Interim Deliverability Status" has the meaning set forth in the Tariff.
- 1.78 "Interim Deliverability Status Percentage" means, for each Showing Month of the Delivery Term through the Showing Month in which the Full Capacity Deliverability Status Finding or Partial Capacity Deliverability Status Finding is obtained, the capacity of the Primary Unit that has received Interim Deliverability Status for such Showing Month, divided by the Contract Quantity of RAR Attributes for such Showing Month, expressed as a percentage.
- 1.79 "Investment Grade" means a Credit Rating of or, if such entities cease to provide Credit Ratings, from another comparable rating agency that is reasonably acceptable to the Parties).
- **1.80** "Joint Powers Act" means the Joint Exercise of Powers Act of the State of California (Government Code Section 6500 et seq.).

- 1.81 "Joint Powers Agreement" means that certain Joint Powers Agreement dated October 1, 2019, as amended from time to time, under which Buyer is organized as a Joint Powers Authority in accordance with the Joint Powers Act.
- 1.82 "LAR" means local area reliability, which is any program of localized resource adequacy requirements established for jurisdictional LSEs by the CPUC pursuant to the Resource Adequacy Rulings, or by another LRA having jurisdiction over the LSE, as implemented in the Tariff, exclusive of FCR and RAR. LAR may also be known as local resource adequacy, local RAR, or local capacity requirement in other regulatory proceedings or legislative actions.
- 1.83 "LAR Attributes" means, with respect to a Unit, any and all resource adequacy attributes (or other locational attributes related to system reliability), as they are identified from time to time by the Resource Adequacy Rulings, CAISO, LRA, or other Governmental Body having jurisdiction, associated with the physical location or point of electrical interconnection of the Unit within the CAISO Control Area, that can be counted toward LAR, but exclusive of any FCR Attributes or RAR Attributes which are not associated with where in the CAISO Control Area the Unit is physically located or electrically interconnected. For clarity, it should be understood that if the CAISO, LRA, or other Governmental Body, defines new or re-defines existing local areas, then such change will not result in a change in payments made pursuant to this Agreement.
- 1.84 "LAR Showings" means the LAR compliance showings (or similar or successor showings) an LSE is required to make to the CPUC (and, to the extent authorized by the CPUC, to the CAISO) pursuant to the Resource Adequacy Rulings and the Tariff, or to an LRA having jurisdiction over the LSE.
- 1.85 "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 having a Credit Rating

 in a form as set forth in Exhibit A or as otherwise reasonably acceptable to Buyer.
- 1.86 "Locational Marginal Price" or "LMP" has the meaning set forth in the Tariff.
- 1.87 "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 a Terminated Transaction, determined in a commercially reasonable manner.
- 1.88 "LRA" has the meaning set forth in the Tariff.
- **1.89** "LSE" means load-serving entity. LSEs may be an investor-owned utility, an electric service provider, a community aggregator or community choice aggregator, or a municipality serving load in the CAISO Control Area (excluding exports).
- 1.90 "Marketable Emission Trading Credits" means emissions trading credits or units pursuant to the requirements of California Division 26 Air Resources; Health & Safety Code Section 39616 and Section 40440.2 for market-based incentive programs such as the South Coast

Air Quality Management District's Regional Clean Air Incentives Market, also known as RECLAIM, and allowances of sulfur dioxide trading credits as required under Title IV of the Federal Clean Air Act (42 U.S.C. § 7651b (a) to (f)).

- 1.91 "Milestones" has the meaning set forth in Section H of the Cover Sheet.
- 1.92 "Monthly Capacity Payment" has the meaning specified in Section 3.10(a) hereof.
- 1.93 "Moody's" means Moody's Investor Services, Inc. or its successor.
- 1.94 "NERC" means the North American Electric Reliability Corporation, or its successor.
- 1.95 "Net Qualifying Capacity" or "NQC" has the meaning set forth in the Tariff.
- 1.96 "Network Upgrades" has the meaning set forth in the Tariff.
- 1.97 "Non-Availability Charges" has the meaning set forth in the Tariff.
- 1.98 "Non-Defaulting Party" has the meaning set forth in Section 5.2.
- 1.99 "Notification Deadline" means, for a given Showing Month, the earlier of the relevant deadlines for (a) the corresponding RAR Showings and FCR Showings, or (b) submission of the CAISO Supply Plan filings applicable to that Showing Month.
- 1.100 "Notifying Party" has the meaning set forth in Section 17.10(a).
- 1.101 "Outage" means any CAISO approved disconnection, separation, or reduction in the capacity of any Unit that relieves all or part of the offer obligations of the Unit consistent with the Tariff. For the avoidance of doubt, Outage shall be deemed to include Planned Outage.
- 1.102 "Partial Capacity Deliverability Status" has the meaning set forth in the CAISO Tariff.
- 1.103 "Partial Capacity Deliverability Status Finding" means a written confirmation from the CAISO that the Primary Unit is eligible for Partial Capacity Deliverability Status.
- 1.104 "Participating Transmission Owner" means an entity that (a) owns, operates and maintains transmission lines and associated facilities and/or has entitlements to use certain transmission lines and associated facilities and (b) has transferred to the CAISO operational control of such facilities and/or entitlements to be made part of the CAISO Grid. The Participating Transmission Owner for purposes of this Agreement is Southern California Edison Company ("SCE").
- 1.105 "Permitted Transferee" 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 or a Credit Rating of



- (b) At least years of experience in the ownership and operations of facilities similar to the Primary Unit or has retained a third-party with such experience to operate the Primary Unit.
- **1.106** "Performance Security" means collateral in the form of cash or a Letter of Credit in an amount set forth in Section G of the Cover Sheet.
- 1.107 "Planned Outage" means, subject to and as further described in the Tariff, a CAISO-approved planned or scheduled disconnection, separation or reduction in capacity of the Unit that is conducted for the purposes of carrying out routine repair or maintenance of such Unit, or for the purposes of new construction work for such Unit.
- **1.108** "Point of Interconnection" means the Primary Unit's point of interconnection to the CAISO system, as further described in the Interconnection Agreement.
- **1.109** "Primary Unit" means the energy storage facility described in Section B of the Cover Sheet and Exhibit D hereof.
- **1.110** "Product" has the meaning set forth in Section 3.1.
- **1.111** "Progress Report" means a report substantially in the form set forth in Exhibit F, the requirements for which are further set forth in Section 16.1(c).
- 1.112 "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 power industry during the relevant time period with respect to grid-interconnected, utility-scale battery energy storage facilities 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 electric power industry with respect to grid-interconnected, utility-scale battery energy storage facilities in the Western United States.
- 1.113 "RA Capacity" means the qualifying and deliverable capacity of the Unit for RAR, LAR, and FCR purposes, as applicable, for the Delivery Term, as determined by the CPUC, CAISO, or other Governmental Body authorized to make such determination under Applicable Laws, including the Resource Adequacy Rulings. RA Capacity encompasses the applicable RAR Attributes, LAR Attributes and FCR Attributes of the capacity provided by a Unit.
- **1.114** "RAR Attributes" means, with respect to a Resource Adequacy Resource, any and all resource adequacy attributes, as they are identified from time to time by the Tariff,

- Resource Adequacy Rulings, LRA, or any Governmental Body having jurisdiction that can be counted toward RAR, exclusive of any LAR Attributes and FCR Attributes.
- 1.115 "<u>RAR Showings</u>" means the RAR compliance showings (or similar or successor showings) an LSE is required to make to the CPUC (and/or, to the extent authorized by the CPUC, to the CAISO), pursuant to the Tariff or Resource Adequacy Rulings, or to an LRA having jurisdiction.
- **1.116** "Recipient Party" has the meaning set forth in Section 17.10(a).
- 1.117 "Regulatory Event" has the meaning set forth in Section 17.7.
- 1.118 "Reliability Compensation Services Tariff" has the meaning set forth in the Tariff.
- 1.119 "Replacement Capacity" has the meaning specified in Section 3.8 hereof.
- 1.120 "Replacement Unit" means a unit meeting the requirements specified in Section 3.1(c) hereof that is located within the CAISO Control Area and that is capable of providing Alternate Capacity, unless Buyer agrees to accept a Replacement Unit with different RAR Attributes and/or FCR Attributes. A Replacement Unit may not be a coal-fired or nuclear generating resource and may not be an unspecified import.
- 1.121 "Requested Confidential Information" has the meaning set forth in Section 11.2(d).
- 1.122 "Residual Unit Commitment" has the meaning set forth in the Tariff.
- 1.123 "Resource Adequacy Plan" has the meaning specified in the Tariff.
- **1.124** "Resource Adequacy Requirements" or "RAR" means the resource adequacy requirements, exclusive of FCR and LAR, established for LSEs by the CPUC pursuant to the CPUC Decisions, by CAISO pursuant to the Tariff, or by any other Governmental Body having jurisdiction over Compliance Obligations.
- 1.125 "Resource Adequacy Rulings" means any applicable CPUC ruling or decision related to resource adequacy, or any other resource adequacy Law, rules or regulations enacted, adopted or promulgated by the CPUC or the CAISO, however described, as such decisions, rulings, Laws, rules or regulations may be amended or modified from time-to-time throughout the Term.
- **1.126** "Resold Product" has the meaning set forth in Article 12.
- 1.127 "Resource Adequacy Resource" has the meaning set forth in the Tariff.
- **1.128** "Resource Category" shall be as described in the CPUC Filing Guide, as such may be modified, amended, supplemented or updated from time to time.
- 1.129 "RMR Contracts" has the meaning set forth in the Tariff.

- **1.130** "S&P" means the Standard & Poor's Rating Group (a division of McGraw-Hill, Inc.) or its successor.
- 1.131 "Schedule" or "Scheduling" means the actions of Seller, Buyer and/or their designated representatives, including each Party's Transmission Providers, if applicable, of notifying, requesting and confirming to each other the quantity and type of Product to be delivered on any given day or days during the Delivery Term at a specified Delivery Point.
- 1.132 "Scheduling Coordinator" has the same meaning as in the Tariff.
- 1.133 "Security Interest" has the meaning set forth in Section 14.3(a).
- 1.134 "Seller" has the meaning set forth in the Preamble.
- 1.135 "Settlement Amount" means the Non-Defaulting Party's Costs and Losses, on the one hand, netted against its Gains, on the other, expressed in U.S. Dollars, which such party incurs as a result of a Terminated Transaction pursuant to Section 5.2.
- 1.136 "Settlement Point" means SP-15.
- 1.137 "Showing Month" shall be the calendar month during the Delivery Term that is the subject of the RAR Showing, LAR Showing, and/or FCR Showing, as applicable, as set forth in the Resource Adequacy Rulings or Tariff. For illustrative purposes only, pursuant to the Resource Adequacy Rulings in effect as of the Effective Date, the monthly RAR Showing made in June is for the Showing Month of August.
- **1.138** "Shown Unit" means a Unit, or any Replacement Unit and specified by Seller in a Supply Plan, but not necessarily identified by Seller to Buyer on the Effective Date.
- **1.139** "Site" means the real property on which the Primary Unit is located as identified in Exhibit D.
- 1.140 "Site Control" means that, for the Term, 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.
- **1.141** "SP-15" means the Existing Zone Generation Trading Hub (as defined in the Tariff) for Existing Zone (as defined in the Tariff) region SP15.
- **1.142** "Storage Capacity Test" means any test or retest of the capacity of the Primary Unit conducted in accordance with Section 3.14 and Exhibit I.
- 1.143 "Storage Contract Capacity" means the total capacity (in MW) of the Primary Unit initially equal to the Contract Quantity of RAR Attributes set forth on the Cover Sheet, and thereafter as established from time to time pursuant to Section 3.14 to reflect the results of the most recent Storage Capacity Test.

- 1.144 "Substitute Capacity" means "RA Substitute Capacity" as defined in the Tariff.
- 1.145 "Substitution Rules" has the meaning specified in the Tariff.
- 1.146 "Supply Plan" means the supply plans, or similar or successor filings, that each Scheduling Coordinator representing RA Capacity submits to the CAISO, LRA, or other Governmental Body, pursuant to Applicable Laws, in order for that RA Capacity to count, as applicable, for RAR Attributes, LAR Attributes, and/or FCR Attributes.
- **1.147** "Tariff" means the tariff and protocol provisions of the CAISO, including associated rules, procedures and business practice manuals, as amended or supplemented from time to time.
- **1.148** "Term" has the meaning set forth in Section 2.1(a).
- 1.149 "Terminated Transaction" has the meaning set forth in Section 5.2.
- 1.150 "Termination Payment" has the meaning set forth in Section 5.3.
- 1.151 "Transmission Provider" means the CAISO.
- **1.152** "<u>Transmission System</u>" means the transmission facilities operated by the CAISO, which provide energy transmission service within the CAISO grid from the Point of Interconnection.
- **1.153** "<u>Unit</u>" shall mean the Primary Unit and any Replacement Units, from which Product is provided by Seller to Buyer.
- 1.154 "Work" means (a) work or operations performed by a Party or on a Party's behalf; and (b) materials, parts or equipment furnished in connection with such work or operations; including (i) warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "a Party's work"; and (ii) the providing of or failure to provide warnings or instructions.

ARTICLE 2: TERM; DELIVERY TERM; CONDITIONS PRECEDENT

2.1 Term.

The term of this Agreement shall commence upon the Effective Date and shall continue until the expiration of the Delivery Term, provided that this Agreement shall thereafter remain in effect until the Parties have fulfilled all obligations arising under this Agreement, including any compensation for the Product, Termination Payment, then-owing indemnification payments or other damages, are paid in full (whether directly or indirectly, such as through set-off or netting) and the Performance Security is released and/or returned (the "Term"). All provisions relating to invoicing, payment, delivery, settlement of other liabilities incurred pursuant to this Agreement and dispute resolution survive for the period necessary to effectuate the rights of the Party benefited by such provision except as otherwise specified herein. Notwithstanding anything to the contrary in this Agreement, (i) all rights under Sections 17.2 (Indemnities) and any other indemnity rights survive the end of the Delivery Term for an additional twelve (12) months; (ii) all rights and

obligations under Article 11 (Confidentiality) survive the end of the Delivery Term for an additional two (2) years; (iii) all rights and obligations under Section 16.2(f) (Limitation on Seller's Ability to Make or Agree to Third-Party Sales from the Primary Unit after Early Termination Date), if applicable, survive early termination of this Agreement for an additional two (2) years; and (iv) all provisions relating to limitations of liability survive without limit.

2.2 Conditions Precedent.

Seller shall provide notice of the expected Commercial Operation Date for the Primary Unit to Buyer no less than sixty (60) days in advance of such date. The Delivery Term shall not commence until Seller completes to Buyer's reasonable satisfaction each of the following conditions:

- (a) Seller shall have secured all Governmental Approvals as are necessary for the safe and lawful operation and maintenance of the Primary Unit and to enable Seller to deliver the Product to Buyer.
- (b) Seller shall have executed an Interconnection Agreement, which shall be in full force and effect, and a copy of the Interconnection Agreement has been delivered to Buyer.
 - (c) Seller shall have secured Site Control.
- (d) Seller shall have provided to Buyer a certification of Seller and a licensed professional engineer, substantially in the form attached hereto as Exhibit C, demonstrating that the Commercial Operation Date has occurred.
- (e) As of the Commercial Operation Date, no Event of Default on the part of Seller shall have occurred and be continuing.
 - (f) Seller has obtained Interim Deliverability Status.
- (g) Seller shall have delivered to Buyer all insurance documents required under Article 15.
- (h) As of the Commercial Operation Date, Seller shall have paid Buyer for all amounts owing under this Agreement, if any, including Commercial Operation Delay Damages.

ARTICLE 3: TRANSACTION, DELIVERY AND PAYMENT

- **3.1** Resource Adequacy Capacity Product. During the Delivery Term, Seller shall provide Buyer with the Contract Quantity of (i) RAR Attributes, and (ii) FCR Attributes, if Flexible RA Product is specified in Sections C and E of the Cover Sheet to this Agreement with respect to each Showing Month (the "Product") on a Contingent Firm basis.
- (a) Notwithstanding anything to the contrary herein, no energy or ancillary services associated with the Unit is required to be made available to Buyer as part of this Agreement and, except as set forth herein, Buyer shall not be responsible for compensating Seller for Seller's commitments to the CAISO required by this Agreement. Seller retains the right to sell, pursuant to the Tariff, any RA Capacity that is in excess of the Primary Unit's Contract Quantity and any

RAR Attributes, LAR Attributes, or FCR Attributes not otherwise transferred, conveyed, or sold to Buyer under this Agreement.

- (b) <u>Reductions in Contract Quantity</u>. Seller's obligation to deliver the Contract Quantity for each Showing Month may be reduced at Seller's option as follows:
- (i) by the amount of any Planned Outages which exist with respect to any portion of the Primary Unit during the applicable Showing Month; provided, (A) Seller notifies Buyer by the Notification Deadline applicable to that Showing Month of the amount of Product from the Primary Unit that Buyer may include in Buyer's Compliance Showings for each day of that month as a result of such Planned Outage, and (B) such reduction is able to be reflected on the Supply Plans in accordance with the Tariff. In the event Seller is unable to provide the Contract Quantity for any portion of a Showing Month because of a Planned Outage of the Primary Unit, Seller has the option, but not the obligation, to provide the applicable Contract Quantity for such portion(s) of such Showing Month as Alternate Capacity pursuant to Section 3.1(c).
- (ii) if the Primary Unit experiences a reduction in Unit NQC and/or Unit EFC as determined by the CAISO and Seller has provided notice of such reduction to Buyer by the Notification Deadline. Seller's potential reduction in the Contract Quantity of RAR Attributes for each remaining Showing Month shall equal the product of (A) the applicable Showing Month Contract Quantity and (B) the total amount (in MW) of reductions in Unit NQC since the Effective Date, divided by (C) Unit NQC as of the Effective Date. Seller's potential reduction in the Contract Quantity of FCR Attributes for each remaining Showing Month shall equal the product of (I) the applicable Showing Month Contract Quantity and (II) the total amount (in MW) Unit EFC was reduced since the Effective Date, divided by (III) Unit EFC as of the Effective Date. If the Primary Unit experiences such a reduction in Unit NQC and/or Unit EFC, then Seller has the option, but not the obligation, upon written notice to Buyer by the Notification Deadline, to provide the applicable portion of the Contract Quantity for such Showing Month (x) from the Primary Unit, provided the Primary Unit has sufficient remaining and available Product, and/or (y) as Alternate Capacity pursuant to Section 3.1(c).
- if the Primary Unit has obtained Interim Deliverability Status of less than (iii) the Contract Quantity, for each Showing Month from the Commercial Operation Date through the Showing Month in which the Partial Capacity Deliverability Status Finding or Full Capacity Deliverability Status is obtained, Seller's obligation to deliver the applicable Contract Quantity for such Showing Month may also be reduced by Seller if Seller has provided notice of such reduction to Buyer by the Notification Deadline. Seller's potential reduction in the Contract Quantity of RAR Attributes and/or FCR Attributes for each Showing Month shall equal the product of (A) the applicable Showing Month Contract Quantity and (B) one (1) minus the Interim Deliverability Status Percentage for such Showing Month. For each calendar year included in the Delivery Term prior to the Partial Capacity Deliverability Status Finding or Full Capacity Deliverability Status Finding for the Primary Unit, Seller has the option, but not the obligation, to provide all or a portion of the applicable shortfall in the Contract Quantity for the following calendar year (I) from the Primary Unit, provided the Primary Unit has sufficient remaining and available Product, and/or (II) as Alternate Capacity pursuant to Section 3.1(c). Seller shall provide notice to Buyer of its election at least forty-five (45) days prior to the commencement of the following calendar year.



- (c) <u>Alternate Capacity</u>. If Seller is unable to provide the full Contract Quantity for a Showing Month for any reason, including, without limitation, as provided in Section 3.1(b), or Seller desires to provide some or all of the Contract Quantity for any day of a Showing Month from a Replacement Unit, then Seller may, at no additional cost to Buyer, provide Buyer with Alternate Capacity from one or more Replacement Units in an amount such that the total amount of Product provided to Buyer from the Primary Unit and any Replacement Unit(s) for each Showing Month is not more than the Contract Quantity, provided that in each case:
- (i) Seller shall notify Buyer in writing of its intent to provide Alternate Capacity and shall identify the Replacement Unit(s) from which such Alternate Capacity shall be provided no later than the Notification Deadline for such Showing Month;
- (ii) The proposed Replacement Unit(s) must (1) be accepted by the CAISO, (2) otherwise satisfy the requirements of this Agreement, and (3) be subject to Buyer's reasonable approval; provided, however, if Buyer has not responded within from Seller, such Replacement Unit(s) shall be deemed approved;
- (iii) Seller shall, or shall cause the Replacement Unit's SC to, submit a Supply Plan for each Showing Month no later than the Notification Deadline for such Showing Month; and
- (iv) If Seller does not comply with the requirements of Sections 3.1(c) for the applicable Showing Month, then any such Replacement Unit(s) shall not be deemed a Replacement Unit for purposes of this Agreement for that Showing Month and Seller shall not receive payment for Product provided by such unit for such Showing Month.

3.2 Seller's and Buyer's Obligations.

Seller shall sell and deliver, or cause to be delivered, and Buyer shall purchase and receive, or

cause to be received, the Designated RA Capacity of the Product at the Delivery Point, and Buyer shall pay Seller the RA Price for the Designated RA Capacity. Seller shall be responsible for any costs or charges imposed on or associated with the Product or its delivery of the Product up to the Delivery Point. Buyer shall be responsible for any costs or charges imposed on or associated with the Product or its receipt at and from the Delivery Point.

3.3 Interconnection. Seller shall take all commercially reasonable actions necessary to obtain Interim Deliverability Status, Partial Capacity Deliverability Status or Full Capacity Deliverability Status in the amount of the Contract Quantity for the Primary Unit by the Guaranteed Commercial Operation Date or as soon as practicable thereafter if such status cannot be obtained by the Commercial Operation Date. Seller shall be responsible for all costs and charges associated with Interconnection Facilities and Network Upgrades necessitated by the interconnection of the Primary Unit.

3.4 Delivery Point.

The "Delivery Point" for the Unit shall be the CAISO Control Area.

3.5 Planned Outages and Forced Outages.

- (a) No later than January 15, April 15, July 15 and October 15 of each Contract Year, and at least sixty (60) days prior to the Commercial Operation Date, Seller shall submit to Buyer Seller's schedule of proposed Planned Outages ("Outage Schedule") for the Primary Unit for the following twelve (12)-month period in a form reasonably agreed to by Buyer. Within twenty (20) Business Days after its receipt of an Outage Schedule, Buyer shall give Notice to Seller of any reasonable request for changes to the Outage Schedule, and Seller shall, consistent with Prudent Operating Practices, accommodate Buyer's requests regarding the timing of any Planned Outage. Seller shall deliver to Buyer the final Outage Schedule no later than ten (10) days after receiving Buyer's comments.
- (b) If reasonably required in accordance with Prudent Operating Practices, Seller shall have the right, on no less than ninety (90) days advance Notice to Buyer, to propose changes to the Outage Schedule developed pursuant to Section 3.5(a); provided, Seller shall schedule all Planned Outages within the time period determined by the CAISO for the Primary Unit as a Resource Adequacy Resource that is subject to the Availability Standards to qualify for an "Approved Maintenance Outage" under the Tariff. Notwithstanding anything in this Agreement to the contrary, no Planned Outages of the Primary Unit shall be scheduled or planned from each June 1 through October 31 during the Delivery Term, unless approved by Buyer in writing in its reasonable discretion.
- (c) Seller shall notify Buyer within of the commencement of a Forced Outage and, within the state of the reafter, Seller shall provide information to Buyer concerning the Forced Outage, including the start and anticipated end dates of the forced Outage, a description of the cause of the Forced Outage, and the MW capacity of operational capacity during the Forced Outage.

3.6 Reserved.

3.7 Delivery of Product.

Seller shall provide Buyer with the Designated RA Capacity of Product for each Showing Month consistent with the following:

- (a) No later than the Notification Deadline corresponding to each Showing Month of the Delivery Term, Seller shall submit, or cause the Unit's Scheduling Coordinator to submit, Supply Plans to identify the characteristics of the Shown Unit and confirm the Designated RA Capacity provided to Buyer for each Showing Month so that the total amount of Designated RA Capacity identified and confirmed for such Showing Month equals the Designated RA Capacity, unless specifically requested not to do so by Buyer.
- (b) Seller shall cause all Supply Plans to meet and be filed in conformance with the requirements of the Tariff. Seller shall submit, or cause the Shown Unit's SC to submit, on a timely basis with respect to each applicable Showing Month, Supply Plans in accordance with the Tariff to identify and confirm the Product delivered to Buyer for each Showing Month of the Delivery Term.
- (c) Seller shall identify the Shown Unit(s) and Designated RA Capacity for a Showing Month by providing Buyer with the specific Shown Unit information in the format set forth in Section B of Cover Sheet no later than the Notification Deadline for such Showing Month.
- (d) The Designated RA Capacity is delivered and received when the CIRA Tool shows that the Supply Plan submitted in compliance with Buyer's instructions, including Buyer's instructions to withhold all or part of the Designated RA Capacity from Seller's Supply Plan for any Showing Month during the Delivery Term as set forth in Section 3.7(f), has been accepted by the CAISO. If CAISO rejects either the Supply Plan or Buyer's Resource Adequacy Plan with respect to any part of the Designated RA Capacity in any Showing Month, the Parties will confer, make such corrections as are necessary for acceptance, and resubmit the corrected Supply Plan or Resource Adequacy Plan for validation before the applicable Notification Deadline for the relevant Showing Month. Seller has failed to deliver Product if Seller fails to submit a Supply Plan for the volume of Designated RA Capacity for any Showing Month in such amount as instructed by Buyer (but not to exceed the Designated RA Capacity) for the applicable Showing Month. Seller shall not have failed to deliver the Designated RA Capacity if Buyer fails or chooses not to submit the Shown Unit(s) and the Product in its Resource Adequacy Plan with the CPUC or CAISO.
- (e) No later than five (5) Business Days before the Notification Deadline for a Showing Month, Buyer may request in writing that Seller not list, or cause the Shown Unit's Scheduling Coordinator not to list, in the Shown Unit's Supply Plan a portion or all of the Designated RA Capacity for any portion of such Showing Month ("Hold-Back Capacity"). Following Buyer's request for Hold-Back Capacity, Buyer may request, in writing, that Seller make the previously requested Hold-Back Capacity available for Buyer's use as Substitute Capacity within the respective Showing Month. Such request shall be provided to Seller no later than five (5) Business Days prior to the first day for which Buyer seeks to use such Substitute Capacity. The portion of the Designated RA Capacity that is the subject of Buyer's request for Hold-Back Capacity shall be deemed Contract Quantity delivered consistent with Section 3.7(d) for purposes of calculating a Monthly Capacity Payment pursuant to Section 3.11. Seller shall, or shall cause the Unit's Scheduling Coordinator to, use commercially reasonable efforts to comply with Buyer's request

under this Section 3.7(f) including taking all commercially reasonable actions to allow Buyer or a subsequent purchaser under Article 12 to utilize the applicable portion of the Designated RA Capacity that Buyer timely requested be withheld from the Supply Plans during each Showing Month under the Substitution Rules, including, but not limited to, providing Buyer or subsequent purchaser under Article 12 with all information needed to utilize the Substitution Rules. Seller shall not be liable for any amounts under Section 3.9 or Section 3.10 resulting from Buyer's inability to use the Hold-Back Capacity as Substitute Capacity unless due to Seller's unexcused failure to make the Hold-Back Capacity available for use as Substitute Capacity.

3.8 CAISO Offer Requirements. To the extent required under the Tariff, Seller shall schedule or cause the Shown Unit's Scheduling Coordinator to schedule with, or make available to, the CAISO the Shown Unit's portion of the Designated RA Capacity in compliance with the Tariff and perform all, or cause the Shown Unit's Scheduling Coordinator, owner, or operator, as applicable, to perform all obligations under the Tariff that are associated with the sale of Product hereunder. Buyer is not liable for the failure of Seller or the failure of any Shown Unit's Scheduling Coordinator, owner, or operator to comply with such Tariff provisions, including any penalties or fines imposed on Seller or the Shown Unit's Scheduling Coordinator, owner, or operator for such noncompliance.

3.9 Damages for Failure to Provide Designated RA Capacity.

If Seller fails to provide Buyer with the Designated RA Capacity of Product for any Showing Month, and such failure is not excused under the terms of this Agreement, then the following shall apply:

(a) Buyer may, but shall not be required to, replace any portion of the Designated RA Capacity not provided by Seller with capacity having equivalent RAR Attributes and/or FCR Attributes as the Designated RA Capacity not provided by Seller; *provided*, if any portion of the Designated RA Capacity that Buyer is seeking to replace is Designated RA Capacity having RAR Attributes and no LAR Attributes, and no such RAR capacity is available (such capacity shall also include FCR Attributes if this is a Flexible RA Product), then Buyer may replace such portion of the Designated RA Capacity with capacity having RAR Attributes and LAR Attributes (as well as FCR Attributes if this is a Flexible RA Product) ("Replacement Capacity"), in either case, by entering into purchase transactions with one or more third parties, including, without limitation, third parties who have purchased capacity from Buyer, so long as such transactions are done at prevailing market prices. Buyer shall use commercially reasonable efforts to minimize damages when procuring any Replacement Capacity.

	(b)	Seller shall pa	ay to Buye	er, on the	date payme	ent would	otherwise b	e due in re	spect
of the	Showin	g Month for w	hich the fa	ilure occu	rred, an ar	nount equ	al to		
					70 0 10	70		deligned to the	
			If Sel	ler fails to	nay these	damages	then Buyer	may offset	those

damages owed it against any future amounts it may owe to Seller pursuant to Article 6 of this Agreement.



3.10 Indemnities for Failure to Deliver Contract Quantity.

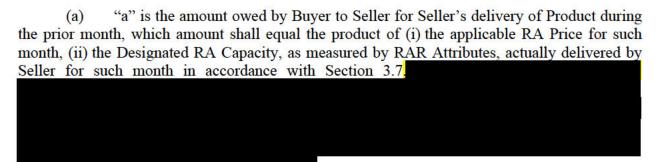
Seller shall be responsible for the cost of, and agrees to indemnify, defend and hold harmless Buyer from any penalties, fines or costs assessed against Buyer by the CPUC or the CAISO, resulting from any of the following:

- (a) Seller's failure to provide any portion of the Designated RA Capacity for the respective Showing Month for the Delivery Term; or
- (b) A Unit Scheduling Coordinator's failure to submit accurate Supply Plans that identify Buyer's right, or a subsequent purchaser's right, to the Designated RA Capacity purchased hereunder.

With respect to the foregoing, the Parties shall use commercially reasonable efforts to minimize such penalties, fines and costs; *provided*, in no event shall Buyer be required to use or change its utilization of its owned or controlled assets or market positions to minimize these costs, penalties and fines. If Seller fails to pay the foregoing penalties, fines or costs, or fails to reimburse Buyer for those penalties, fines or costs, then Buyer may offset those penalties, fines or costs against any future amounts it may owe to Seller under this Agreement.

3.11 Monthly Capacity Payment.

Buyer shall make a Monthly Capacity Payment to Seller, in arrears, after the applicable Showing Month. The "Monthly Capacity Payment" shall be equal (a) + (b) - (c), where:



(b) "b" is the amount owed by Buyer to Seller in consideration of the CAISO TB4 Energy Swap for the prior month, which amount shall equal the product of (i) the TB4 Swap Price, (ii) the time-weighted average Storage Contract Capacity for such month, and (iii) 1,000, rounded

to the nearest pen	ny (i.e., two de	cimal places);	

(c) "c" is the Monthly Energy Settlement Amount owed by Seller to Buyer for the prior month pursuant to Section 4.1.

3.12 Allocation of Other Payments and Costs.

- (a) Seller may retain any revenues it may receive from, and shall pay all costs charged by, the CAISO or any other third party with respect to any Unit for any products other than the Designated RA Capacity, including for (i) start-up, shut-down, and minimum load costs, (ii) capacity revenue for ancillary services, (iii) energy sales, (iv) any revenues for black start or reactive power services, or (v) the sale of the unit-contingent call rights on the storage capacity of the Unit to provide energy to a third party, so long as such rights do not confer on such third party the right to claim any portion of the RA Capacity sold hereunder in order to make an RAR Showing, LAR Showing, FCR Showing, or any similar capacity or resource adequacy showing with the CAISO or CPUC.
- (b) Buyer shall be entitled to receive and retain all revenues associated with the Designated RA Capacity of the Unit during the Delivery Term (including any capacity or availability revenues from RMR Contracts for any Unit, Reliability Compensation Services Tariff, and Residual Unit Commitment capacity payments, but excluding payments described in Section 3.12(a) above).
 - (c) In accordance with Section 3.11 of this Agreement:
- (i) all such Buyer revenues described in Section 3.12(b) received by Seller, or a Unit's Scheduling Coordinator, owner, or operator shall be remitted to Buyer, and Seller shall pay such revenues to Buyer if the Unit's Scheduling Coordinator, owner, or operator fails to remit those revenues to Buyer (and upon any such payment by Seller, Seller shall be subrogated to all rights of Buyer against such Unit's Scheduling Coordinator, owner, or operator for the amount of such revenues paid). If Seller fails to pay such revenues to Buyer, Buyer may offset any amounts owing to it for such revenues against any future amounts it may owe to Seller under this Agreement.
- (ii) all such Seller, or a Unit's Scheduling Coordinator, owner, or operator revenues described in Section 3.12(a), but received by Buyer shall be remitted to Seller, and Buyer shall pay such revenues to Seller if the Unit's Scheduling Coordinator, owner, or operator fails to remit those revenues to Seller (and upon any such payment by Buyer, Buyer shall be subrogated to all rights of Seller against such Unit's Scheduling Coordinator, owner, or operator for the amount of such revenues paid). If Buyer fails to pay such revenues to Seller, Seller may offset

any amounts owing to it for such revenues against any future amounts it may owe to Buyer under this Agreement.

- (d) If a centralized capacity market develops within the CAISO or WECC region, Buyer will have exclusive rights to offer, bid, or otherwise submit Designated RA Capacity provided to Buyer pursuant to this Agreement for re-sale in such market, and retain and receive any and all related revenues. Buyer shall be responsible for any material, incremental costs of offering, bidding, submitting, or re-selling Designated RA Capacity in such centralized capacity market.
- (e) Buyer acknowledges and agrees that all Availability Incentive Payments are for the benefit of Seller and for Seller's account, and that Seller shall receive, retain, or be entitled to receive all credits, payments, and revenues, if any, resulting from Seller achieving or exceeding Availability Standards. The Parties acknowledge and agree that any Non-Availability Charges are the responsibility of Seller, and for Seller's account and Seller shall be responsible for all fees, charges, or penalties, if any, resulting from Seller failing to achieve Availability Standards.

3.13 Force Majeure.

- Except as provided in Section 16.2(c), 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 Force Majeure. The Party rendered unable to fulfill any obligation by reason of a Force Majeure shall take reasonable actions necessary to remove such inability with due speed and diligence. Nothing herein shall be construed as permitting that Party to continue to fail to perform after said cause has been removed. The obligation to use due speed and diligence shall not be interpreted to require resolution of labor disputes by acceding to demands of the opposition when such course is inadvisable in the discretion of the Party having such difficulty. 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. Notwithstanding the foregoing, the occurrence and continuation of a Force Majeure Event shall not (a) suspend or excuse the obligation of Seller to achieve the Guaranteed Commercial Operation Date beyond the extensions provided in Section 16.2(c), or (b) limit Buyer's right to declare an Event of Default pursuant to Section 5.1(d) after all applicable extensions of the Guaranteed Commercial Operation Date and receive a Damage Payment upon exercise of Buyer's remedies pursuant to Section 5.2.
- Majeure event, the claiming Party shall provide the other Party with oral notice of the event of Force Majeure, and within two (2) weeks of the initial notice of a Force Majeure event, the claiming Party shall provide the other Party with notice in the form of a letter describing in detail the occurrence giving rise to the Force Majeure event, including the nature, cause, estimated date of commencement thereof, and the anticipated extent of any delay or interruption in performance. Failure to provide timely notice constitutes a waiver of the Force Majeure event as to all periods prior to the delivery of the notice. Upon written request from Buyer, Seller shall provide documentation demonstrating to Buyer's reasonable satisfaction that each day of the claimed delay was the result of a Force Majeure event and did not result from Seller's actions or failure to exercise due diligence or take reasonable actions. The claiming Party shall promptly notify the other Party

in writing of the cessation or termination of such Force Majeure, all as known or estimated in good faith by the affected Party. The suspension of performance due to a claim of Force Majeure must be of no greater scope and of no longer duration than is required by the Force Majeure event.



3.14 Storage Capacity Test.

- (a) Prior to the Commercial Operation Date, Seller shall complete a Storage Capacity Test in accordance with this Section 3.14 and Exhibit I. Thereafter, Seller may elect from time to time to run one or more retests of the Storage Capacity Test in accordance with this Section 3.14 and Exhibit I. If Buyer reasonably believes that the Storage Contract Capacity has varied materially from the results of the most recent Storage Capacity Test, Buyer may request a Storage Capacity Test upon five (5) Business Days' prior notice to Buyer. Buyer may request a Storage Capacity Test only once during any Contract Year.
- (b) Seller shall conduct a Storage Capacity Test by discharging the Primary Unit for four (4) consecutive hours and providing Buyer the CAISO meter data showing the total discharging energy delivered from the Primary Unit to the Point of Interconnection during such four (4) consecutive hour period. The total amount of discharging energy delivered from the Primary Unit to the Point of Interconnection during such four (4) consecutive hour period (up to, but not in excess of, eight hundred (800) MWh), shall be divided by four (4) hours to determine the Storage Contract Capacity, which shall be expressed in MW AC, and shall be the new Storage Contract Capacity in accordance with Section 3.14(c) below until updated pursuant to a subsequent Storage Capacity Test.
- (c) If the actual capacity determined pursuant to a Storage Capacity Test varies from the then current Storage Contract Capacity, then the actual capacity determined pursuant to such Storage Capacity Test shall become the new Storage Contract Capacity (not to exceed two hundred (200) MW) at the beginning of the day following the completion of the test for all purposes under this Agreement, including compensation under Section 3.11 and Section 4.1, until a revised Storage Contract Capacity is established pursuant to a subsequent Storage Capacity Test. For the avoidance of doubt, Seller shall have the right and option in its sole discretion to install storage capacity in excess of the initial Storage Contract Capacity of two hundred (200) MW; provided, for all purposes of this Agreement, the amount of Storage Contract Capacity shall never be deemed to exceed two hundred (200) MW.

ARTICLE 4: CAISO TB4 ENERGY SWAP

4.1 Monthly Energy Settlement Amount.

For each month in the Delivery Term, Seller will pay Buyer the Monthly Energy Settlement Amount for such month, where:

- (a) The "Monthly Energy Settlement Amount" shall equal the sum across each day in the applicable month of the following: the product of (i) the Storage Contract Capacity for such day, multiplied by (ii) the Daily Energy Settlement Rate for such day.
- (b) The "<u>Daily Energy Settlement Rate</u>" shall equal (i) the sum of the four (4) highest hourly LMPs at the Settlement Point in the Day-Ahead Market for such day, minus (ii) the sum of the four (4) lowest hourly LMPs at the Settlement Point in the Day-Ahead Market for such day;

ARTICLE 5: EVENTS OF DEFAULT; REMEDIES

5.1 Events of Default.

An "Event of Default" shall mean, with respect to a Party (a "Defaulting Party"), the occurrence of any of the following:

- (a) the failure to make, when due, any payment required pursuant to this Agreement if such failure is not remedied within ten (10) Business Days after written notice;
- (b) 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 Party does not fully mitigate the adverse consequences as reasonably determined by the other Party of such incorrect representation or warranty to the other Party within thirty (30) days after written notice thereof;
- (c) the failure to perform any material covenant or obligation set forth in this Agreement (except to the extent constituting a separate Event of Default, and except for Seller's obligations to deliver the Product, the exclusive remedy for which is provided in Section 3.8 and Section 3.9) if such failure is not remedied within thirty (30) Business Days after written notice;
- (d) the failure by Seller to achieve Commercial Operation on or before the Guaranteed Commercial Operation Date, as such date may be extended by Seller's payment of Commercial Operation Delay Damages or a Development Cure Period;
- (e) if at any time, Seller delivers or attempts to deliver Product to the Delivery Point for sale under this Agreement that was not generated by the Unit, except for Alternate Capacity;

- (f) Seller sells, assigns, or otherwise transfers, or commits to sell, assign, or otherwise transfer, the Product, or any portion thereof, from the Primary Unit for delivery during the Delivery Term to any party other than Buyer, a subsequent purchaser under Article 12, or CAISO, except as permitted under this Agreement or as otherwise required by Applicable Law;
 - (g) such Party becomes Bankrupt;
- (h) such Party assigns this Agreement or any of its rights hereunder other than in compliance with Section 17.3, if applicable;
- (i) the failure of such Party to satisfy the creditworthiness/collateral requirements agreed to pursuant to Article 14 hereof if such failure is not remedied within ten (10) Business Days after written notice, including the failure to replenish the Performance Security amount in accordance with this Agreement in the event Buyer draws against it for any reason other than to satisfy a Damage Payment or a Termination Payment;
- (j) 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 transfere 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; or
- (k) 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:
 - (i) the issuer of the outstanding Letter of Credit shall fail to maintain a Credit Rating of ;
 - (ii) the issuer of such Letter of Credit becomes Bankrupt;
 - (iii) 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;
 - (iv) the issuer of the outstanding Letter of Credit shall fail to honor a properly documented request to draw on such Letter of Credit;
 - (v) 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;
 - (vi) such Letter of Credit fails or ceases to be in full force and effect at any time; or

(vii) 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.

5.2 Declaration of an Early Termination Date and Calculation of Settlement Amounts.

If an Event of Default with respect to a Defaulting Party shall have occurred and be continuing, the other Party (the "Non-Defaulting Party") shall have the right to (i) designate a day, no earlier than the day such notice is effective and no later than twenty (20) days after such notice is effective, as an early termination date ("Early Termination Date") to accelerate all amounts owing between the Parties and to liquidate and terminate this Agreement (referred to herein as a "Terminated Transaction") between the Parties, (ii) withhold any payments due to the Defaulting Party under this Agreement; and (iii) suspend performance. If the Early Termination Date occurs before the Commercial Operation Date and Seller is the Defaulting Party, then the Damage Payment shall be owed to Buyer. If the Early Termination Date occurs before the Commercial Operation Date and Buyer is the Defaulting Party, then Seller shall calculate, in a commercially reasonable manner, a Settlement Amount for such Terminated Transaction as of the Early Termination Date (or, to the extent that in the reasonable opinion of the Non-Defaulting Party certain of such Terminated Transaction are commercially impracticable to liquidate and terminate or may not be liquidated and terminated under Applicable Law on the Early Termination Date, as soon thereafter as is reasonably practicable). If the Early Termination Date occurs after the Commercial Operation Date, then as soon as reasonably practicable, the Non-Defaulting Party shall calculate, in a commercially reasonable manner, a Settlement Amount for such Terminated Transaction as of the Early Termination Date (or, to the extent that in the reasonable opinion of the Non-Defaulting Party certain of such Terminated Transaction are commercially impracticable to liquidate and terminate or may not be liquidated and terminated under Applicable Law on the Early Termination Date, as soon thereafter as is reasonably practicable). The Gains and Losses for a Terminated Transaction shall be determined by calculating the amount that would be incurred or realized to replace or to provide the economic equivalent of the remaining payments or deliveries in respect of the Terminated Transaction. The Non-Defaulting Party (or its agent) may determine its Gains and Losses by reference to information either available to it internally or supplied by one or more third parties 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. Third parties supplying such information may include, without limitation, dealers in the relevant markets, end-users of the relevant product, information vendors and other sources of market information. If the 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).

5.3 Net Out of Settlement Amounts.

The Non-Defaulting Party shall net out (a) any Settlement Amount that is due to the Non-Defaulting Party, plus (b) any or all other amounts due to the Non-Defaulting Party under this Agreement against (c) all amounts due to the Defaulting Party under this Agreement, so that all such amounts shall be netted out to a single liquidated amount (the "Termination Payment") payable by one Party to the other. The Termination Payment shall be due to or from the Non-Defaulting Party as appropriate. 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 (i) the actual damages that the Non-Defaulting Party would incur in connection with a Terminated Transaction would be difficult or impossible to predict with certainty, (ii) the Termination Payment described in this Section 5.3 is a reasonable and appropriate approximation of such damages, and (iii) the Termination Payment described in this Section 5.3 is the exclusive remedy of the Non-Defaulting Party in connection with a 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.

5.4 Notice of Payment of Termination Payment.

As soon as practicable after a liquidation, notice shall be given by the Non-Defaulting Party to the Defaulting Party of the amount of the Termination Payment and whether the Termination Payment is due to or due from the Non-Defaulting Party. The notice shall include a written statement explaining in reasonable detail the calculation of such amount. The Termination Payment shall be made by the Party that owes it within ten (10) days after such notice is effective.

5.5 Disputes with Respect to Termination Payment.

If the Defaulting Party disputes the Non-Defaulting Party's calculation of the Termination Payment, in whole or in part, the Defaulting Party shall, within ten (10) days of receipt of Non-Defaulting Party's calculation of the Termination Payment, provide to the Non-Defaulting Party a detailed written explanation of the basis for such dispute; *provided*, *however*, that if the Termination Payment is due from the Defaulting Party, the Defaulting Party shall first transfer Performance Security to the Non-Defaulting Party in an amount equal to the Termination Payment.

5.6 Closeout Setoffs.

After calculation of a Termination Payment in accordance with Section 5.3, if the Defaulting Party would be owed the Termination Payment, the Non-Defaulting Party shall be entitled, at its option and in its discretion, to the extent this Agreement is not yet liquidated in accordance with Section 5.2, to withhold payment of the Termination Payment to the Defaulting Party. The remedy provided for in this Section 5.6 shall be without prejudice and in addition to any right of setoff, combination of accounts, lien or other right to which any Party is at any time otherwise entitled (whether by operation of law, contract or otherwise).

ARTICLE 6: PAYMENT AND NETTING

6.1 Billing Period.

The calendar month shall be the standard period for all payments under this Agreement (other than Termination Payments). Seller shall use commercially reasonable efforts to deliver an invoice to Buyer for the Monthly Capacity Payment within ten (10) days after the end of the prior monthly delivery period. Each invoice shall include CAISO metering and transaction data sufficient to document and verify any Storage Capacity Test pursuant to Section 3.14 during the preceding month, all Outages and Forced Outages, and the amount of Replacement RA delivered to Buyer (if any) and (ii) Seller's records of metered data, including data showing a calculation of the

Monthly Capacity Payment and other relevant data for the prior month; and (b) be in a format reasonably specified by Buyer, covering the Product provided in the preceding month determined in accordance with the applicable provisions of this Agreement. Each Party will render to the other Party an invoice for the payment obligations, if any, incurred hereunder during the preceding month.

6.2 Timeliness of Payment.

All undisputed amounts shall be due and payable in accordance with each Party's invoice instructions by the thirtieth (30th) day after receipt of the invoice or, if such day is not a Business Day, then on the next Business Day. Each Party will make payments by electronic funds transfer, or by other mutually agreeable method(s), to the account designated by the other Party. Any amounts not paid by the due date will be deemed delinquent and will accrue interest at the Interest Rate, such interest to be calculated from and including the due date to but excluding the date the delinquent amount is paid in full.

6.3 Disputes and Adjustments of Invoices.

A Party may, in good faith, dispute the correctness of any invoice or any adjustment to an invoice, rendered under this Agreement or adjust any invoice for any arithmetic or computational error within twelve (12) months of the date the invoice, or adjustment to an invoice, was rendered. In the event an invoice or portion thereof, or any other claim or adjustment arising hereunder, is disputed, payment of the undisputed portion of the invoice shall be required to be made when due, with notice of the objection given to the other Party. Any invoice dispute or invoice adjustment shall be in writing and shall state the basis for the dispute or adjustment. Payment of the disputed amount shall not be required until the dispute is resolved. Upon resolution of the dispute, any required payment shall be made within five (5) Business Days of such resolution along with interest accrued at the Interest Rate from and including the due date to but excluding the date paid. Inadvertent overpayments shall be returned upon request or deducted by the Party receiving such overpayment from subsequent payments, with interest accrued at the Interest Rate from and including the date of such overpayment to but excluding the date repaid or deducted by the Party receiving such overpayment. Any dispute with respect to an invoice is waived unless the other Party is notified in accordance with this Section 6.3 within twelve (12) months after the invoice is rendered or any specific adjustment to the invoice is made. If an invoice is not rendered within twelve (12) months after the close of the month during which performance occurred, the right to payment for such performance is waived.

6.4 Netting of Payments.

The Parties hereby agree that they shall discharge mutual debts and payment obligations due and owing to each other under this Agreement 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, including any related damages calculated pursuant to Sections 3.9, 3.10 or 16.2(c), 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.

6.5 Payment Obligation Absent Netting.

If no mutual debts or payment obligations exist and only one Party owes a debt or obligation to the other during the monthly billing period, including, but not limited to, any related damage amounts calculated pursuant to Sections 3.9 or 3.10, interest, and payments or credits, that Party shall pay such sum in full when due.

6.6 Security.

Unless the Party benefiting from the Performance Security notifies the other Party in writing, and except in connection with a liquidation and termination in accordance with Article 5, all amounts netted pursuant to this Article 6 shall not take into account or include any Performance Security which may be in effect to secure a Party's performance under this Agreement.

6.7 Records.

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 Applicable Law. Upon fifteen (15) 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 Ten Thousand Dollars (\$10,000).

ARTICLE 7: LIMITATIONS

7.1 No Consequential Damages.

EXCEPT TO THE EXTENT (A) PART OF AN EXPRESS REMEDY OR MEASURE OF DAMAGES HEREIN, (B) PART OF A THIRD PARTY INDEMNITY CLAIM UNDER ARTICLE 16, (C) INCLUDED IN A LIQUIDATED DAMAGES CALCULATION, OR (D) RESULTING FROM A PARTY'S 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.

7.2 Limitation of Remedies, Liability and 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 TAX CREDITS, IF ANY, SHALL BE DEEMED TO BE DIRECT DAMAGES. TO THE EXTENT ANY DAMAGES REQUIRED TO BE PAID HEREUNDER ARE LIQUIDATED, INCLUDING UNDER SECTIONS 3.9, 3.10, 5.2,16.2(b) AND 16.2(e), 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 8: GOVERNMENTAL CHARGES

8.1 Cooperation.

Each Party shall use reasonable efforts to implement the provisions of and to administer this Agreement in accordance with the intent of the Parties to minimize all taxes, so long as neither Party is materially adversely affected by such efforts.

8.2 Governmental Charges.

Seller shall pay or cause to be paid all taxes imposed by any government authority ("<u>Governmental Charges</u>") on or with respect to the Product or a transaction arising prior to the Delivery Point. Buyer shall pay or cause to be paid all Governmental Charges on or with respect to the Product or

a transaction at and from the Delivery Point (other than ad valorem, franchise or income taxes which are related to the sale of the Product and are, therefore, the responsibility of the Seller). In the event Seller is required by law or regulation to remit or pay Governmental Charges which are Buyer's responsibility hereunder, Buyer shall promptly reimburse Seller for such Governmental Charges. If Buyer is required by law or regulation to remit or pay Governmental Charges which are Seller's responsibility hereunder, Buyer may deduct the amount of any such Governmental Charges from the sums due to Seller under Article 6 of this Agreement. Nothing shall obligate or cause a Party to pay or be liable to pay any Governmental Charges for which it is exempt under the law.

ARTICLE 9: RESERVED

ARTICLE 10: REPRESENTATIONS; WARRANTIES; COVENANTS

10.1 Mutual Representations and Warranties

On the Effective Date, each Party represents and warrants to the other Party that:

- (a) it is 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;
- (b) it has all regulatory authorizations necessary for it to legally perform its obligations under this Agreement, except all permits necessary to construct, operate and maintain the Primary Unit and sell the Product therefrom in the case of Seller;
- (c) the execution, delivery and performance of this Agreement are within its powers, have been duly authorized by all necessary action and do not violate any of the terms and conditions in its governing documents, any contracts to which it is a party or any Applicable Law applicable to it;
- (d) this Agreement and each other document executed and delivered in accordance with this Agreement constitutes its legally valid and binding obligation enforceable against it in accordance with its terms; subject to any Equitable Defenses.
- (e) it is not Bankrupt and there are no proceedings pending or being contemplated by it or, to its knowledge, threatened against it which would result in it being or becoming Bankrupt;
- (f) there is not pending or, to its knowledge, threatened against it or any of its Affiliates any legal proceedings that could materially adversely affect its ability to perform its obligations under this Agreement;
- (g) it is a "forward contract merchant" within the meaning of the United States Bankruptcy Code; and
- (h) it has entered into this Agreement in connection with the conduct of its business and it has the capacity or ability to make or take delivery of Product.

10.2 Buyer and Seller Covenants.

- (a) Buyer and Seller shall, throughout the Delivery Term, take all commercially reasonable actions and execute any and all documents or instruments reasonably necessary to ensure Buyer's right to the use of the Contract Quantity for the sole benefit of Buyer or any subsequent purchaser under Article 12, and that Buyer may use the Contract Quantity for the purpose of meeting its Compliance Obligations. Such commercially reasonable actions shall include, without limitation:
 - (i) Cooperating with and providing, and in the case of Seller causing the Unit's Scheduling Coordinator, owner, or operator to cooperate with and provide requested supporting documentation to the CAISO, the CPUC, or any other Governmental Body responsible for administering the applicable Compliance Obligations, including, to the extent applicable, (1) to demonstrate that the Expected Contract Quantity can be delivered to the CAISO controlled grid for the minimum hours required to satisfy RAR pursuant to the "deliverability" standards established by the CAISO or other Governmental Body of competent jurisdiction, and (2) provision of a Supply Plan to the CAISO by Seller or its Scheduling Coordinator and sufficient information to allow for the submission of a complete Resource Adequacy Plan by Buyer's Scheduling Coordinator; and
 - (ii) Negotiating in good faith to make necessary amendments, if any, to this Agreement to conform it to subsequent clarifications, revisions, or decisions rendered by the CAISO, CPUC, FERC, or other Governmental Body having jurisdiction to administer RAR, LAR, or FCR so as to maintain the benefits of the bargain struck by the Parties on the Effective Date; *provided*, *however*, that such commercially reasonable actions shall not include any obligation that the owner or operator of the Unit undertake capital improvements, Unit enhancements, or the construction of new facilities nor in any way limit the Parties with respect to advocacy for any regulatory policies or market changes before any entity.

10.3 Additional Seller Representations, Warranties and Covenants.

Seller represents, warrants and covenants to Buyer that:

- (a) Throughout the Delivery Term, the Unit qualifies as a Resource Adequacy Resource that is eligible to provide the Product pursuant to the Tariff and the Resource Adequacy Rulings;
- (b) Throughout the Delivery Term, Seller owns or has the exclusive right to the RA Capacity sold under this Agreement;
- (c) Throughout the Delivery Term, no portion of the Contract Quantity has been committed by Seller to any third party in order to satisfy Compliance Obligations or analogous obligations in CAISO markets or non-CAISO markets;
- (d) The aggregation of all amounts of Product that Seller has sold, assigned, or transferred for the Shown Unit for each Showing Month during the Delivery Term does not exceed such Shown Unit's Net Qualifying Capacity and, if applicable, the Shown Unit's Effective Flexible

Capacity, for that Shown Unit for such Showing Month;

- (e) Throughout the Delivery Term, with respect to the RA Capacity provided under this Agreement, Seller shall, and the Unit's Scheduling Coordinator is obligated to, comply with Applicable Laws, including the Tariff, relating to the Compliance Obligations applicable to the Product;
- (f) Seller has notified the Scheduling Coordinator of the Unit that, throughout the Delivery Term, Seller has transferred the Designated RA Capacity to Buyer, and that the Scheduling Coordinator is obligated to deliver the Supply Plans in accordance with this Agreement and the Tariff;
- (g) Seller has notified the Scheduling Coordinator of the Unit that Seller is obligated, throughout the Delivery Term, to cause the Unit's Scheduling Coordinator to provide to Buyer, before the Notification Deadline, the Designated RA Capacity of the Unit that is to be submitted in the Supply Plan associated with this Agreement for the applicable period; and
- (h) Seller has notified the Unit's Scheduling Coordinator that, throughout the Delivery Term, Buyer is entitled to the revenues set forth in Section 3.12(b) of this Agreement and that such Scheduling Coordinator is obligated to promptly deliver those revenues to Buyer, along with appropriate documentation supporting the amount of those revenues.
- **10.4 Prevailing Wage**. Seller shall use commercially 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 Primary Unit are paid wages at rates not less than those prevailing for workers performing similar work in the locality as provided by applicable Laws, if any. Nothing herein shall require Seller, its contractors and subcontractors to comply with, or assume liability created by other inapplicable provisions of any applicable labor Laws. Buyer agrees that Seller's obligations under this Section 13.4 will be satisfied upon the execution of a project labor agreement related to construction of the Primary Unit.
- 10.5 Workforce Development. Seller acknowledges that Buyer will, from time to time, request voluntary disclosure of Seller's certification status with the CPUC Supplier Clearinghouse, and voluntary disclosure regarding Seller's efforts to work with diverse business enterprises, including women, minority, disabled veteran, and lesbian, gay, bisexual, transgender and/or persons with disabilities business enterprises in a form similar to Exhibit H.
- 10.6 Community Benefits. Seller pledges to deliver two hundred thousand dollars (\$200,000.00) to Buyer so that Buyer may direct such amount to community benefits initiatives that directly benefit stakeholders in Buyer's service area. Buyer shall have sole discretion to determine which initiatives will be funded and will provide Seller notice describing the initiatives Buyer intends to fund. Seller shall make this payment within sixty (60) days of the Commercial Operation Date upon Seller's review of the scope of the initiatives to be funded by Buyer. Upon Seller's request, Buyer's personnel responsible for allocating funding to community benefits initiatives will meet with Seller to discuss the initiatives to be funded by Buyer. Notwithstanding anything to the contrary in this Section 10.6, Buyer will not make any public statement about the Primary Unit, this Agreement, Seller, or Seller's Affiliates in connection with any community benefits initiatives funded with Seller's community benefits funds paid through this Section 10.6

without the prior written consent of Seller.

10.7 Additional Buyer Representations, Warranties, and Covenants. 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 located within a venue permitted under Applicable 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.).

ARTICLE 11: CONFIDENTIALITY

- 11.1 Definition of Confidential Information. The following constitutes "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, 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; (iv) information that the recipient independently developed without a violation of this Agreement; and (v) information that is determined by Buyer to be subject to the California Public Records Act.
- 11.2 Duty to Maintain Confidentiality. Neither Party shall disclose Confidential Information to a third party (other than the Party's or its Affiliates' employees, actual or potential provider of debt, equity or tax equity financing or refinancing for or in connection with the development, construction, purchase, installation or operation of the Primary Unit, contractors, insurers, lenders or potential lenders, investors or potential investors, counsel, accountants or advisors who have a need to know such information and have agreed to keep such terms confidential) except in order to comply with any applicable law, regulation, or any exchange, control area or independent system operator rule or in connection with any court or regulatory proceeding; provided, however, each Party shall, to the extent practicable, use reasonable efforts to prevent or limit the disclosure. The Parties shall be entitled to all remedies available at law or in equity to enforce, or seek relief in connection with, this confidentiality obligation.
- (a) Notwithstanding the foregoing, the Parties agree that Buyer may disclose the information pertaining to this Agreement to any Governmental Body, the CPUC, the CAISO or any LRA having jurisdiction in order to support its Compliance Showings or other regulatory compliance filings and Seller may disclose the transfer of the Designated RA Capacity under this Agreement to the Scheduling Coordinator of the Unit in order for such Scheduling Coordinator to

timely submit accurate Supply Plans; *provided*, each disclosing Party shall use reasonable efforts to limit, to the extent possible, the ability of any such applicable Governmental Body, CAISO, or Scheduling Coordinator to further disclose such information. In addition, in the event Buyer resells all or any portion of the Designated RA Capacity to another party, Buyer shall be permitted to disclose to the other party to such resale transaction all such information to the extent such disclosure is necessary to affect such resale transaction; *provided*, such other party agrees to keep such information confidential.

- (b) The Parties acknowledge and agree that the Agreement and any transactions entered into in connection herewith are subject to the requirements of the California Public Records Act (California Government Code Section 7920.000 et seq.). In order to designate information as confidential, the Disclosing Party must clearly stamp and identify the specific portion of the material designated with the word "Confidential." The Parties agree not to over-designate material as Confidential Information. Over-designation includes stamping whole agreements, entire pages or series of pages as "Confidential" that clearly contain information that is not Confidential Information.
- Upon request or demand of any third person or entity not a Party hereto to Buyer pursuant to the California Public Records Act for production, inspection and/or copying of Confidential Information ("Requested Confidential Information"), Buyer shall as soon as practical notify Seller in writing via email that such request has been made. Seller shall be solely responsible for taking at its sole expense whatever legal steps are necessary to prevent release of the Requested Confidential Information to the third party by Buyer. If Seller takes no such action after receiving the foregoing notice from Buyer, Buyer shall, at its discretion, be permitted to comply with the third party's request or demand and is not required to defend against it. If Seller does take or attempt to take such action, Buyer shall provide timely and reasonable cooperation to Seller, if requested by Seller, and Seller agrees to indemnify and hold harmless Buyer from any claims, liability, award of attorneys' fees, or damages, and to defend any action, claim or lawsuit brought against Buyer for Buyer's refusal to disclose any Requested Confidential Information.

ARTICLE 12: BUYER'S RE-SALE OF PRODUCT

No less than prior to the Notification Deadline for any Showing Month of the Delivery Term, Buyer may provide written notice to Seller of Buyer's intent to re-sell all or a portion of the Product and any associated rights, in each case, acquired under this Agreement. If Buyer re-sells all or a portion of the Product and any associated rights acquired under this Agreement in accordance with this Article 12 ("Resold Product"), Seller agrees, and agrees to cause the Unit's Scheduling Coordinator, to follow Buyer's reasonable instructions with respect to providing such Resold Product to subsequent purchasers of such Resold Product to the extent such instructions are consistent with Seller's obligations under this Agreement. Seller further agrees, and agrees to cause the Unit's Scheduling Coordinator, to take all commercially reasonable actions and execute any and all documents or instruments reasonably necessary to allow such subsequent purchasers to use such Resold Product in a manner consistent with Buyer's rights under this Agreement. If Buyer incurs any liability to any purchaser of such Resold Product directly due to the failure of Seller or the Unit's Scheduling Coordinator to comply with the terms of this Agreement, then Seller shall be liable to Buyer for any liabilities Seller would have incurred under

this Agreement if Buyer had not resold the Product, including without limitation, pursuant to Sections 3.8 and 3.9.

In the event there is any Resold Product, Buyer agrees to notify Seller that such a sale has occurred and agrees to provide Seller with the information specified below promptly following such sale (and any other information reasonably requested by Seller so that Seller may perform its obligations in this Article 12) and promptly notify Seller of any subsequent changes to such information with respect to any particular sale: (i) benefitting load serving entity SC identification number (SCID), (ii) volume (in MW) of Resold Product, and (iii) subsequent sale delivery period for Resold Product.

ARTICLE 13: CHANGE IN LAW

- 13.1 Change in Law. The Parties acknowledge that an essential purpose of this Agreement is to provide Product that complies with the Resource Adequacy Rulings. The Parties acknowledge that Governmental Authorities, including the CPUC and CAISO, may undertake actions to implement changes in Law. Seller agrees, subject to the provisions of this Article 13 to use commercially reasonable efforts to cooperate with respect to any future changes to this Agreement needed to satisfy requirements of Governmental Authorities associated with changes in Law to maximize benefits to Buyer, including: (i) the modification of the description of the Product as may be required, including updating the Agreement to reflect any mandatory contractual language required by Governmental Authorities; or (ii) submission of any reports, data, or other information required by Governmental Authorities; provided, Seller shall have no obligation to modify this Agreement, or take other actions not required under this Agreement, if such modifications or actions would materially adversely affect, or could reasonably be expected to have or result in a material adverse effect on, any of Seller's rights, benefits, risks and/or obligations under this Agreement.
- 13.2 Compliance Expenditure Cap. If a change in Laws occurring after the Effective Date has increased Seller's known or reasonably expected costs to obtain, maintain, convey or effectuate Buyer's use of any Product in accordance with this Agreement (any action required to be taken by Seller to comply with such change in Law, a "Compliance Action"), then the Parties agree that the maximum aggregate amount of in costs and expenses Seller shall be required to bear during the term of this Agreement to comply with all of such obligations shall be capped (the "Compliance Expenditure Cap").
- (a) If Seller reasonably anticipates the need to incur out-of-pocket expenses in excess of the Compliance Expenditure Cap in order to take any Compliance Action, Seller shall provide Notice to Buyer of such anticipated out-of-pocket expenses.
- (b) Buyer will have 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 of the costs that exceed the Compliance Expenditure Cap (such Buyer-agreed upon costs (including lost production, if any), the "Accepted Compliance Costs"), or (2) waive Seller's obligation to take such Compliance Actions, or any part thereof for which Buyer has not agreed to reimburse Seller.

- (c) If Buyer agrees to reimburse Seller for 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 Seller's actual costs to effect the Compliance Actions, not to exceed the Accepted Compliance Costs, within sixty (60) days from the time that Buyer receives an invoice and documentation of such costs from Seller.
- (d) Any change in the economic value of any Product provided by Seller to Buyer resulting from any change in Law shall not affect the Contract Price or Buyer's obligation to make payments required hereunder.

ARTICLE 14: COLLATERAL REQUIREMENTS

14.1 [Reserved]

14.2 Performance Security.

Seller shall deliver Performance Security to Buyer within thirty (30) days after the Effective Date. Seller shall maintain the Performance Security in full force and effect, and shall, within ten (10) Business Days after any draws made by Buyer in accordance with this Agreement, replenish the Performance Security, until the following have occurred: (a) the Delivery Term has expired or terminated early; and (b) all payment obligations of Seller then due and payable under this Agreement, including compensation for penalties, termination damages, indemnification payments orother 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 end of the Delivery Term, or (iii) fails to honor Buyer's properly documented request todraw 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.

14.3 First Priority Security Interest in Cash or Cash Equivalent Collateral.

- (a) 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 the Performance Security, any other cash collateral and cash equivalent collateral posted under this Agreement, 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.
- (b) Upon or any time after the occurrence 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 Performance Security, Buyer may do any one or more of the following (in each case subject to the final sentence of this Section 14.3):

- (i) Exercise any of its rights and remedies with respect to the Performance Security including any such rights and remedies under Applicable Law then in effect;
- (ii) Draw on any outstanding Letter of Credit issued for its benefit and retain any cash held by Buyer as Performance Security; and
- (iii) Liquidate the Performance Security 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.

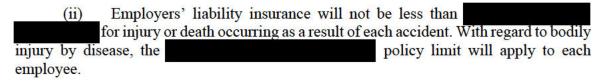
ARTICLE 15: INSURANCE

15.1 Insurance.

Prior to the start of construction of the Primary Unit and thereafter throughout the remainder of the Term, Seller shall procure and maintain the following insurance coverage and require and cause its contractors to maintain the same levels of coverage. For the avoidance of doubt, the obligations of Seller in this Section 15.1 constitute a material obligation of this Agreement.

(a) Workers' Compensation and Employers' Liability.

(i) If it has employees, workers' compensation insurance indicating compliance with any applicable labor codes, acts, Applicable Laws or statutes, California state or federal, where Seller performs Work.



(b) Commercial General Liability.

(i) Commercial general liability insurance, including products and completed operations and personal injury insurance, in a minimum amount of per occurrence, and an annual aggregate of not less endorsed to provide contractual liability in said amount (subject to policy terms and conditions), specifically covering Seller's insurable indemnity obligations under this Agreement and including Buyer as an additional insured but only to the extent of

Seller's insurable indemnity obligations under this Agreement. Limits may be satisfied through a combination of primary and excess policies.

(ii) An umbrella insurance policy in a minimum limit of liability of

(iii) Defense costs shall be provided as an additional benefit and not included within the limits of liability. Such insurance shall contain standard cross-liability and severability of interest provisions.

(c) <u>Business Auto.</u>

- (i) Business auto insurance for bodily injury and property damage with limits of per occurrence.
- (ii) 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.

(d) <u>Construction All-Risk Insurance.</u>

(i) During the construction of the Primary Unit prior to the Commercial Operation Date, construction all-risk form property insurance covering the Primary Unit during such construction periods, and naming Seller (and/or Lender if any) as the loss payee.

(e) <u>Contractor's Pollution Liability.</u>

- (i) If the scope of Work involves areas of known pollutants or contaminants, Seller shall maintain or require to be maintained, pollution liability coverage for bodily injury, property damage, including clean-up costs and defense costs resulting from sudden, and accidental conditions, including the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, hydrocarbons, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water shall be maintained,
- (ii) The limit will be at least each occurrence for bodily injury and property damage.
- (iii) The policy will endorse Buyer as additional insured but only to the extent of Seller's insurable indemnity obligations under this Agreement.

15.2 Evidence of Insurance.

Prior to the start of construction of the Primary Unit and upon annual renewal thereafter, Seller shall deliver to Buyer certificates of insurance evidencing the coverage required under this Agreement. These certificates shall specify that Buyer shall be given at least thirty (30) days prior

notice by Seller in the event of any cancellation or termination of coverage, except ten (10) days for nonpayment of premium. With the exception of Workers Compensation/Employers Liability, such insurance shall be primary coverage without right of contribution from any insurance of Buyer.

ARTICLE 16: PRIMARY UNIT CONSTRUCTION AND COMMERCIAL OPERATION

16.1 Construction of the Primary Unit.

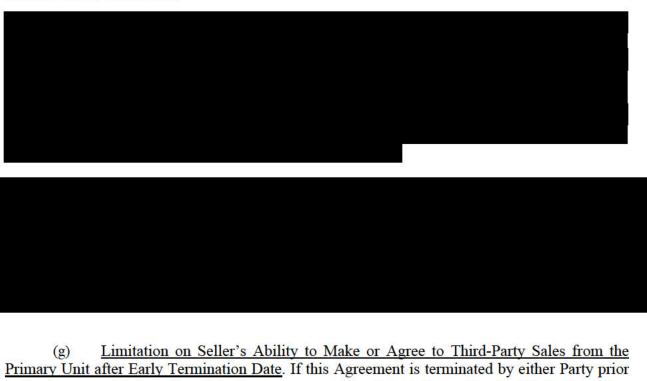
- (a) <u>Construction Start</u>. "<u>Construction Start</u>" will occur upon satisfaction of the following: Seller has executed an engineering, procurement, and construction contract (or equivalent agreements) and issued thereunder a notice to proceed or its equivalent that authorizes the contractor to mobilize to the Site and begin physical construction of the Primary Unit 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 Exhibit B hereto, and the date certified therein shall be the "Construction Start Date."
- Progress Reports. Within fifteen (15) days after the close of (i) each calendar (b) 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 agree to 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 Exhibit F. 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. Seller shall also provide Buyer with any information in Seller's possession that is reasonably requested by Buyer for Buyer to demonstrate to the CPUC, CAISO, or other Governmental Bodies that Buyer has met its applicable resource adequacy requirements, including providing status reports to the CPUC with respect to the Primary Unit. Subject to the provisions of Section 16.2, so long as Seller complies with its obligations under this Section 16.1(b), Seller shall not be considered in default of its obligations under this Agreement solely as a result of missing any Milestone.

16.2 Commercial Operation.

- (a) <u>Commercial Operation</u>. "<u>Commercial Operation</u>" means the condition existing when Seller has fulfilled all of the conditions precedent in Section 2.2 of this Agreement and provided notice to Buyer substantially in the form of Exhibit C. Seller shall cause Commercial Operation for the Primary Unit to occur by the Guaranteed Commercial Operation Date, as such date may be extended pursuant to Section 16.2(b) and Section 16.2(c), subject to the limitations in Section 16.2(d).
- (b) <u>Commercial Operation Delay Damages</u>. Seller may extend the Guaranteed Commercial Operation Date by paying Commercial Operation Delay Damages in advance to Buyer for each day Seller desires to extend the Guaranteed Commercial Operation Date, not to exceed a total of of extensions by such payment of Commercial Operation Delay Damages. On or before the date that is ten (10) days prior to the then-current

Guaranteed Commercial Operation Date, Seller shall provide notice and payment to Buyer of the Commercial Operation Delay Damages for the number of days of extension to the Guaranteed Commercial Operation Date. If Seller achieves Commercial Operation prior to the Guaranteed Commercial Operation Date as extended by the payment of Commercial Operation Delay Damages, Buyer shall refund to Seller the Commercial Operation Delay Damages for each day Seller achieves Commercial Operation prior to the Guaranteed Commercial Operation Date times the Commercial Operation Delay Damages, not to exceed the total amount of Commercial Operation Delay Damages paid by Seller pursuant to this Section 16.2(b).

- Commercial Operation Date shall, subject to notice and documentation requirements set forth in Section 16.2(d), be automatically extended on a day-for-day basis (the "Development Cure Period") for the duration of any and all delays arising out of the following circumstances to the extent the following circumstances are not the result of Seller's failure to take all commercially reasonable actions to meet its requirements and deadlines: (a) a Force Majeure event occurs, or (b) the upgrades identified in the Interconnection Agreement for the Primary Unit are not complete and ready for such Primary Unit to connect and sell Product by the date that is three (3) months prior to the Guaranteed Commercial Operation Date, despite the exercise of diligent and commercially reasonable efforts by Seller. Notwithstanding anything in this Agreement to the contrary, the cumulative extensions granted under the Development Cure Period shall not exceed . Upon request from Buyer, Seller shall provide documentation reasonably demonstrating that the delays described above did not result from Seller's actions or failure to take commercially reasonable actions.
- (d) <u>Maximum Milestone Extensions</u>. Notwithstanding anything in this Agreement to the contrary, the cumulative extensions granted under the Development Cure Period shall not exceed including due to an event of Force Majeure, and the cumulative extensions granted to the Guaranteed Commercial Operation Date by the payment of Commercial Operation Delay Damages and any Development Cure Period(s) shall not exceed. No extension shall be given if the delay was the result of Seller's failure to take all commercially reasonable actions to meet its requirements and deadlines (other than in the case of the extension set forth in Section 16.2(c)). 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 failure to take such commercially reasonable actions.
- (e) <u>Termination for Failure to Achieve Guaranteed Commercial Operation Date</u>. If the Primary Unit has not achieved Commercial Operation on or before the Guaranteed Commercial Operation Date, as such date may be extended by Seller's payment of Commercial Operation Delay Damages pursuant to Section 16.2(b) and/or a Development Cure Period pursuant to pursuant to Section 16.1(c), then Buyer may terminate this Agreement pursuant to Section 5.1(d). If Buyer terminates this Agreement under Section 5.1(d), Buyer has the right to collect as liquidated damages an amount equal to the full Performance Security that is required to be posted by Seller pursuant to this Agreement; *provided*, payment of such amount shall constitute liquidated damages and Buyer's sole and exclusive remedy for such termination.



(g) <u>Limitation on Seller's Ability to Make or Agree to Third-Party Sales from the Primary Unit after Early Termination Date</u>. If this Agreement is terminated by either Party prior to the Commercial Operation Date for any reason other than a Buyer Event of Default, neither Seller nor Seller's Affiliates may sell, market or deliver any Product associated with or attributable to the Primary Unit to a party other than Buyer for a period of two (2) years following such termination, 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 on terms and conditions materially similar to the terms and conditions contained in this Agreement

(i) Buyer

fails to accept such offer within forty-five (45) days of Buyer's receipt thereof or (ii) Buyer and Seller fail to execute a definitive agreement within after Buyer's acceptance of such offer despite both Parties negotiating in good faith or due to either Party's failure to negotiate in good faith.

Neither Seller nor Seller's Affiliates may sell or transfer the Primary Unit, or any part thereof, or land rights or interests in the Site (including Seller's interest in the interconnection queue position of the Primary Unit) so long as the limitations contained in this Section 16.2(g) apply, unless the transferee agrees to be bound by the terms set forth in this Section 16.2(g) pursuant to a written agreement approved by Buyer in its reasonable discretion. Seller shall indemnify and hold Buyer harmless from all benefits lost and other damages sustained by Buyer as a result of any breach by Seller of its covenants contained within this Section 16.2(g).

ARTICLE 17: MISCELLANEOUS

17.1 Title and Risk of Loss.

Title to and risk of loss related to the Product shall transfer from Seller to Buyer at the Delivery Point. Seller warrants that it will deliver to Buyer the Designated RA Capacity free and clear of all liens, security interests, claims and encumbrances or any interest therein or thereto by any person arising prior to the Delivery Point.

17.2 Indemnity.

- (a) <u>Indemnity by Seller</u>. Seller shall release, indemnify and hold harmless Buyer or Buyer's respective directors, officers, agents, and representatives against and from any and all loss, Claims, actions or suits associated with third party claims, including costs and attorney's fees resulting from, or arising out of or in any way connected with Seller's construction, operation and/or maintenance of the Primary Unit, including without limitation any Environmental Costs and any loss, Claim, action or suit, for or on account of injury to, bodily or otherwise, or death of persons, or for damage to or destruction of property belonging to Buyer, Seller, or others, excepting only such loss, Claim, action or suit as may be caused solely by the willful misconduct or gross negligence of Buyer, its Affiliates, or Buyer's and Affiliates' respective agents, employees, directors, or officers.
- (b) <u>Indemnity by Buyer</u>. Buyer shall release, indemnify and hold harmless Seller, its directors, officers, agents, and representatives against and from any and all loss, Claims, actions or suits, including costs and attorney's fees resulting from, or arising out of or in any way connected with Buyer's access to the Primary Unit site, including any loss, Claim, action or suit, for or on account of injury to, bodily or otherwise, or death of persons, or for damage to or destruction of property belonging to Buyer, Seller, or others, excepting only such loss, Claim, action or suit as may be caused solely by the willful misconduct or gross negligence of Seller, its Affiliates, or Seller's and Affiliates' respective agents, employees, directors or officers.
- (c) <u>No Dedication</u>. Without limitation of each Party's obligations under Sections 17.2(a) and 17.2(b) herein, nothing in this Agreement shall be construed to create any duty to, any standard of care with reference to, or any liability to any person or entity not a Party to this Agreement. No undertaking by one Party to the other under any provision of this Agreement shall constitute the dedication of that Party's system or any portion thereof to the other Party or the public, nor affect the status of Buyer as an independent public utility corporation or Seller as an independent individual or entity.

17.3 Assignment.

Neither Party shall assign this Agreement or its rights hereunder without the prior written consent of the other Party, which consent shall not be unreasonably withheld, conditioned, or delayed; provided, however, Seller may, without the consent of Buyer (and without relieving itself from liability hereunder), (i) transfer, sell, pledge, encumber or assign this Agreement or the accounts, revenues or proceeds hereof in connection with any financing or other financial arrangements, (ii) transfer or assign this Agreement to an affiliate of such Party which affiliate's creditworthiness is

equal to or higher than that of such Party, or (iii) transfer or assign this Agreement to any Permitted Transferee; *provided*, *however*, that in the case of any such assignment pursuant to clause (ii) or clause (iii), any such assignee shall agree in writing to be bound by the terms and conditions hereof and so long as the transferring Party delivers such tax and enforceability assurance as the non-transferring Party may reasonably request. In connection with any financing or refinancing of the Primary Unit, Buyer shall in good faith negotiate and agree upon a consent to collateral assignment of this Agreement in a form that is commercially reasonable and customary in the industry.

17.4 Governing Law and Venue.

This Agreement and the rights and duties of the Parties hereunder shall be governed by and construed, enforced and performed in accordance with the laws of the state of California, without regard to principles of conflicts of Law. 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. Each of the Parties irrevocably and unconditionally agrees that any suit, action or other proceeding arising out of or relating to this Agreement, the transactions contemplated hereby, any provision hereof or the breach, performance, enforcement or validity or invalidity of this Agreement or any provision hereof shall be filed in either the United States District Court for the Southern District of California or the Superior Court of California, County of San Diego, as appropriate (and agrees not to commence any suit, action or proceeding relating thereto except in such courts). Each of the Parties irrevocably and unconditionally waives any objection to the laying of venue of any suit, action or proceeding arising out of or relating to this Agreement, the transactions contemplated hereby, any provision hereof or the breach, performance, enforcement or validity or invalidity of this Agreement or any provision hereof in the United States District Court for the Southern District of California or the Superior Court of California, County of San Diego, as appropriate, and hereby further irrevocably and unconditionally waives and agrees not to plead or claim in any such court that any such suit, action or proceeding brought in any such court has been brought in an inconvenient forum. Notwithstanding the foregoing, each Party agrees that a final judgment (i.e., judgment after any appeals that may be duly made) in any suit, action or proceeding so brought shall be conclusive and may be enforced by suit on the judgment in any jurisdiction or in any other manner provided in law or in equity.

17.5 Notices.

All notices, requests, statements or payments shall be made as specified in Exhibit G. Notices (other than scheduling requests) shall, unless otherwise specified herein, be in writing and may be delivered by hand delivery, United States mail, overnight courier service, email or facsimile. Notice by email, facsimile or hand delivery shall be effective at the close of business on the day actually received, if received during business hours on a Business Day, and otherwise shall be effective at the close of business on the next Business Day. Notice by overnight United States mail or courier shall be effective on the next Business Day after it was sent. A Party may change its addresses by providing notice of same in accordance herewith.

17.6 Mobile-Sierra.

Absent the agreement of all Parties to the proposed change, the standard of review for changes to any rate, charge, classification, term or condition of this Agreement, whether proposed by a Party

(to the extent that any waiver below is unenforceable or ineffective as to such Party), a non-party or FERC acting <u>sua sponte</u>, 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), and clarified by *Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1 of Snohomish*, 554 U.S. 527 (2008); *NRG Power Marketing LLC v. Maine Public Utility Commission*, 558 U.S. 527 (2010.

Notwithstanding any provision of this Agreement, and absent the prior written agreement of the Parties, each Party, to the fullest extent permitted by Applicable Laws, for itself and its respective successors and assigns, hereby also expressly and irrevocably waives any rights it can or may have, now or in the future, whether under Sections 205, 206, or 306 of the Federal Power Act or otherwise, to seek to obtain from FERC by any means, directly or indirectly (through complaint, investigation, supporting a third party seeking to obtain or otherwise), and each hereby covenants and agrees not at any time to seek to so obtain, an order from FERC changing any section of this Agreement specifying any rate or other material economic terms and conditions agreed to by the Parties.

17.7 General.

This Agreement (including the exhibits, schedules and any written supplements hereto, if any) constitutes the entire agreement between the Parties relating to the subject matter. Notwithstanding the foregoing, any collateral, credit support or margin agreement or similar arrangement between the Parties shall, upon designation by the Parties, be deemed part of this Agreement and shall be incorporated herein by reference. This Agreement shall be considered for all purposes as prepared through the joint efforts of the Parties and shall not be construed against one Party or the other as a result of the preparation, substitution, submission or other event of negotiation, drafting or execution hereof. Except to the extent herein provided for, no amendment or modification to this Agreement shall be enforceable unless reduced to writing and executed by both Parties. Each Party agrees if it seeks to amend any applicable wholesale power sales tariff during the term of this Agreement, such amendment will not in any way affect outstanding transactions under this Agreement without the prior written consent of the other Party. Each Party further agrees that it will not assert, or defend itself, on the basis that any applicable tariff is inconsistent with this Agreement. This Agreement shall not impart any rights enforceable by any third party (other than a permitted successor or assignee bound to this Agreement). Waiver by a Party of any default by the other Party shall not be construed as a waiver of any other default. Any provision declared or rendered unlawful by any applicable court of law or regulatory agency or deemed unlawful because of a statutory change (individually or collectively, such events referred to as "Regulatory Event") will not otherwise affect the remaining lawful obligations that arise under this Agreement; provided, further, that if a Regulatory Event occurs, the Parties shall use commercially reasonable efforts to reform this Agreement in order to give effect to the original intention of the Parties. The term "including" when used in this Agreement shall be by way of example only and shall not be considered in any way to be in limitation. The headings used herein are for convenience and reference purposes only. All indemnity and audit rights shall survive the termination of this Agreement for twelve (12) months. This Agreement shall be binding on each Party's successors and permitted assigns.

17.8 Audit.

Each Party has the right, at its sole expense and during normal working hours, to examine the records of the other Party to the extent reasonably necessary to verify the accuracy of any statement, charge or computation made pursuant to this Agreement. If requested, a Party shall provide to the other Party statements evidencing the Designated RA Capacity delivered hereunder. If any such examination reveals any inaccuracy in any statement, the necessary adjustments in such statement and the payments thereof will be made promptly and shall bear interest calculated at the Interest Rate from the date the overpayment or underpayment was made until paid; *provided*, *however*, that no adjustment for any statement or payment will be made unless objection to the accuracy thereof was made prior to the lapse of twelve (12) months from the rendition thereof, and thereafter any objection shall be deemed waived.

17.9 Forward Contract.

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

17.10 Dispute Resolution.

- (a) In the event of any claim, controversy or dispute between the Parties arising out of or relating to or in connection with this Agreement (including any dispute concerning the validity of this Agreement or the scope and interpretation of this Section 17.10) (a "<u>Dispute</u>"), any Party (the "<u>Notifying Party</u>") may deliver to the other Parties (the "<u>Recipient Party</u>") notice of the Dispute with a detailed description of the underlying circumstances of such Dispute (a "<u>Dispute Notice</u>"). The Dispute Notice shall include a schedule of the availability of the Notifying Party's senior officers (having a title of senior vice president (or its equivalent) or higher) duly authorized to settle the Dispute during the thirty (30) day period following the delivery of the Dispute Notice.
- (b) The Recipient Party shall, within five (5) Business Days following receipt of the Dispute Notice, provide to the Notifying Party a brief summary of the Recipient Party's position on the Dispute and a parallel schedule of availability of the Recipient Party's senior officers (having a title of senior vice president (or its equivalent) or higher) duly authorized to settle the Dispute. Following delivery of the respective senior officers' schedules of availability, the senior officers of the Parties shall meet and confer as often as they deem reasonably necessary during the remainder of the thirty (30) day period in good faith negotiations to resolve the Dispute to the satisfaction of each Party.
- (c) In the event a Dispute is not resolved pursuant to the procedures set forth in Sections 17.10(a) and (b) by the expiration of the thirty (30) day period set forth in Section 17.10(b), then a Party may pursue any legal remedy available to it in accordance with this Agreement.

17.11 Execution.

A signature received via facsimile or email shall have the same legal effect as an original.

17.12 Joint Powers Authority.

Seller acknowledges and agrees that Buyer is organized as a Joint Powers Authority in accordance with the Joint Powers Act of the State of California (Government Code Section 6500 et seq.) pursuant to a Joint Powers Agreement and is a public entity separate from its members. Buyer shall solely be responsible for all debts, obligations and liabilities accruing and arising out of this Agreement and Seller agrees that it shall have no rights and shall not make any claim, take any actions or assert any remedies against any of Buyer's members in connection with this Agreement.

17.13 Dodd-Frank Act. The Parties intend this Agreement to be a "Forward Capacity Transaction" within the meaning of Commodity Futures Trading Commission, Final Order in Responseto a Petition From Certain Independent System Operators and Regional Transmission Organizations To Exempt Specified Transactions Authorized by a Tariff or Protocol Approved by the Federal Energy Regulatory Commission, 78 Fed. Reg. 19,880 (Apr. 2, 2013). Notwithstanding the prior sentence, if and to the extent that this Agreement and the performance of the Parties' obligations requires any reporting to the Commodity Futures Exchange Commission (together with any successor body, the "CFTC") pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, Seller shall be responsible for all such reporting (and Seller shall bear all costs and expenses associated therewith) and shall be the reporting counterparty for purposes of any applicable parts of the regulations of the CFTC promulgated under the Commodity Exchange Act. Buyer shall promptly provide information reasonably required by Seller for any such reporting and Seller shall be entitled to report and disclose information concerning all swaps transacted under this Agreement (including information regarding the economic terms and valuations of this Agreement) to any applicable Governmental Authority (or a third party swap data repository as required by a Governmental Authority), from time to time, to the extent required by any applicable laws, regulations, rules or orders of any Governmental Authority. Additionally, to the extent either Party needs additional information or details from the other Party in order to comply with any such applicable laws, regulations, rules or orders (including information concerning such other Party's organization, corporate status, status under the CFTC's regulations and/or unique entity identifier), such other Party shall promptly provide such additional information or details to the first Party upon request therefor. Buyer shall promptly reimburse Seller for any costs, fines or penalties Seller incurs as a result of Buyer's failure to comply with this Section 17.13. Seller shall promptly reimburse Buyer for any costs Buyer incurs as a result of Seller's failure to comply with this Section 17.13 and the Commodity Exchange Act, except to the extent such costs are a result of any action or omission of Buyer. Notwithstanding any provision of this Agreement to the contrary, no Event of Default, termination event, or other similar event shall be deemed to occur under this Agreement solely on the basis of a breach of any covenant or agreement in this Section 17.13 other than the obligation to make reimbursement payments.

17.14 Market-Based Rate Authority.

Seller agrees, in accordance with Federal Energy Regulatory Commission (FERC) Order No. 697, to, upon request of Buyer, submit a letter of concurrence in support of any affirmative statement by Buyer that this Agreement does not transfer "ownership or control of generation capacity" from Seller to Buyer as the term "ownership or control of generation capacity" is used in 18 CFR Section 35.42. Seller also agrees that it will not, in filings, if any, made subject to Order Nos. 652 and 697, claim that this Agreement conveys ownership or control of generation capacity from Seller to Buyer.

17.15 Physical Transactions. The Parties understand and agree that the transactions under this Agreement are physical transactions for deferred delivery, and that the Parties contemplate making or taking physical delivery of electric energy or capacity. Buyer is a California community choice aggregator engaged in the business of delivering electric energy and capacity to its retail load and routinely makes or takes delivery of electric energy and capacity in order to provide service to its retail electric customers.

17.16 Rules of Interpretation.

In this Agreement, except as expressly stated otherwise or unless the context otherwise requires:

- (a) headings and the rendering of text in bold and italics are for convenience and reference purposes only and do not affect the meaning or interpretation of this Agreement;
- (b) words importing the singular include the plural and vice versa and the masculine, feminine and neuter genders include all genders;
- (c) the words "hereof", "herein", and "hereunder" and words of similar import shall refer to this Agreement as a whole and not to any particular provision of this Agreement;
- (d) a reference to an Article, Section, paragraph, clause, Party, or Exhibit is a reference to that Article, Section, paragraph, clause of, or that Party or Exhibit to, this Agreement unless otherwise specified;
- (e) a reference to a document or agreement, including this Agreement shall mean such document, agreement or this Agreement including any amendment or supplement to, or replacement, novation or modification of this Agreement, but disregarding any amendment, supplement, replacement, novation or modification made in breach of such document, agreement or this Agreement;
 - (f) a reference to a Person includes that Person's successors and permitted assigns;
- (g) the terms "include" and "including" mean "include or including (as applicable) without limitation" and any list of examples following such term shall in no way restrict or limit the generality of the word or provision in respect of which such examples are provided;
- (h) references to any statute, code or statutory provision are to be construed as a reference to the same as it may have been, or may from time to time be, amended, modified or reenacted, and include references to all bylaws, instruments, orders and regulations for the time being made thereunder or deriving validity therefrom unless the context otherwise requires;
- (i) in the event of a conflict, a mathematical formula or other precise description of a concept or a term shall prevail over words providing a more general description of a concept or a term;
- (j) references to any amount of money shall mean a reference to the amount in United States Dollars;

- (k) the expression "and/or" when used as a conjunction shall connote "any or all of";
- (l) words, phrases or expressions not otherwise defined herein that (i) have a generally accepted meaning shall have such meaning in this Agreement or (ii) do not have well known and generally accepted meaning 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.

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

ATHOS STORAGE, LLC	SAN DIEGO COMMUNITY POWER a California joint powers authority
By:	By:
Name:	Name:
Title:	Title:

EXHIBIT A: FORM OF LETTER OF CREDIT

[Issuing Bank Letterhead and Address]

IRREVOCABLE STANDBY LETTER OF CREDIT NO. [XXXXXXX]

Date:	
Bank Ret	f.:
Amount:	US\$[XXXXXXXX]
Expiry D	ate:

APPLICANT DETAILS TO BE PROVIDED

Beneficiary:

San Diego Community Power, a California joint powers authority [Address]

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] (the "Letter of Credit") in favor of San Diego Community Power, a California joint powers authority ("Beneficiary"), [Address], for an amount not to exceed the aggregate sum of U.S. \$[XXXXXX] (United States Dollars [XXXXX] and 00/100), pursuant to that certain Resource Adequacy Agreement dated as of _____ and as amended (the "Agreement") between [Applicant] and Beneficiary. This Letter of Credit shall become effective immediately and shall expire on [XXXXXX] 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 "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. [XXXXXXX] ("Drawing Certificate").

The Drawing Certificate may be presented by (a) physical delivery, or (b) facsimile to [bank fax number [XXX-XXXXX]] confirmed by [e-mail to [bank email address]] (if presented by fax it must be followed up by a phone call to us at [XXXXXX] or [XXXXXX] to confirm receipt) with the originals to follow via courier. The drawing will be effective upon our receipt of the original documents at the above noted address.

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 documents presented under and in compliance with the terms of this Letter of Credit 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 registered mail or 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 is subject to the Uniform Customs and Practice for Documentary Credits (2007 Revision) International Chamber of Commerce Publication No. 600 (the "UCP"), except to the extent that the terms hereof are inconsistent with the provisions of the UCP, including but not limited to Articles 14(b) and 36 of the UCP, in which case the terms of this Letter of Credit shall govern. In the event of an act of God, riot, civil commotion, insurrection, war or any other cause beyond Issuer's control (as defined in Article 36 of the UCP) that interrupts Issuer's business and causes the place for presentation of the Letter of Credit to be closed for business on the last day for presentation, the Expiration Date of the Letter of Credit will be automatically extended without amendment to a date thirty (30) calendar days after the place for presentation reopens for business.

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.

All notices to Beneficiary shall be in writing and are required to be sent by certified letter, overnight courier, or delivered in person to: San Diego Community Power, Chief Operating Officer, [Address]. Only notices to Beneficiary meeting the requirements of this paragraph shall be considered valid. Any notice to Beneficiary which is not in accordance with this paragraph shall be void and of no force or effect.

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

Drawing Certificate [Insert Bank Name and Address] Ladies and Gentlemen: The undersigned, a duly authorized representative of San Diego Community Power, a California joint powers authority, [Buyer address], as beneficiary (the "Beneficiary") of the Irrevocable Letter of Credit No. [XXXXXXX] (the "Letter of Credit") issued by [insert bank name] (the "Bank") by order of (the "Applicant"), hereby certifies to the Bank as follows: Applicant and Beneficiary are party to that certain Resource Adequacy Agreement dated 1. as of , (the "Agreement"). Beneficiary is making a drawing under this Letter of Credit in the amount of U.S. 2. because a Seller Event of Default (as such term is defined in the Agreement) or \$ other occasion provided for in the Agreement where Beneficiary is authorized to draw on the letter of credit has occurred. OR Beneficiary is making a drawing under this Letter of Credit in the amount of U.S. \$ which equals the full available amount under the Letter of Credit, because we have received notice from the Bank that you have elected not to extend the Expiration Date of the Letter of Credit beyond its current Expiration Date and Applicant is required to maintain the Letter of Credit in force and effect beyond the expiration date of the Letter of Credit but has failed to provide Beneficiary with a replacement Letter of Credit or other acceptable instrument within thirty (30) days prior to such expiration date. The undersigned is a duly authorized representative of [Buyer], a California joint powers authority and is authorized to execute and deliver this Drawing Certificate on behalf of Beneficiary. You are hereby directed to make payment of the requested amount to [Buyer], a California joint powers authority by wire transfer in immediately available funds to the following account: [Specify account information] San Diego Community Power Name and Title of Authorized Representative Date

Exhibit A: (DRAW REQUEST SHOULD BE ON BENEFICIARY'S LETTERHEAD)

EXHIBIT B: FORM OF CONSTRUCTION START DATE CERTIFICATE

This certification of Construction Start Date ("Certification") is delivered by [Seller] ("Seller") to San Diego Community Power, a California joint powers authority ("Buyer") in accordance with the terms of that certain Resource Adequacy Agreement dated [date] (the "Agreement") by and between Seller and Buyer. All capitalized terms used in this Certification but not otherwise defined herein shall have the respective meanings assigned to such terms in the Agreement.

Seller hereby certifies and represents to Buyer that the Construction Start (as defined in 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.

part of Construction Start is attached hereto.
IN WITNESS WHEREOF, the undersigned has executed this Certification on behalf of Seller as of the day of
[Seller]
By:
Its:
Date:

EXHIBIT C: FORM OF COMMERCIAL OPERATION DATE CERTIFICATE

This certification ("Certification") of Commercial Operation is delivered by [Seller] ("Seller") to San Diego Community Power, a California joint powers authority ("Buyer") in accordance with the terms of that certain Resource Adequacy Agreement dated [date] ("Agreement") by and between Seller and Buyer. All capitalized terms used in this Certification but not otherwise defined herein shall have the respective meanings assigned to such terms in the Agreement.

	As of	[DATE]	, Seller hereby certific	les and represents to Buyer the followin	g:
a) b) c)	synchroni Seller has than [capa The Stora operating electric er Point of I forth in Se	zed with the Trainstalled equipmentity equal to ge Capacity Test capability that therety of no less the interconnection, ection 3.14.	nsmission System. ment for the Primary Ur of Contract Quantity of t conducted on [DATE] can be sustained for for han [capacity equal to in accordance with the	demonstrated a maximum dependable our (4) consecutive hours to discharge of Contract Quantity of NQC] to the testing requirements and protocols see	le ge he
d)		tion to parallel the CE on [DATE	<u>-</u>	tained by the Participating Transmission	on
SELL	ER:				
Signat	ure:				
				- -	
ENGI	NEER				
Signat	ure:			_	
				_	
				_	
_					

EXHIBIT D: DESCRIPTION OF PRIMARY UNIT

The following describes the Primary Unit to be constructed, operated and maintained by Seller through the Term in accordance with the Agreement.

Unit name: Athos Power Plant (Q1405)

Resource type: Battery Storage

Nameplate capacity: 200

Location: Desert Center (Riverside County), CA

Unit physical address: 25250 Rice Rd, Desert Center, CA 92239

Unit elevation: 556 ft above mean sea level

Unit latitude: Latitude: 33.756897°

Unit longitude: Longitude: -115.34146°

Interconnection: SCE

CAISO transmission access charge area (e.g. SDG&E): SCE

Point of interconnection: SCE 230 kV Red Bluff

Point of interconnection address: Red Bluff Substation will be located adjacent to the south side of Interstate 10 (I-10), east of Aztec Road, and west of Corn Springs Road, in unincorporated Riverside County, California

Existing zone (e.g. SP-15): SP-15

PNode: Not yet assigned; to be provided by Seller prior to start of Delivery Term

CAISO Resource ID: Not yet assigned; to be provided by Seller prior to start of Delivery Term

Substation: SCE 230 kV Red Bluff

EXHIBIT E: [RESERVED]

EXHIBIT F: PROGRESS REPORTING FORM

Each Progress Report must include the following items:

- 1. Executive summary.
- 2. Primary Unit description.
- 3. Site plan of the Primary Unit.
- 4. Description of any material planned changes to the Primary Unit or the Site.
- 5. Schedule showing progress on Primary Unit construction generally and achieving each of the Milestones and the Commercial Operation Date.
- 6. Summary of activities during the previous quarter or month, as applicable, including any OSHA labor hour reports.
- 7. Forecast of activities scheduled for the current calendar quarter or month, as applicable.
- 8. Written description about the progress relative to the Milestones and the Commercial Operation Date, including whether Seller is on schedule with respect to the same.
- 9. List of issues that are likely to potentially affect achievement of the Milestones and the Commercial Operation Date.
- 10. Progress and schedule of the EPC Contract, all major equipment supply agreements, Governmental Approvals, technical studies, and financing arrangements.
- 11. Pictures, in sufficient quantity and of appropriate detail, in order to document construction and interconnection progress.
- 12. Any other documentation reasonably requested by Buyer.

EXHIBIT G: NOTICES

ATHOS STORAGE, LLC	SAN DIEGO COMMUNITY POWER, a
("Seller")	California joint powers authority ("Buyer")
All Notices:	All Notices:
Street: 3 Lagoon Dr., Suite 280	P.O. Box 12716
City: Redwood City, CA 94065	San Diego, CA 92112
Attn: SBE Legal, SBE Power Marketing	Attn: Byron Vosburg, Chief Commercial Officer
Phone: 650-731-3262	Officer Phone: (619) 880-6545
Email: legalus@sbenergy.com,	Email: bvosburg@sdcommunitypower.org
powermarkets@sbenergy.com	Linair. ovosotiig@saconintaintypower.org
Reference Numbers:	Reference Numbers:
Telefore Tvamsers.	Telefolica i validati si
Invoices:	Invoices:
Attn: SBE Asset Mgmt	Attn: SDCP Settlements
Phone: 650-443-7064	Phone: (619) 880-6545
Email: amus@sbenergy.com	E-mail: settlements@sdcommunitypower.org
Payments:	Payments:
Attn: SBE Asset Mgmt	Attn: Michael Maher
Phone: 650-443-7064	Phone: (415) 526-3020
Email: amus@sbenergy.com	E-mail: mmaher@mahercpa.com
0 33	U I
Wire Transfer:	Wire Transfer:
BNK: TBD	BNK: River City Bank
ABA: TBD	ABA:
ACCT:TBD	ACCT:
With additional Notices of an Event of	With additional Notices of an Event of
Default to:	Default to:
Attn: Ryan Bates, VP General Counsel	Attus CDCD Commel Commel
3 Lagoon Dr., Suite 280	Attn: SDCP General Counsel PO Box 12716
Redwood City, CA 94065	San Diego, CA 92112
Phone: (650) 731-3262	5.11.2112
Email: ryan@sbenergy.com,	Email: legal@sdcommunitypower.org
legalus@sbenergy.com	
regards(wsbellergy.com	4

EXHIBIT H

WORKFORCE DEVELOPMENT

Sample Supplier Diversity Survey

Please note that not all questions may apply to your business. For the questions that do not apply, please skip them or answer "Not Applicable" or "Decline to State."

Pursuant to Proposition 209, SDCP does not give preferential treatment based on race, sex, color, ethnicity, or national origin. Providing information in these categories is optional and will not impact your participation in any future SDCP solicitation selection process. Responses are collected for informational and reporting purposes only pursuant to Senate Bill (SB) 255.
*Required
1. Business Name*
2. Email Address*
3. Where is your business located/headquartered?
4. Is your business certified under General Order 156 (GO 156)? GO 156 is a California Public Utilities Commission ruling that requires utility entities to report annually on their contracts with majority women-owned, minority-owned, disabled veteran-owned and LGBT-owned business enterprises (WMDVLGBTEs) in all categories. Qualified businesses become GO 156 Certified through the CPUC and are then added to the GO 156 Clearinghouse database at www.thesupplierclearinghouse.com.
Yes
No
Qualified as a WMDVLGBTBE but not GO 156 certified
5. If you answered "yes" to Question 4, when does your certification expire?
6. If you answered "yes" or "qualified, but not certified" to Question 4, in which categories are you certified or qualified? Please choose all that apply.
Minority Owned
Women Owned
LGBT Owned

Disabled Veteran Owned

Small Business Enterprise, as defined by 8(d) of the Small Business Act

7. If your business is a minority-owned business enterprise, what GO156 certification or qualification does your business fall under?

Black American

Hispanic American

Asian Pacific American

Native American

- 8. Please list the Standardized Industrial Code (SIC) of the products and services your business offers. Search for your SIC in the "Commodity Codes" search bar, here: https://sch.thesupplierclearinghouse.com/FrontEnd/SearchCertifiedDirectory.asp.
- 9. If certified under GO 156, please list your annual business revenue as reported to the CPUC Supplier Clearinghouse. You may check your CPUC Supplier Clearinghouse status here: https://sch.thesupplierclearinghouse.com/FrontEnd/SearchCertifiedDirectory.asp.
- 10. If your business is qualified, but not GO 156 certified, please identify the reasons for not completing the certification process?
- 11. If your business has used GO 156 certified subcontractors for your SDCP contract, please include a list of your subcontractor business names, if the subcontract is for products or services, and the anticipated subcontract amount. Example: Electrical Design Technology, Inc.; products (batteries); \$100,000.
- 12. If applicable, please describe any hiring policies your business has for using small, local, and/or economically disadvantaged subcontractors or for using subcontractors that qualify for the GO 156 Supplier Clearinghouse.
- 13. Does your business have a history of using apprenticeship programs, local hires, union labor, or multi-trade project labor agreements? Local hires can be defined as labor-sourced from within SDCP's service area.

Yes, apprenticeship programs in this recent contract with SDCP

Yes, local labor in this recent contract with SDCP

Yes, union labor in this recent contract with SDCP

Yes, multi-trade PLA in this recent contract with SDCP

Yes, apprenticeship programs but not in this contract with SDCP

Yes, history of local hire but not in this contract with SDCP

Yes, history of union labor but not in this contract with SDCP

Yes, history of multi-trade PLA but not in this contract with SDCP

Uses California-based labor, but not local to SDCP's service areas

None of the above

Not applicable

14. Are you a small business? Please refer to the Small Business Association' Size Standards tool for more information: https://www.sba.gov/sizestandards.

Yes

No

- 15. If you answered "yes" to question 14, please describe your history with labor agreements, union labor, multi-trade labor, apprenticeship labor, or how many local workers/businesses you employ for your contract with SDCP.
- 16. Is there any additional feedback that you would like to provide to SDCP at this time?
- 17. Does the bidder have formal initiatives to promote diversity, equity, and inclusion among its workforce?
- 18. If the answer to question 17 is "Yes,", please explain and provide supporting documentation.
- 19. Has the bidder adopted formal Environmental, Social, and Governance (ESG) goals?
- 20. If the answer to question 19 is "Yes", please explain and provide supporting documentation.

EXHIBIT I

STORAGE CAPACITY TESTS

Storage Capacity Test Notice and Frequency

- A. <u>Storage Capacity Test</u>. Upon no less than ten (10) Business Days prior Notice to Buyer, Seller shall schedule and complete a Storage Capacity Test prior to the Commercial Operation Date. Such initial Storage Capacity Test and any subsequent Commercial Operation Storage Capacity Test conducted pursuant to Section 3.14 shall be performed in accordance with this <u>Exhibit I</u> and shall establish the Storage Contract Capacity hereunder based on the actual capacity and capabilities of the Primary Unit determined by such Storage Capacity Test(s).
- B. Test Results and Re-Setting of Storage Contract Capacity. No later than five (5) Business Days following any Storage Capacity Test, Seller shall submit a testing report detailing results and findings of the test. The report shall include Primary Unit meter readings and plant log sheets verifying the operating conditions and output of the Primary Unit. In accordance with Section 3.14(c) of the Agreement, Part II.J and Part II.K below, the Storage Contract Capacity determined pursuant to a Storage Capacity Test (in the case of the Storage Contract Capacity, up to, but not in excess of, 200 MW) shall become the new Storage Contract Capacity at the beginning of the day following the completion of the test for calculating the Storage Payment and all other purposes under this Agreement.

Storage Capacity Test Procedures

PART I. GENERAL.

Each Storage Capacity Test (including the initial Storage Capacity Test and all re-performances thereof) shall be conducted in accordance with Prudent Operating Practices, all operating restrictions applicable to the Primary Unit, and the provisions of this <u>Exhibit I</u>. For ease of reference, a Storage Capacity Test is sometimes referred to in this <u>Exhibit I</u> as a "SCT". Buyer or its representative may be present for the SCT and may, for informational purposes only, use its own metering equipment (at Buyer's sole cost).

PART II. REQUIREMENTS APPLICABLE TO ALL STORAGE CAPACITY TESTS.

Note: Seller shall have the right and option in its sole discretion to install storage capacity in excess of the initial Storage Contract Capacity of 200 MW; provided, for all purposes of this Agreement, the amount of Storage Contract Capacity shall never be deemed to exceed 200 MW.

- A. <u>Purpose of Test</u>. Each SCT shall:
 - (1) Determine an updated Storage Contract Capacity;
- B. <u>Test Elements</u>. Each SCT shall include the following test elements:
 - The measurement of discharging energy, as measured by the Primary Unit Meter or other mutually agreed meter, that is discharged from the Primary

- Unit to the Delivery Point until the Stored Energy Level reaches zero MWh as indicated by the battery management system ("Energy Out");
- Electrical output at maximum discharging capacity at the Primary Unit Meter (MW);
- C. <u>Parameters</u>. During each SCT, the following parameters shall be measured and recorded simultaneously for the Primary Unit, at ten (10) minute intervals:
 - (1) discharge time (minutes);
 - (2) discharging energy (MWh);
 - (3) Stored Energy Level (MWh).
- D. <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) near the horizontal centerline of the Primary Unit; and
 - (3) Ambient air Temperature (°F).

E. Test Conditions.

- (i) <u>General</u>. At all times during a SCT, the Primary Unit shall be operated in compliance with Prudent Operating Practices and all operating protocols recommended, required or established by the manufacturer for operation at maximum charging capacity and maximum discharging capacity.
- (ii) <u>Abnormal Conditions</u>. If abnormal operating conditions that prevent the recordation of any required parameter occur during a SCT, Seller may postpone or reschedule all or part of such SCT in accordance with Part II.G below.
- (iii) <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.
- F. <u>Incomplete Test.</u> 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 or the Transmission Provider, 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 C, including copies of the raw data taken during the test;
 - (3) the level of Storage Contract Capacity, Energy In, Energy Out, charging capacity, the current charge and discharge Ramp Rate, and Stored Energy Level 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 rejects the results of any SCT, such SCT shall be repeated in accordance with Part II.F.

- H. Supplementary Storage Capacity Test Protocol. No later than sixty (60) days prior to commencing Primary Unit construction, Seller shall deliver to Buyer for its review and approval (such approval not to be unreasonably delayed or withheld) an updated supplement to this Exhibit I with additional and supplementary details, procedures and requirements applicable to Storage Capacity Tests based on the then current design of the Primary Unit ("Supplementary Storage Capacity Test Protocol"). Thereafter, from time to time, Seller may deliver to Buyer for its review and approval (such approval not to be unreasonably delayed or withheld) any Seller recommended updates to the then current Supplementary Storage Capacity Test Protocol (and each update thereto), once approved by Buyer, shall be deemed an amendment to this Exhibit I.
- I. Adjustment to Storage Contract Capacity. The total amount of discharging energy delivered to the Delivery Point (expressed in MWh AC) during the first four (4) hours of discharge (up to, but not in excess of, 800 MWh), shall be divided by four (4) hours to determine the Storage Contract Capacity, which shall be expressed in MW AC, and shall be the new Storage Contract Capacity in accordance with Section 3.14(c) of the Agreement until updated pursuant to a subsequent Storage Capacity Test.

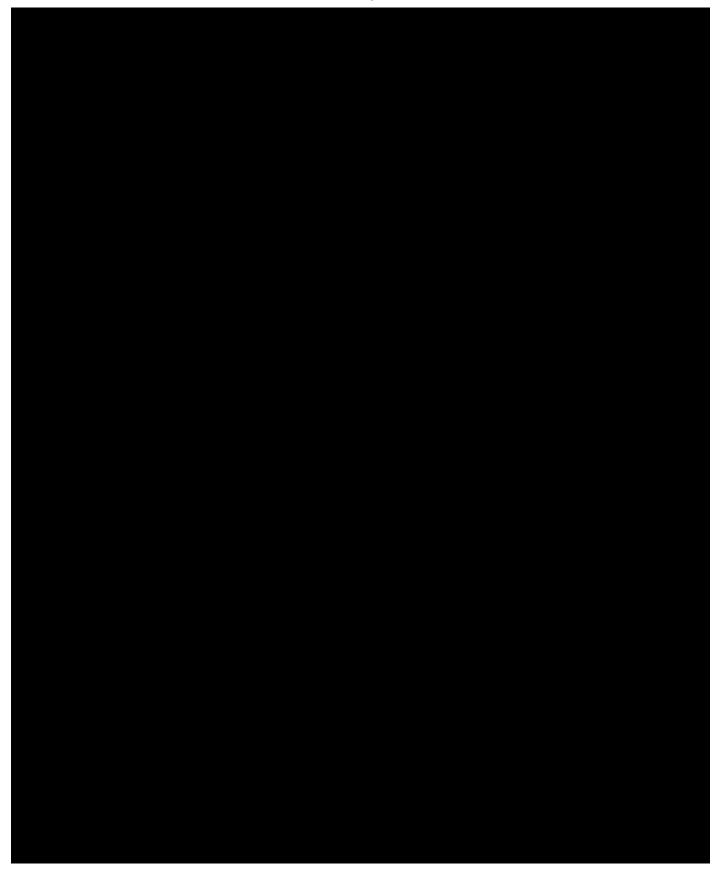
Part III. INITIAL SUPPLEMENTARY STORAGE CAPACITY TEST PROTOCOL

The initial Supplementary Storage Capacity Test Protocol outlined below shall not be binding on the Parties until delivery of the Supplementary Storage Capacity Test Protocol in accordance with Part II.I above and is included for the convenience of the Parties.

A. Procedure:

- (1) System Starting State: The Primary Unit shall be balanced using OEM procedures as appropriate and will be in the on-line state at the Minimum Stored Energy Level.
- (2) Record the initial value of the Primary Unit State-of-Charge ("SOC").
- (3) Charge the Primary Unit at the maximum charging capacity until the battery reaches the maximum SOC allowed at that rate. Continue charging the Primary Unit at the fixed maximum battery voltage (CV charging). Stop the Primary Unit charge routine when the battery has reached the desired SOC, not to exceed six hours of charging.
- (4) Following an agreed-upon rest period, command a real power discharge that results in an AC power output of the Primary Unit's maximum discharging capacity and maintain the discharging state until the earlier of (a) the Facility has discharged at the maximum discharging level for four (4) consecutive hours, (b) the Primary Unit has reached zero percent (0%) state of charge (the "Minimum Stored Energy Level"), or (c) the sustained discharging level is at least 2% less than the maximum discharging capacity.
- (5) Record and store the AC Energy discharged (in MWh) as measured at the Primary Unit Meter. Such data point shall be used for purposes of calculation of the Storage Contract Capacity.
- (6) If the Primary Unit has not reached the Minimum Stored Energy Level pursuant to Part III.A.4, continue discharging the Primary Unit until it reaches the Minimum Stored Energy Level.
- (7) Record and store the AC Energy discharged (in MWh) as measured at the Primary Unit Metering Points. "Energy Out" means that total AC Energy discharged (in MWh) as measured at the Primary Unit Metering Point associated with Charging Energy from the commencement of discharging pursuant to Part III.A.4 until the Primary Unit has reached the Minimum Stored Energy Level pursuant to either Part III.A.4 or Part III.A.6, as applicable. All separately metered Primary Unit Station Use shall be excluded from the measurement of Energy Out.
- <u>Test Results</u>: The resulting Storage Contract Capacity measurement is the sum of the total discharging energy at the Primary Unit Meter divided by four (4) hours.







SAN DIEGO COMMUNITY POWER Staff Report – Item 14

TO: Board of Directors

FROM: Byron Vosburg, Chief Commercial Officer

Kenny Key, Director of Power Contracts

VIA: Karin Burns, Chief Executive Officer

SUBJECT: Approve Amended and Restated Renewable Power Purchase

Agreement with Yellow Pine Solar III, LLC

DATE: March 27, 2025

RECOMMENDATION:

Approve the proposed Amended and Restated Renewable Power Purchase Agreement ("A&R PPA") with Yellow Pine Solar III, LLC and authorize the Chief Executive Officer to execute the agreement.

BACKGROUND:

As San Diego Community Power (Community Power) 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 are 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 Community Power 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 Community Power can build its power supply portfolio while also providing power supply cost certainty so that Community Power can develop its pro forma financial model.

Moreover, the California Renewable Portfolio Standard (RPS), as modified in 2015 by Senate Bill 350, requires that Community Power provide 65% of its RPS-required renewable energy from contracts of at least ten years in length. Finally, in D.21-06-025, the California Public Utilities Commission (CPUC) required each Load Serving Entity (LSE) in California to make long-term purchase commitments for resource adequacy from new, incremental generation facilities that will achieve commercial operation during 2023 through 2026.

The proposed A&R PPA is for capacity and renewable energy benefits from a 35 MW solar and 35 MW, 4-hour battery energy storage facility (currently referred to as "Yellow Pine Solar III") with Yellow Pine Solar III, LLC, a subsidiary of NextEra Energy Resources Development, LLC (NextEra). The original PPA originated from an offer Community Power received in 2022 via its 2022 Long-Term California RPS-Eligible Renewable Energy Request for Proposals (RFP). Community Power engaged with NextEra after short-listing the project and has reached terms mutually agreeable to both parties. The original PPA was approved by Community Power's Board in June 2023.

Due to delays in network upgrades required for deliverability, the project shifted its commercial operations date from 2025 to 2027. The parties worked to find amenable terms that would keep the project viable while protecting Community Power ratepayers.

ANALYSIS AND DISCUSSION:

Staff negotiated the attached A&R PPA for the purchase of renewable energy and resource adequacy from the Yellow Pine Solar III project, which is a solar-plus-battery-storage project to be developed in Clark County, Nevada by NextEra.

The project is part of a larger 500 MW development by NextEra. Community Power's portion of the project will have a guaranteed capacity of 35 MW of solar production and 35 MW of battery storage capacity. Below is additional information regarding NextEra, the project and the A&R PPA.

Background on NextEra:

- NextEra has over 33 years of experience with renewable energy development
- NextEra has developed 1,982 MW in California across 18 projects
- Notable projects from NextEra include:
 - Arlington II, 100 MW solar + 132 MW storage, 2022
 - Arlington III, 131 MW solar + 110 MW storage, 2022
 - Golden Hills North Wind, 46 MW, 2017
 - Blythe IV, 125 MW solar (2020) + 47 MW storage (2022)
 - Desert Sunlight Storage, 230 MW, 2022

Project Overview - Yellow Pine Solar III, LLC

- Project: 35 MW Solar, 35 MW/140 MWh lithium-ion battery energy system
- Project location: Clark County, Nevada
- Contract term: 20 years
- Expected annual energy production: approximately 101,000 MWhs
- Guaranteed energy production: 85% of projected annual deliveries
- Pricing:
 - Solar Fixed energy price applicable to the full term of the agreement subject to limited adjustment due to the verified impact of certain photovoltaic tariff events

- BESS Fixed capacity price adjusted for availability and verified capacity
- Community Power would receive financial compensation in the event of seller's failure to successfully achieve certain development milestones as well as seller's failure to meet the guaranteed energy production from the solar facility and failure to meet guaranteed efficiency from the storage facility once the project is operational.

A&R PPA Overview:

- Shifted GCOD from June 1, 2025, to energy only June 1, 2027, with a Resource Adequacy guarantee date of June 1, 2028.
- Reduced pricing.
- Incorporated slice of day resource adequacy language and protections.

Community Benefits:

- The project will provide 80 construction jobs and 2 permanent jobs
- The project will use union labor. NextEra's primary engineering and procurement contractor will execute a project labor agreement for the project
- NextEra provides sole sponsorship of developing solar curriculum and research at University of Nevada Las Vegas, including mentoring the annual senior design project focused on solar energy systems
- NextEra hosts a Renewable Energy Training (RET) simulation lab at University of Nevada Las Vegas and College of Southern Nevada
- NextEra provides presentations at local high schools in Southern Nevada that highlight the benefits of renewable energy and growing career opportunities within the state
- NextEra established an internship program that leads to career opportunities at NextEra solar and storage sites.
- NextEra has offered Clark County Public Schools to apply for our \$50,000 STEM Classroom Makeover Grant
- NextEra contributes back-to-school supplies in Clark County Public Schools
- NextEra contributes to the Three Square Food Bank in Clark County

COMMITTEE REVIEW:

Key terms of this A&R PPA were reviewed with the Energy Contract Working Group (ECWG) in Q3 and Q4 2024, and the ECWG recommended to move forward with the execution of this A&R PPA.

FISCAL IMPACT:

The competitive energy and capacity pricing of the A&R PPA are confidential, but the long-term purchase of renewable energy and capacity will provide Community Power with significant value and cost certainty over the term of this A&R PPA.

ATTACHMENTS:

A: Amended and Restated Renewable Power Purchase Agreement with Yellow Pine Solar III, LLC (redacted version for commercially sensitive information)

ITEM 14 ATTACHMENT A

AMENDED AND RESTATED RENEWABLE POWER PURCHASE AGREEMENT

COVER SHEET

Seller: Yellow Pine Solar III, LLC ("Seller")

Buyer: San Diego Community Power, a California joint powers authority ("Buyer")

<u>Description of Facility</u>: A 35 MW_{AC} solar renewable energy generation facility and 35 MW_{AC} (4-hour) battery energy storage facility located in Clark County, in the State of Nevada, as further described in <u>Exhibit A</u>.

Milestones:

Milestone	Date for Completion
Executed Interconnection Agreement	Completed
Procure Storage Facility Major Equipment	
Procure Generating Facility Major Equipment	
Evidence of Site Control	
CEC Pre-Certification Obtained	
Obtain Federal and State Discretionary Permits	
Guaranteed Construction Start Date	
Guaranteed Commercial Operation Date	6/1/2027
Guaranteed RA Date	6/1/2028

Delivery Term: Twenty (20) Contract Years

Expected Energy:

Contract Year	Expected Energy (MWh)		
1			
2			
3			
4			
5			
6			

Cover Sheet

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Guaranteed Generating Capacity: 35 MWAC of Generating Facility capacity

Guaranteed Storage Capacity: 35 MWAC for four (4) hour discharge

Guaranteed Storage Output: 140 MWh (based on four (4) hour discharge)

Dedicated Interconnection Capacity: 35 MW_{AC}

Guaranteed Efficiency Rate:

Contract Year	Guaranteed Efficiency Rate		
1			
2 – 20			

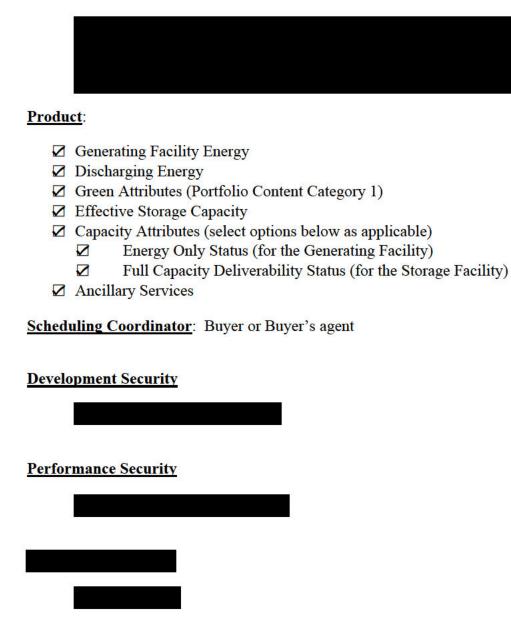
Minimum Efficiency Rate (Storage Facility):

Contract Price:



Cover Sheet

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Exhibit I	Form of Installed Capacity and Efficiency Rate Test Certificate
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Exhibit K	Form of Letter of Credit issued on behalf of Seller for Benefit of Buyer
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AMENDED AND RESTATED RENEWABLE POWER PURCHASE AGREEMENT

This Amended and Restated Renewable Power Purchase Agreement ("<u>Agreement</u>") is entered into as of March ____, 2025 (the "<u>Execution Date</u>"), effective as of July 3, 2023 (the "<u>Effective Date</u>"), between Buyer and Seller. 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, the Parties previously entered into that certain Renewable Power Purchase Agreement dated as of July 3, 2023 (the "<u>Prior PPA</u>"), pursuant to which Seller agreed to sell, and Buyer agreed to purchase, on the terms and conditions set forth in the Prior PPA, certain product as set forth in the Prior PPA;

WHEREAS, Seller intends to develop, design, construct, own, and operate the Facility;

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

WHEREAS, the Parties desire to amend and restate in its entirely the Prior PPA in accordance with the terms and conditions set forth in this Agreement.

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(d).



"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 Transfer" and "Permitted Transferee", "control", "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. Notwithstanding the foregoing, with respect to Seller, Affiliate shall include any investment funds or publicly-traded vehicles for the ownership of operating power generation, storage, or transmission assets (such as a "yield co") controlled by Seller, NextEra Energy, Inc. or an Affiliate of NextEra Energy, Inc., XPLR Infrastructure, LP (f/k/a NextEra Energy Partners, LP) ("NEP"), XPLR Infrastructure Operating Partners, LP (f/k/a NextEra Energy Operating Partners, LP) ("NEOP"), and NextEra Energy Capital Holdings, Inc. ("NEECH"), and their respective direct or indirect subsidiaries.

"After-Tax Basis" means, with respect to any payment received, or deemed to have been received, by any Person, the amount of such payment (the "Base Payment"), supplemented by a further payment (the "Additional Payment") to such Person so that the sum of the Base Payment plus the Additional Payment will be equal to the Base Payment, after deduction of the amount of all taxes required to be paid by such Person in respect of the receipt or accrual of the Base Payment and the Additional Payment (taking into account any current or previous credits or deductions arising from the underlying event giving rise to the payment, the Base Payment and the Additional Payment). Such calculations shall be made on the assumption that the recipient is subject to Federal income taxation at the statutory rate applicable to corporations under subchapter C of the Internal Revenue Code of 1986, as amended, and subject to the highest state and local income tax rate then in effect for corporations in the states in which the Person is subject to taxation during the applicable fiscal year, and shall take into account the deductibility, if applicable (for Federal income tax purposes), of state and local income taxes.

"<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.

"<u>Ancillary Services</u>" means all ancillary services, ancillary services-related products and other ancillary services-related attributes, if any, associated with the Facility, provided, for avoidance of doubt, the Ancillary Services do not include Black Start.

"<u>Approved Forecast Vendor</u>" means Seller or any vendor reasonably acceptable to both Buyer and Seller for the purposes of providing or verifying the forecasts under Section 4.3(d).

- "<u>Automatic Generation Control</u>" or "<u>AGC</u>" has the meaning set forth in the CAISO Tariff.
 - "Availability Adjustment" has the meaning set forth in Exhibit P.
- "Available Charging Capacity" means the capacity of the Storage Facility, expressed in whole MWs, that is mechanically available to receive Charging Energy.
- "Available Discharging Capacity" means the capacity of the Storage Facility, expressed in whole MWs, that is mechanically available to provide Discharging Energy.
- "Available Generating Capacity" means the capacity of the Generating Facility, expressed in whole MWs, that is mechanically available to generate Energy.
- "Availability Forecast" means any Notice of any change to the Available Generating Capacity, Available Charging Capacity, or Available Discharging Capacity to be delivered by or on behalf of Seller and provided to facilitate creation of the CAISO VER generation forecast as required by CAISO Tariff Appendix Q and pursuant to Section 4.3(d).
- "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.
 - "Bid" has the meaning as set forth in the CAISO Tariff.
- "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. Pacific Prevailing Time (PPT) 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 the 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 deliver less Generating Facility Energy than the full amount of energy forecasted consistent with the Availability Forecast in accordance with Section 4.3 to be produced from the Generating Facility for a period of time; and
- (b) for the same time period as referenced in (a), the notice referenced in (a) results from the manner in which Buyer or the SC schedules or bids the Generating Facility or Generating Facility Energy, including where Buyer or the SC for the Generating Facility:
- (i) did not submit a Self-Schedule or an Energy Supply Bid for the MW subject to the reduction; or

EXECUTION VERSION

- (ii) submitted an Energy Supply Bid and the CAISO notice referenced in (a) is solely a result of CAISO implementing the Energy Supply Bid; or
- (iii) submitted a bid or schedule of the Storage Facility (including for ancillary services) that results in curtailment of the Generating Facility; or
- (iv) submitted a Self-Schedule for less than the full amount of Generating Facility Energy forecasted consistent with the Availability Forecast to be generated by or delivered from the Generating Facility.

If the Generating Facility is subject to a Planned Outage, Forced Facility Outage, Force Majeure Event or a Curtailment Period during the same time period as referenced in (a), then the calculation of Deemed Delivered Energy during such period shall not include any Generating Facility Energy that was not generated or stored due to such Planned Outage, Forced Facility Outage, Force Majeure Event or Curtailment Period.

"Buyer Curtailment Order" means the instruction from Buyer or SC to Seller to reduce Generating Facility Energy by the amount, and for the period of time set forth in such instruction, for reasons unrelated to a Buyer Bid Curtailment, Planned Outage, Forced Facility Outage, Force Majeure Event affecting the Facility or Curtailment Order.

"Buyer Curtailment Period" means the period of time, as measured using current Settlement Intervals, during which Seller reduces Generating Facility Energy pursuant to or as a result of (a) Buyer Bid Curtailment, (b) a Buyer Curtailment Order or (c) any other action or omission by Buyer (or its agents) including a Buyer Default which causes Seller to be unable to deliver Generating 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 Dispatched Test" has the meaning in Section 4.9(b).

"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, metering scheme, 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 Generating Facility Energy, Charging Energy, and Discharging Energy delivered to or from the Delivery Point.
- "CAISO Certification" means the certification and testing requirements for a storage unit set forth in the CAISO Tariff that are applicable to the Storage Facility, including certification and testing for all Ancillary Services (to the extent possible given that the Storage Facility may not have Full Capacity Deliverability Status at such time), PMAX, and PMIN associated with such storage units, that are applicable to the Storage Facility.
- "CAISO Grid" has the same meaning as "CAISO Controlled Grid" as defined in the CAISO Tariff.
- "<u>CAISO Operating Order</u>" means the Operating Instruction or Dispatch Instruction as defined in the CAISO Tariff.
- "CAISO Tariff" means the California Independent System Operator Corporation Agreement and Tariff, Business Practice Manuals (BPMs), and Operating Procedures, including the rules, protocols, procedures and standards attached thereto, as the same may be amended or modified from time-to-time and approved by FERC.
- "California Renewables Portfolio Standard" or "RPS" means the renewable energy program and policies established by California State Senate Bills 1038 (2002), 1078 (2002), 107 (2008), X-1 2 (2011), 350 (2015), and 100 (2018) as codified in, *inter alia*, California Public Utilities Code Sections 399.11 through 399.31 and California Public Resources Code Sections 25740 through 25751, as such provisions are amended or supplemented from time to time.
- "Capacity Attribute" means any current or future defined characteristic, certificate, tag, credit, or accounting construct associated with the amount of power that the Storage Facility can discharge to the Delivery Point, at a particular moment and that can be purchased and sold under CAISO market rules, including Resource Adequacy Benefits.
 - "Capacity Damages" has the meaning set forth in Section 6(a) of 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) that the Generating Facility is an Eligible Renewable Energy Resource for purposes of the California Renewables Portfolio Standard and that all Generating Facility Energy delivered to the Delivery Point (net of losses if required by Law) qualifies as generation from an Eligible Renewable Energy Resource.

"<u>CEC Precertification</u>" means that the CEC has issued a precertification for the Generating Facility indicating that the planned operations of the Generating Facility would comply with applicable CEC requirements for CEC Certification and Verification.

"Change in Law" means the occurrence, after the Effective Date, of any of the following: (a) the adoption or taking effect of any Law; (b) any change in any Law or in the administration, interpretation or application of any Law by any Governmental Authority; (c) the making or issuance of any request, guideline or directive (whether or not having the force of law) by any Governmental Authority; (d) any change to a Resource Adequacy Ruling; (e) any order, decision, resolution, rule, regulation, guidance document, or other determination of the CPUC, (f) any change in the CAISO Tariff or any document included in the definition thereof whether or not approved by FERC, or (g) any change in STC REC-1, STC REC-2 or STC 6.

"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) shall be excluded from the total outstanding equity interests in Seller:

provided further, a Change of Control shall not be deemed to have occurred as a result of a Permitted Transfer.

"Charging Energy" means Energy, net of Station Use, delivered to the Storage Facility pursuant to a Charging Notice, as measured by the Storage Facility Meter in accordance with CAISO metering requirements and Prudent Operating Practices, as such meter readings are adjusted pursuant to CAISO requirements for any applicable Electrical Losses and Station Use. All Charging Energy shall be used solely to charge the Storage Facility.

"Charging Notice" means the operating instruction, and any subsequent updates, given by Buyer, Buyer's SC or the CAISO to the Storage Facility, directing the Storage Facility to charge with Charging Energy at a specific MW rate for a specified period of time or amount of MWh; provided, any such operating instruction shall be in accordance with the Operating Procedures. For the avoidance of doubt, (i) any Buyer request to initiate a Storage Capacity Test as defined in Section 4.9 shall be considered a Charging Notice; and (ii) any Seller Initiated Test as defined in Section 4.9 shall not be considered a Charging Notice. Any instruction to charge the Storage Facility pursuant to a Buyer Dispatched Test shall be considered a Charging Notice.

"COD Certificate" has the meaning set forth in Section 3(c) of Exhibit B.

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- "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" or "COD" has the meaning set forth in Exhibit B.
- "Commercial Operation Delay Damages"
- "Communications Protocols" means certain Operating Restrictions developed by the Parties pursuant to Exhibit Q that involve procedures and protocols regarding communication with respect to the operation of the Storage Facility pursuant to this Agreement.
 - "Compliance Action" has the meaning set forth in Section 3.12(b).
 - "Compliance Expenditure Cap" has the meaning set forth in Section 3.12(b).
 - "Confidential Information" has the meaning set forth in Section 18.1.
 - "Construction Start" has the meaning set forth in Section 1(b) of Exhibit B.
 - "Construction Start Date" has the meaning set forth in Section 1(b) of Exhibit B.
- "Contract Capacity" means the sum of the Guaranteed Generating Capacity and the Guaranteed Storage Capacity.
- "Contract Price" has the meaning set forth on the Cover Sheet. To be clear, 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 commencing on 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 Non-Defaulting Party either in terminating any arrangement pursuant to which it has hedged or financed its obligations or entering into new arrangements which replace this Agreement; and all reasonable attorneys' fees and expenses incurred by the Non-Defaulting Party in connection with terminating this 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.

"CPM Soft Offer Cap" has the meaning set forth in the CAISO Tariff.

"<u>CPUC</u>" means the California Public Utilities Commission or any successor agency performing similar statutory functions.

"CPUC System RA Penalty Price" means the RA penalties assessed against load serving entities by the CPUC for RA deficiencies that are not replaced or cured, as established by the CPUC in the Resource Adequacy Rulings and subsequently incorporated into the annual Filing Guide for System, Local and Flexible Resource Adequacy (RA) Compliance Filings that is issued by the CPUC Energy Division, or any replacement or successor documentation established by the CPUC Energy Division to reflect RA penalties that are established by the CPUC and assessed against load serving entities for RA deficiencies.

"Credit Rating" means, with respect to any entity, the publicly available or (subject to the express condition that the Party seeking to use private rating reports has provided to the other party true and correct copies of the private rating reports of such subject entity) private 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 publicly available or (subject to the above parenthetical) private rating then assigned to such entity as an issuer rating by S&P, Fitch or Moody's. If ratings by Fitch, S&P and Moody's are not equivalent, the lower rating shall apply.

"Cure Plan" has the meaning set forth in Section 11.1(b)(vi).

"Curtailment Order" means any of the following:

- (a) CAISO orders, directs, alerts, or provides notice to a Party, including a CAISO Operating Order, to curtail deliveries of Facility Energy, and/or accepting Charging Energy from the CAISO Grid (to the extent permitted under this Agreement) 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 Facility Energy, (ii) Seller from delivering Facility

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Energy to the Delivery Point; or (iii) to the extent permitted under Section 4.5(i), Seller from receiving Charging Energy from a source other than the Generating Facility; or

(d) a curtailment in accordance with Seller's obligations under its Interconnection Agreement with the Participating Transmission Owner or distribution operator.

Notwithstanding anything to the contrary in this Agreement, if in the future the CAISO adopts any rule or regulation that would allow for the Parties and/or Buyer's SC to deliver Charging Energy to the Storage Facility during any Curtailment Order, the Parties agree to use commercially reasonable efforts to do so. For clarification, any notice, order, or instruction from the CAISO to curtail or reduce Generating Facility Energy and/or the Generating Facility that results from a Buyer instruction or lack of instruction to the Buyer SC and/or having submitted a Self-Schedule, Energy Supply Bid, or bid for Ancillary Services for the Storage Facility, all of which is consistent with the definition of Buyer Bid Curtailment, is a Buyer Bid Curtailment not a Curtailment Order.

"<u>Curtailment Period</u>" means the period of time, as measured using current Settlement Intervals, during which generation from the Generating Facility is reduced pursuant to a Curtailment Order; *provided* that the Curtailment Period shall be inclusive of the time required for the Generating Facility to ramp down and ramp up.

"Damage Payment"

"<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.

"<u>Dedicated Interconnection Capacity</u>" means the maximum instantaneous amount of Energy that is permitted to be delivered by the Facility to the Delivery Point under Seller's Interconnection Agreement, in the amount of MWs as set forth on the Cover Sheet.

"<u>Deemed Delivered Energy</u>" means the amount of Energy expressed in MWh 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, for any time period, shall be equal to the difference between (a) the amount of Energy as determined by the Lost Output / Deemed Delivered Energy Computation, *minus* (b) the amount of Energy that the Generating Facility produced and delivered to the Delivery Point during the Buyer Curtailment Period; *provided* that, if the applicable difference between the foregoing clauses (a) and (b) is negative, the Deemed Delivered Energy shall be zero (0).

"<u>Defaulting Party</u>" has the meaning set forth in Section 11.1(a).

"**Deficient Month**" has the meaning set forth in Section 4.10(e).

"Deliverability Network Upgrades" has the meaning set forth in the CAISO Tariff.

"<u>Delivery Point</u>" has the meaning set forth in <u>Exhibit A</u>.

"<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 Section 5(b) of <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.

"<u>Discharging Energy</u>" means all Energy that is delivered from the Storage Facility to the Delivery Point pursuant to a Discharging Notice during any Settlement Interval or Settlement Period, as measured by the Storage Facility Meter, as such meter readings are adjusted for Electrical Losses to the Delivery Point.

"Discharging Notice" means the operating instruction, and any subsequent updates, given by Buyer, Buyer's SC or the CAISO to the Storage Facility, directing the Storage Facility to discharge Discharging Energy at a specific MW rate for a specified period of time or amount of MWh; provided, (a) any such operating instruction or updates shall be in accordance with the Operating Procedures and the CAISO Tariff, and (b) if, during a period when the Storage Facility is instructed by Buyer, Buyer's SC or the CAISO to be discharging, the sum of Generating Facility Energy and Discharging Energy would exceed the Dedicated Interconnection Capacity, such "Discharging Instruction" shall be deemed to be automatically adjusted to reduce the amount of Discharging Energy so that the sum of Discharging Energy and Generating Facility Energy does not exceed the Dedicated Interconnection Capacity, until such time as Buyer, Buyer's SC or the CAISO issues a further modified Discharging Notice.

"<u>Dispute Notice</u>" has the meaning set forth in Section 15.4.

"Early Termination Date" has the meaning set forth in Section 11.2(a).

"Effective Date" has the meaning set forth on the Preamble.

"Effective Storage Capacity" means the lesser of (a) PMAX, and (b) the maximum dependable operating capacity of the Storage Facility to discharge Energy for four (4) hours of continuous discharge, as measured in MW AC at the Delivery Point (i.e., measured at the Storage Facility Meter and adjusted for Electrical Losses to the Delivery Point) pursuant to the most recent Storage Capacity Test (including the Commercial Operation Storage Capacity Test, as evidenced by a certificate substantially in the form attached as Exhibit I-2 hereto), in either case (a) or (b) up to but not in excess of (i) the Guaranteed Storage Capacity (with respect to a Commercial Operation Storage Capacity Test) or (ii) the Installed Storage Capacity (with respect to any other Storage Capacity Test).

"<u>Efficiency Rate</u>" means the measured round-trip efficiency rate of the Storage Facility, expressed as a percentage, calculated pursuant to a Storage Capacity Test by dividing Energy Out by Energy In and which for a given calendar month shall be prorated as necessary if more than one Efficiency Rate applies during such calendar month.

"<u>Electrical Losses</u>" means, subject to meeting any applicable CAISO requirements and in accordance with Section 7.1, all transmission or transformation losses (a) between the Generating Facility Meter and the Delivery Point associated with delivery of Generating Facility Energy, (b) between the Storage Facility Meter and the Delivery Point associated with delivery of Discharging Energy, (c) between the Delivery Point and the Storage Facility Meter associated with delivery of Charging Energy.

"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 alternating current electrical energy measured in MWh.

"Energy In" has the meaning set forth in Part II.B and Part III.A.4 of Exhibit O.

"Energy Management System" or "EMS" means the Storage Facility's energy management system.

"Energy-only Rate" has the meaning set forth on the Cover Sheet.

"Energy Out" has the meaning set forth in Part II.B Part III.A.9 of Exhibit O.

"Energy Supply Bid" has the meaning set forth in the CAISO Tariff.

"Event of Default" has the meaning set forth in Section 11.1.



"Execution Date" has the meaning set forth on the Preamble.

"Excess MWh" has the meaning set forth in Exhibit C.

"<u>Executed Interconnection Agreement Milestone</u>" means the date for completion of execution of the Interconnection Agreement by Seller (or Seller's Affiliate) and the PTO as set forth on the Cover Sheet.

"Expected Energy" means the quantity of Generating Facility Energy that Seller expects to be able to deliver to Buyer 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.

"Facility" means the Generating Facility and the Storage Facility.

"<u>Facility Energy</u>" means the sum of the Generating Facility Energy and the Discharging Energy.

"<u>FERC</u>" means the Federal Energy Regulatory Commission or any successor government agency.



"Fitch" means Fitch Ratings Ltd., or its successor.

"Force Majeure Event" has the meaning set forth in Section 10.1.

"Forced Facility Outage" means an unexpected failure of one or more components of the Facility that prevents Seller from making all or a portion of the Generating Facility Energy and Discharging Energy available at the Delivery Point or receiving Charging Energy from the Delivery Point and that is not the result of a Force Majeure Event.

"Forecasting Penalty" has the meaning set forth in Section 4.3(f).

"Full Capacity Deliverability Status" has the meaning set forth in the CAISO Tariff.

"Future Environmental Attributes" shall mean, except to the extent set forth in the last sentence of this definition, any and all generation attributes (other than Green Attributes or Tax Benefits) 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 Benefits associated with the development, construction, operation or ownership 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,

or (iv) emission reduction credits encumbered or used by the Facility for compliance with local, state, or federal operating and/or air quality permits.

"Gains" means, with respect to any Non-Defaulting 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 Non-Defaulting 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 and Capacity 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 Generating Facility Energy; *provided*, the "Generating Facility" does not include the Storage Facility or the Shared Facilities.

"Generating Facility Energy" means the Energy, net of Electrical Losses and Station Use, that is measured by the Generating Facility Meter in accordance with CAISO metering requirements and Prudent Operating Practices.

"Generating Facility Meter" means the CAISO Approved Meter, along with a CAISO-approved 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 Generating Facility Energy delivered to the Generating Facility Meter for the purpose of invoicing in accordance with Section 8.1. The Generating Facility may contain multiple measurement devices that will make up the Generating Facility Meter, and, unless otherwise indicated, references to the Generating Facility Meter shall mean all such measurement devices and the aggregated data of all such measurement devices, taken together.

"GEP Damages" has the meaning set forth in Section 4.7.

"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 the CPUC; provided, however, that "Governmental Authority" shall not in any event include any Party.

"Green Attributes" means, except to the extent set forth in the last sentence to of this definition, 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 under the preceding definition are limited to Green Attributes that exist under applicable Law as of the Effective Date. Green Attributes do not include (i) any energy, capacity, reliability or other power attributes from the Facility, (ii) Tax Benefits associated with the development, construction, operation or ownership 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 and/or air quality permits.

"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 Commercial Operation Date" has the meaning set forth on the Cover Sheet.

"Guaranteed Construction Start Date" has the meaning set forth on the Cover Sheet.

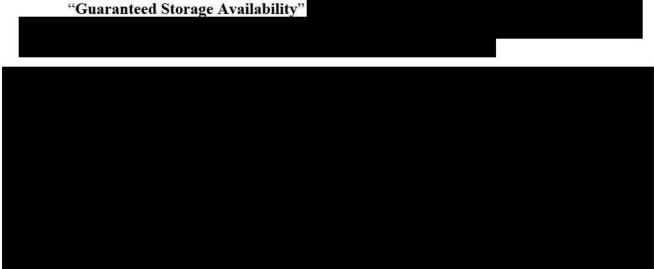
"Guaranteed Capacity" means the sum of the Guaranteed Generating Capacity and the Guaranteed Storage Capacity.

"Guaranteed Efficiency Rate" means the guaranteed Efficiency Rate of the Storage Facility throughout the Delivery Term, as set forth on the Cover Sheet, as may be adjusted pursuant to Section 4.5(i).

"Guaranteed Generating Capacity" means the generating capacity of the Generating Facility, as measured in MW AC at the Delivery Point (i.e., measured at the Generating Facility Meter and adjusted for Electrical Losses to the Delivery Point), set forth on the Cover Sheet, as may be adjusted pursuant to Exhibit B, Section 6(b).

"Guaranteed RA Amount" shall be, at any point in time on or after the Guaranteed RA Date, the amount of Qualifying Capacity (in MWs) that is able to be shown for each hour of the

four (4) hour discharge,



"Guaranteed Storage Capacity" means the total capacity (in MW) of the Storage Facility initially equal to the amount set forth on the Cover Sheet, as the same may be adjusted from time to time pursuant to Section 6(a) of Exhibit B.

"Guaranteed Storage Output" means the product of the Guaranteed Storage Capacity multiplied by four (4) hours, represented in MWh, initially equal to the amount set forth on the Cover Sheet.

"Guarantor" means, with respect to Seller, (a) NextEra Energy Capital Holdings, Inc., (b) an Affiliate of Seller with an Investment Grade Credit Rating, or (c) any Person reasonably acceptable to Buyer, that (i) has an Investment Grade Credit Rating, (ii) is incorporated or organized in a jurisdiction of the United States and is in good standing in such jurisdiction, and (iii) 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 amounts of Generating Facility Energy, Charging Energy, or Discharging Energy deviates from the amount of Scheduled Energy.

"Indemnifiable Loss(es)" has the meaning set forth in Section 16.1(a).

"Indemnified Party" has the meaning set forth in Section 16.1(a).

"Indemnifying Party" has the meaning set forth in Section 16.1(a).

"Installed Storage Capacity" means the maximum dependable operating capability of the Storage Facility to discharge Energy measured in MW(ac) at the Storage Facility Meter and adjusted for Electrical Losses to the Delivery Point, that achieves Commercial Operation (up to but not in excess of the Guaranteed Storage Capacity), demonstrated through a Storage Capacity Test, and as evidenced by a certificate substantially in the form attached as Exhibit I-1 hereto.

"Installed PV Capacity" means the maximum generating capacity of the Generating Facility, as measured in MW(ac) at the Delivery Point (i.e., measured at the Generating Facility Meter and adjusted for Electrical Losses to the Delivery Point), that achieves Commercial Operation (up to but not in excess of the Guaranteed Generating Capacity), 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-2 hereto.

"Insurable Force Majeure Event" means any Force Majeure Event which (i) results in direct, physical loss to the Facility and (ii) excludes Force Majeure Events that occur beyond the Delivery Point.

"Interconnection Agreement" means the interconnection agreement(s) entered into by Seller or a Seller Affiliate pursuant to which the Facility will be interconnected with the Transmission System, providing for interconnection capacity available or allocable to the Facility that is no less than the Dedicated Interconnection Capacity, 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.

"Interconnection Point" has the meaning set forth in Exhibit A.

"Interest Rate" has the meaning set forth in Section 8.2.

"Interim Deliverability Status" has the meaning set forth in the CAISO Tariff.

"Interim Deliverability Status MW" has the meaning set forth in Exhibit C, Section (e).

"Inter-SC Trade" or "IST" has the meaning set forth in the CAISO Tariff.

"Investment Grade Credit Rating"

"ITC" means the investment tax credit established pursuant to Section 48 of the United States Internal Revenue Code of 1986, as in effect from time-to-time throughout the Contract Term or any successor provision.

"<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 1, 2019, 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 construction, interim, back leverage or long-term debt, equity or 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), 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 equity or tax equity investor directly or indirectly providing financing or refinancing for the Facility or purchasing equity ownership interests of Seller or its Affiliates, 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 or (iii) 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 having at least and having a Credit Rating of a previously provided by Seller to Buyer under the Prior PPA, or (ii) in a form substantially similar to the letter of credit set forth in Exhibit K, if issued on behalf of Seller for the benefit of Buyer; and (b) in a form substantially similar to Exhibit S if issued on behalf of Buyer for the benefit of Seller.

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

"Limited Assignee" has the meaning set forth in Section 14.3.

"Local Capacity Area Resource" has the meaning set forth in the CAISO Tariff.

"<u>Local RAR</u>" means the local resource adequacy requirements established for load serving entities by the CPUC pursuant to the Resource Adequacy Rulings, the CAISO pursuant to the CAISO Tariff, or by any other Governmental Authority having jurisdiction.

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

"Losses" means, with respect to the Non-Defaulting 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 Non-Defaulting 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, as applicable, and must include the value of Green Attributes, Capacity Attributes, and Tax Benefits.

"Lost Output" means the amount of Generating Facility Energy expressed in MWh 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 Force Majeure Events, Curtailment Periods, System Emergencies, or Buyer Default, which amount shall be calculated using the Lost Output / Deemed Delivered Energy Computation for the period of time during such Force Majeure Events, Curtailment Periods, System Emergencies, or Buyer Default, less the amount of Generating Facility Energy delivered to the Storage Facility or the Delivery Point during such period of time (or other relevant period); provided, if the applicable difference is negative, the Lost Output shall be zero (0).

"Lost Output / Deemed Delivered Energy Computation" means the total amount of energy that the Generating Facility would have produced during a Buyer Curtailment Period or a Lost Output period, as calculated by Seller in a manner reasonably acceptable to Buyer, consistent with the Availability Forecast, using the best available data obtained through commercially reasonable methods and meteorological data at the Generating Facility during such Buyer Curtailment Period or Lost Output period, and any adjustments necessary to accurately reflect the Generating Facility's capacity to produce and deliver energy to the Delivery Point, including applicable losses and manufacturers' warranted power curves, subject to Buyer's verification not to be unreasonably withheld. Should Buyer not be satisfied with resulting calculation by Seller, Seller shall hire a third party to perform such calculation in accordance with the above, subject to approval by Buyer not to be unreasonably withheld.

"Major Equipment Failure" has the meaning set forth in Section 11.1(b)(ix).

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

"Maximum Charging Capacity" has the meaning set forth in in Exhibit Q.

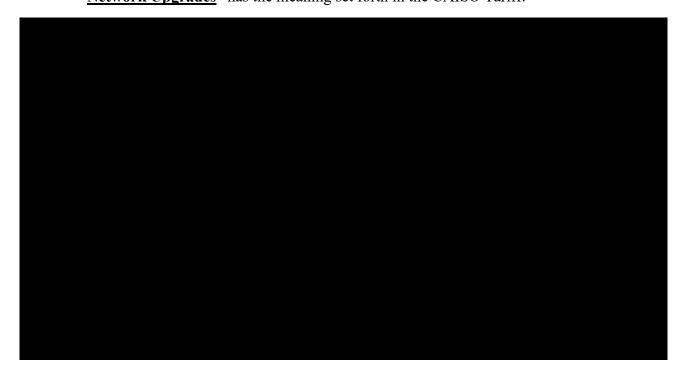
"Maximum Discharging Capacity" has the meaning set forth in in Exhibit Q.

"Meter Service Agreement" has the meaning set forth in the CAISO Tariff.

"<u>Milestones</u>" means the development activities for significant permitting, interconnection, and construction milestones set forth on the Cover Sheet.

"Minimum Efficiency Rate" means the percentage specified on the Cover Sheet, and for avoidance of doubt applies to the Storage Facility.

- "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.
 - "NEECH" has the meaning set forth in the definition of Affiliate.
 - "NEER" means NextEra Energy Resources, LLC.
- "Negative LMP" means, in any Settlement Period or Settlement Interval, the Day-Ahead Market or Real-Time Market at the Facility's PNode is less than Zero dollars (\$0).
 - "Negative LMP Costs" has the meaning set forth in Exhibit C.
 - "NEOP" has the meaning set forth in the definition of Affiliate.
 - "NEP" has the meaning set forth in the definition of Affiliate.
- "<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 this Agreement, mean written communications by a Party to be delivered by hand delivery, United States mail, next Business Day courier service, or electronic messaging (e-mail).

"<u>Operating Procedures</u>" or "<u>Operating Restrictions</u>" means those restrictions, rules, requirements, and procedures set forth on <u>Exhibit Q</u>.

"Participating Generator Agreement" has the meaning set forth in the CAISO Tariff.

"Participating Transmission Owner" or "PTO" means an entity that owns, operates and maintains (or designates a third-party to operate or maintain on its behalf) 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 Year period during the Delivery Term so that the first Performance Measurement Period shall include Contract Years 1 and 2 of the Delivery Term. 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, each with respect to the Delivery Term.

"Performance Security" means (i) cash or (ii) a Letter of Credit or (iii) a Guaranty in the amount set forth on the Cover Sheet.

"Permitted Transfer" means each of the following transactions:

- (a) Transactions among Affiliates of Seller, including any corporate reorganization, merger, combination or similar transaction or transfer of assets or ownership interests involving Seller or its Affiliates; *provided*, that: (i) Ultimate Parent retains the authority, directly or indirectly, to control Seller (or if applicable, the surviving entity), or (ii) a wholly-owned, indirect subsidiary of Ultimate Parent operates the Facility;
 - (b) A Change of Control of Ultimate Parent, NEECH, NEP, NEOP, or NEER;
- (c) Any change of economic and voting rights triggered in Seller's organization documents arising from the financing of the Facility and that does not result in the transfer of ownership, economic or voting rights in any entity that had no such rights immediately prior to the change;
- (d) The direct or indirect transfer of shares of, or equity interests in, Seller to a Lender;
 or
- (e) A transfer of the Facility (or the direct or indirect ownership of equity interests in Seller) in connection with any of the following: (i) all or substantially all of the assets of NEER, NEECH, or Ultimate Parent; (ii) all or substantially all of NEER's or Ultimate Parent's renewable energy generation portfolio; or (iii) all or substantially all of NEER's or Ultimate Parent's solar generation and/or energy storage portfolio; or (iv) the direct or indirect transfer of shares of, or equity interests in, Seller to a person in which, following the transfer, an Affiliate of NEER continues to hold an economic interest in the Facility; provided, that in the case of each of (i) through (iv) above: (A) the transferee (1) executes and delivers to Buyer a written agreement under which the transferee assumes in writing all of Seller's duties and obligations under this Agreement and otherwise agrees to be bound by all of the terms and conditions of this Agreement, and (2) meets the Seller credit security requirements; and (B) the entity that operates the Facility following such transfer is (or contracts with) a Qualified Operator.

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

(a)

(b) At least three (3) years of experience in the ownership and operations of power generation facilities similar to the Facility, or has retained a third-party with such experience to operate the Facility.

Notwithstanding the foregoing, with respect to Seller, Permitted Transferee shall include its Ultimate Parent, NEER, NEECH, NEOP, and NEP, and their respective direct or indirect subsidiaries.

"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" means, subject to and as further described in the CAISO Tariff, a CAISO-approved planned or scheduled disconnection, separation or reduction in capacity of the Facility that is conducted for the purposes of carrying out routine repair or maintenance of such Facility, or for the purposes of new construction work for such Facility.

"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.

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

"Prior PPA" has the meaning set forth in the Recitals.

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

"Production Tax Credits" or "PTCs" means production tax credit under Section 45 or 45Y of the Internal Revenue Code as in effect from time-to-time throughout the Delivery Term or any successor or other provision providing for a federal tax credit determined by reference to renewable electric energy produced from wind, solar or other renewable energy resources or by reference to storage of renewable energy resources for which Seller, as the owner of the Generating Facility or the Storage Facility, each as applicable, is eligible.

"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 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 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.

"PTC Amount" means the amount, on a dollar per MWh basis, equal to the Production Tax Credits that Seller would have earned in respect of Generating Facility Energy at the time, grossed up on an After-Tax Basis at the then-highest marginal combined federal and state corporate tax rate, but failed to earn as a result of a Buyer Curtailment Period, with the applicable MWh figure to be calculated by reference to the amount of Deemed Delivered Energy.

"Qualified Operator" means Seller or an operator of photovoltaic solar generation facilities that has sufficient experience and technical capability to perform for Seller's benefit the obligations of Seller under this Agreement related to the operation and maintenance of the Facility in accordance with the applicable requirements of this Agreement, as evidenced by such operator having operated three (3) or more photovoltaic solar generation facilities, each having a nameplate capacity rating of twenty (20) MW or more, for not less than three (3) years and at least one (1) battery energy storage facility having a nameplate capacity rating of one (1) MW and/or two (2) MWh or more, for not less than two (2) years.

"Qualifying Capacity" has the meaning set forth in the CAISO Tariff.

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

"RA Deficiency Amount" 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 Cover Sheet.

"RA Rate" has the meaning set forth on the Cover Sheet.

"**RA Shortfall**" has the meaning set forth in in Section 3.8(b).

"RA Shortfall Month" means, for purposes of calculating an RA Deficiency Amount under Section 3.8(b), any Showing Month, commencing with the First Showing Month, during which (i) the (a) lowest amount of Net Qualifying Capacity eligible to be qualified as RAR and, if applicable, Local RAR from the Facility by both the CPUC and CAISO for such Showing Month, plus (b) any Replacement RA (if applicable) that was included in the Showing Month for Buyer was less than (ii) the Guaranteed RA Amount for such Showing Month.

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

"Real-Time Price" 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.

"Recurring Certificate Transfers" has the meaning set forth in Section 4.10(a).

"Reliability Network Upgrades" has the meaning set forth in the CAISO Tariff.

"Remedial Action Plan" has the meaning set forth in 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 Rate" has the meaning set forth on the Cover Sheet.

"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 Generating Facility during the Performance Measurement Period for which the Replacement Green Attributes are being provided.

"Replacement RA" means Resource Adequacy Benefits, if any, equivalent to those that would have been provided by the Storage Facility with respect to the applicable Showing Month in which a RA Deficiency Amount is due to Buyer including the same Slice-of-Day (as defined in the Resource Adequacy Rulings), generation profile and related characteristics, any successor criteria applicable to the Facility, and as applicable, Flexible RAR and Local RA unless Buyer consents to accept Replacement RA from another facility that provides non-equivalent Resource Adequacy Benefits.

"Resource Adequacy Benefits" means the rights and privileges attached to the Storage 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 and flex attributes associated with the Storage Facility.

"Resource Adequacy Requirements" or "RAR" means the resource adequacy requirements applicable to an entity as established by the CAISO pursuant to the CAISO Tariff,

by the CPUC pursuant to the Resource Adequacy Rulings, or by any other Governmental Authority.

"Resource Adequacy Rulings" means any applicable CPUC ruling or decision related to resource adequacy, or any other resource adequacy laws, rules or regulations enacted, adopted or promulgated by the CPUC or the CAISO, however described, as such decisions, rulings, Laws, rules or regulations may be amended or modified from time-to-time throughout the Contract Term.

<u>"RETA"</u> means the State of Nevada Renewable Energy Tax Abatement including pursuant to NRS 701A.300-.390, inclusive, and NAC 701A.500- 660, inclusive, as in effect from time-to-time throughout the Contract Term or any successor provision.

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

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

"Scheduled Energy" means the Generating Facility Energy, Charging Energy, and Discharging 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.

"Season" means the time periods set forth in the definition of Guaranteed Storage Availability and used to calculate the Seasonal Storage Availability in accordance with Exhibit P.

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

"Seasonal Storage Availability" has the meaning set forth in Exhibit P.

"Self-Schedule" has the meaning set forth in the CAISO Tariff.

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

"Seller Initiated Test" has the meaning set forth in Section 4.9(b).

"Seller's WREGIS Account" has the meaning set forth in Section 4.10(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; provided, that the Parties agree that the value of Green Attributes, Capacity Attributes, and Tax Benefits are direct damages to be accounted for as specified in the definitions of Losses and Gains.

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

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

"SQMD Plan" 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 Affiliates and/or third parties or by Seller for electric generation or storage facilities owned by Seller other than the Facility.

"Showing Month" shall be the calendar month of the Delivery Term, commencing with the First Showing Month, that is the subject of the RA Compliance Showing, as set forth in the Resource Adequacy Rulings and outlined in the CAISO Tariff. For illustrative purposes only, pursuant to the CAISO Tariff and Resource Adequacy Rulings in effect as of the Effective Date, the monthly RA Compliance Showing made in June is for the Showing Month of August.

"<u>Site</u>" means the real property on which the Facility is or will be located, as further described in <u>Exhibit A</u>, and as shall be updated by Seller at the time Seller provides an executed Construction Start Date certificate in the form of Exhibit J to Buyer.

"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.

"<u>SP-15</u>" means the Existing Zone Generation Trading Hub for Existing Zone region SP-15 as set forth in the CAISO Tariff.

"Station Use" means (1) with respect to the Generating Facility, the Energy that is used within the Generating Facility when the Generating Facility is not providing Generating Facility Energy; and (2) with respect to the Storage Facility, the Energy that is used within the Storage Facility to power the information technology, telecommunications, lights, motors, temperature control systems, control facility systems and other electrical loads that are necessary for operation of the Storage Facility (or as otherwise defined by the retail energy provider and CAISO Tariff) except during periods in which the Storage Facility is charging or discharging pursuant to a Charging Notice or Discharging Notice.

"<u>Storage Capacity Test</u>" or "<u>SCT</u>" means any test or retest of the capacity of the Storage Facility and/or Efficiency Rate conducted in accordance with the testing procedures, requirements and protocols set forth in Section 4.9 and <u>Exhibit O</u>.

"Storage Cure Plan" has the meaning set forth in Section 11.1(b)(ix).

"Storage Facility" means the energy storage facility described on the Cover Sheet and in Exhibit A, located at the Site and including the Energy Management System and mechanical equipment and associated facilities and equipment required to deliver Storage Product (but excluding the Generating Facility and any Shared Facilities), and as such storage facility may be expanded or otherwise modified from time to time in accordance with the terms of this Agreement.

"Storage Facility Meter" means a CAISO Approved Meter, along with a CAISO-approved 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 and the amount of Discharging Energy discharged from the Storage Facility at the Storage Facility to the Delivery Point for the purpose of invoicing in accordance with Section 8.1. 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 Payment" means the amount calculated pursuant to Section (e) of Exhibit C.

"Storage Product" means (a) Discharging Energy, (b) Capacity Attributes, if any, (c) Effective Storage Capacity, and (d) Ancillary Services, if any, in each case arising from or relating to the Storage Facility.

"Storage Rate" has the meaning set forth on the Cover Sheet.

"<u>Stored Energy Level</u>" means, at a particular time, the amount of Energy in the Storage Facility available to be discharged as Discharging Energy, expressed in MWh.

"Supplementary Storage Capacity Test Protocol" has the meaning set forth in Exhibit O.

"Supply Plan" has the meaning set forth in the CAISO Tariff.

"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 Benefits</u>" means the PTC, ITC, RETA, and any and all other federal, state, and/or local tax benefit, grant or incentive, including energy credits determined under Section 38, 45, 45Y, 46, 48 and 48E of the Internal Revenue Code of 1986, as amended, investment tax credits, production tax credits, depreciation, amortization, deduction, expense, exemption, preferential rate, and/or other tax benefit or incentive associated with the production, sale, or storage of renewable energy and/or the operation, construction, investments in or ownership of, the Generating Facility, the Storage Facility, and/or the Facility (including any cash payment or grant).

"Terminated Transaction" 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 Generating Facility Energy delivered (a) commencing on the later of (i) the first date that the CAISO informs Seller in writing that Seller may deliver Generating 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 Commercial Operation Date.

"Test Energy Rate" has the meaning set forth in Section 3.6.

"Throughput" means, at any point in time during any day or Contract Year of the Delivery Term, as applicable, the total cumulative amount of Discharging Energy from the Storage Facility at such point in time during such day or Contract Year of the Delivery Term, as applicable (expressed in MWh).

"<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 downstream from the Delivery Point.



"<u>Ultimate Parent</u>" means NextEra Energy, Inc., NEER, NEP, NEOP, or NEECH, and includes any combination thereof.

"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.

"WREGIS Operating Rules" means those operating rules and requirements adopted by WREGIS as of October 2022, 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 Article, Section, paragraph, clause of, or that Party or Exhibit to, this Agreement unless otherwise specified;
- (e) a reference to a document or agreement, including this Agreement 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 terms "include" and "including" mean "include or including (as applicable) without limitation" and any list of examples following such terms 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 set forth herein ("<u>Contract Term</u>"); *provided*, *however*, that subject to Buyer's obligations in Section 3.6, Buyer's obligations to pay for or accept any applicable Product are subject to Seller's completion of the applicable 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 indemnity and audit rights shall remain in full force and effect for two (2) years following the termination of this Agreement.

2.2 **Conditions Precedent**.

- (a) The Commercial Operation Date shall not occur until Seller completes each of the following conditions to Buyer's reasonable satisfaction with respect to the Facility:
- (i) Seller has delivered to Buyer (i) a completion certificate from a Licensed Professional Engineer substantially in the form of Exhibit H-1 and (ii) a certificate from a Licensed Professional Engineer substantially in the form of Exhibit I-1 setting forth the Installed Storage Capacity on the Commercial Operation Date;

- (ii) 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;
- (iii) An Interconnection Agreement between Seller (or Seller's Affiliate) 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;
- (iv) All necessary and applicable regulatory authorizations, approvals and permits for the operation of the Facility have been obtained and all required conditions thereof that are capable of being satisfied on the COD have been satisfied;
- (v) Seller has received CEC Precertification of the Generating Facility (and reasonably expects to receive final CEC Certification and Verification for the Generating Facility in no more than one hundred eighty (180) days from the Commercial Operation Date);
- (vi) 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 COD 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 service agreements, and other appropriate documentation required to effect Facility registration with WREGIS and to enable Renewable Energy Credit transfers related to the Generating Facility within the WREGIS system;
 - (vii) The Storage Facility has obtained CAISO Certification;
- (viii) The Storage Facility has successfully completed all testing required by any requirement of Law necessary to operate the Facility; and
- (ix) Insurance requirements for the Facility have been met, with evidence provided in writing to Buyer, in accordance with Section 17.1;
- (x) Seller has delivered the Facility Performance Security to Buyer in accordance with Section 8.8; and
- (xi) Seller has paid Buyer for all amounts owing under this Agreement, if any, including 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 thereafter until the COD, Seller shall provide to Buyer a Progress Report that (a) describes the progress towards meeting the Milestones; (b) identifies any missed Milestones, including the cause of the delay; and (c) provides a detailed description of Seller's corrective actions to achieve the missed Milestones. The Progress Reports shall be substantially in the form set forth in <u>Exhibit E</u>. Seller agrees to quarterly or monthly (as applicable) meetings between representatives of Buyer and Seller to

review the Progress Reports and discuss Seller's construction progress. 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 from Buyer. 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 misses three (3) or more Milestones, or misses any one (1) Milestone 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 of the end of such ninety (90)-day period following such missed Milestone completion date, 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 (e.g., governmental approvals, financing, property acquisition, design activities, equipment procurement, project construction, interconnection, or any other factor), Seller's reasonably detailed description of its proposed course of action to achieve the missed Milestones and all subsequent Milestones; 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. 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 Contract Term, Buyer will purchase all 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. At its sole discretion, Buyer may during the Delivery Term resell all or a portion of the Product, provided that no such resale or use shall relieve Buyer of any obligations hereunder. During the Delivery Term, Buyer will have exclusive rights to offer, bid, 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.
- 3.2 <u>Sale of Green Attributes</u>. During the Delivery Term, Seller shall sell and deliver to Buyer, and Buyer shall purchase from Seller, all Green Attributes attributable to the Generating Facility Energy; *provided*, that the Generating Facility Energy will be subject to proportional adjustments resulting from any reductions or offsets imposed under applicable rules or polices of the California Energy Commission to account for losses resulting from the Storage Facility.
- 3.3 <u>Imbalance Energy</u>. Buyer and Seller recognize that in any given Settlement Period there may be Imbalance Energy. To the extent there is any Imbalance Energy, any payments related to such Imbalance Energy shall be for the account of Buyer.
- 3.4 <u>Ownership of Tax Benefits</u>. Seller shall have all right, title and interest in and to all Tax Benefits. Buyer acknowledges that any Tax Benefits belong to Seller. If any Tax Benefits,

or values representing the same, are initially credited or paid to Buyer, Buyer shall cause such Tax Benefits 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 Tax Benefits.

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 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 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; *provided*, that the Parties acknowledge and agree that 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 Generating Facility, Seller shall notify Buyer of the availability of the Test Energy. If and to the extent the Generating Facility generates Test Energy, Seller shall sell, and Buyer shall purchase from Seller, all Test Energy and any associated Product of the Generating Facility on an as-available basis. As full compensation for such Test Energy and associated Product, Buyer shall pay Seller

(the "Test

Energy Rate"). 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 for the Guaranteed Storage Capacity in the CAISO generator interconnection process. Seller shall use commercially reasonable efforts to achieve Full Capacity Deliverability Status or Interim Capacity Deliverability Status in the amount of the Guaranteed Storage Capacity by the Guaranteed RA Date. As between Buyer and Seller, Seller shall be responsible for the cost and

installation of any Deliverability Network Upgrades associated with obtaining such Full Capacity Deliverability Status.

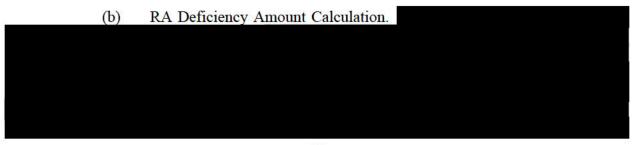
- (a) From and after the Guaranteed RA Date, and subject to Section 3.12, Seller grants, pledges, assigns and otherwise commits to Buyer all the Capacity Attributes from the Storage Facility.
- (b) If the Storage Facility achieves Interim Deliverability Status in an amount that is less than the Guaranteed Storage Capacity, for each Showing Month from the date that the Storage Facility achieves Interim Deliverability Status to the first Showing Month for which Full Capacity Deliverability is obtained, the Storage Payment shall be calculated in accordance with Exhibit C, Section (e).



- (d) From and after the date the Storage Facility achieves Full Capacity Deliverability Status or Interim Deliverability Status and subject to Section 3.12, Seller shall maintain eligibility for Full Capacity Deliverability Status or Interim Deliverability Status for the Storage Facility from the CAISO and shall perform all actions necessary to ensure that the Storage Facility qualifies to provide Resource Adequacy Benefits to Seller. Throughout the Delivery Term, and subject to Section 3.12, Seller hereby covenants and agrees to transfer all Resource Adequacy Benefits to Buyer.
- (e) For the duration of the Delivery Term, and subject to Section 3.12, Seller shall take commercially reasonable administrative actions, including complying with all applicable registration and reporting requirements, and executing 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), in each case, as the sole remedy for the Capacity Attributes Seller failed to convey to Buyer.





3.9 <u>CEC Certification and Verification</u>. Subject to Section 3.12, 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 for the Generating Facility throughout the Delivery Term, including compliance with all applicable requirements for certified facilities set forth in the current version of the *RPS Eligibility Guidebook* (or its successor). Seller shall obtain CEC Precertification by the Commercial Operation Date. Within thirty (30) days after the COD, 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 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 Generating Facility.



3.11 California Renewables Portfolio Standard.

- (a) <u>Tracking of RECs in WREGIS</u>. Seller warrants that all necessary steps to allow the Renewable Energy Credits transferred to Buyer to be tracked in the Western Renewable Energy Generation Information System will be taken prior to the first delivery under the contract. [STC REC-2].
- (b) <u>Transfer of Renewable Energy Credits</u>. 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. [STC REC-1].
- (c) <u>Eligibility</u>. Seller, and, if applicable, its successors, represents and warrants that throughout the Delivery Term of this Agreement that: (i) the Project qualifies and is certified by the CEC as an Eligible Renewable Energy Resource ("ERR") as such term is defined in Public Utilities Code Section 399.12 or Section 399.16; and (ii) the Project's output delivered to Buyer qualifies under the requirements of the California Renewables Portfolio Standard. To the extent a change in law occurs after execution of this Agreement that causes this representation and warranty to be materially false or misleading, it shall not be an Event of Default if Seller has used commercially reasonable efforts to comply with such change in law. [STC 6].
- (d) With respect to the immediately preceding paragraphs (a) (c), (i) the reference in Section 3.11(a) to "first delivery under the contract" has the same meaning as "first delivery of Generating Facility Energy under this Agreement", (ii) the references in Section 3.11(c) to "Project" have the same meaning as "Generating Facility", (iii) the reference in Section 3.11(c)(ii) to "the Project's output" has the same meaning as "the Generating Facility Energy net of losses if required by Law", and (iv) each reference in the last sentences of Section 3.11(b) and Section 3.11(c) to "commercially reasonable efforts" means efforts consistent with and subject to Section 3.12 below.

3.12 Compliance Expenditure Cap.

(a) The Parties acknowledge that a purpose of this Agreement is to provide renewable generation that meets the requirements of the California Renewables Portfolio Standard and that Governmental Authorities, including the CEC, CPUC, CAISO and WREGIS, may undertake actions to implement a Change in Law. Seller agree to use commercially reasonable efforts to cooperate with respect to any future changes to this Agreement needed to satisfy

requirements of Governmental Authorities associated with a Change in Law to maximize benefits to Buyer provided under this Agreement as of the Effective Date, including: (i) the modification of the description of Green Attributes and/or Capacity Attributes as may be required, including updating the Agreement to reflect any mandatory contractual language required by Governmental Authorities; (ii) submission of any reports, data, or other information required by Governmental Authorities from Seller; or (iii) all other actions that may be required by Seller to assure that this Agreement or the Generating Facility is eligible as an ERR and for other benefits under the California Renewables Portfolio Standard; *provided*, Seller shall have no obligation to modify this Agreement, or take other actions not required under this Agreement, if such modifications or actions would materially adversely affect, or could reasonably be expected to have or result in a material adverse effect on, any of Seller's rights, benefits, risks and/or obligations under this Agreement.

(b) If a Change in Law occurring after the Effective Date increases Seller's known or reasonably expected costs and expenses to comply with Seller's obligations under the Agreement with respect to obtaining, maintaining, conveying or effectuating Buyer's use of Green Attributes or Capacity Attributes (any action required to be taken by Seller to comply with such Change in Law, a "Compliance Action"), then the Parties agree that the maximum aggregate amount of costs and expenses Seller shall be required to bear during the Contract Term to comply with all of such Compliance Actions in performing its obligations under the Agreement shall be capped at

(the "Compliance Expenditure Cap").

- (c) If Seller reasonably anticipates the need to incur costs and expenses in excess of the Compliance Expenditure Cap in order to take any Compliance Action Seller shall provide Notice to Buyer of such anticipated costs and expenses.
- (d) 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 some portion of the costs and expenses that exceed the Compliance Expenditure Cap (such Buyer-agreed upon costs, the "Accepted Compliance Costs"), 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, or if Buyer does not timely pay the costs and expenses in excess of the Accepted Compliance Costs, Buyer shall be deemed to have waived its rights to require Seller to take the Compliance Actions that are the subject of the Notice, and Seller shall have no further obligation to take, and no liability or obligation under this Agreement for any failure to take, such Compliance Actions.
- (e) If Buyer agrees to reimburse Seller for 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 Seller's actual costs and expenses to effect the Compliance Actions, not to exceed the Accepted Compliance Costs, within sixty (60) days from the time that Buyer receives an invoice and documentation of such costs and expenses from Seller.
 - (f) If a Change in Law prevents Seller from complying with its obligations

under this Agreement with respect to obtaining, maintaining, conveying or effectuating Buyer's use of (as applicable) any Product pursuant to Sections 3.1, 3.2, 3.4, 3.5, 3.6, 3.7, 3.8, 3.9, or 3.11, and it is not possible to overcome the Change in Law through Compliance Actions or the expenditure of money, then,

Seller shall provide Notice to Buyer

of such Change in Law and the consequences for Seller's performance hereunder, the Parties shall enter into negotiations to make the minimum changes to this Agreement necessary to make this Agreement capable of being performed and administered consistent with such Change in Law, while attempting to preserve to the maximum extent possible the benefits, burdens, and obligations set forth in this Agreement as of the Effective Date, *provided* that if no such agreement is achieved resolution shall be determined in accordance with Article 15.

ARTICLE 4 OBLIGATIONS AND DELIVERIES

4.1 **Delivery**.

- (e) Energy. Subject to the provisions of this Agreement, commencing on the first day of the Delivery Term through the end of the Contract Term, Seller shall supply and deliver the applicable Product to Buyer at the Delivery Point (except for Generating Facility Energy used as Charging Energy), and Buyer shall take delivery of the Product at the Delivery Point (except for Generating Facility Energy used as Charging Energy) in accordance with the terms of this Agreement. Seller shall 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, any costs associated with delivering the Charging Energy from the Generating Facility to the Storage Facility, and any operation and maintenance charges imposed 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. The Generating Facility Energy, Charging Energy, and Discharging Energy will be scheduled to the CAISO by Buyer (or Buyer's designated Scheduling Coordinator) in accordance with Exhibit D.
- (f) <u>Green Attributes</u>. All Green Attributes associated with the Generating Facility during the Delivery Term are exclusively dedicated to and vested in Buyer. Seller represents and warrants that Seller holds the rights to all Green Attributes from the Generating 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 Generating Facility.

4.2 Title and Risk of Loss.

(a) <u>Energy</u>. Title to and risk of loss related to the Generating Facility Energy and Discharging 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 shall pass and transfer from Seller to Buyer upon the transfer of such Green Attributes in accordance with WREGIS.
- 4.3 <u>Forecasting</u>. Seller shall provide the forecasts described below at its sole expense and in a format acceptable to Buyer (or Buyer's designee). 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.
- (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 (if applicable) a non-binding forecast of each month's average-day expected Generating Facility Energy, by hour, for the following calendar year in a form substantially similar to the table found in Exhibit F-1, or as reasonably agreed to by the Parties.
- (30) days before the beginning of Commercial Operation, and thereafter at least ten (10) Business Days before the beginning of each month during the Delivery Term, Seller shall provide to Buyer and the SC (if applicable) a non-binding forecast of the hourly (i) Available Generating Capacity, (ii) Available Charging Capacity, and (iii) Available Discharging Capacity for each day of the following month in a form substantially similar to the table found in Exhibit F-2, or as reasonably agreed to by the Parties ("Monthly Delivery Forecast").
- Prevailing Time on the Business Day immediately preceding the date of delivery, or as otherwise specified by Buyer or the Buyer's SC consistent with Prudent Operating Practice, Seller shall provide Buyer with a non-binding forecast of (i) Available Generating Capacity, (ii) Available Charging Capacity, and (iii) Available Discharging Capacity, in each case, for 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 hour, Seller's best estimate of (i) Available Generating Capacity, (ii) Available Charging Capacity, and (iii) Available Discharging Capacity. These Day-Ahead Forecast shall be sent to Buyer's SC. 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 Availability 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) <u>Availability Forecasts</u>. During the Delivery Term, Seller shall notify Buyer and Buyer's SC of any changes from the Day-Ahead Forecast of one (1) MW or more in (i) Available Generating Capacity, (ii) Available Charging Capacity, and (iii) Available Discharging Capacity, each reported in a format in accordance with the CAISO Tariff, 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 Charging Capacity, or Available Discharging Capacity changes by at least one (1) MW 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 and Buyer's SC as soon as reasonably possible. Such Availability Forecasts 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 Charging Capacity, or Available Discharging Capacity, as applicable, the expected end date and time of such event, and any other information required by the CAISO or reasonably requested by Buyer. With respect to any Forced Facility Outage, Seller shall use commercially reasonable efforts to notify Buyer and Buyer's SC of such outage within ten (10) minutes of the commencement of the Forced Facility Outage. Seller shall inform Buyer and Buyer's SC 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 Availability Forecasts shall be communicated in a method reasonably acceptable to Buyer, provided that Buyer specifies the method no later than five (5) 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 Buyer.

- (e) <u>Forced Facility Outages</u>. Notwithstanding anything to the contrary herein, Seller shall promptly notify Buyer's SC 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>. 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 its scheduling activities with respect to Generating Facility Energy during such hour, Seller shall be responsible for a "<u>Forecasting Penalty</u>" for each such hour equal to the product of (A) the absolute difference (if any) between (i) the CAISO VER day-ahead forecast, and (ii) the actual Generating Facility Energy based upon the CAISO VER forecast (absent any Charging Energy and Discharging Energy), <u>multiplied by</u> (B) the absolute value of the Real-Time Price in such hour. Settlement of Forecasting Penalties shall occur as set forth in Article 8 of this Agreement.
- (g) <u>CAISO Tariff Requirements</u>. Seller shall comply with all applicable CAISO Tariff requirements, procedures, protocols, rules and testing as necessary for Buyer to submit Bids for the electric energy generated, charged and discharged by the Facility. In addition, 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 Generating Facility Energy, by the amount and for the period set forth in any Curtailment Order, Buyer Curtailment Order, or Buyer Bid Curtailment including any notice received from CAISO in respect of a Buyer Bid Curtailment, provided that Seller is not required to reduce such amount to the extent reduction is or would be inconsistent with the limitations of the Generating Facility. In the event the Facility

is curtailed: (i) due to a System Emergency or any Force Majeure Event, Seller shall not be liable for failure to deliver such curtailed Generating Facility Energy and Buyer shall not be obligated to pay for such curtailed Generating Facility Energy; (ii) by the CAISO or the PTO including a Curtailment Order, Seller shall not be liable for failure to deliver such curtailed Generating Facility Energy and Buyer shall not be obligated to pay for such curtailed Generating Facility Energy; and (iii) for any reason other than during a Buyer Curtailment Period, Seller shall not be liable for failure to deliver such curtailed Generating Facility Energy and Buyer shall not be obligated to pay for such curtailed Generating Facility Energy.

- (b) <u>Buyer Curtailment</u>. Buyer shall have the right to order Seller to curtail deliveries of Generating Facility Energy through Buyer Curtailment Orders and to curtail deliveries of Generating Facility Energy through Buyer Bid Curtailments, provided that Buyer shall pay Seller for all Deemed Delivered Energy associated with a Buyer Curtailment Period at the Renewable Rate and, if applicable, the PTC Amount, in accordance with Exhibit C.
- (c) Failure to Comply. If Seller fails to comply with a Buyer Curtailment Order, Buyer Bid Curtailment or Curtailment Order, then, for each MWh of Generating Facility Energy that is delivered by the Facility to the Delivery Point in contradiction to the Buyer Curtailment Order, Buyer Bid Curtailment or Curtailment Order, Seller shall pay Buyer for each such MWh at an amount equal to the sum of (A) + (B) + (C), where: (A) is the amount, if any, paid to Seller by Buyer for delivery of such excess MWh 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 in each Settlement Interval and the Negative LMP for such Settlement Interval, 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.
- (d) Seller Equipment Required for Curtailment Instruction Communications. Seller shall acquire, install, and maintain such facilities, communications links and other equipment, and implement such protocols and practices, as necessary to respond and follow instructions from the CAISO, Buyer and Buyer's SC, including an electronic signal conveying real time and intra-day instructions, to operate the Facility as directed by the Buyer in accordance with this Agreement 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, Seller shall take the steps necessary to become compliant as soon as reasonably possible. Seller shall be liable pursuant to Section 4.4(c) 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 then-current methodologies. 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.

4.5 Charging Energy Management.

- (a) <u>Generally</u>. Upon receipt of a Charging Notice, Seller shall take any and all action necessary to deliver the Charging Energy to the Storage Facility in order to deliver the Storage Product in accordance with the terms of this Agreement, including maintenance, repair or replacement of equipment in Seller's possession or control used to deliver the Charging Energy from the Delivery Point and Generating Facility to the Storage Facility. Except as expressly set forth in this Agreement, including Section 4.5(c) and Section 4.9(b), Buyer shall be responsible for paying all CAISO costs and charges associated with Charging Energy including, subject to 4.5(i), procuring Charging Energy from the CAISO.
- (b) <u>Charging Notices</u>. During the Delivery Term, 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 compliance with the CAISO Tariff and other applicable Laws and the requirements and limitations set forth in this Agreement, including the Operating Restrictions and the provisions of Section 4.5(a). Each Charging Notice issued in accordance with this Agreement will be effective unless and until such Charging Notice is modified with an updated Charging Notice (including as automatically updated in accordance with the definition of Charging Notice). Seller shall comply with all Charging Notices, subject to the requirements and limitations set forth in this Agreement.
- (c) No Unauthorized Charging. Seller shall not charge the Storage Facility during the Delivery Term other than pursuant to a Charging Notice (it being understood that Seller may adjust a Charging Instruction to the extent necessary to maintain compliance with the Operating Restrictions), or in connection with a Seller Initiated Test (including Facility maintenance or a Storage Capacity Test), or pursuant to a notice from the CAISO, the PTO, Transmission Provider, or any other Governmental Authority. If, during the Delivery Term, Seller (i) charges the Storage Facility to a Stored Energy Level greater than the Stored Energy Level provided for in the Charging Notice or (ii) charges the Storage Facility in 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. Notwithstanding the foregoing, during any Curtailment Period, Buyer and Seller shall use commercially reasonable efforts to cause all curtailed Generating Facility Energy to be used as Charging Energy to the extent allowed by CAISO.
- (d) <u>Discharging Notices</u>. During the Delivery Term, 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 Procedures. Seller shall comply with all Discharging Notices, subject to the requirements and limitations set forth in this Agreement. Each Discharging Notice issued in accordance with this Agreement will be effective unless and until Buyer modifies such Discharging Notice by providing Seller with an updated Discharging Notice.
- (e) <u>No Unauthorized Discharging</u>. 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 Discharging Instruction to the extent necessary to maintain compliance with the Operating Restrictions), or in connection with a Seller Initiated Test (including Facility maintenance or a Storage Capacity Test), or pursuant to a notice from CAISO, the PTO, Transmission Provider, or any other Governmental Authority. If, during the Contract Term, Seller (i) discharges the Storage Facility other than as provided for in the Discharging Notice or (ii) discharges the Storage Facility in violation of the first sentence of this Section 4.5(e), then (x) Seller shall be responsible for all Energy costs associated with such discharging of the Storage Facility, (y) Buyer shall not be required to pay for the discharging of such Energy (i.e., Discharging Energy), and (z) Buyer shall be entitled to all of the benefits (including Storage Product) associated with such discharge.

- (f) <u>Curtailments</u>. Notwithstanding anything in this Agreement to the contrary, during any 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 or the Transmission Provider. Buyer's SC 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 Operational Procedures.
- Operation Date, (i) Buyer shall have no rights to issue or cause to be issued Charging Notices or Discharging Notices, (ii) Seller shall have exclusive rights to test, charge and discharge the Storage Facility, and (iii) all CAISO costs, revenues, penalties and other amounts owing to or paid by CAISO in respect of the Storage Facility shall be for Seller's account. Seller is responsible to procure, at its own cost, any energy required for commissioning purposes and to arrange to discharge such energy into the grid. Upon the Commercial Operation Date, (i) Buyer shall have exclusive rights to issue or cause to be issued Charging Notices or Discharging Notices provided such scheduling shall be consistent with the final sentence of Exhibit D, Section (a), and (ii) all CAISO costs, revenues, penalties and other amounts owing to or paid by CAISO in respect of the Storage Facility operations shall be for Buyer's account.
- (h) <u>Station Use</u>. Notwithstanding anything to the contrary in this Agreement, the Parties acknowledge (i) Seller is responsible for providing all Energy to serve Station Use (including paying the cost of any Energy used to serve Station Use during periods in which the Storage Facility is not charging or discharging pursuant to a Charging Notice or Discharging Notice), (ii) Energy supplied from Charging Energy or Discharging Energy during periods in which the Storage Facility is charging or discharging pursuant to a Charging Notice or Discharging Notice shall not be considered Station Use, (iii) Station Use may be supplied over the same circuit as Charging Energy and Discharging Energy, and (iv) Seller shall indemnify and hold harmless Buyer from any and all costs, penalties or charges for Energy supplied for Station Use by any means other than retail service from the applicable utility, and shall take any additional measures to ensure Station Use (other than that supplied from Charging Energy or Discharging Energy as

provided in clause (ii) or over the same circuit as Charging Energy and Discharging Energy as provided in clause (iii)) is supplied by the applicable utility's retail service if necessary to avoid any such costs, penalties or charges.

		(1)	Grid Cl	narging.	. Buye	r may p	rocure C	harging	Energy	from a	source	other
than	the	Generating	Facility	subject	to the	express	s limitat	ion				

- 4.6 **Reduction in Energy Delivery Obligation**. For the avoidance of doubt, and in no way limiting Section 3.1 or Exhibit G:
- Facility Maintenance. Subject to providing Buyer sixty (60) days prior Notice, Seller shall schedule all Planned Outages within the time period determined by the CAISO for the Storage Facility as a Resource Adequacy Resource that is subject to the Availability Standards, to qualify for an "Approved Maintenance Outage" under the CAISO Tariff (or such shorter period as may be reasonably acceptable to Buyer based on the likelihood of dispatch by Buyer) and Seller shall either provide replacement Capacity Attributes as required by CAISO or reimburse Buyer for any cost Buyer incurs in connection therewith (including the cost of any replacement Capacity Attributes as required by the CAISO). During the five-month period from June 1 to October 31 during the Delivery Term, Seller shall not schedule any non-emergency maintenance that reduces the energy generation capability of the Facility, unless (i) such outage is required to avoid an emergency or damage to the Facility or its Interconnection Facilities, (ii) such maintenance is necessary to maintain equipment warranties or is otherwise required by the equipment manufacturer and cannot be scheduled outside the months of June to October, (iii) such outage is in connection with Force Majeure events, (iv) such outage is required by law, or the requirements of CAISO or the interconnecting utility and/or each other applicable Governmental Authority, or (v) the Parties agree otherwise in writing.
- (b) <u>Forced Facility Outage</u>. Seller shall be permitted to reduce deliveries of Product during any Forced Facility Outage. However, the impact of such reduced deliveries with respect to the Storage Facility shall be calculated in accordance with <u>Exhibit P</u>. 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, Buyer Curtailment Period or upon Notice of a Curtailment Order pursuant to the terms of this Agreement, the Interconnection Agreement or applicable tariff. However, the impact of such reduced deliveries with respect to the Storage Facility shall be calculated in accordance with <u>Exhibit P</u>.

- (d) <u>Force Majeure Event</u>. Seller shall be permitted to reduce deliveries of Product during any Force Majeure Event, so long as Seller complies with the applicable requirements of Article 10. However, the impact of such reduced deliveries with respect to the Storage Facility shall be calculated in accordance with <u>Exhibit P</u>.
- (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. However, the impact of such reduced deliveries with respect to the Storage Facility shall be calculated in accordance with <u>Exhibit P</u>.

Notwithstanding anything in this Section 4.6 to the contrary, (i) any reduction in Product resulting from this Section 4.6 shall not reduce Seller's obligation to deliver Resource Adequacy Benefits in the form of the Storage Facility being shown on a Supply Plan unless the outage is of a long enough time period or otherwise prevents the Storage Facility from being shown on a Supply Plan; and (ii) to the extent Generating Facility Energy is not or cannot be delivered to Buyer as a result of any of the conditions in this Section 4.6, Buyer shall have no obligation to pay Seller for any associated Product from the Generating Facility.

4.7 <u>Guaranteed Energy Production</u>. During each Performance Measurement Period, Seller shall deliver to Buyer an amount of Generating Facility Energy, not including any Excess MWh, equal to no less than the Guaranteed Energy Production. For purposes of determining whether Seller has achieved the Guaranteed Energy Production, Seller shall be deemed to have delivered to Buyer all (a) Deemed Delivered Energy and (b) Lost Output for the Performance Measurement Period. 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 ("GEP Damages"),

4.8 Storage Availability and Efficiency.

- (a) During the Delivery Term, the Storage Facility shall maintain a Seasonal Storage Availability no less than the Guaranteed Storage Availability. The Seasonal Storage Availability shall be calculated in accordance with Exhibit P with respect to the then-applicable Effective Storage Capacity.
- (b) If, during the Delivery Term the Seasonal Storage Availability during any Season is less than the Guaranteed Storage Availability, then Seller shall owe an Availability Adjustment to Buyer as liquidated damages, as determined in accordance with Exhibit P, which, except as set forth in Section 11.1(b)(ix) and (x), shall be Buyer's sole and exclusive remedy in connection with Seller's failure to meet the Guaranteed Storage Availability.
- (c) During the Delivery Term, the Storage Facility shall maintain an Efficiency Rate, calculated pursuant to a Storage Capacity Test, of no less than the Guaranteed Efficiency Rate. If the Efficiency Rate during any month is less than the Guaranteed Efficiency Rate, Seller shall owe liquidated damages pursuant to Exhibit C which, except as set forth in

Section 11.1(b)(xi), shall be Buyer's sole and exclusive remedy in connection with the Efficiency Rate.

4.9 **Storage Capacity Tests**.

- (a) Prior to the Commercial Operation Date, Seller shall schedule and complete a 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 <u>Exhibit O</u>.
- Buyer shall have the right to send one or more representative(s) to witness (b) all Storage Capacity Tests. Alternatively, to the extent that any Storage Capacity Tests are done remotely, and no representatives are needed on site, Seller shall arrange for both Parties to have access to all data and other information arising out of such tests. Buyer shall be responsible for all costs, expenses and fees payable or reimbursable to its representative(s) witnessing any Storage Capacity Test. Any such representative(s) of Buyer shall adhere to the safety and security procedures of Seller. Buyer shall indemnify and hold Seller harmless for any losses or claims for personal injury, death or property damage to the Facility or Site to the extent caused by Buyer, its authorized agents, employees, and inspectors, during any such access. For any Storage Capacity Tests, or other operational tests during Off-Peak Flexible Ramp Hours as defined by CAISO, initiated by Seller ("Seller Initiated Test"), including all tests conducted prior to Storage Facility Commercial Operation, any Storage Facility Commercial Operation Storage Capacity Test, any Storage Capacity Test conducted if the Effective Storage Capacity immediately prior to such Storage Capacity Test is of the Installed Storage Capacity, any test required by CAISO, and other Seller-requested discretionary tests or dispatches, Seller shall (i) be liable for all CAISO costs and charges for associated Charging Energy, and (ii) be entitled to any CAISO revenues associated with Discharging Energy. For any Storage Capacity Tests initiated by Buyer, including all required annual tests pursuant to Exhibit O ("Buyer Dispatched Test"), Buyer shall (x) pay Seller the Renewable Rate for associated Charging Energy, (y) be liable for all CAISO costs and charged for associated Charging Energy, and (z) be entitled to any CAISO revenues associated with associated Discharging Energy. No Charging Notices or Discharging Notices shall be issued during any Seller Initiated Test. Charging Notices or Discharging Notices may be issued during a Buyer Dispatched Test as reasonably necessary to implement the applicable test. The Storage Facility shall be deemed unavailable during any Seller Initiated Test. Any Buyer Dispatched Test shall be deemed an Excused Event for the purposes of calculating the Seasonal Storage Availability. For any Seller Initiated Test, other than Storage Capacity Tests required by Exhibit O for which there is a stated notice requirement, 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); provided, however, when these requests occur during off-peak hours, notice by Seller to Buyer is and Buyer's cooperation for Seller to perform such tests shall not be unreasonably withheld.
- (c) Following each Storage Capacity Test, Seller shall submit a testing report in accordance with Exhibit O. If the actual capacity or efficiency rate determined pursuant to a Storage Capacity Test varies from the then current Effective Storage Capacity and/or Efficiency Rate, as applicable, then the actual capacity and/or efficiency rate, as applicable, determined pursuant to a Storage Capacity Test (not to exceed the Guaranteed Storage Capacity set forth on the Cover Sheet, as such Guaranteed Storage Capacity may have been adjusted (if at all) pursuant

to <u>Exhibit B</u>, Section 6) shall become the new Effective Storage Capacity and/or Efficiency Rate at the beginning of the day following the completion of the test for all purposes under this Agreement, including compensation under <u>Exhibit C</u>.

- 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 Generating Facility Energy (net of losses if required by Law) 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.
- (a) Seller shall ensure that all steps necessary to register the Generating Facility with WREGIS have been taken prior to Commercial Operation and that, within ninety (90) days of Commercial Operation, Seller shall ensure the Generating Facility is registered with active status in WREGIS and is associated with an active account in WREGIS ("Seller's WREGIS Account"), which Seller shall maintain until the end of the Delivery Term. Seller shall transfer the WREGIS Certificates using "Recurring 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 Generating 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 Recurring 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 Generating Facility Energy generated (net of losses if required by Law), 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 Generating Facility Energy for such calendar month as evidenced by the Generating Facility's metered data (net of losses if required by Law).
- (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.
- (e) A "WREGIS Certificate Deficit" means any deficit or shortfall in WREGIS Certificates delivered to Buyer for a calendar month as compared to the Generating

Facility Energy (net of losses if required by Law) for the same calendar month ("<u>Deficient Month</u>") caused by an error or omission of Seller. If any WREGIS Certificate Deficit is caused, or the result of any action or inaction by Seller, then the amount of Generating 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 of the Delivery Term; 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 Replacement Green Attributes delivered to CAISO as Scheduled Energy within ninety (90) days after the Deficient Month (i) upon a schedule 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 4.10, 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) Subject to Section 3.12, 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 CEC modifies its *RPS Eligibility Guidebook* to enable the full amount of Generating Facility Energy to generate WREGIS Certificates, without reduction for Storage Facility efficiency losses, 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 maximum quantity of WREGIS Certificates that can be transferred to Buyer from the Generating Facility in the same calendar month.
- 4.11 <u>Interconnection</u>. Seller shall be responsible for all costs of interconnecting the Facility to the Delivery Point. During the Delivery Term, Seller shall have and maintain interconnection capacity available or allocable to the Facility that is no less than the Dedicated Interconnection Capacity throughout the Delivery Term.
- 4.12 <u>Green-E Certification</u>. Upon request of Buyer, Seller shall submit, an Approved Tracking Attestation Form ("<u>Attestation</u>") in connection with a request that the Generating Facility be qualified as "CRS" listed by the Center for Resource Solutions ("<u>CRS</u>") at https://www.tfaforms.com/4652008 or its successor. If requested, the Attestation shall be submitted yearly, within thirty (30) days of Buyer's request, and in accordance with the requirements of CRS.

ARTICLE 5 TAXES

5.1 <u>Allocation of Taxes and Charges</u>. 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 of 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, the generation and sale of Product, and the disposal or recycling of any equipment associated with the Facility, including without limitation, batteries and solar panels.
- 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, commercially 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 Energy or Discharging Energy to Buyer.
- 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. Seller agrees that any agreements regarding Shared Facilities (i) shall permit Seller to perform or satisfy, and shall not purport to limit, Seller's obligations hereunder, including providing interconnection capacity for the Facility's sole use in an amount not less than the Dedicated Interconnection Capacity, (ii) shall provide for separate metering and a separate CAISO Resource ID for each of the Generating Facility and the Storage Facility, (iii) shall provide that any other generating or energy storage facilities not included in the Facility but using Shared Facilities shall not be included within the Facility's CAISO Resource IDs; and (iv) shall provide that any curtailment of the full capacity of Shared Facilities that is ordered by Transmission Provider that Seller and its Affiliates have discretion to allocate across generating

or energy storage facilities using the Shared Facilities shall not be allocated to the Facility more than its pro rata portion of the total capacity of all generating or energy storage facilities using the Shared Facilities.

ARTICLE 7 METERING

7.1 **Metering**.

- The Facility shall have a separate CAISO Resource ID for each of the (a) Generating Facility and the Storage Facility. Seller shall measure the amount of Generating Facility Energy using the Generating Facility Meter, and Seller shall measure the Charging Energy and the Discharging Energy using the Storage Facility Meter; all of 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. If Seller elects to submit a SQMD Plan for the Facility, or only the Storage Facility, as applicable, then all Facility Meters, or all Storage Facility Meters, as applicable, will be programmed, operated and maintained pursuant to the applicable CAISO-approved SQMD Plan for the Facility, or only the Storage Facility, as applicable, at Seller's cost (including, for avoidance of doubt, reimbursement to Buyer of reasonable and customary costs owed by Buyer to its Scheduling Coordinator for submitting SQMD Plan meter data to the CAISO), throughout the period to which the SQMD Plan applies. Seller shall provide to Buyer a copy of any CAISOapproved SQMD Plan and any modifications thereto and notice of any termination or withdrawal thereof. Subject to meeting any applicable CAISO requirements, the Generating Facility Meter and Storage Facility Meter shall be programmed to adjust for Electrical Losses and Station Use, as applicable, from such meters to the Delivery Point in a manner subject to Buyer's prior written approval, not to be unreasonably withheld. Seller shall separately meter all Station Use through a separate register within the Generating Facility Meter and/or Storage Facility Meter, as applicable. Metering shall be consistent with the Metering Diagram set forth as Exhibit R, as may be revised to be consistent with any CAISO-approved Plan, a final version of which shall be provided to Buyer at least thirty (30) days before Commercial Operation Date. Each Generating Facility Meter and Storage Facility 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, to the extent such meter data and related meters are not the subject of a CAISOapproved SQMD Plan for the Facility, or only the Storage Facility, as applicable. Seller and Buyer, or Buyer's Scheduling Coordinator, 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, to the extent such meter data and related meters are not the subject of a CAISO-approved SQMD Plan for the Facility, or only the Storage Facility, as applicable.
- (b) Section 7.1(a) is based on the Parties' mutual understanding as of the Effective Date that (i) the CAISO requires the configuration of the Facility to include, as the sole

meters for the Facility, the Generating Facility Meter and the Storage Facility Meter, (ii) the CAISO requires the Generating Facility Meter and the Storage Facility Meter to be programmed for Electrical Losses as set forth in the definition of Electrical Losses in this Agreement, and (iii) the automatic adjustments to Charging Instructions and Discharging Instructions as set forth in the definitions of Charging Instruction and Discharging Instruction in this Agreement will not result in Seller violating, or incurring any costs, penalties or charges under, the CAISO Tariff. If any of the foregoing mutual understandings in (i), (ii), or (iii) between the Parties become incorrect during the Delivery Term, the Parties shall cooperate in good faith to make any amendments and modifications to the Facility and this Agreement as are reasonably necessary to conform this Agreement to the CAISO Tariff and avoid, to the maximum extent practicable, any CAISO charges, costs or penalties that may be imposed on either Party due to non-conformance with the CAISO Tariff, such agreement not to be unreasonably delayed, conditioned or withheld.

Facility Meter at least annually and more frequently than annually if Buyer or Seller reasonably believe there may be a meter malfunction. The tests shall be conducted by independent third parties qualified to conduct such tests. Buyer shall be notified at least 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 so long as such adjustments are accepted by CAISO and also with respect to the Generating Facility Meter, WREGIS; *provided*, such period may not exceed twelve (12) months.

ARTICLE 8 INVOICING AND PAYMENT; CREDIT

Invoicing. Seller shall use commercially reasonable efforts to deliver an invoice 8.1 to Buyer within ten (10) days after the end of the prior monthly delivery period. Each invoice shall (a) include 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 and any other payment amounts under this Agreement, including the amount of Generating Facility Energy, Charging Energy, Discharging Energy, and Replacement RA delivered to Buyer (if any); the calculation of Deemed Delivered Energy, Lost Output, 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) reflect 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. The invoice shall be delivered by electronic mail in accordance with Exhibit N.

- 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. Buyer shall pay undisputed invoice amounts within thirty (30) days of Buyer's receipt of Seller's invoices; provided, 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 under this Agreement 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 3-Month prime rate (or any equivalent successor rate accepted by a majority of major financial institutions) 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),

 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 Invoice Adjustments; Billing Errors. Invoice adjustments shall be made if (a) there have been good faith inaccuracies in invoicing or payment that are not otherwise disputed under Section 8.5, (b) an adjustment to an amount previously invoiced or paid is required due to a correction of data by the CAISO, or (c) there have been meter inaccuracies; provided, however, that there shall be no adjustments to prior invoices based upon meter inaccuracies except to the extent that such meter adjustments are accepted by CAISO for revenue purposes. 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 <u>Billing Disputes</u>. A Party may, in good faith, dispute the correctness of any invoice or any adjustment to an invoice rendered under this Agreement or adjust any invoice for any arithmetic or computational error within twelve (12) months of the date the invoice, or adjustment to an invoice, was rendered. In the event an invoice or portion thereof, or any other claim or adjustment arising hereunder, is disputed, payment of the undisputed portion of the invoice shall be required to be made when due. 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 twelve (12) months after the invoice is rendered or subsequently adjusted, except to the extent any misinformation was from a third party not affiliated with any Party and such third party corrects its information after the twelve-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 with respect to this Agreement 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 Exhibits B and P, 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.
- Development Security to Buyer

 Seller shall maintain the applicable Development Security in full force and effect until the earlier of (i) Seller's delivery of the applicable Performance Security, or (ii) sixty (60) days after termination of this Agreement with respect to the Facility at which time Buyer shall return the applicable Development Security to Seller, less any 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, 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.
- 8.8 <u>Seller's Performance Security</u>. To secure its obligations under this Agreement, Seller shall deliver the 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 <u>Exhibit L</u> or such other form as may be agreed to by the Parties. Seller shall maintain the applicable Performance Security in full force and effect until the following have occurred: (i) the Delivery Term with respect to the Facility has expired or terminated early; and (ii) all payment obligations of the Seller then due and payable under this Agreement, including compensation for penalties, Termination Payment, indemnification payments or other damages, if any, are paid in full (whether directly or indirectly such as through set-off or netting).

A.

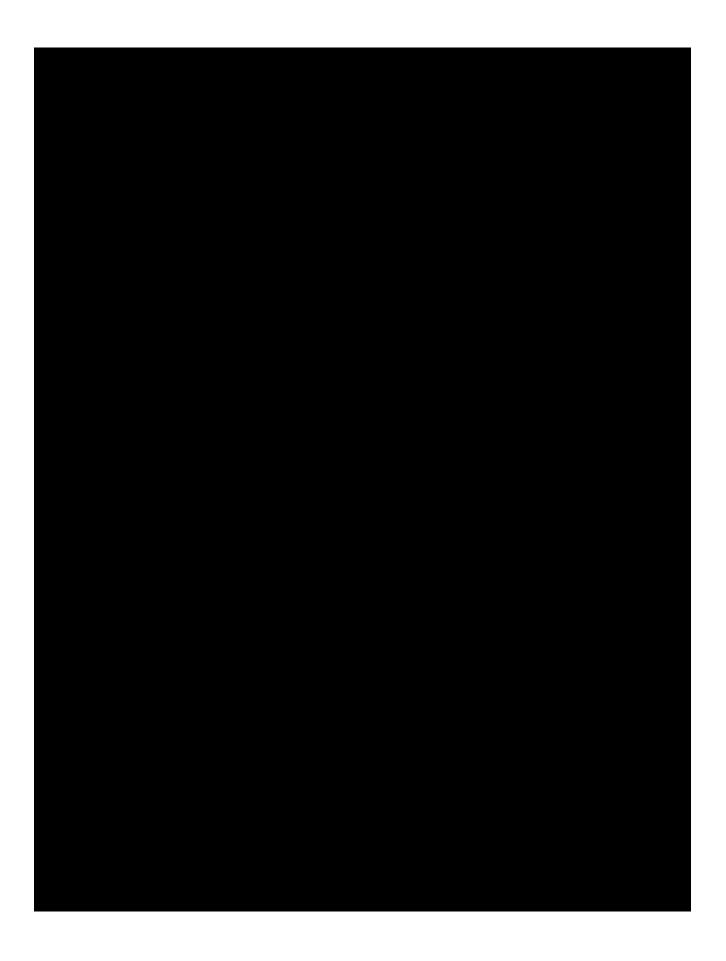
If the Performance Security is a Letter of Credit and the issuer of such Letter of Credit (A) fails to maintain the minimum Credit Rating set forth in the definition of Letter of Credit, (B) indicates its intent not to renew such Letter of Credit and such Letter of Credit expires prior to the end of the Delivery Term with respect to the Facility, or (C) 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 (a) exchange one permitted form of Development Security or Performance Security for another permitted form of Development Security or Performance Security, as applicable, as well as (b) change the issuer of Letter of Credit for any such Development Security or Performance Security. First Priority Security Interest in Cash or Cash Equivalent Collateral. To secure its obligations under this Agreement, and until released as provided herein, each Party ("Party A") hereby grants to the other Party ("Party B") a present and continuing first-priority security interest ("Security Interest") in, and lien on (and right to net against), and assignment of, as applicable, the Development Security, Performance Security, to the extent provided in the form of cash, and any other cash collateral and cash equivalent collateral posted pursuant to Sections 8.7, 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 Party B, and Party A agrees to take all action as Party B reasonably requires in order to perfect Party B'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 Party A, an Early Termination Date resulting from an Event of Default caused by Party A, or an occasion provided for in this Agreement where Party B is authorized to retain all or a portion of the Development Security, Performance Security, as applicable, Party B 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 as applicable, including any such rights Security, Performance Security, and remedies under Law then in effect: Draw on any outstanding Letter of Credit issued for its benefit and retain any cash held by Party B as Development Security, Performance Security, as applicable; and Liquidate all Development Security, Performance Security, (as applicable) then held by or for the benefit of Party B free from any claim or right of any nature whatsoever of Party A, including any equity or right of purchase or redemption by Party

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

8.10 Provision of Financial Statements.

- (a) From the Effective Date, Buyer shall provide to Seller unaudited quarterly financial statements within ninety (90) days of end of each quarter and audited financial statements within one hundred eighty (180) days after the end of each fiscal year; *provided*, *however*, that this requirement shall be satisfied if such financial statements are publicly available on Buyer's website. Buyer's annual financial statements shall have been prepared in accordance with generally accepted accounting principles in the United States, consistently applied.
- (b) 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's ultimate parent (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, and if applicable, as posted on the website of the Guarantor's ultimate parent or the Securities Exchange Commission.







ARTICLE 9 NOTICES

- 9.1 <u>Addresses for the Delivery of Notices</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 Acceptable Means of Delivering Notice. Each Notice required, permitted, or contemplated hereunder shall be deemed to have been validly served, given or delivered as follows: (a) if sent by United States mail with proper first class postage prepaid, three (3) Business Days following the date of the postmark on the envelope in which such Notice was deposited in the United States mail; (b) if sent by a regularly scheduled next Business Day delivery carrier with delivery fees either prepaid or an arrangement with such carrier made for the payment of such fees, the next Business Day after the same is delivered by the sending Party to such carrier; (c) if sent by electronic communication (including electronic mail or other electronic means) and if concurrently with the transmittal of such electronic communication the sending Party provides a copy of such electronic Notice by hand delivery or next Business Day delivery carrier, at the time indicated by the time stamp upon delivery; or (d) if delivered in person, upon receipt by the receiving Party. Notwithstanding the foregoing, invoices sent pursuant to Section 8.1 and 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) "<u>Force Majeure Event</u>" 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 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) and any quarantine related to any such 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.

- (c) Notwithstanding the foregoing, the term "Force Majeure Event" does not include: (i) economic conditions that render a Party's performance of this Agreement at the Contract Price unprofitable or otherwise uneconomic (including Buyer's ability to buy the Product at a lower price, or Seller's ability to sell Product at a higher price, than the Contract Price); (ii) Seller's inability to obtain permits or approvals of any type for the construction, operation, or maintenance of the Facility; (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 that disables physical or electronic facilities necessary to transfer funds to the payee Party; (iv) a Curtailment Order, except to the extent such Curtailment Order is caused by a Force Majeure Event; (v) Seller's inability to obtain sufficient labor, equipment, materials, or other resources to build or operate the Facility or the Shared Facilities except to the extent such inability is caused by a Force Majeure Event; (vi) a strike, work stoppage or labor dispute limited only to any one or more of Seller, Seller's Affiliates, Seller's contractors, their subcontractors thereof or any other third party employed by Seller to work on the Facility; or (vii) any equipment failure, except if such equipment failure is caused by a Force Majeure Event.
- 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. The obligation to use due speed and diligence shall not be interpreted to require resolution of labor disputes by acceding to demands of the opposition when such course is inadvisable in the discretion of the Party having such difficulty. Nothing herein shall be construed as permitting that Party to continue to fail to perform after said cause has been removed, provided the suspension of performance due to a claim of Force Majeure Event shall include any reasonable time period for mobilization/re-mobilization. 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 Guaranteed Commercial Operation Date beyond the extensions provided in Exhibit B, (c) limit Buyer's right to declare an Event of Default pursuant to Section 11.1(b)(iii) or Section 11.1(b)(iv) and receive a Damage Payment as liquidated damages upon exercise of Buyer's default rights pursuant to Section 11.2 (provided that promptly upon Buyer's receipt of the Damage Payment, Buyer shall return to Seller the Development Security to the extent it did not comprise (i.e., was not used as) the Damage Payment), or (d) limit Buyer's right to terminate the Agreement with respect to the

Facility pursuant to Section 2 and/or Section 4 of <u>Exhibit B</u> and receive the Damage Payment as liquidated damages, provided that promptly upon Buyer's receipt of the Damage Payment Buyer shall return to Seller the Development Security to the extent such applicable security did not comprise (i.e., was not used as) the Damage Payment.

10.3 <u>Notice</u>. Within five (5) Business Days of becoming aware of the impact of a Force Majeure Event, the non-performing Party shall provide the other Party with oral notice of the event of Force Majeure, and within two (2) weeks of becoming so aware, the non-performing Party shall provide the other Party with Notice in the form of a letter describing in detail the particulars of the occurrence giving rise to the Force Majeure claim. Failure to provide timely written Notice as described in the preceding sentence constitutes a waiver of a Force Majeure claim as to all periods prior to the delivery of a timely Notice. The suspension of performance due to a claim of Force Majeure must be of no greater scope and of no longer duration than is required by the Force Majeure.



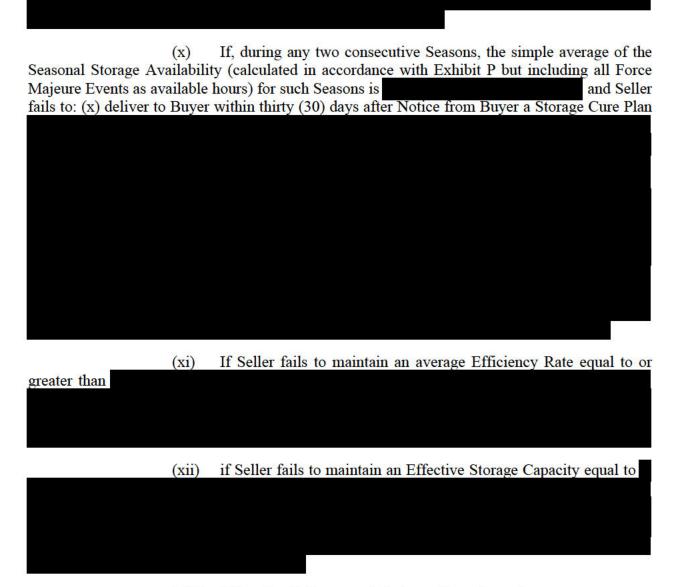
ARTICLE 11
DEFAULTS; REMEDIES; TERMINATION

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) day period despite exercising commercially reasonable efforts);
- the failure by such Party to perform any material covenant or material 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 to the extent an exclusive remedy for such performance failure is set forth herein including without limitation (A) failure to provide Capacity Attributes, the exclusive remedies for which are set forth in Section 3.8, (B) failure in connection with unauthorized charging, the exclusivity remedies for which are set forth in Section 4.5(c), (C) failure in connection with unauthorized discharging, the exclusivity remedies for which are set forth in Section 4.5(e), (D) failure related to the Adjusted Energy Production that do not trigger the provisions of Section 11.1(b)(vi), (vii) or (viii), the exclusive remedies for which are set forth in Section 4.7, (E) failures related to the Seasonal Storage Availability that do not trigger the provisions of Section 11.1(b)(ix) or (x), the exclusive remedies for which are set forth in Section 4.8(b); and (F) failures related to the Guaranteed Efficiency Rate that do not trigger Section 11.1(b)(xi), the exclusive remedies for which are set forth in Section 4.8(c)); and any 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 Article 14, 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, other than in compliance with other provisions of this Agreement;
- (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 Energy to the Delivery Point for sale under this Agreement that was not generated or discharged by the Facility, except as may be permitted under Section 4.5(i);
 - (ii) [intentionally omitted];
- (iii) the failure by Seller to achieve Construction Start on or before the Guaranteed Construction Start Date, as such date may be extended pursuant to a Development Cure Period pursuant to Section 5(a) of <u>Exhibit B</u>:
- (iv) The failure of Seller to achieve Commercial Operation on or before the Guaranteed Commercial Operation Date, as such date may be extended pursuant to a Development Cure Period pursuant to Section 5(a) of Exhibit B and/or Seller's payment of Commercial Operation Delay Damages pursuant to Section 3(b) of Exhibit B:
- (v) Seller sells, assigns, or otherwise transfers, or commits to sell, assign, or otherwise transfer, the Product, or any portion thereof, during the Term to any party other than Buyer, except as expressly permitted under this Agreement;
- Production (calculated in accordance with Exhibit G) for such period is not of the Expected Energy amount for such period, and Seller fails to: (x) deliver to Buyer within thirty (30) days after Notice from Buyer a plan or report developed by Seller that describes the cause of the failure 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 ("Cure Plan"),
- (vii) If, beginning with the second Contract Year of the Delivery Term, the Adjusted Energy Production (calculated in accordance with Exhibit G) is not of the Expected Energy amount in any Contract Year of the Delivery Term and Seller fails to: (x) deliver to Buyer within thirty (30) days after Notice from Buyer a Cure Plan,

(viii) If, beginning with the second Contract Year of the Delivery Term, during any two (2) consecutive Contract Year period during the Delivery Term, the Adjusted Energy Production (calculated in accordance with Exhibit G) is
(ix) If, during any four consecutive Seasons of the Delivery Term, the simple average of the Seasonal Storage Availability (calculated in accordance with Exhibit P but
and Seller fails to: (x) deliver to Buyer within thirty (30) days after Notice from Buyer a plan or report developed by Seller that describes the cause of the failure 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 ("Storage Cure Plan")



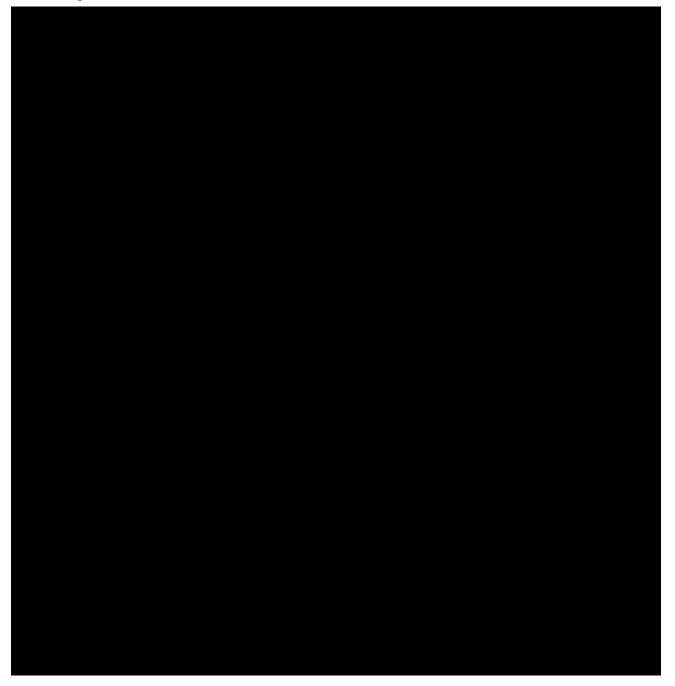
(xiii) failure by Seller to satisfy the collateral requirements pursuant to Sections 8.7 or 8.8 within five (5) Business Days after Notice from Buyer, including the failure to replenish the Performance Security amount to the extent set forth this Agreement in the event Buyer draws against the Generating Facility Performance Security or the Storage Facility Performance Security, as applicable, for any reason other than to satisfy a Termination Payment;

(xiv) 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.
- (xv) 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

(xvi) 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.

(c) with respect to Buyer as the Defaulting Party, the occurrence of any of the following:



- 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 prior to the Commercial Operation Date, including an Event of Default under Section 11.1(b)(iii) and Section 11.1(b)(iv), subject to the limitations in Section 11.6), 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;

provided, 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 any Terminated Transaction and the Event of Default related thereto except to the extent applicable Buyer's rights set forth in Section 11.7, and *further provided*, promptly upon Buyer's receipt of the Damage Payment or Termination Payment, as applicable Buyer shall return to Seller the Development Security or the Performance Security to the extent either of them, as applicable, did not comprise (i.e., was not used as) the Damage Payment or the Termination Payment, as applicable.

11.3 <u>Termination Payment</u>. The Termination Payment ("<u>Termination Payment</u>") 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 a 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 a 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 Notice of Payment of Damage Payment or Termination Payment. 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 Damage Payment or Termination 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 Damage Payment or Termination, 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 Damage Payment or Termination Payment</u>. If the Defaulting Party disputes the Non-Defaulting Party's calculation of the Damage Payment or the Termination Payment, as applicable, in whole or in part, the Defaulting Party shall, within ten (10) Business Days of receipt of the Non-Defaulting Party's calculation of the Damage Payment or the Termination Payment, provide to the Non-Defaulting Party a detailed written explanation of the basis for such dispute. Disputes regarding the Damage Payment or Termination Payment, as applicable, shall be determined in accordance with Article 15.
- 11.6 <u>Seller Pre-COD Liability Limitations</u>. Notwithstanding anything to the contrary in this Agreement, Seller's total liability with respect to the Facility prior to the Commercial Operation Date
- Facility after Early Termination Date Prior to the Commercial Operation Date. If the Agreement is terminated by either Party with respect to the Facility prior to the Commercial Operation Date for any reason except due to Buyer's Event of Default, then neither Seller nor Seller's Affiliates may sell, market or deliver any Product associated with the Facility to a party other than Buyer for a period following such early termination, 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 on terms and conditions materially similar to the terms and conditions contained in this Agreement

and Buyer fails to accept such offer within forty-five (45) days of Buyer's receipt thereof. So long as the limitations contained in this Section 11.7 still apply, neither Seller nor Seller's Affiliates may sell or transfer the Facility, or any part thereof, or the Facility's interest in the land rights or interests in the Site (including with respect to the interconnection queue position), unless the transferee agrees to be

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bound by the terms set forth in this Section 11.7 pursuant to a written agreement approved by Buyer not to be unreasonably withheld, conditioned or delayed. Seller shall indemnify and hold Buyer harmless from all benefits lost and other damages sustained by Buyer as a result of any breach by Seller of its covenants contained within this Section 11.7.

- 11.8 <u>Rights And Remedies Are Cumulative</u>. Except where an express and exclusive remedy or measure of 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.
- 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 No Consequential Damages. 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 <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. THE

VALUE OF ANY TAX BENEFITS, 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 LOSS OR RECAPTURE OF ANY TAX BENEFITS, IF ANY, SHALL BE DEEMED TO BE DIRECT DAMAGES.

TO THE EXTENT ANY DAMAGES REQUIRED TO BE PAID HEREUNDER ARE LIQUIDATED, INCLUDING UNDER SECTIONS 3.8, 4.5(c), 4.5(e), 4.7, 4.8, 11.2, 11.3, 11.6, 11.7, 11.8, 11.9, AND AS PROVIDED IN EXHIBIT B, EXHIBIT C (SECTION (f)), 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 Execution 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 (subject to potential management, board, or board committee approvals as and when required for the applicable performance obligations) perform this Agreement and is not prohibited from entering into this Agreement or discharging and (subject to the foregoing parenthetical) 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 (subject to the foregoing parenthetical) 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. Notwithstanding

the foregoing, Seller's failure to obtain the approvals set forth in the parenthetical in the first two sentences above (i) shall not suspend or excuse Seller's failure to perform its obligations under this Agreement, including the obligation of Seller to achieve the Guaranteed Construction Start Date or Guaranteed Commercial Operation Date beyond the extensions provided in Exhibit B, and (ii) shall not limit Buyer's right to declare an Event of Default pursuant to Section 11.1(a) or Section 11.1(b)and receive a Damage Payment upon exercise of Buyer's default rights pursuant to Section 11.2.

- (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) As of the Effective Date, Seller represents and warrants to Buyer that it has not received notice from or been advised by any existing or potential supplier or service provider that COVID-19 has caused, or is reasonably likely to cause, a delay in the construction of the Facility or the delivery of materials necessary to complete the Facility, in each case that would cause the Commercial Operation Date to be later than the Guaranteed Commercial Operation Date. Notwithstanding anything to the contrary in this Agreement, Buyer's only remedy for any breach of this representation by Seller shall be that Seller may not claim relief under Article 10 for a Force Majeure Event or Section 5 of Exhibit B for a Development Cure Period on the basis of such delays.
 - (f) Seller shall maintain Site Control throughout the Delivery Term.
- 13.2 <u>Buyer's Representations and Warranties</u>. As of the Execution 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, including but not limited to community choice aggregation, the Joint Powers Act, competitive bidding, public notice, open meetings, election, referendum, or prior appropriation requirements, 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 located 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.
- (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 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 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 Nevada law, if any ("<u>Prevailing Wage Requirement</u>"). Nothing herein shall require Seller, its contractors and subcontractors to comply with, or assume liability created by other inapplicable provisions of any Nevada labor laws. Buyer agrees that Seller's obligations under this Section 13.4 will be satisfied upon the execution of a community workforce agreement, work site, project labor agreement, collective bargaining agreement, or other similar agreement by Seller's primary EPC contractor related to construction of the Facility.

ARTICLE 14 ASSIGNMENT

- 14.1 General Prohibition on Assignments. 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 purported assignment made without the 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 third-party costs, including reasonable attorneys' fees, associated with the preparation, review, execution and delivery of documents in connection with any assignment of this Agreement by Seller. Buyer shall cooperate with Seller or any Lender or other financing party to execute or arrange for the delivery of any consents, estoppels, and other documents reasonably requested by Seller, Lender, or such other financing party, including the Collateral Assignment Agreement and Estoppel Certificate as provided in Section 14.2, to consummate any financing or refinancing, including in connection with a financing in which the membership interests of Seller or its direct or indirect parent are collaterally assigned in lieu of an assignment of this Agreement; provided, however, Buyer will have no obligation to provide any consent, or enter into any agreement, that materially and adversely affects any of Buyer's rights, benefits, risks or obligations under this Agreement, or to modify the Agreement, except as provided in this Article 14.
- 14.2 <u>Collateral Assignment</u>; <u>Financing Cooperation</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. In connection with any financing or refinancing of the Facility by Seller, upon request of Seller, Buyer shall in good faith work with Seller and Lender to agree upon, execute, and deliver to Seller and Lender (i) a consent to collateral assignment of this Agreement in a form substantially similar to the consent to collateral assignment set forth in <u>Exhibit T</u> ("<u>Collateral Assignment Agreement</u>") and (ii) an estoppel certificate in a form substantially similar to the estoppel certificate set forth in <u>Exhibit U</u> ("<u>Estoppel Certificate</u>").
- 14.3 <u>Permitted Assignment by Buyer</u>. Subject to the terms and conditions of this Agreement, Buyer may make a limited assignment in connection with a municipal prepayment transaction to an entity ("**Limited Assignee**") that has an Investment Grade Credit Rating of

Buyer's right to receive certain Product (which shall not be for retail sale) and Buyer's obligation to make payments for such Product to the Seller ("Assigned Product"). The limited assignment shall not introduce, or purport to convey or otherwise allege, any right of Buyer or Limited Assignee to make any prepayment to Seller under the Agreement or to file or impose any lien on the Facility, or otherwise modify any provision of this Agreement, and shall be expressly subject to the Limited Assignee's timely payment of amounts due under this Agreement with respect to the Assigned Product. Buyer shall pay Seller for any payments not timely made by Limited Assignee, and Buyer shall remain obligated to perform all of its obligations under this Agreement notwithstanding the limited assignment, including without limitation any credit-related requirements, and payment for all amounts due and owing under this Agreement, including the total gross amount due to Seller under each invoice. Any failure by the Limited Assignee to make payments to Seller when due hereunder shall be a Buyer Event of Default if not cured within the applicable cure period specified in this Agreement. Subject to the foregoing, Buyer may make such an assignment upon not less than thirty (30) days' advance written notice by delivering to Seller a written request for Seller's consent to such assignment and the proposed form of limited assignment agreement in form and substance acceptable to Seller and its Lenders (if any), including that Seller shall not be required to agree to any terms or conditions which are reasonably expected to have an adverse effect on Seller or its Lenders. Notwithstanding anything to the contrary in connection with such limited assignment, if (1) the assignment, transfer or conveyance of the Assigned Product pursuant to such limited assignment, or (2) Seller's performance of any obligation under the assignment agreement, including without limitation if Seller makes any change to the recipient of the WREGIS Certificates, fails to meet any requirements of this Agreement, then Seller shall not be deemed to be in breach of any obligation in this Agreement, including without limitation any representation or warranty herein.

Limited Assignee and Buyer shall

comply with all reasonable requests received by Seller or any Lender in connection with such limited assignment, including providing any requested acknowledgments with respect to any Collateral Assignment Agreement. The form of limited assignment shall be substantially in the form of the attached Exhibit V.

14.4 Permitted Assignment by Seller. Seller may without the prior written consent of Buyer: (a) assign this Agreement to an Affiliate of Seller, including to NEOP, NEP and NEECH; (b) assign, collaterally assign, or pledge its interest hereunder and/or in the Facility to a Lender or any other financing party in accordance with Section 14.2; or (c) make any Permitted Transfer or otherwise assign this Agreement pursuant to or in connection with any Permitted Transfer. 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 that, Buyer's consent shall not be required if: (a) such Change of Control is, or is a result of, a direct or indirect Change of Control of NEOP or NEP; or (b) the entity that is the Seller at the conclusion of the Change of Control is a Permitted Transferee. For avoidance of doubt, (i) a Change of Control shall not be deemed to have occurred as a result of a Permitted Transfer, and no consent is required under this Agreement with respect to a Permitted Transfer, and (ii) Seller may, without the prior written consent of Buyer, finance all or any portion of the Facility or the Interconnection Facilities or the Shared

Facilities utilizing debt financing, equity financing (including tax equity), lease financing, or any other form of financing or any combination thereof, including pursuant to a portfolio financing of multiple energy generation, storage, and transmission facilities and other assets of Seller or Seller's Affiliates (which may include cross-collateralization or similar arrangements).

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 Law. To the extent enforceable at such time, each Party waives its respective right to any jury trial with respect to any litigation arising under or in connection with this Agreement. [STC 17].
- 15.3 <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 the County of San Diego, California.
- 15.4 <u>Dispute Resolution</u>. In the event of any claim, controversy or dispute between the Parties arising out of or relating to or in connection with this Agreement, any Party may deliver to the other Party notice of the Dispute with a detailed description of the underlying circumstances of such Dispute (a "<u>Dispute Notice</u>"). The senior officers of the Parties shall meet and confer as often as they deem reasonably necessary during the thirty (30) day period following receipt of the Dispute Notice in good faith negotiations to resolve the Dispute to the satisfaction of each Party. In the event a Dispute is not resolved by the expiration of the thirty (30) day period, then a Party may pursue any legal remedy available to it in accordance with this Agreement.

ARTICLE 16 INDEMNIFICATION

16.1 **Indemnity**.

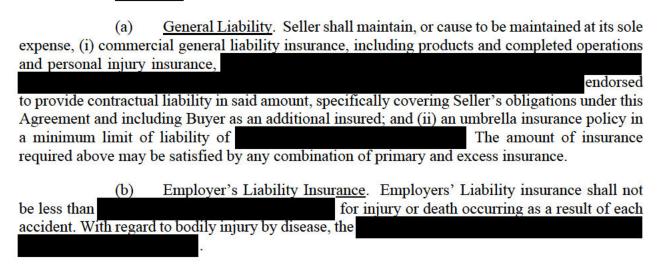
- (a) Each Party (the "<u>Indemnifying Party</u>") agrees to indemnify, defend and hold harmless the other Party and its Affiliates, directors, officers, employees and agents (collectively, the "<u>Indemnified Party</u>") from and against all third party claims, demands, losses, liabilities, penalties, and expenses (including reasonable attorneys' fees) (i) 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, or (ii) for third-party claims resulting from the Indemnifying Party's breach (including inaccuracy of any representation of warranty made hereunder), performance or non-performance of its obligations under this Agreement ("<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 Claims. Promptly after receipt by a Party of any claim or Notice of the commencement of any action, administrative, or legal proceeding, or investigation as to which the indemnity provided for in this Article 16 may apply, the Indemnified Party shall notify the Indemnifying Party in writing of such fact. The Indemnifying Party shall assume the defense thereof with counsel designated by the Indemnifying Party and satisfactory to the Indemnified Party, provided, if the defendants in any such action include both the Indemnified Party and the Indemnifying Party and the Indemnified Party shall have reasonably concluded that there may be legal defenses available to it which are different from or additional to, or inconsistent with, those available to the Indemnifying Party, the Indemnified Party shall have the right to select and be represented by separate counsel, at the Indemnifying Party's expense, unless a liability insurer is willing to pay such costs. If the Indemnifying Party fails to assume the defense of a claim meriting indemnification, the Indemnified Party may at the expense of the Indemnifying Party contest, settle, or pay such claim, provided that settlement or full payment of any such claim may be made only following consent of the Indemnifying Party or, absent such consent, written opinion of the Indemnified Party's counsel that such claim is meritorious or warrants settlement. Except as otherwise provided in this Article 16, in the event that a Party is obligated to indemnify and hold the other Party and its successors and assigns harmless under this Article 16, the amount owing to the Indemnified Party will be the amount of the Indemnified Party's damages net of any insurance proceeds received by the Indemnified Party following a reasonable effort by the Indemnified Party to obtain such insurance proceeds.

ARTICLE 17 INSURANCE

17.1 Insurance.



(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 Nevada Law

- (d) <u>Business Auto Insurance</u>. Seller shall maintain at all times during the Contract Term business auto insurance for bodily injury and property damage with limits of 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, until the Commercial Operation Date, construction all-risk form property insurance covering the Facility during such construction period, and naming the Seller (and Lender if any) as the loss payee.
- (f) <u>Pollution Liability Coverage</u>. Seller shall maintain or cause to be maintained during the construction of the Facility prior to the Commercial Operation Date, insurance for pollution coverage under its Commercial General Liability insurance and/or Excess or Umbrella Liability insurance policies, with a cross liability endorsement and with minimum limits of
- (g) <u>Subcontractor Insurance</u>. Seller shall require all of its subcontractors to carry: (i) comprehensive general liability insurance with a combined single limit of coverage not less than (ii) workers' compensation insurance and employers' liability coverage in accordance with applicable requirements of Law; and (iii) business auto insurance for bodily injury and property damage with limits of . All subcontractors shall name Seller as an additional insured to insurance carried pursuant to clauses (g)(i) and (g)(iii). All subcontractors shall provide a primary endorsement and a waiver of subrogation to Seller for the required coverage pursuant to this Section 17.1(g).
- (h) <u>Property Insurance</u>. On and after the Commercial Operation Date, Seller shall maintain or cause to be maintained insurance against loss or damage from all causes under standard "all risk" property insurance coverage in amounts that are not less than the actual replacement value of the Facility; *provided*, however, with respect to property insurance for natural catastrophes, Seller shall maintain limits equivalent to a probable maximum loss amount determined by a firm with experience providing such determinations.
- (i) Evidence of Insurance. Within thirty (30) days after execution of the Agreement and upon annual renewal thereafter, Seller shall deliver to Buyer certificates of insurance evidencing such coverage as is required to be in effect at the times specified above. Such certificates shall specify that Buyer shall be given at least thirty (30) days prior Notice by Seller in the event of any material modification, cancellation or termination 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. The general liability, auto liability and worker's compensation policies shall be endorsed with a waiver of subrogation in favor of Buyer for all work performed by Seller, its employees, agents and sub-contractors.

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.
- 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; provided, each Party shall, to the extent practicable, use reasonable efforts to prevent or limit the disclosure 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 Law, order, regulation, ruling, regulatory request, accounting disclosure rule or standard or any exchange, control area or independent system operator 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 Records Act (Government Code Section 7920 et seq.) and that any request made thereunder may require disclosure of Confidential Information, if not subject to an exception from disclosure.
- 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 herein. 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 except as otherwise limited under this Agreement, in law, in equity or otherwise, Disclosing Party will be entitled to obtain injunctive relief against the threatened breach of this Agreement 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

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Article 18, Confidential Information may be disclosed by the Receiving Party to any of its agents, consultants, contractors, trustees, or actual or potential financing parties (including, in the case of Seller, its Lender(s)), so long as the Person to whom Confidential Information is disclosed agrees in writing to be bound by confidentiality provisions no less stringent than those in this Article 18 to the same extent as if it were a Party.

18.5 <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 (including the Prior PPA), 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 <u>No Waiver</u>. 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 and/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 Law.
- 19.7 <u>Counterparts</u>; <u>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 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 <u>No Recourse to Members of Buyer</u>. 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; Inapplicability/Waiver of Bankruptcy Code Section 366.

(a) Each Party acknowledges, intends, and to the extent applicable agrees that (i) this Agreement and the transactions contemplated by this Agreement constitute a "forward contract" and at least one of the Parties is a "forward contract merchant" within the meaning of the United States Bankruptcy Code; (ii) all payments made or to be made by a Party pursuant to this Agreement, including the application by a Party of Performance Security to any amounts due and owing to such Party, constitute "settlement payments" within the meaning of the United States Bankruptcy Code; and (iii) its rights under Section 11.2 of this Agreement constitute a "contractual right to liquidate, terminate or accelerate" or offset under a forward contract within the meaning

of 88556, 561 of the Bankruptcy Code.

- (b) Each Party acknowledges and agrees that, upon a Party becoming Bankrupt, the other Party shall be entitled to exercise its rights and remedies under this Agreement in accordance with the safe harbor provisions of the Bankruptcy Code set forth in, inter alia, Sections 362(b)(6), 362(b)(17), 362(b)(27), 546(e), 548(d)(2), 556, and 561 thereof.
- (c) Each Party acknowledge and agrees that, for all purposes of this Agreement, that the provisions of 11 U.S.C. § 366 in any bankruptcy case or proceeding wherein such Party is a debtor are inapplicable, or if found to be applicable each Party waives and agrees not to assert the applicability of the provisions of 11 U.S.C. § 366 in any bankruptcy case or proceeding wherein such Party is a debtor. In any such bankruptcy case or 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 any other provision of 11 U.S.C. § 101-1532.
- 19.12 <u>Further Assurances</u>. 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.
- 19.13 Change in Electric Market Design. If a change in the CAISO Tariff renders this 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 the 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 Execution Date.

YELLOW PINE SOLAR III, I	LLC	SAN DIEGO COMMUNITY POWER, a California joint powers authority
By:		•
Name:		By:
Title:		Name:
		Title:

EXHIBIT A

FACILITY DESCRIPTION

Site Name: Yellow Pine Solar III

Site includes all or some of the following APNs: 17100001004, 17100001010, 17100001011, 17100001012, 17100001009, 16800002025, 16800002024, 17100001007, 17100001008,

17100001005, 17100001006, 17100001004, 17100001005

County: Clark County, Nevada

Zip Code: 89061

Latitude and Longitude: 36.067942°, -115.780358°

Facility Description: A 35 MW_{AC} solar renewable energy generation facility and 35 MW_{AC} (4-hour) battery energy storage facility located in Clark County, in the State of Nevada, as will be depicted in the preliminary Site Plan to be provided within 90 days of Effective Date, which Seller is to provide an updated site plan at least sixty (60) prior to the Commercial Operation Date.

Interconnection Point: The Facility shall interconnect at the PNode.

Delivery Point: The Delivery Point for the Generating Facility and Storage Facility shall be the PNode for the Generating Facility and the PNode for the Storage Facility, respectively.

Generating Facility Meter: See Exhibit R.

Storage Facility Meter: See Exhibit R.

PNode: If not available at the Effective Date, the PNode shall be established prior to the prior to the earlier of the Commercial Operation Date and Seller's initial delivery of Test Energy under this Agreement. Seller shall promptly notify Buyer following establishment of the PNode.

Participating Transmission Owner: GridLiance

Additional Information: Preliminary Site Plan to be provided within 90 days of Effective Date and to be updated, not to exceed the Guaranteed Storage Capacity, no later than 60 days prior to the COD.

EXHIBIT B

FACILITY CONSTRUCTION AND COMMERCIAL OPERATION

1. Facility Construction.

"Construction Start" will occur following Seller's execution of an engineering, procurement and construction (EPC) contract related to the Facility and issuance of a full notice to proceed with the construction of the Facility under the EPC contract, mobilization to the Site by Seller and/or its designees and includes the physical movement of soil at the Site. The date of Facility Construction Start will be evidenced by and subject to Seller's delivery to Buyer of a certificate substantially in the form attached as Exhibit J-1 hereto, and the date certified therein by Seller shall be the "Construction Start Date." Seller shall cause Construction Start to occur no later than the Guaranteed Construction Start Date.

2. Termination for Failure to Achieve Construction Start.

If Seller fails to achieve the Construction Start on or before the Guaranteed Construction Start Date, as such date may be extended by a Development Cure Period, Buyer shall have the right, in its sole discretion, to: (i) terminate this Agreement; and (ii) collect the Damage Payment as liquidated damages and Buyer's sole and exclusive remedy for Seller's failure to achieve the Construction Start on or before the Guaranteed Construction Start Date. Promptly upon Buyer's receipt of the Damage Payment, Buyer shall return to Seller the Development Security to the extent it did not comprise (i.e., was not used as) the Damage Payment.

3. Commercial Operation.

- "Commercial Operation" means the condition existing when (i) Seller has fulfilled all of the conditions precedent in Section 2.2(a) of this Agreement and (ii) Seller has confirmed to Buyer in writing that Commercial Operation has been achieved by providing Notice to Buyer substantially in the form of Exhibit H-1 (the "COD Certificate"). The "Commercial Operation Date" or "COD" shall be the date on which Commercial Operation is achieved. For avoidance of doubt, Seller may achieve the Commercial Operation at any time prior to the Guaranteed Commercial Operation Date. Seller shall notify Buyer at least sixty (60) days before the anticipated COD.
- Seller may extend the Guaranteed Commercial Operation Date, one (1) or more times, by paying Commercial Operation Delay Damages in advance to Buyer for each day Seller desires to extend the Guaranteed Commercial Operation Date,

If

Seller elects to extend the Guaranteed Commercial Operation Date, on or before the date that is five (5) Business Days prior to the then-current Guaranteed Commercial Operation Date, Seller shall provide Notice and payment to Buyer of the Commercial Operation Delay Damages for the number of days of extension to the Guaranteed Commercial Operation Date. If Seller achieves Commercial Operation prior to the Guaranteed Commercial Operation Date, as extended by the payment of Commercial Operation Delay Damages, Buyer shall refund to Seller the Commercial Operation Delay Damages for each day Seller achieves Commercial Operation prior to the Exhibit B - 1

Guaranteed Commercial Operation Date times the Commercial Operation Delay Damages, not to exceed the total amount of Commercial Operation Delay Damages paid by Seller pursuant to this this Section 3(b) of Exhibit B.

4. Termination for Failure to Achieve Commercial Operation.

If Seller fails to achieve Commercial Operation on or before the Guaranteed Commercial Operation Date, as such date may be extended by a Development Cure Period or payment of Commercial Operation Delay Damages, Buyer shall have the right, in its sole discretion, to (i) terminate this Agreement, and (ii) collect the Damage Payment as liquidated damages and Buyer's sole and exclusive remedy for Seller fails to achieve Commercial Operation on or before the Guaranteed Commercial Operation Date. Promptly upon Buyer's receipt of the Damage Payment, Buyer shall return to Seller the Development Security to the extent it did not comprise (i.e., was not used as) the Damage Payment.

Development Cure Period.

(a) The Guaranteed Construction Start Date and the Guaranteed Commercial Operation Date shall, subject to notice and documentation requirements set forth in Section 5(c) of this Exhibit B, both be extended on a day-for-day basis (the "Development Cure Period") for the duration of any and all delays (including for events that may have commenced or result from events prior to the Execution Date) arising out of the following circumstances to the extent the following circumstances are not the result of Seller's failure to take commercially reasonable actions to meet its requirements and deadlines: (i) a Force Majeure Event occurs; (ii) delays caused by transmission provider (e.g., the CAISO) or the Participating Transmission Owner that are outside the reasonable control of Seller,

(b) Development Cure Period Requirements Generally. Notwithstanding anything to the contrary herein, no extension shall be given under a Development Cure Period if, and to the extent that (i) the delay was the result of Seller's failure to take 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 for a Force Majeure Event (provided for clarification purposes, if the Force Majeure Event written notice is provided but not timely under Section 10.3, Seller shall be entitled to a Development Cure Period extension but reduced by the number of days that such notice is late), if applicable, or 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 Commercial Operation 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 commercially reasonable actions.
6. Failure to Reach Guaranteed Storage Capacity or Guaranteed Generating Capacity.
(a) <u>Guaranteed Storage Capacity</u> . If Seller has not installed one hundred percent (100%) of the Guaranteed Storage Capacity after the Commercial Operation Data Seller shall pay Capacity Democrat to Duyon for each MW that the Commercial
Operation Date, Seller shall pay Capacity Damages to Buyer for each MW that the Guaranteed Storage Capacity exceeds the Installed Storage Capacity, and the Guaranteed Storage Capacity
and other applicable portions of this Agreement shall be adjusted accordingly. "Capacity Damages" means
(b) <u>Guaranteed Generating Capacity</u> . If Seller has not installed one hundred percent
(100%) of the Guaranteed Generating Capacity after the Commercial Operation Date, Seller shall pay Capacity Damages (as defined above) to Buyer and the Guaranteed
Generating Capacity and other applicable portions of this Agreement shall be adjusted accordingly.

EXHIBIT C

COMPENSATION

Generating Facility Energy, plus the Renewable Rate for each MWh of Deemed Delivered Energy,

Renewable Rate. Buyer shall pay Seller the Renewable Rate for each MWh of

Buyer shall compensate Seller for the Product in accordance with this Exhibit C.

(a)

if any,		of the Ex	xpected Energy for each Contract Year of
the Delivery	Гerm.		
Delivered End Contract Year	ergy exceeds	Generating Faci	If, at any point in any Contract Year ility Energy plus the amount of Deemed of the Expected Energy for such for additional Generating Facility Energy
of the Guarar hours ("Exce	enerating Facility Energy of steed Generating Capacity ss MWh"), then	delivered to the and the duration there is a Negar	If during any Settlement Interval, the Delivery Point is greater than the product on of the Settlement Interval, expressed in tive LMP during such Settlement Interval, act of absolute value of the Negative LMP
times such Ex	cess MWh ("Negative LN	MP Costs").	_
(d)	Curtailment Payments.	Seller shall red	ceive no compensation from Buyer for

- Generating Facility Energy reduced pursuant to a Curtailment Order during any Curtailment Period.
- (e) <u>Storage Payment</u>. All Storage Product shall be paid on a monthly basis (and prorated by the number of days in a month for the first calendar month and the last calendar month, if the Delivery Term for that first calendar month does not start on the first day of a calendar month and if the Delivery Term for that last calendar month does not end on the last day of the prior calendar month, respectively), and such payment ("<u>Storage Payment</u>") shall be calculated as follows:
- (i) For the period commencing on the Commercial Operation Date to the First Showing Month, by *multiplying* (i) the Energy-Only Rate, *by* (ii) 1,000, *by* (iii) the Effective Storage Capacity, for such month;
- (ii) For the period commencing on the First Showing Month through the Delivery Term, by *multiplying* (i) the RA Rate, *by* (ii) 1,000, *by* (iii) the Effective Storage Capacity, for such month;
- (iii) for any month during which the Facility has been allocated Interim Deliverability Status in an amount (expressed in MW) that is less than the Guaranteed Storage Exhibit C 1

Capacity ("<u>Interim Deliverability Status MW</u>"), by *adding*, (A) (the Guaranteed Storage Capacity – the Interim Deliverability Status MW) *multiplied* by the Energy-only Rate, *plus* (B) the Interim Deliverability Status MW *multiplied* by the RA Rate.

Such Storage Payment constitutes the entirety of the amount due to Seller from Buyer for the Storage Product. If the Effective Storage Capacity is adjusted pursuant to a Storage Capacity Test on any day other than the first day of a calendar month, Storage Payment shall be calculated separately for each portion of the month in which the different Effective Storage Capacity is applicable.

- (f) <u>Liquidated Damages for Failure to Achieve Guaranteed Efficiency Rate</u>. If during any month during the Delivery Term, the Efficiency Rate(s) applicable to such month is/are less than the Guaranteed Efficiency Rate, Seller shall owe liquidated damages to Buyer, which damages shall be calculated by *multiplying* (i) the total Charging Energy for such month, *by* (ii) the percentage amount by which such applicable Efficiency Rate(s) is/are less than the Guaranteed Efficiency Rate, *by* (iii) the Renewable Rate, which amount Seller shall set off against amounts payable by Buyer in the applicable monthly invoice.
- (g) <u>PTC Amount</u>. During the period (not to exceed a total of one hundred twenty (120) consecutive months) in which Seller is receiving PTCs, Buyer shall also pay the PTC Amount for Deemed Delivered Energy until the sum of Generating Facility Energy plus the amount of Deemed Delivered Energy exceeds of the Expected Energy for each such Contract Year of the Delivery Term.
 - (h) <u>Test Energy</u>. Test Energy is compensated in accordance with Section 3.6.
- (i) Tax Benefits. 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 Benefits, or if any Tax Benefits 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 Benefits. Seller shall bear all risks, financial and otherwise, throughout the Contract Term, associated with Seller's or the Facility's eligibility to receive Tax Benefits 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 Product, shall be effective regardless of whether the sale of Product is eligible for, or receives Tax Benefits during the Contract Term.

EXHIBIT D

SCHEDULING COORDINATOR RESPONSIBILITIES

- Buyer as Scheduling Coordinator for the Facility. Upon the Commercial Operation Date, or earlier if requested by Seller to accommodate an earlier operation date of the Generating Facility, Buyer shall be the Scheduling Coordinator or designate a qualified third party to provide Scheduling Coordinator services with the CAISO for the Facility for both the delivery and the receipt of Test Energy and the Product at the Delivery Point. At least thirty (30) days prior to the Commercial Operation Date, or such earlier date for the Generating Facility as referenced above, including for the delivery of Test Energy, (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 Commercial Operation Date or earlier date for the Generating Facility as referenced above, 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 Commercial Operation Date or earlier date for the Generating Facility as referenced above. On and after the Storage Facility Commercial Operation Date or earlier date for the Generating Facility as referenced above, 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, fifteenminute market or real time basis, as determined by Buyer. Notwithstanding anything to the contrary in this Exhibit D or elsewhere in this Agreement, prior to Commercial Operation each of the Buyer and Buyer's SC shall provide Seller commercially reasonable assistance with the need to test, commission and timely achieve each of the Commercial Operation Date, and in connection therewith each of the Storage Facility and the Generating Facility shall be scheduled in manner which prioritizes, and Buyer and Buyer's SC shall not provide any scheduling instructions including any Charging Notices or Discharging Notices which interfere with, that need to, test, commission and timely achieve Commercial Operation Date.
- (b) <u>Notices</u>. Beginning on the Commercial Operation Date or earlier date for the Generating Facility as referenced above, 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, by electronic mail, or other transmission to the personnel designated to receive such information.
- (c) <u>CAISO Costs and Revenues</u>. Except as otherwise set forth below, Buyer (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 assume all liability and reimburse Buyer for any and all costs, charges or sanctions (i) due to Seller's failure to perform its obligations under this Agreement, (ii) incurred by Buyer as a result of Seller's failure to adhere to its obligations under the CAISO Tariff or any CAISO directive, including due to outages for which notice by Seller has not been provided as required, or (iii) associated with Resource Adequacy Capacity (as defined in the CAISO Tariff) from the Facility (including Non-Availability Charges (as defined in the CAISO Tariff)). Any Availability Incentive Payments (as defined in the CAISO Tariff) are for the benefit of Seller and for Seller's account and any Non-Availability Charges are the responsibility of Seller and for Seller's account (if such penalties are related to Seller's failure to adhere to its obligations under this agreement). 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 any CAISO directive, or to perform in accordance with this Agreement, including with respect to the outage notification requirements set forth in this Agreement, the cost of the sanctions or penalties shall be Seller's responsibility.

- (d) CAISO Settlements. Starting on the Commercial Operation Date, or earlier date for the Generating Facility as referenced above, and continuing throughout the Delivery Term, Buyer (as the Facility's SC) shall be responsible for all settlement functions with the CAISO related to the Facility. Buyer shall render a separate invoice to Seller for any CAISO payments, charges or penalties ("CAISO Charges Invoice") for which Seller is responsible under this Agreement. CAISO Charges Invoices shall be rendered after settlement information becomes available from the CAISO that identifies any CAISO charges. Notwithstanding the foregoing, Seller acknowledges that the CAISO will issue additional invoices reflecting CAISO adjustments to such CAISO charges. Buyer 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 for which Seller is responsible under this Agreement within thirty (30) 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 Data 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 Data 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. At least once per Contract Year, Seller shall review and confirm that the data provided for the CAISO's Master Data File and Resource Data Template (or successor data systems) for this Facility remains consistent with the actual operating characteristics of the Facility and update such data as appropriate.
- (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.

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. Description of any material planned changes to the Facility or the Site.
- 5. Gantt chart schedule showing progress on achieving each of the Milestones.
- 6. Summary of activities during the previous calendar quarter or month, as applicable, including any OSHA labor hour reports.
- 7. Forecast of activities scheduled for the current calendar quarter or month, as applicable.
- 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 reasonably 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. Prevailing wage reports as required by applicable 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. Workforce Development or Supplier Diversity Reporting (if applicable). Format to be provided by Buyer.
- 15. Any other documentation reasonably requested by Buyer.

EXHIBIT F-1

AVERAGE EXPECTED ENERGY

[Average Expected Energy, MWh Per Hour]

	1:00	2:00	3:00	4:00	5:00	6:00	7:00	8:00	9:00	10:0 0	11:0 0	12:0 0	14:0	15:0	16:0 0	17:0 0	18:0 0	19:0 0	20:0	21:0 0	22:0 0	23:0 0	24:0 0
JAN																							
FEB																							
MAR																							
APR																							
MAY																							
JUN																							
JUL																							
AUG																							
SEP																							
OCT																							
NOV																							
DEC																							

The foregoing table is provided for informational purposes only, and it shall not constitute, or be deemed to constitute, an obligation of any of the Parties to this Agreement.

EXHIBIT F-2

FORM OF AVAILABLE EFFECTIVE DISCHARGING AND CHARGING STORAGE CAPACITY AND GENERATING CAPACITY

[Parties to mutually agree on reasonably acceptable form]

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:

$$[(A-B)*(C-D)]-(E)$$

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} = Replacement price for the Performance Measurement Period, in \$/MWh, which is the sum of

 \underline{D} = the Renewable Rate for the Contract Year of the Delivery Term which ends each Performance Measurement Period, in \$/MWh

 \underline{E} = The amount of GEP Damages paid by Seller with respect to the immediately preceding Performance Measurement Period

"<u>Adjusted Energy Production</u>" shall mean the sum of the following: Generating Facility Energy + Deemed Delivered Energy + Lost Output.

No payment shall be due if the calculation of (a) (A - B), (b) (C - D), or (c) [(A - B) * (C - D)] - (E), yields a negative number. In no event will Buyer owe any payment to Seller pursuant to this Exhibit G.

Within sixty (60) days after each Contract Year of the Delivery Term, Buyer shall 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.

EXHIBIT H

FORM OF COMMERCIAL OPERATION DATE CERTIFICATE

This certification ("Certification") of Storage Facility Commercial Operation Date is delivered by [licensed professional engineer] ("Engineer") to San Diego Community Power, a California ioint powers authority ("Buver") in accordance with the terms of that certain Amended and

Restated Renewable Power Purchase Agreement dated [Date] by and between [SELLER ENTITY] ("Seller") and Buyer ("Agreement"). 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 and Storage Facility are fully operational, 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 of the Guaranteed Generating Capacity
3. Seller has installed equipment for the Storage Facility with an Installed Storage Capacity of no less than of the Guaranteed Storage Capacity.
4. Seller has commissioned all equipment in accordance with its respective manufacturer's specifications.
5. Seller has demonstrated functionality of the Facility's communication systems and automatic generation control (AGC) interface to operate the Facility as necessary to respond and follow instructions, including an electronic signal conveying real time and intra-day instructions, directed by the Buyer in accordance with the Agreement and/or the CAISO.
6. The Generating Facility's testing included a performance test demonstrating peak electrical output of no less than of the Guaranteed Generating Capacity for the Generating Facility at the Delivery Point, as adjusted for ambient conditions on the date of the Facility testing.
7. The Storage Facility is fully capable of charging, storing and discharging energy up to no less than of the Guaranteed Storage Capacity and receiving instructions to charge, store and discharge Energy, all within the operational constraints and subject to the applicable Operating Restrictions.
8. Authorization to parallel the Facility was obtained from the Participating Transmission Owner on [DATE] .
9. The Transmission Provider has provided documentation supporting full unrestricted release for Commercial Operation of the Facility[DATE]

	*		tion supporting Commercial Operation of the[DATE]
in the Full N	etwork Model and has the	he ability to of	ting Facility and Storage Facility to be included ffer Bids into the CAISO Day-Ahead and Real-Facility and the Storage Facility.
EXECUTED	by [LICENSED PROF	ESSIONAL E	ENGINEER]
this	_ day of	_, 20	
			[LICENSED PROFESSIONAL ENGINEER]
			By:
			Printed Name:
			T:41

EXHIBIT I

FORM OF INSTALLED CAPACITY AND EFFICIENCY RATE TEST CERTIFICATE

This certification ("Certification") of Installed Capacity is delivered by [licensed professional engineer] ("Engineer") to San Diego Community Power, a California joint powers authority ("Buyer") in accordance with the terms of that certain Amended and Restated Renewable Power Purchase Agreement dated [Date] by and between [SELLER ENTITY] ("Seller") and Buyer ("Agreement"). All capitalized terms used in this Certification but not otherwise defined herein shall have the respective meanings assigned to such terms in the Agreement.

I hereby certify the following:

- 1. The performance test for the Generating Facility demonstrated peak electrical output of __ MW AC at the Delivery Point, as adjusted for ambient conditions on the date of the performance test ("Installed Generating Capacity");
- 2. The Storage Capacity Test demonstrated an Effective Storage Capacity of __ MW AC, in accordance with the testing procedures, requirements and protocols set forth in Section 4.9 and <u>Exhibit O</u> (the "<u>Installed Storage Capacity</u>").
 - 3. The sum of (a) and (b) is __ MW AC and shall be the "<u>Installed Capacity</u>".
- 4. The Storage Capacity Test conducted on [DATE] demonstrated an Efficiency Rate of __%, all in accordance with the testing procedures, requirements and protocols set forth in Exhibit O.

EXECUT	ED by [LICENSED	PROFESSIONAL	ENGINEER]
this	day of	, 20	
			[LICENSED PROFESSIONAL ENGINEER]
			By:
			Printed Name:
			Title

EXHIBIT J

FORM OF CONSTRUCTION START DATE CERTIFICATE

This certification of Construction Start Date ("<u>Certification</u>") is delivered by [SELLER ENTITY] ("<u>Seller</u>") to San Diego Community Power, a California joint powers authority ("<u>Buyer</u>") in accordance with the terms of that certain Amended and Restated Renewable Power Purchase Agreement dated [Date] by and between Seller and Buyer ("<u>Agreement</u>"). 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:

	Construction Start (as defined in <u>Exhibit B</u> of the Agreement) has occurred, and a notice to proceed that Seller issued to its contractor as part of Construction Start is to;
2. <u>Date</u>") ; and	the Construction Start Date occurred on (the " <u>Construction Start</u>
	the precise Site on which the Facility is located is, which must be within the fithe previously identified Site:
	S WHEREOF, the undersigned has executed this Certification on behalf of Seller as y of
[SELLER EN	TTITY]
Ву:	
Printed Name	::
Title:	

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 Authority PO Box 12716 San Diego, CA 92112

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] (the "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 Amended and Restated Renewable Power Purchase Agreement dated as of _____ and as amended (the "Agreement") between Applicant and Beneficiary. This Letter of Credit shall become effective immediately and shall renew annually until terminated in accordance with the terms hereof (the "Expiration Date").

Funds under this Letter of Credit are available to Beneficiary by valid 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").

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-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.

We hereby agree with Beneficiary that all documents presented under and in compliance with the terms of this Letter of Credit will be duly honored upon presentation to 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.

This Letter of Credit may only be terminated upon one hundred twenty (120) days' prior written notice from Issuer to Beneficiary by registered mail or overnight courier service that Issuer elects 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 is subject to the Uniform Customs and Practice for Documentary Credits (2007 Revision) International Chamber of Commerce Publication No. 600 (the "UCP"), except to the extent that the terms hereof are inconsistent with the provisions of the UCP, including but not limited to Articles 14(b) and 36 of the UCP, in which case the terms of this Letter of Credit shall govern. In the event of an act of God, riot, civil commotion, insurrection, war or any other cause beyond Issuer's control (as defined in Article 36 of the UCP) that interrupts Issuer's business and causes the place for presentation of the Letter of Credit to be closed for business on the last day for presentation, the Expiration Date of the Letter of Credit will be automatically extended without amendment to a date thirty (30) calendar days after the place for presentation reopens for business.

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.

All notices to Beneficiary shall be in writing and are required to be sent by certified letter, overnight courier, or delivered in person to: San Diego Community Power, Chief Financial Officer, PO Box 12716, San Diego, CA 92112. Only notices to Beneficiary meeting the requirements of this paragraph shall be considered valid. Any notice to Beneficiary which is not in accordance with this paragraph shall be void and of no force or effect.

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

(DRAW REQUEST SHOULD BE ON BENEFICIARY'S LETTERHEAD)

Drawing Certificate
[Insert Bank Name and Address]
Ladies and Gentlemen:
The undersigned, a duly authorized representative of San Diego Community Power, a California joint powers authority, PO Box 12716, San Diego, CA 92112, as beneficiary (the "Beneficiary") of the Irrevocable Letter of Credit No. [XXXXXXX] (the "Letter of Credit") issued by [insert bank name] (the "Bank") by order of (the "Applicant"), hereby certifies to the Bank as follows:
1. Applicant and Beneficiary are party to that certain Renewable Power Purchase Agreement dated as of, 20 (the "Agreement").
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 or other occasion provided for in the Agreement where Beneficiary is authorized to draw on the letter of credit has occurred.
OR
Beneficiary is making a drawing under this Letter of Credit in the amount of U.S. \$, which equals the full available amount under the Letter of Credit because Applicant is required to maintain the Letter of Credit in force and effect beyond the expiration date of the Letter of Credit but has failed to provide Beneficiary with a replacement Letter of Credit or other acceptable instrument within thirty (30) days prior to such expiration date.
3. The undersigned is a duly authorized representative of San Diego Community Power and is authorized to execute and deliver this Drawing Certificate on behalf of Beneficiary.
You are hereby directed to make payment of the requested amount to San Diego Community Power by wire transfer in immediately available funds to the following account:
[Specify account information]
San Diego Community Power
Name and Title of Authorized Representative
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 [SELLER ENTITY], a ("Seller"), entered into that certain Amended and Restated 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 (the "Obligations"), 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; provided, that the Guarantor's aggregate liability under or arising out of this Guaranty for payment of the Obligations shall not exceed Dollars (\$

Guaranty only when and if a payment is due and payable by Seller to Buyer under the terms and conditions of the PPA. 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

Demand Notice. For avoidance of doubt, a payment shall be due for purposes of this

2.

(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), (y) replacement Performance Security is provided in an amount and form required by the terms of the PPA, or (z) the ______ anniversary of the Effective Date. 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 (except for such defenses, setoffs or counterclaims that may be asserted by Seller with respect to the PPA, but that are expressly waived under any provision of this Guaranty).

- 4. Waivers by Guarantor. 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. Subrogation. 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 which would invalidate or materially impair Guarantor's ability to perform its obligations under this Guaranty, (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. Notices. 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 (4) 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 7.

If delivered to Buyer, to it at	[] Attn: [] Fax: []
If delivered to Guarantor, to it at	[] Attn: [] Fax: []

- **8.** Governing Law and Forum Selection. 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 the City and County of San Diego, California.
- 9. Miscellaneous. 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:
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 Amended and Restated 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 Information¹

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		

 $^{^{\}mathbf{1}}$ To be repeated for each unit if more than one.

[SELLER ENTITY]	
By:	
Its:	
Date:	

EXHIBIT N

NOTICES

YELLOW PINE SOLAR III, LLC ("Seller")	SAN DIEGO COMMUNITY POWER ("Buyer")
All Notices:	All Notices:
	Street: PO Box 12716 City: San Diego, CA 92112 Attn: Byron Vosburg, Chief Commercial Officer Phone: (619) 880-6545 Email: bvosburg@sdcommunitypower.org , powercontracts@sdcommunitypower.org
Reference Numbers:	Reference Numbers:
Duns: [To be provided by Seller prior to the	
Delivery Term]	
Federal Tax ID Number: [To be provided by Seller prior to the Delivery Term]	
Invoices:	Invoices:
mvoices.	invoices.
	Attn: SDCP Settlements Phone: (619) 880-6545 Email: settlements@sdcommunitypower.org
Scheduling:	Scheduling:
	Tenaska Power Services Co. Attn: Kara Whillock Phone: (972) 333-6122 Email: kwhillock@tnsk.com Day Ahead: (817) 303-1115 Real Time: (817) 303-1852 Facsimile: (817) 303-1104

Exhibit N - 1

YELLOW PINE SOLAR III, LLC ("Seller")	SAN DIEGO COMMUNITY POWER ("Buyer")
Confirmations:	Confirmations:
	Attn: SDCP Settlements Phone: (619) 880-6545 Email: settlements@sdcommunitypower.org
Payments:	Payments:
	Attn: SDCP Settlements Phone: (619) 880-6545 Email: settlements@sdcommunitypower.org
Wire Transfer: Seller shall provide to	Wire Transfer:
Buyer the information below at least 60 days	
prior to the Commercial Operation Date	_
DNIZ.	
BNK: ABA:	
ACCT:	
Defaults:	With additional Notices of an Event of Default to:
	Attn: SDCP General Counsel
	PO Box 12716San Diego, CA 92112
	Email: legal@sdcommunitypower.org

YELLOW PINE SOLAR III, LLC ("Seller")	SAN DIEGO COMMUNITY POWER ("Buyer")
Emergency Contact:	Emergency Contact:
	Attn: Byron Vosburg, Chief Commercial Officer Phone: (619) 880-6545
	Email: bvosburg@sdcommunitypower.org

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 Storage Capacity Test prior to the Commercial Operation Date. Such initial Storage Capacity Test (and any subsequent Storage Capacity Test permitted in accordance with Section 6(a) of <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 capacity of the Storage Facility determined by such Storage Capacity Test.
- B. <u>Subsequent Storage Capacity Tests</u>. Following the Commercial Operation Date, at least fifteen (15) days in advance of the start of each Contract Year of the Delivery Term, upon no less than ten (10) Business Days prior Notice to Buyer, Seller shall schedule and complete a Storage Capacity Test. In addition, Buyer shall have the right to require a retest of the Storage Capacity Test at any time upon no less than ten (10) Business Days prior Notice to Seller if Buyer provides data with such Notice reasonably indicating that the then-current Effective Storage Capacity has varied materially from the results of the most recent Storage Capacity Test. Seller shall have the right to run a retest of any Storage Capacity Test upon five (5) Business Days' prior Notice to Buyer (or any shorter period reasonably acceptable to Buyer consistent with Prudent Operating Practice).
- C. Test Results and Re-Setting of Effective Storage Capacity and Efficiency Rate. No later than ten (10) 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(c) of the Agreement, Part II.J and Part II.K below, the actual Efficiency Rate and Effective Storage Capacity determined pursuant to a Storage Capacity Test (up to, but not in excess of, the Guaranteed Storage Capacity set forth on the Cover Sheet, as such original Guaranteed Storage Capacity may have been adjusted (if at all) pursuant to Section 6(a) of Exhibit B) shall become the new Effective Storage Capacity and Efficiency Rate at the beginning of the day following the completion of the test for calculating the Storage Payment and all other purposes under this Agreement.

Storage Capacity Test Procedures

PART I. GENERAL.

Each Storage Capacity Test (including the initial Storage Capacity Test and all re-performances thereof) shall be conducted in accordance with Prudent Operating Practices and the provisions of this <u>Exhibit O</u>. For ease of reference, a Storage Capacity Test is sometimes referred to in this <u>Exhibit O</u> as a "<u>SCT</u>". Buyer or its representative may be present for the SCT and may, for informational purposes only, use its own metering equipment (at Buyer's sole cost).

PART II. REQUIREMENTS APPLICABLE TO ALL STORAGE CAPACITY TESTS.

- A. Purpose of Test. Each SCT shall:
 - (1) Determine an updated Effective Storage Capacity;
 - (2) Determine the amount of Energy required to fully charge the Storage Facility;
 - (3) Determine the Storage Facility charge ramp rate;
 - (4) Determine the Storage Facility discharge ramp rate; and
 - (5) Determine an updated Efficiency Rate.
- B. Test Elements. Each SCT shall include the following test elements:
 - The measurement of Charging Energy, as measured by the Storage Facility Meter or other mutually agreed meter, that is required to charge the Storage Facility up to the maximum Stored Energy Level not to exceed the Guaranteed Storage Output (MWh) ("Energy In");
 - The measurement of Discharging Energy, as measured by the Storage Facility Meter or other mutually agreed meter, that is discharged from the Storage Facility to the Delivery Point until the Storage Energy Level reaches zero MWh as indicated by the battery management system ("Energy Out");
 - Electrical output at Maximum Discharging Capacity (as defined in Exhibit Q) at the Storage Facility Meter (MW);
 - Electrical input at Maximum Charging Capacity (as defined in <u>Exhibit Q</u>) at the Storage Facility Meter (MW);
 - Amount of time between the Storage Facility's electrical output going from 0 to Maximum Discharging Capacity;
 - Amount of time between the Storage Facility's electrical input going from 0 to Maximum Charging Capacity;
 - Amount of energy required to go from 0% Stored Energy Level to 100% Stored Energy Level charging at a rate equal to the Maximum Charging Capacity.
- C. <u>Parameters</u>. During each SCT, the following parameters shall be measured and recorded simultaneously for the Storage Facility, at ten (10) minute intervals:
 - (1) discharge time (minutes);
 - (2) charging energy (MWh);

- (3) discharging energy (MWh);
- (4) Stored Energy Level (MWh).
- D. <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) near the horizontal centerline of the Storage Facility; and
 - (3) Ambient air Temperature (°F).
- E. Test Showing. Each SCT must demonstrate that the Storage Facility:
 - (1) successfully started;
 - (2) operated for at least four (4) consecutive hours at Maximum Discharging Capacity;
 - operated for at least four (4) consecutive hours at Maximum Charging Capacity;
 - (4) has a Stored Energy Level of an amount that is, at least, equal to the Maximum Stored Energy Level (as defined in Exhibit A); and
 - (5) is able to deliver Discharging Energy to the Delivery Point as measured by the Storage Facility Meter for four (4) consecutive hours at a rate equal to the Maximum Discharging Capacity.

F. Test Conditions.

- (i) <u>General</u>. At all times during a SCT, the Storage Facility shall be operated in compliance with Prudent Operating Practices, the Operating Restrictions, and all operating protocols recommended, required or established by the manufacturer for operation at Maximum Discharging Capacity and Maximum Charging Capacity.
- (ii) <u>Abnormal Conditions</u>. If abnormal operating 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.G below.
- (iii) <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.

- G. <u>Incomplete Test.</u> 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 or the Transmission Provider, Seller shall be permitted to reconduct such SCT on dates and at times reasonably acceptable to the Parties.
- H. <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 C, including copies of the raw data taken during the test;
 - (3) the level of Effective Storage Capacity, Energy In, Energy Out, Efficiency Rate, Charging Capacity, the current charge and discharge ramp rate, and Stored Energy Level 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 rejects the results of any SCT, such SCT shall be repeated in accordance with Part II.F.

I. <u>Supplementary Storage Capacity Test Protocol</u>. No later than ninety (90) days prior to the Storage Facility COD, Seller shall deliver to Buyer for its review and approval (such approval not to be unreasonably delayed or withheld) an updated 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 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. The initial Supplementary Storage Capacity Test Protocol (and each

update thereto), once approved by Buyer, shall be deemed an amendment to this Exhibit O.

- J. Adjustment to Effective Storage Capacity. The total amount of Discharging Energy delivered to the Delivery Point (expressed in MWh AC) during each of the first four (4) hours of discharge (up to, but not in excess of, the Guaranteed Storage Output), shall be divided by four (4) hours to determine the Effective Storage Capacity, which shall be expressed in MW AC, and shall be the new Effective Storage Capacity in accordance with Section 4.9(c) of the Agreement until updated pursuant to a subsequent Storage Capacity Test.
- K. <u>Adjustment to Efficiency Rate</u>. The total amount of Energy Out (as reported in Part II.B above) divided by the total amount of Energy In (as reported in Part II.B above), and expressed as a percentage, shall be the new Efficiency Rate, and shall be used for the calculation of liquidated damages (if any) under <u>Exhibit C</u> until updated pursuant to a subsequent Storage Capacity Test.

Part III. INITIAL STORAGE CAPACITY TEST PROTCOL

A. <u>Initial Storage Capacity Test Protocol.</u>

• Procedure:

- (1) System Starting State: The Storage Facility shall be balanced using OEM procedures as appropriate and will be in the on-line state at the Minimum Stored Energy Level.
- (2) Record the initial value of the Stored Energy Level.
- (3) Charge the Storage Facility at the Maximum Charging Capacity until the battery reaches the Maximum Stored Energy Level allowed at that rate. Continue charging the Storage Facility at the fixed maximum battery voltage (CV charging). Stop the Storage Facility charge routine when the battery has reached the Maximum Stored Energy Level, not to exceed six (6) hours of charging.
- (4) Record and store the AC energy charged to the Storage Facility as measured at the Storage Facility Meter ("<u>Energy In</u>"). All separately metered Storage Facility Station Use shall be excluded from the measurement of Energy In.
- (5) Following an agreed-upon rest period, command a real power discharge that results in an AC power output of the Storage Facility's Maximum Discharging Capacity and maintain the discharging state until the earlier of (a) the Facility has discharged at the Maximum Discharging Capacity for four (4) consecutive hours, (b) the Storage Facility has reached the Minimum Stored Energy Level, or (c) the sustained discharging capacity is the Maximum Discharging Capacity.

- (6) Record and store the AC Energy discharged (in MWh) as measured at the Storage Facility Meter. Such data point shall be used for purposes of calculation of the Effective Storage Capacity.
- (7) If the Storage Facility has not reached the Minimum Stored Energy Level pursuant to Part III.A.5, continue discharging the Storage Facility until it reaches the Minimum Stored Energy Level.
- (8) Record and store the AC Energy discharged (in MWh) as measured at the Storage Facility Meter. "Energy Out" means that total AC Energy discharged (in MWh) as measured at the Storage Facility Meter from the commencement of discharging pursuant to Part III.A.5 until the Storage Facility has reached the Minimum Stored Energy Level pursuant to either Part III.A.5 or Part III.A.7, as applicable. All separately metered Storage Facility Station Use shall be excluded from the measurement of Energy Out.

Test Results:

- (1) The resulting Efficiency Rate is calculated as Energy Out/Energy In.
- (2) The resulting Effective Storage Capacity measurement is the sum of the total Discharging Energy in step (6) above divided by four (4) hours.

EXHIBIT P

STORAGE FACILITY AVAILABILITY

SEASONAL STORAGE AVAILABILITY CALCULATION

Seller shall calculate the "<u>Seasonal Storage Availability</u>" for a given Season of the Delivery Term using the formula set forth below:

6 16 4 7177 700	$[{\rm AVAILHRS}_s + {\rm EXCUSEDHRS}_s]$
Seasonal Storage Availability (%) =	[SEASONHRS _s]
Where	

s = relevant Season "s" in which Seasonal Storage Availability is calculated;

SEASONHRS_s is the total number of hours for the Season; *provided*, for the first Season the SEASONHRS_s shall be between the COD and end of that Season;

AVAILHRS_s is the total number of hours, or partial hours, in the Season during which the Storage Facility was available to charge and discharge Energy between the Storage Facility and the Delivery Point and to provide Ancillary Services (provided that notwithstanding anything to the contrary set forth above in this Exhibit P or elsewhere in this Agreement, to the extent the Storage Facility is unable to provide Ancillary Services for any reason not excused under this Agreement during any Settlement Interval or Settlement Period that is not otherwise deemed EXCUSEDHRS_m, but the Storage Facility is able to charge and discharge Energy between the Storage Facility and the Delivery Point, then such impact on AVAILHRSs at the Delivery Point (excluding, for avoidance of doubt, all circumstances at the high-voltage side of the Delivery Point or beyond that may limit Seller's delivery of Product). If the Storage Facility is available pursuant to the preceding sentence during any applicable hour, or partial hour, but for less than the full amount of the Effective Storage Capacity, the AVAILHRS_m for such time period shall be calculated by multiplying such AVAILHRS_m by a percentage determined by dividing (a) by (b); where (a) is the lower of (i) such capacity amount reported as available by Seller's real-time EMS data feed to Buyer for the Facility for such hours, or partial hours, and (ii) Seller's most recent Availability Forecast in Section 4.3(d), and (b) is the Effective Storage Capacity; and

EXCUSEDHRS_s is the total number of hours, or partial hours, in the Season that are not included as AVAILHRS_m due to Force Majeure Events (excluding Insurable Force Majeure Events;

(each, an "<u>Excused Event</u>"). For avoidance of doubt, the Storage Facility will also not be deemed to be unavailable (i.e., the following shall also be deemed Excused Events) during System Emergencies, Curtailment Orders, Buyer Dispatched Tests, Buyer Defaults, or due to the application of the Operating Restrictions Exhibit P - 1

in Exhibit Q. If an Excused Event results in less than the full amount of the Effective Storage Capacity for the Storage Facility being unavailable during any applicable hour, or partial hour, the EXCUSEDHRS_m for such time period shall be calculated by multiplying such EXCUSEDHRS_m by a percentage determined by dividing (a) by (b); where (a) is the lower of such Effective Storage Capacity amount that is not reported as available by (i) Seller's real-time EMS data feed to Buyer for the Storage Facility for such hours, or partial hours, and (ii) Seller's most recent Availability Forecast in Section 4.3(d), and (b) is the Effective Storage Capacity. For avoidance of doubt, the total of AVAILHRS_m plus EXCUSEDHRS_m for any hour, or partial hour, shall never exceed 1.

If the Storage Facility or any component thereof was previously deemed unavailable for an hour or part of an hour, and Seller provides a revised Notice indicating the Storage Facility is available for that hour or part of an hour 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 or any component thereof was previously deemed unavailable for an hour or part of an hour and Seller provides a revised Notice indicating the Storage Facility is available for that hour or part of an hour at least sixty (60) minutes prior to the time the Buyer is required to schedule or bid the 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.



EXHIBIT Q

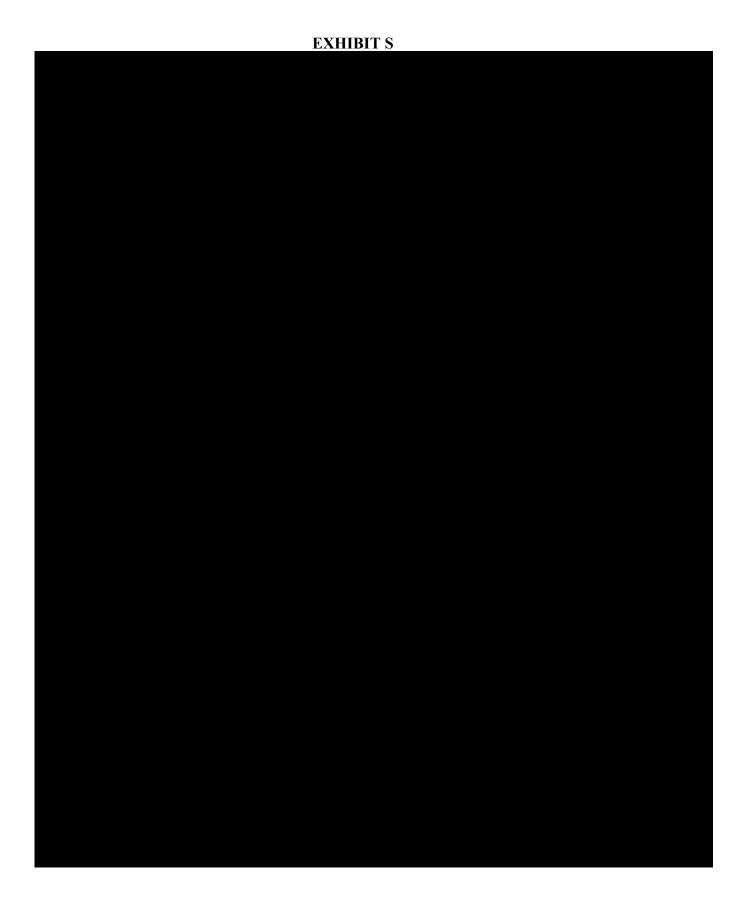
OPERATING RESTRICTIONS

The Parties will develop and finalize the Operating Restrictions prior to the Commercial Operation Date; *provided*, the Operating Restrictions (i) may not be materially more restrictive of the operation of the Facility than as set forth below, unless agreed to by Buyer in writing, (ii) will, at a minimum, include the rules, requirements and procedures set forth in this <u>Exhibit Q</u>, (iii) will include protocols and parameters for Seller's operation of the Storage Facility in the absence of Discharging Notices or other similar instructions from Buyer relating to the use of the Storage Facility, and (iv) may include facility scheduling, operating restrictions and Communications Protocols.

File Update Date:	[XX/XX/20XX]			
Technology:	Lithium-Ion Batterie	es		
A. Contract Capacity				
Guaranteed Storage Capacity	(MW):	35		
Effective Storage Capacity (M	W):	35 as updated pursuant to the most current Storage		
0		Capacity Test		
B. Total Unit Dispatchable Range Information				
Maximum Stored Energy Leve	el (MWh):	140		
Minimum Stored Energy Leve	l (MWh):	0		
Maximum Charging Capacity	(MW):	35		
Maximum Discharging Capaci	ity (MW):	35		
Maximum annual average rest	ing State of Charge	40%		
(SOC)	999.9 EUR			
C. Maximum Throug	hput			
Maximum daily Throughput:		280 (2 cycles)		
Maximum annual Throughput	:	51,100 (365 cycles)		
D. Charge and Discha	arge Rates			
Ramp Rate (MW/minute)	100.0	60		
E. Ancillary Services				
Spinning reserve is included:		Yes		
Non-spinning reserve is includ	ed:	Yes		
Regulation up is included:		Yes		
Regulation down is included:		Yes		
Black start is included:		No		
Voltage support is included:		Yes		
F. Charging Energy Restrictions				
At all times		Pursuant to Section 4.5(i)		

EXHIBIT R METERING DIAGRAM















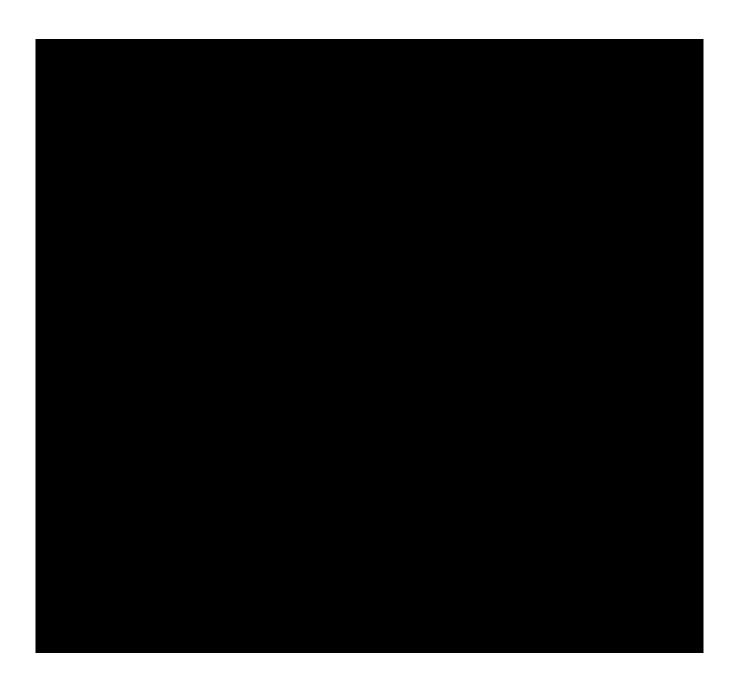


EXHIBIT T

FORM OF COLLATERAL ASSIGNMENT AGREEMENT

FORM OF CONSENT AND AGREEMENT ([NAME OF CONTRACTING PARTY]) ([NAME OF ASSIGNED AGREEMENT])

This CONSENT AND AGREEMENT (this "Consent"), dated as of,
20[], is executed by and among [NAME OF CONTRACTING PARTY], a [legal form of
Contracting Party] organized under the laws of the State of [] (the "Contracting Party"),
[], a [] (the " <u>Project Owner</u> "), and [], as collateral agent
(in such capacity, together with its successors and permitted assigns, the "Collateral Agent") for
various financial institutions named from time to time as Lenders under the Credit Agreement (as
defined below) and any other parties (or any of their agents) who hold any other secured
indebtedness permitted to be incurred under the Credit Agreement (the Collateral Agent and all
such parties collectively, the "Secured Parties").
A. The Project Owner owns, operates and maintains []
(the "Project").
B. The Contracting Party and the Project Owner have entered into the
agreement specified in Schedule I hereto (as further amended, restated, supplemented or otherwise
modified from time to time in accordance with the terms thereof and hereof, the "Assigned
Agreement").
C. The Borrower, the Project Owner, the other affiliates of the Borrower as
Guarantors, various financial institutions named therein from time to time as
Lenders,], as the Administrative Agent and Collateral Agent, have entered
into a Credit Agreement, dated as of [](as amended, modified or supplemented
from time to time, the "Credit Agreement"), providing for the extension of the credit facilities
described therein.
D. As security for the payment and performance by the Project Owner of its
obligations under the Credit Agreement and the other Financing Documents (as defined below)
and for other obligations owing to the Secured Parties, the Project Owner has assigned all of its
right, title and interest in, to and under, and granted a security interest in, the Assigned Agreement
to the Collateral Agent pursuant to the Assignment and Security Agreement, dated as of
between the Project Owner and the Collateral Agent (as amended,
restated, supplemented or otherwise modified from time to time in accordance with the terms
thereof, the "Security Agreement", and, together with the Credit Agreement and any other
financing documents relating to the issuance of the Notes, the "Financing Documents").
E. It is a requirement under the Credit Agreement that the Project Owner cause
the Contracting Party to execute and deliver this Consent.

NOW, THEREFORE as an inducement for Lenders to make the Loans, and for other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, and intending to be legally bound, the parties hereto hereby agree as follows:

1. <u>CONSENT TO ASSIGNMENT</u>. THE CONTRACTING PARTY HEREBY ACKNOWLEDGES AND CONSENTS TO THE PLEDGE AND ASSIGNMENT OF ALL RIGHT, TITLE AND INTEREST OF THE PROJECT OWNER IN, TO AND UNDER (BUT NOT ITS OBLIGATIONS, LIABILITIES OR DUTIES WITH RESPECT TO) THE ASSIGNED AGREEMENT BY THE PROJECT OWNER TO THE COLLATERAL AGENT PURSUANT TO THE SECURITY AGREEMENT.

2. <u>REPRESENTATIONS AND WARRANTIES.</u> THE CONTRACTING PARTY REPRESENTS AND WARRANTS AS FOLLOWS:

- (a) <u>No Amendments</u>. [Except as described in Schedule I hereto,] there are no amendments, modifications or supplements (whether by waiver, consent or otherwise) to the Assigned Agreement, either oral or written.
- (b) <u>No Previous Assignments</u>. The Contracting Party affirms that it has no notice of any assignment relating to the right, title and interest of the Project Owner in, to and under the Assigned Agreement other than the pledge and assignment to the Collateral Agent referred to in Section 1 above.
- (c) No Termination Event: No Disputes. After giving effect to the pledge and assignment referred to in Section 1, and after giving effect to the consent to such pledge and assignment by the Contracting Party, there exists no event or condition (a "Termination Event") that would, either immediately or with the passage of time or giving of notice, or both, entitle either the Project Owner or the Contracting Party to terminate the Assigned Agreement or suspend the performance of its obligations under the Assigned Agreement. [Except as set forth on Schedule III hereto,] there are no unresolved disputes between the parties under the Assigned Agreement. All amounts due under the Assigned Agreement as of the date hereof have been paid in full [, except as set forth on Schedule III hereto].

3. RIGHT TO CURE.

- (a) From and after the date hereof and unless and until the Contracting Party shall have received written notice from the Collateral Agent that the lien of the Security Agreement has been released in full, the Collateral Agent shall have the right, but not the obligation, following an "event of default" or "default" (or any other similar event however defined) by the Project Owner under the Assigned Agreement, to pay all sums due under the Assigned Agreement by the Project Owner and to perform any other act, duty or obligation required of the Project Owner thereunder as described in Section 3(c) below; provided, that no such payment or performance shall be construed as an assumption by the Collateral Agent or any other Secured Party of any covenants, agreements or obligations of the Project Owner under or in respect of the Assigned Agreement.
 - (b) The Contracting Party agrees that it will not (i) terminate the Assigned

Agreement [(other than pursuant to Section __ of the Assigned Agreement)]1or (ii) suspend the performance of any of its obligations under the Assigned Agreement without first giving the Collateral Agent notice and opportunity to cure as provided below. The Contracting Party further agrees that it will not assign any obligation under the Assigned Agreement without the prior consent of the Collateral Agent, except to the extent the Contracting Party may subcontract such obligations to other parties.

- If a Termination Event shall occur [(other than a termination pursuant to Section of the Assigned Agreement)]2, and the Contracting Party shall then be entitled to and shall desire to terminate the Assigned Agreement or suspend the performance of any of its obligations under the Assigned Agreement, the Contracting Party shall, prior to exercising such remedies or taking any other action with respect to such Termination Event, give written notice to the Collateral Agent of such Termination Event. If the Collateral Agent elects to exercise its right to cure as herein provided, it shall have a period of [30]3 days after receipt by it of notice from the Contracting Party referred to in the preceding sentence in which to cure the Termination Event specified in such notice if such Termination Event consists of a payment default, or if such Termination Event is an event other than a failure to pay amounts due and owing by the Project Owner (a "Non-monetary Event") the Collateral Agent shall have such longer period as is required to cure such Termination Event so long as the Collateral Agent has commenced and is diligently pursuing appropriate action to cure such Termination Event; provided, however, that (i) if possession of the Project is necessary to cure such Non-monetary Event and the Collateral Agent has commenced foreclosure proceedings, the Collateral Agent will be allowed a reasonable time to complete such proceedings, and (ii) if the Collateral Agent is prohibited from curing any such Non-monetary Event by any process, stay or injunction issued by any governmental authority or pursuant to any bankruptcy or insolvency proceeding or other similar proceeding involving the Project Owner, then the time periods specified herein for curing a Termination Event shall be extended for the period of such prohibition.
- (d) Any curing of or attempt to cure any Termination Event shall not be construed as an assumption by the Collateral Agent or the other Secured Parties of any covenants, agreements or obligations of the Project Owner under or in respect of the Assigned Agreement.
- 4. <u>REPLACEMENT AGREEMENTS</u>. NOTWITHSTANDING ANY PROVISION IN THE ASSIGNED AGREEMENT TO THE CONTRARY, IN THE EVENT THE ASSIGNED AGREEMENT IS REJECTED OR OTHERWISE TERMINATED AS A RESULT OF ANY BANKRUPTCY, INSOLVENCY, REORGANIZATION OR SIMILAR PROCEEDINGS AFFECTING THE PROJECT OWNER, AT THE COLLATERAL AGENT'S REQUEST, THE CONTRACTING PARTY WILL ENTER INTO A NEW AGREEMENT WITH THE COLLATERAL AGENT OR THE COLLATERAL AGENT'S

Insert applicable provision, if any, of the Assigned Agreement giving the Contracting Party a right to terminate the Assigned Agreement other than upon a default or other event or condition curable by the Project Owner.

Insert applicable provision, if any, of the Assigned Agreement giving the Contracting Party a right to terminate the Assigned Agreement other than upon a default or other event or condition curable by the Project Owner.

<u>3</u> Or longer cure period specified in Assigned Agreement.

DESIGNEE FOR THE REMAINDER OF THE ORIGINALLY SCHEDULED TERM OF THE ASSIGNED AGREEMENT, EFFECTIVE AS OF THE DATE OF SUCH REJECTION, WITH THE SAME COVENANTS, AGREEMENTS, TERMS, PROVISIONS AND LIMITATIONS AS ARE CONTAINED IN THE ASSIGNED AGREEMENT.

- SUBSTITUTE OWNER. 5. THE CONTRACTING **PARTY** ACKNOWLEDGES THAT IN CONNECTION WITH THE EXERCISE OF REMEDIES FOLLOWING A DEFAULT UNDER THE FINANCING DOCUMENTS, THE COLLATERAL AGENT MAY (BUT SHALL NOT BE OBLIGATED TO) ASSUME, OR CAUSE ANY PURCHASER AT ANY FORECLOSURE SALE OR ANY ASSIGNEE OR TRANSFEREE UNDER ANY INSTRUMENT OF ASSIGNMENT OR TRANSFER IN LIEU OF FORECLOSURE TO ASSUME, ALL OF THE INTERESTS, RIGHTS AND OBLIGATIONS OF THE PROJECT OWNER THEREAFTER ARISING UNDER THE ASSIGNED AGREEMENT. IF THE INTEREST OF THE PROJECT OWNER IN THE ASSIGNED AGREEMENT SHALL BE ASSUMED, SOLD OR TRANSFERRED AS PROVIDED ABOVE, THE ASSUMING PARTY SHALL AGREE IN WRITING TO BE BOUND BY AND TO ASSUME THE TERMS AND CONDITIONS OF THE ASSIGNED AGREEMENT AND ANY AND ALL OBLIGATIONS TO THE CONTRACTING PARTY ARISING OR ACCRUING THEREUNDER FROM AND AFTER THE DATE OF SUCH ASSUMPTION, AND THE CONTRACTING PARTY SHALL CONTINUE TO PERFORM ITS OBLIGATIONS UNDER THE ASSIGNED AGREEMENT IN FAVOR OF THE ASSUMING PARTY AS IF SUCH PARTY HAD THEREAFTER BEEN NAMED AS THE "CUSTOMER" UNDER THE ASSIGNED AGREEMENT; PROVIDED THAT IF THE COLLATERAL AGENT OR ITS DESIGNEE (OR ANY ENTITY ACTING ON BEHALF OF THE COLLATERAL AGENT, THE COLLATERAL AGENT'S DESIGNEE OR ANY OF THE OTHER SECURED PARTIES) ASSUMES THE ASSIGNED AGREEMENT AS PROVIDED ABOVE, IT SHALL NOT BE PERSONALLY LIABLE FOR THE PERFORMANCE OF THE OBLIGATIONS THEREUNDER EXCEPT TO THE EXTENT OF ALL OF ITS RIGHT, TITLE AND INTEREST IN AND TO THE PROJECT.
- 6. PAYMENTS. THE CONTRACTING PARTY SHALL MAKE ALL PAYMENTS DUE TO THE PROJECT OWNER UNDER THE ASSIGNED AGREEMENT DIRECTLY INTO THE ACCOUNT SPECIFIED ON SCHEDULE II HERETO, OR TO SUCH OTHER PERSON OR ACCOUNT AS SHALL BE SPECIFIED FROM TIME TO TIME BY THE COLLATERAL AGENT TO THE CONTRACTING PARTY IN WRITING. ALL PARTIES HERETO AGREE THAT EACH PAYMENT BY THE CONTRACTING PARTY AS SPECIFIED IN THE PRECEDING SENTENCE OF AMOUNTS DUE TO THE PROJECT OWNER FROM THE CONTRACTING PARTY UNDER THE ASSIGNED AGREEMENT SHALL SATISFY THE CONTRACTING PARTY'S CORRESPONDING PAYMENT OBLIGATION UNDER THE ASSIGNED AGREEMENT.
- 7. <u>NO AMENDMENTS</u>. THE CONTRACTING PARTY ACKNOWLEDGES THAT THE FINANCING DOCUMENTS RESTRICT THE RIGHT OF THE PROJECT OWNER TO AMEND OR MODIFY THE ASSIGNED AGREEMENT,

OR TO WAIVE OR PROVIDE CONSENTS WITH RESPECT TO CERTAIN PROVISIONS OF THE ASSIGNED AGREEMENT, UNLESS CERTAIN CONDITIONS SPECIFIED IN THE FINANCING DOCUMENTS ARE MET. THE CONTRACTING PARTY SHALL NOT, WITHOUT THE PRIOR WRITTEN CONSENT OF THE COLLATERAL AGENT, AMEND OR MODIFY THE ASSIGNED AGREEMENT, OR ACCEPT ANY WAIVER OR CONSENT WITH RESPECT TO CERTAIN PROVISIONS OF THE ASSIGNED AGREEMENT, UNLESS THE CONTRACTING PARTY HAS RECEIVED FROM THE PROJECT OWNER A COPY OF A CERTIFICATE DELIVERED BY THE PROJECT OWNER TO THE COLLATERAL AGENT TO THE EFFECT THAT SUCH AMENDMENT, MODIFICATION, WAIVER OR CONSENT HAS BEEN MADE IN ACCORDANCE WITH THE TERMS AND CONDITIONS OF THE FINANCING DOCUMENTS, WHICH MAY IN CERTAIN CIRCUMSTANCES REQUIRE THE PRIOR WRITTEN CONSENT OF THE COLLATERAL AGENT THERETO.

- 8. <u>ADDITIONAL PROVISIONS</u>. [TO BE SPECIFIED IF NECESSARY TO CLARIFY THE ASSIGNED AGREEMENT.]
- NOTICES. NOTICE TO ANY PARTY HERETO SHALL BE IN WRITING AND SHALL BE DEEMED TO BE DELIVERED ON THE EARLIER OF: (A) THE DATE OF PERSONAL DELIVERY, (B) POSTAGE PREPAID, REGISTERED OR CERTIFIED MAIL, RETURN RECEIPT REQUESTED, OR SENT BY EXPRESS COURIER, IN EACH CASE ADDRESSED TO SUCH PARTY AT THE ADDRESS INDICATED BELOW (OR AT SUCH OTHER ADDRESS AS SUCH PARTY MAY HAVE THERETOFORE SPECIFIED BY WRITTEN NOTICE DELIVERED IN ACCORDANCE HEREWITH), UPON DELIVERY OR REFUSAL TO ACCEPT DELIVERY, OR (C) IF TRANSMITTED BY FACSIMILE, THE DATE WHEN SENT AND FACSIMILE **RECEIVED: PROVIDED** THAT ANY CONFIRMATION IS **FACSIMILE** COMMUNICATION SHALL BE FOLLOWED PROMPTLY BY A HARD COPY ORIGINAL THEREOF BY EXPRESS COURIER:

	[] [] Attn: [] Telephone No.: [Facsimile No.: [
The Project Owner:	
The Contracting Party:	

- 10. <u>SUCCESSORS AND ASSIGNS</u>. THIS CONSENT SHALL BE BINDING UPON AND SHALL INURE TO THE BENEFIT OF THE SUCCESSORS AND ASSIGNS OF THE CONTRACTING PARTY, AND SHALL INURE TO THE BENEFIT OF THE COLLATERAL AGENT, THE OTHER SECURED PARTIES, THE PROJECT OWNER AND THEIR RESPECTIVE SUCCESSORS, TRANSFEREES AND ASSIGNS.
- 11. <u>COUNTERPARTS</u>. THIS CONSENT MAY BE EXECUTED IN ONE OR MORE COUNTERPARTS WITH THE SAME EFFECT AS IF THE SIGNATURES THERETO AND HERETO WERE UPON THE SAME INSTRUMENT.
- 12. <u>GOVERNING LAW</u>. THIS CONSENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK, WITHOUT REGARD TO PRINCIPLES OF CONFLICTS OF LAWS THEREUNDER (OTHER THAN SECTION 5-1401 OF THE NEW YORK GENERAL OBLIGATIONS LAW).

IN WITNESS WHEREOF, the parties hereto have caused their duly authorized officers to execute and deliver this Consent as of the date first written above.

[NAME OF CONTRACTING PARTY]

By:		
,	Name:	
	Title:	
[1
as C	Collateral Agent	1
By:		
	Name:	
	Title:	
Ack	nowledged and Agreed:	
[-
_		
By:		
	Name:	
	Title:	

Schedule I

Assigned Agreement

Schedule II

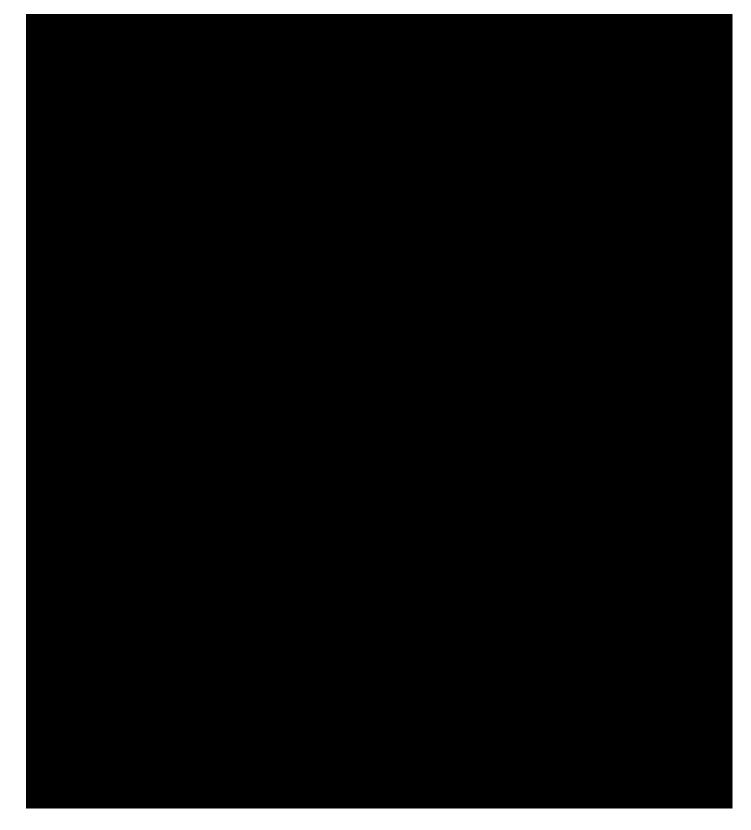
Payment Instructions (Section 6)

All payments due to the Project Owner pursuant to the Assigned Agreement shall be made to [INSERT REVENUE ACCOUNT INFORMATION].

[Schedule III]

[Amounts Due and Unpaid under the Assigned Agreement (Section 2(c))]

EXHIBIT U FORM OF ESTOPPEL CERTIFICATE



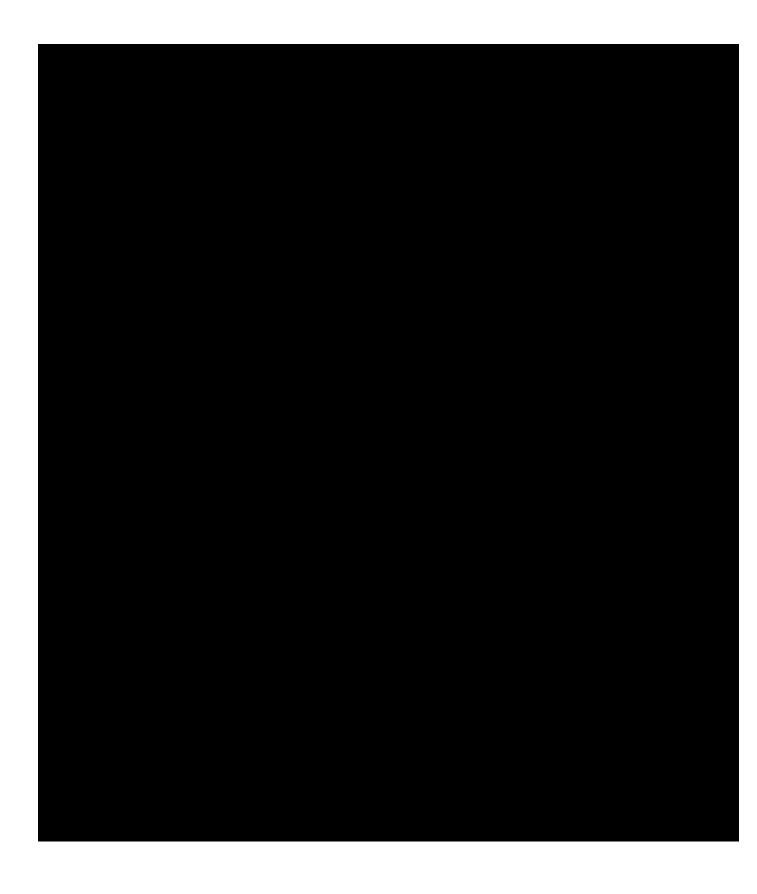






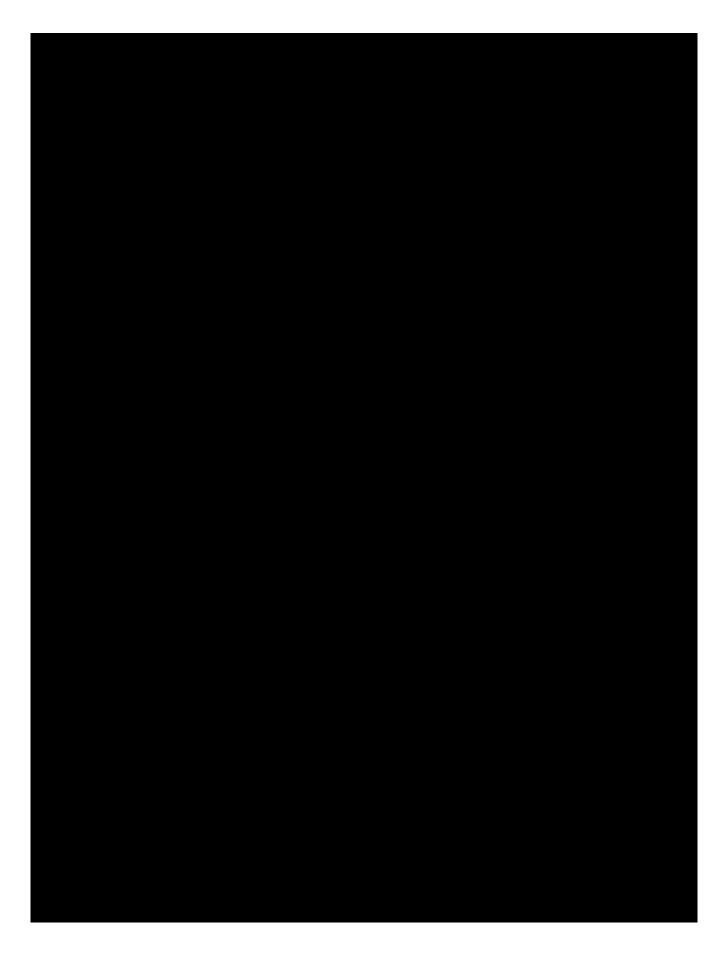
EXHIBIT V FORM OF LIMITED ASSIGNMENT AGREEMENT





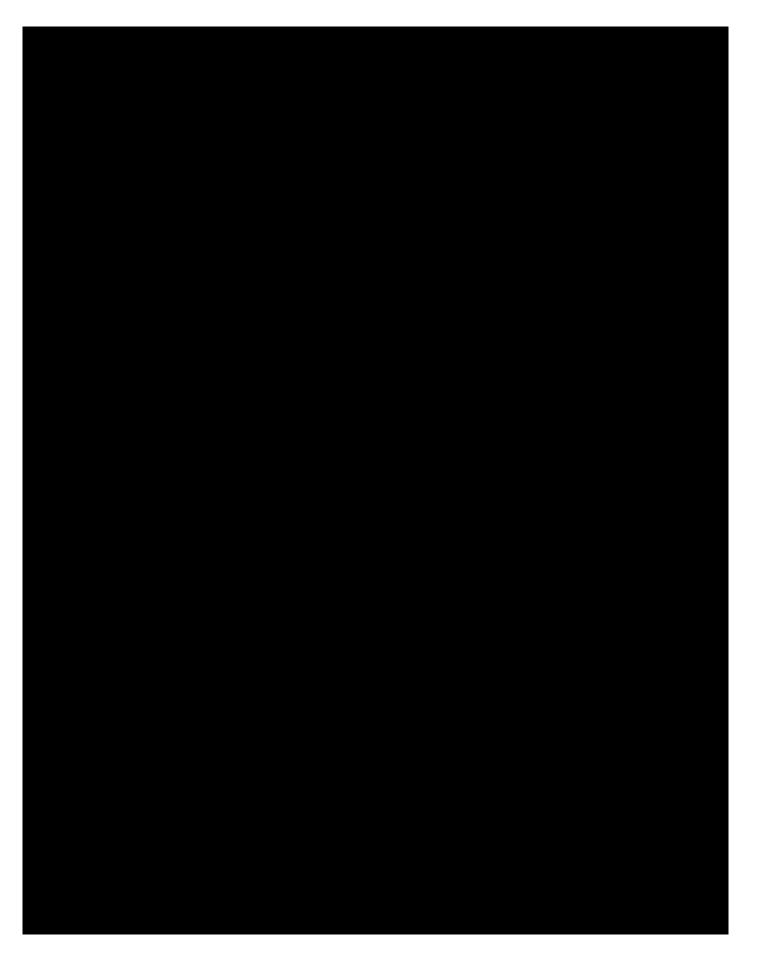














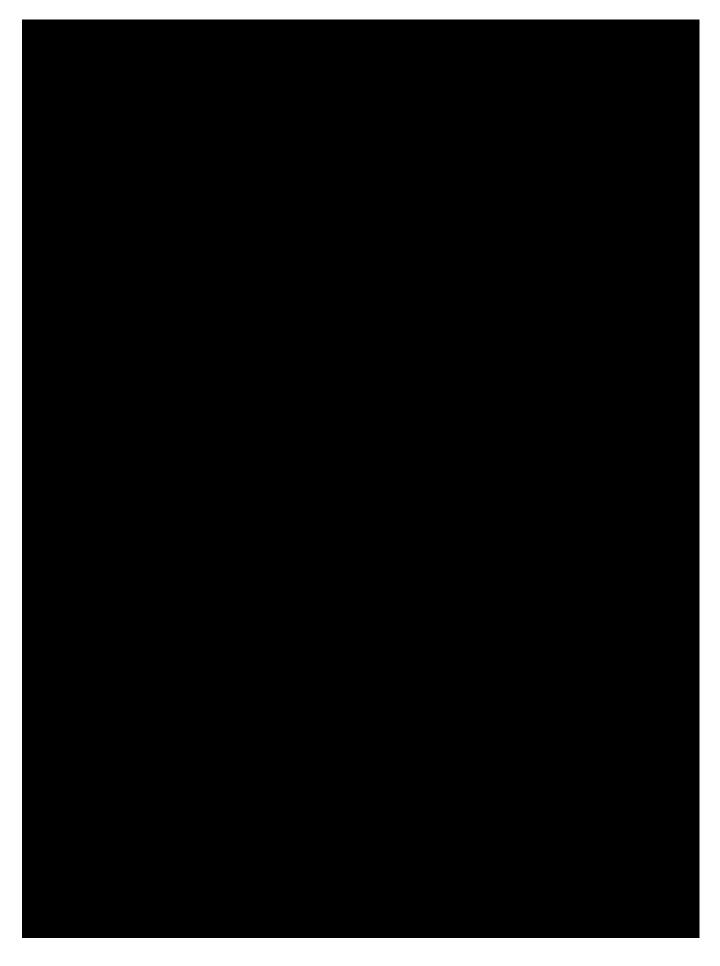




















SAN DIEGO COMMUNITY POWER Staff Report – Item 15

TO: Board of Directors

FROM: Byron Vosburg, Chief Commercial Officer

Kenny Key, Director of Power Contracts

VIA: Karin Burns, Chief Executive Officer

SUBJECT: Approve Amendments to Long-Term Resource Adequacy Agreements

with EnerSmart

DATE: March 27, 2025

RECOMMENDATION:

Approve the four proposed amendments to long-term Resource Adequacy Agreements with EnerSmart's subsidiaries, set up as LLCs for each project, for a total purchase of 10.5 MW of Resource Adequacy (EnerSmart El Cajon BESS LLC 3.0 MW, EnerSmart Imperial Beach BESS LLC 3.0 MW, EnerSmart Mesa Heights BESS LLC 3.0 MW, EnerSmart Chula Vista BESS LLC 1.5 MW), and authorize the CEO to execute the agreements.

BACKGROUND:

As San Diego Community Power (Community Power) strives to meet its environmental, financial, and regulatory compliance goals and requirements, long-term agreements of at least 10 years in duration are integral components of its portfolio. Long-term resource adequacy agreements provide facility developers with the certain revenue stream against which they can finance up-front capital requirements, so each long-term agreement that Community Power signs with a developing facility will underpin a new, incremental project.

In D.21-06-025, the California Public Utilities Commission (CPUC) required each Load Serving Entity (LSE) in California to make significant long-term purchase commitments for resource adequacy from new, incremental generation facilities that will achieve commercial operation during 2023 through 2026. Additionally, Community Power has set internal targets to procure 600MW of capacity from local wholesale projects by 2035.

The agreements proposed originated from an offer Community Power received in 2022 via its Local RFI Solicitation. Community Power engaged with EnerSmart after short-listing the projects and has reached terms mutually agreeable to both parties.

Community Power's Board approved the original resource adequacy Agreements in September 2023 and October 2023. Since then, the projects have attempted to apply for deliverability. Due to delays in that process, as well as to network upgrades, the deliverability date has been pushed back, potentially into the 2030s. These amendments are required to keep the projects viable and allow them to continue to apply for local deliverability.

ANALYSIS AND DISCUSSION:

Staff negotiated the four attached Long-Term Resource Adequacy Agreements for the purchase of resource adequacy from four stand-alone battery-storage projects being developed by EnerSmart in San Diego County.

Resource Adequacy would help with Community Power's internal Local Procurement targets as well as external resource adequacy and mid-term reliability compliance requirements. Specifically, these projects would help with local resource adequacy obligations. Below is additional information regarding EnerSmart and the draft agreements.

Background on EnerSmart:

- EnerSmart is a local developer and has a management team with decades of experience in project development
- EnerSmart is planning to develop over 160 MW of stand-alone storage in San Diego across 10 projects

Contract Overview for the four Local Projects:

- Product: Local Resource Adequacy, 10.5 MW NQC in total
- Projects: A total of 10.5 MW NQC from lithium-ion battery energy systems with durations between 2-6 hours
- Project location: El Cajon, Imperial Beach, Mesa Heights, Chula Vista
- Guaranteed Initial Resource Adequacy Delivery Date: between March 1, 2026, and Q4 2027
- Term: 10 to 15 years
- Pricing: Fixed price for resource adequacy which adjusts based on the year deliverability is obtained
- Community Power receives financial compensation if EnerSmart fails to meet certain performance requirements

Amendment Overview:

- Adjust term from 10 years to 15 years for three of the four projects
- Allow for interim deliverability status and provide Community Power pricing protection depending on year deliverability received
- Added in slice of day resource adequacy language and protections

Community Benefits:

- EnerSmart plans to use local labor when possible and union labor on portions of each project
- EnerSmart commits to prevailing wage for all projects
- EnerSmart's projects benefit the community by providing clean energy to the grid when it's needed the most, helping to reduce the local risk of brownouts and blackouts
- EnerSmart's projects provide local storage reducing the need for additional transmission to import energy

COMMITTEE REVIEW:

Key terms of the Resource Adequacy Agreements were reviewed with the Energy Contract Working Group (ECWG) during Q3 and Q4 of 2024, and the ECWG recommended to move forward with the execution of the agreements.

FISCAL IMPACT:

The competitive resource adequacy pricing of the agreement is confidential, but the long-term purchase of resource adequacy will provide Community Power with significant value and cost certainty over the term of this agreement.

ATTACHMENTS:

- A. Amended and Restated Resource Adequacy Agreement with EnerSmart El Cajon BESS, LLC (redacted version for commercially sensitive information)
- B. Amended and Restated Resource Adequacy Agreement with EnerSmart Imperial Beach BESS, LLC (redacted version for commercially sensitive information)
- C. Amended and Restated Resource Adequacy Agreement with EnerSmart Mesa Height BESS, LLC (redacted version for commercially sensitive information)
- D. Amended and Restated Resource Adequacy Agreement with EnerSmart Chula Vista BESS, LLC (redacted version for commercially sensitive information)

ITEM 15 ATTACHMENT A

AMENDED AND RESTATED RESOURCE ADEQUACY AGREEMENT **COVER SHEET**

A. Parties

Seller: EnerSmart El Cajon BESS LLC, a California limited liability company

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

B. Unit Information

Unit Name:	EnerSmart El Cajon
Location:	1523 E Main St. El Cajon, CA 92111
CAISO Resource ID:	21NGR18729
Unit SCID:	AESM
Unit NQC:	3 MW
Unit EFC:	3 MW
Resource Type:	Battery Energy Storage System
Resource Category (1, 2, 3 or 4):	4
FCR Category (1, 2 or 3):	2
Path 26 (North or South):	SP26
Local Capacity Area (if any, as of Effective Date):	SDGE
Deliverability restrictions, if any, as described in most recent CAISO deliverability assessment:	TBD
Run Hour Restrictions	N/A

C. Resource Duration

Contract Year	Resource Duration	
1		
2		
3		
4		
5		
6		

7		
8		
9		
10		
11		
12		
13		
14		
15		

D. RA Product and Attributes

Throughout the Delivery Term, Seller shall provide Buyer with the Designated RA Capacity of Product having the following attributes:

☑ RAR Attributes
☐ RAR Attributes with FCR Attributes
☐ LAR Attributes
☑ LAR Attributes with FCR Attributes
☐ FCR Attributes

E. Delivery Term

The Delivery Term is fifteen (15) Contract Years, subject to adjustment as set forth in Section 2.1(b).

F. Contract Quantities

The Contract Quantities for each Showing Month of the Delivery Term sl	hall	l	oe	:
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RAR Attributes:

LAR Attributes:

FCR Attributes:

G. Contract Price

The Contract Price shall be:

H. Seller's Security Amounts

Performance Security: \$20/kW multiplied by the Contract Quantity of RAR Attributes.

I. Milestones

Milestone	Date for Completion
Site Control obtained	October 2021
Interconnection Agreement executed	July 2022
Expected Construction Start Date	September 2025
Full Capacity Deliverability Status obtained	
Guaranteed Initial Delivery Date	

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PREAMBLE

This Amended and Restated Resource Adequacy Agreement ("<u>Agreement</u>") is entered into between EnerSmart El Cajon BESS LLC, a California limited liability company ("<u>Seller</u>") and **San Diego Community Power**, a California joint powers authority ("<u>Buyer</u>"), each individually a "<u>Party</u>" and together the "<u>Parties</u>," as of March ___, 2025 (the "<u>Effective Date</u>"). All capitalized terms used in this Agreement are used with the meanings ascribed to them in Article 1 to this Agreement.

RECITALS

WHEREAS, the Parties entered into that certain Resource Adequacy Agreement dated October 5, 2023 for the purchase and sale of Product from the Unit ("Original Agreement");

WHEREAS, the Parties hereby agree to amend, restate, replace and supersede the terms of the Original Agreement as set forth herein;

WHEREAS, Seller intends to develop, design, construct, own, and operate the Unit; 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 "Affiliate" means, with respect to any person, any other person (other than an individual) that, directly or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control with, such person. For this purpose, "control" means the direct or indirect ownership of fifty percent (50%) or more of the outstanding capital stock or other equity interests having ordinary voting power.
- 1.2 "Agreement" has the meaning set forth in the Preamble.
- 1.3 "Alternate Capacity" means any replacement RA Capacity having at least equivalent RAR Attributes, LAR Attributes and/or FCR Attributes as the Product provided by the Unit, including the same Slice-of-Day (as defined in the Resource Adequacy Rulings) and related characteristics, and any successor criteria applicable to the Unit; provided, if any portion of the Designated RA Capacity that Seller is seeking to replace is Designated RA Capacity having RAR Attributes and no LAR Attributes, and no such RAR capacity is available (such capacity shall also include FCR Attributes if this is a Flexible RA Product), then Seller may replace such portion of the Designated RA Capacity with capacity having RAR Attributes and LAR Attributes (as well as FCR Attributes if this is a Flexible RA Product).

- 1.4 "Applicable Laws" means any law, rule, regulation, order, decision, judgment, or other legal or regulatory determination by any Governmental Body having jurisdiction over one or both Parties or this Agreement, including without limitation, the Tariff.
- 1.5 "Availability Incentive Payments" means Availability Incentive Payments as defined in the Tariff.
- 1.6 "Availability Standards" means Availability Standards as defined in the Tariff.
- 1.7 "Bankrupt" means with respect to any entity, such entity (a) files a petition or otherwise commences, authorizes or acquiesces in the commencement of a proceeding or cause of action under any bankruptcy, insolvency, reorganization or similar law, or has any such petition filed or commenced against it and such petition filed or commenced against it is not stayed or dismissed within ninety (90) days thereafter, (b) makes an assignment or any general arrangement for the benefit of creditors, (c) otherwise becomes bankrupt or insolvent (however evidenced), (d) has a liquidator, administrator, receiver, trustee, conservator or similar official appointed with respect to it or any substantial portion of its property or assets, or (e) is generally unable to pay its debts as they fall due.
- **1.8** "Business Day" means any day except a Saturday, Sunday, or a Federal Reserve Bank holiday in California.
- 1.9 "Buyer" has the meaning set forth in the Preamble.
- 1.10 "CAISO" means the California Independent System Operator or its successor.
- **1.11** "CAISO Control Area" means the Control Area (as defined in the Tariff) that is operated by the CAISO.
- 1.12 "CAISO Controlled Grid" has the meaning set forth in the Tariff.
- 1.13 "CAISO Offer Requirements" has the meaning set forth in Article 4.



- 1.15 "CIRA Tool" means the CAISO Customer Interface for Resource Adequacy.
- 1.16 "Claiming Party" has the meaning set forth in Section 3.12.
- 1.17 "Claims" means all third party claims or actions, threatened or filed and, whether groundless, false, fraudulent or otherwise, that directly or indirectly relate to the subject

matter of an indemnity, and the resulting losses, damages, expenses, attorneys' fees and court costs, whether incurred by settlement or otherwise, and whether such claims or actions are threatened or filed prior to or after the termination of this Agreement.

- 1.18 "Compliance Issue" has the meaning set forth in Article 13.
- 1.19 "Compliance Obligation" means the RAR, Local RAR, FCR, and any other resource adequacy or capacity procurement requirements imposed on LSEs by the CPUC pursuant to the Resource Adequacy Rulings, by the CAISO, by the WECC, or by any other Governmental Body having jurisdiction.
- 1.20 "Confidential Information" has the meaning set forth in Article 11.
- 1.21 "Construction Start" has the meaning set forth in Section 16.1(a).
- 1.22 "Construction Start Date" has the meaning set forth in Section 16.1(a).
- 1.23 "Contract Price" has the meaning set forth in Section G of the Cover Sheet.
- "Contract Quantity" means, with respect to any particular Showing Month of the Delivery Term, the amount of Product (in MWs) set forth in Section F of the Cover Sheet, which Seller has agreed to provide to Buyer from the Unit for such Showing Month, which amount may be amended in accordance with Section 16.2(b).
- 1.25 "Contract Year" means a period of twelve (12) consecutive months; the first Contract Year shall commence on the Initial Delivery Date; and each subsequent Contract Year shall commence on the anniversary of the Initial Delivery Date.
- 1.26 "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 a Terminated Transaction; and all reasonable attorneys' fees and expenses incurred by the Non-Defaulting Party in connection with the Terminated Transaction.
- 1.27 "CPUC" means the California Public Utilities Commission or its successor.
- 1.28 "<u>CPUC Filing Guide</u>" means the annual document issued by the CPUC which sets forth the guidelines, requirements and instructions for LSE's to demonstrate compliance with the CPUC's resource adequacy program.
- 1.29 "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.
- 1.30 "Defaulting Party" has the meaning set forth in Section 5.1.

- 1.31 "Delivery Point" has the meaning set forth in Section 3.4.
- 1.32 "<u>Delivery Term</u>" means the period of Contract Years set forth on the Cover Sheet beginning on the Initial Delivery Date as such period may be amended pursuant to Section 2.1(b), unless terminated earlier in accordance with the terms and conditions of this Agreement.
- 1.33 "<u>Designated RA Capacity</u>" shall be equal to, with respect to each Showing Month of the Delivery Term, the Contract Quantity of Product for each hour of the Resource Duration in such Showing Month able to be shown on Buyer's monthly or annual Supply Plan, including the amount of Contract Quantity that Seller has elected to provide as Alternate Capacity from one or more Replacement Units in accordance with Section 3.6.
- 1.34 "Development Cure Period" has the meaning set forth in Section 16.2(c).
- 1.35 "<u>Dispute</u>" has the meaning set forth in Section 17.10(a).
- 1.36 "Dispute Notice" has the meaning set forth in Section 17.10(a).
- 1.37 "Early Termination Date" has the meaning set forth in Section 5.2.
- **1.38** "Effective Date" is the date set forth in the Preamble.
- 1.39 "<u>Effective Flexible Capacity</u>" or "<u>EFC</u>" means the capacity of a resource that can be counted towards an LSE's Flexible Capacity Requirements, as identified from time to time by the Tariff, the Resource Adequacy Rulings, LRA, or other Governmental Body having jurisdiction.
- **1.40** "EPC Contract" means the Seller's engineering, procurement and construction contract with the EPC Contractor.
- **1.41** "<u>EPC Contractor</u>" means Seller's engineering, procurement and construction contractor or such Person performing those functions.
- 1.42 "Equitable Defenses" means any bankruptcy, insolvency, reorganization and other laws affecting creditors' rights generally, and with regard to equitable remedies, the discretion of the court before which proceedings to obtain same may be pending.
- 1.43 "Event of Default" has the meaning set forth in Section 5.1.
- 1.44 "FCR Attributes" means, with respect to a Resource Adequacy Resource, any and all flexible resource adequacy attributes that can be counted toward an LSE's FCR, as they are identified from time to time by the Resource Adequacy Rulings, the Tariff, an LRA, or other Governmental Body having jurisdiction including any Resource Duration attributes, exclusive of any LAR Attributes and any RAR Attributes.
- 1.45 "FCR Showings" means the FCR compliance showings (or similar or successor showings) an LSE is required to make to the CPUC (and, to the extent authorized by the CPUC, to

- the CAISO) pursuant to the Resource Adequacy Rulings and the Tariff, or to an LRA having jurisdiction over the LSE.
- **1.46** "FERC" means the Federal Energy Regulatory Commission or any successor government agency.
- 1.47 "<u>Final Deliverability</u>" means the condition existing when all network upgrades (which may include certain transmission plan upgrades) are completed and all transmission contingencies are resolved such that the Unit no longer requires annual Interim Deliverability Status allocations in order to deliver the Contract Quantity of RAR Attributes to Buyer from the Unit.
- **1.48** "Final Deliverability Date" means the date on which Final Deliverability occurs as evidenced in the Notice provided by Seller to Buyer pursuant to Section 3.3(c).
- 1.49 "<u>Financing Parties</u>" means the person(s) or entity(ies), if any, from time to time issuing or providing any construction, term, back leverage, working capital, bond or other financing, credit support, credit enhancements, interest rate hedging or other permanent debt, lease financing, cash equity, mezzanine or tax equity funding for the Unit, Seller, or any Affiliate of Seller, including any applicable trustee, collateral agent or similar person or entity.
- **1.50** "Flexible Capacity Category" has the meaning set forth in the Resource Adequacy Resource.
- 1.51 "Flexible Capacity Requirements" or "FCR" means the flexible capacity requirements established for LSEs by the CPUC pursuant to the Resource Adequacy Rulings, or by an LRA or other Governmental Body having jurisdiction.
- **1.52** "Flexible RA Product" means that the Product includes FCR Attributes, if applicable, as specified in Sections D and F of the Cover Sheet.
- 1.53 "Force Majeure" means an event or circumstance which prevents one Party from performing its obligations under the Agreement, which event or circumstance was not anticipated as of the Effective Date, which is not within the reasonable control of, or the result of the negligence of, the Claiming Party, and which, by the exercise of due diligence, the Claiming Party is unable to overcome or avoid or cause to be avoided. Force Majeure shall not be based on (i) the loss of Buyer's markets; (ii) Buyer's inability economically to use or resell the Product purchased hereunder; (iii) the loss or failure of Seller's supply (except to the extent due to a Force Majeure); or (iv) Seller's ability to sell the Product at a price greater than the Contract Price. Neither Party may raise a claim of Force Majeure based in whole or in part on curtailment by a Transmission Provider (i) unless such Party has contracted for firm transmission with a Transmission Provider for the Product to be delivered to or received at the Delivery Point and (ii) except to the extent such curtailment is due to Transmission Provider; provided, however, that existence of the foregoing factors shall not be sufficient to conclusively or presumptively prove the existence of a Force Majeure absent a showing of other facts and circumstances which in the aggregate with such factors establish that a Force Majeure as defined in the first sentence hereof has occurred.

- 1.54 "Full Capacity Deliverability Status" or "FCDS" has the meaning set forth in the Tariff.
- 1.55 "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 a Terminated Transaction, determined in a commercially reasonable manner.
- 1.56 "Governmental Approvals" means all authorizations, consents, approvals, waivers, exceptions, variances, filings, permits, orders, licenses, exemptions, notices to and declarations of or with any Governmental Body and shall include those siting and operating permits and licenses, and any of the foregoing under any applicable environmental law, that are required for the use and operation of the Unit.
- 1.57 "Governmental Body" means (a) any federal, state, local, municipal or other government; (b) any governmental, regulatory or administrative agency, commission or other authority lawfully exercising or entitled to exercise any administrative, executive, judicial, legislative, police, regulatory or taxing authority or power; (c) any court or governmental tribunal, but in all cases, excludes both Parties; and (d) CAISO.
- 1.58 "Governmental Charges" has the meaning set forth in Section 8.2.
- 1.59 "Guaranteed Initial Delivery Date" is the date set forth in Section I of the Cover Sheet, subject to extension pursuant to Section 16.2(c), but as limited by Section 16.2(d).
- 1.60 1.61
- 1.62 "<u>Initial Delivery</u>" has the meaning set forth in Section 16.2(a).

1.64

- 1.63 "<u>Initial Delivery Date</u>" means the date on which Initial Delivery is achieved.
- 1.65 "Interconnection Agreement" means the interconnection agreement entered into by Seller pursuant to which the Unit and Seller's Interconnection Facilities will be interconnected with the Transmission System during the Delivery Term.
- 1.66 "<u>Interconnection Facilities</u>" means the interconnection facilities, control and protective devices and metering facilities required to connect the Unit with the Transmission System in accordance with the Interconnection Agreement.
- 1.67 "Interest Rate" means, for any date, the lesser of (a) the per annum rate of interest equal to the prime lending rate as may from time to time be published in *The Wall Street Journal* under "Money Rates" on such day (or if not published on such day on the most recent preceding day on which published), plus two percent (2%) and (b) the maximum rate permitted by applicable law.
- **1.68** "<u>Interim Deliverability Notice</u>" has the meaning set forth in Section 3.3(b).

- 1.69 "Interim Deliverability Period" has the meaning set forth in Section 3.3.
- 1.70 "Interim Deliverability Status" or "IDS" has the meaning set forth in the CAISO Tariff.
- 1.71 "Investment Grade" means a Credit Rating of at least

 (or, if such entities cease to provide Credit Ratings, from another comparable rating agency that is reasonably acceptable to the Parties).
- 1.72 "Joint Powers Act" means the Joint Exercise of Powers Act of the State of California (Government Code Section 6500 et seq.).
- 1.73 "Joint Powers Agreement" means that certain Joint Powers Agreement dated October 1, 2019, as amended from time to time, under which Buyer is organized as a Joint Powers Authority in accordance with the Joint Powers Act.
- 1.74 "<u>LAR</u>" means local area reliability, which is any program of localized resource adequacy requirements established for jurisdictional LSEs by the CPUC pursuant to the Resource Adequacy Rulings, or by another LRA having jurisdiction over the LSE, as implemented in the Tariff. LAR may also be known as local resource adequacy, local RAR, or local capacity requirement in other regulatory proceedings or legislative actions.
- 1.75 "LAR Attributes" means, with respect to a Unit, any and all resource adequacy attributes (or other locational attributes related to system reliability), as they are identified from time to time by the Resource Adequacy Rulings, CAISO, LRA, or other Governmental Body having jurisdiction, associated with the physical location or point of electrical interconnection of the Unit within the CAISO Control Area, that can be counted toward LAR, including any Resource Duration attributes, but exclusive of any RAR Attributes which are not associated with where in the CAISO Control Area the Unit is physically located or electrically interconnected. For clarity, it should be understood that if the CAISO, LRA, or other Governmental Body, defines new or re-defines existing local areas, then such change will not result in a change in payments made pursuant to this Agreement.
- 1.76 "LAR Showings" means the LAR compliance showings (or similar or successor showings) an LSE is required to make to the CPUC (and, to the extent authorized by the CPUC, to the CAISO) pursuant to the Resource Adequacy Rulings and the Tariff, or to an LRA having jurisdiction over the LSE.
- 1.77 "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 having a Credit Rating of at least with an outlook designation of outlook designation of from Moody's, in a form as set forth in Exhibit A or as otherwise acceptable to Buyer.
- **1.78** "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 a Terminated Transaction, determined in a commercially reasonable manner.
- 1.79 "LRA" has the meaning set forth in the Tariff.

- **1.80** "LSE" means load-serving entity. LSEs may be an investor-owned utility, an electric service provider, a community aggregator or community choice aggregator, or a municipality serving load in the CAISO Control Area (excluding exports).
- 1.81 "<u>Milestones</u>" has the meaning set forth in Section I of the Cover Sheet.
- 1.82 "Monthly RA Capacity Payment" has the meaning specified in Section 3.10(a).
- 1.83 "Moody's" means Moody's Investor Services, Inc. or its successor.
- 1.84 "NERC" means the North American Electric Reliability Corporation, or its successor.
- 1.85 "Net Qualifying Capacity" or "NQC" has the meaning set forth in the Tariff.
- 1.86 "Non-Availability Charges" has the meaning set forth in the Tariff.
- 1.87 "Non-Defaulting Party" has the meaning set forth in Section 5.2.
- 1.88 "Notification Deadline" has the meaning set forth in Section 3.6(a).
- 1.89 "Notifying Party" has the meaning set forth in Section 17.10(a).
- 1.90 "Outage" means any CAISO approved disconnection, separation, or reduction in the capacity of any Unit that relieves all or part of the obligations of the Unit under the CAISO Offer Requirements consistent with the Tariff. For the avoidance of doubt, Outage shall be deemed to include Planned Outage.
- 1.91 "Participating Transmission Owner" means an entity that (a) owns, operates and maintains transmission lines and associated facilities and/or has entitlements to use certain transmission lines and associated facilities and (b) has transferred to the CAISO operational control of such facilities and/or entitlements to be made part of the CAISO Grid. The Participating Transmission Owner for purposes of this Agreement is San Diego Gas & Electric.
- **1.92** "Performance Security" means collateral in the form of cash or a Letter of Credit in an amount set forth in Section G of the Cover Sheet.
- 1.93 "Planned Outage" means, subject to and as further described in the Tariff, a CAISO-approved planned or scheduled disconnection, separation or reduction in capacity of the Unit that is conducted for the purposes of carrying out routine repair or maintenance of such Unit, or for the purposes of new construction work for such Unit.
- 1.94 "Product" has the meaning set forth in Section 3.1.
- 1.95 "Progress Report" means a report substantially in the form set forth in Exhibit F, the requirements for which are further set forth in Section 16.1(b).
- 1.96 "RA Capacity" means the qualifying and deliverable capacity of the Unit for the number of hours corresponding to the applicable Resource Duration for RAR, LAR, and FCR

- purposes, as applicable, for the Delivery Term, as determined by the CPUC, CAISO, or other Governmental Body authorized to make such determination under Applicable Laws, including the Resource Adequacy Rulings. RA Capacity encompasses the applicable RAR Attributes, LAR Attributes and FCR Attributes of the capacity provided by a Unit.
- 1.97 "RAR" means the resource adequacy requirements, exclusive of LAR and FCR, established for LSEs by the CPUC pursuant to the Resource Adequacy Rulings, or by an LRA or other Governmental Body having jurisdiction.
- 1.98 "RAR Attributes" means, with respect to a Resource Adequacy Resource, any and all resource adequacy attributes, as they are identified from time to time by the Tariff, Resource Adequacy Rulings, LRA, or any Governmental Body having jurisdiction that can be counted toward RAR, including any Resource Duration attributes, exclusive of any LAR Attributes and FCR Attributes.
- 1.99 "RAR Showings" means the RAR compliance showings (or similar or successor showings) an LSE is required to make to the CPUC (and/or, to the extent authorized by the CPUC, to the CAISO), pursuant to the Tariff or Resource Adequacy Rulings, or to an LRA having jurisdiction.
- **1.100** "Recipient Party" has the meaning set forth in Section 17.10(a).
- 1.101 "Regulatory Event" has the meaning set forth in Section 17.7.
- 1.102 "Reliability Compensation Services Tariff" has the meaning set forth in the Tariff.
- 1.103 "Replacement Capacity" has the meaning specified in Section 3.8(a).
- 1.104 "Replacement Unit" means a unit that (i) has the same operational and locational characteristics set forth in Section B of the Cover Sheet, (ii) provides equivalent RAR Attributes, LAR Attributes and FCR Attributes, as applicable, as the Unit under the RAR counting rules established by the CPUC, CAISO, or other Governmental Body with jurisdiction; *provided however*, Seller may provide Replacement RA from a unit that does not have equivalent RAR Attributes, LAR Attributes and FCR Attributes, as applicable, with the prior consent of Buyer, and (iii) is capable of providing Alternate Capacity. A Replacement Unit may not be a coal-fired or nuclear generating resource.
- 1.105 "Required TPD Allocation" means an allocation of TP Deliverability from the CAISO that is sufficient for the Unit to obtain Full Capacity Deliverability Status for at least the Contract Quantity.
- 1.106 "Residual Unit Commitment" has the meaning set forth in the Tariff.
- 1.107 "Resold Product" has the meaning set forth in Article 12.
- 1.108 "Resource Adequacy Plan" has the meaning specified in the Tariff.

- 1.109 "Resource Adequacy Rulings" means any applicable CPUC ruling or decision relating to resource adequacy, and any other existing or subsequent 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 Term.
- 1.110 "Resource Adequacy Resource" has the meaning set forth in the Tariff.
- **1.111** "Resource Category" shall be as described in the CPUC Filing Guide, as such may be modified, amended, supplemented or updated from time to time.
- **1.112** "Resource Duration" means, for each Contract Year, the number of continuous hours of discharge as set forth on the Cover Sheet.
- **1.113** "RMR Contracts" has the meaning set forth in the Tariff.
- **1.114** "S&P" means the Standard & Poor's Rating Group (a division of McGraw-Hill, Inc.) or its successor.
- 1.115 "Schedule" or "Scheduling" means the actions of Seller, Buyer and/or their designated representatives, including each Party's Transmission Providers, if applicable, of notifying, requesting and confirming to each other the quantity and type of Product to be delivered on any given day or days during the Delivery Term at a specified Delivery Point.
- **1.116** "Scheduling Coordinator" has the same meaning as in the Tariff.
- 1.117 "Security Interest" has the meaning set forth in Section 14.3(a).
- 1.118 "Seller" has the meaning set forth in the Preamble.
- 1.119 "Settlement Amount" means, with respect to the Non-Defaulting Party, the aggregate Losses or Gains, and Costs, expressed in U.S. Dollars, which such party incurs as a result of a Terminated Transaction pursuant to Section 5.2.
- 1.120 "Showing Month" shall be the calendar month during the Delivery Term that is the subject of the RAR Showing, LAR Showing, and/or FCR Showing, as applicable, as set forth in the Resource Adequacy Rulings or Tariff. For illustrative purposes only, pursuant to the Resource Adequacy Rulings in effect as of the Effective Date, the monthly RAR Showing made in June is for the Showing Month of August.
- **1.121** "Shown Unit" means the Unit and any Replacement Units, from which Product is provided by Seller to Buyer.
- 1.122 "Site" means the real property on which the Unit is located as identified in Appendix D.
- 1.123 "Site Control" means that, for the Term, 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.

- **1.124** "Substitution Rules" has the meaning specified in the Tariff.
- 1.125 "Supply Plan" means the supply plans, or similar or successor filings, that each Scheduling Coordinator representing RA Capacity submits to the CAISO, LRA, or other Governmental Body, pursuant to Applicable Laws, in order for that RA Capacity to count, as applicable, for RAR Attributes, LAR Attributes, and/or FCR Attributes.
- **1.126** "Tariff" means the tariff and protocol provisions of the CAISO, including associated rules, procedures and business practice manuals, as amended or supplemented from time to time.
- 1.127 "Term" has the meaning set forth in Section 2.1.
- **1.128** "Terminated Transaction" has the meaning set forth in Section 5.2.
- 1.129 "Termination Payment" has the meaning set forth in Section 5.3.
- 1.130 "TP Deliverability" has the meaning set forth in the CAISO Tariff.
- 1.131 "Transmission Provider" means the CAISO.
- **1.132** "<u>Transmission System</u>" means the transmission facilities operated by the CAISO, which provide energy transmission service within the CAISO grid from the Delivery Point.
- 1.133 "<u>Unit</u>" shall mean the storage asset described in Section B of the Cover Sheet and Exhibit D.
- 1.134 "Work" means (a) work or operations performed by a Party or on a Party's behalf; and (b) materials, parts or equipment furnished in connection with such work or operations; including (i) warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "a Party's work"; and (ii) the providing of or failure to provide warnings or instructions.

ARTICLE 2: TERM; DELIVERY TERM; CONDITIONS PRECEDENT

2.1 Term.

- (a) The term of this Agreement shall commence upon the Effective Date and shall continue until the expiration of the Delivery Term, provided that this Agreement shall thereafter remain in effect until the Parties have fulfilled all obligations arising under this Agreement, including any compensation for the Product, Termination Payment, then-owing indemnification payments or other damages, are paid in full (whether directly or indirectly, such as through set-off or netting) and the Performance Security is released and/or returned (the "Term"). Upon Seller's request, Buyer will promptly confirm in writing the Initial Delivery Date following Seller's completion of all conditions precedent hereto.
- (b) If (i) the Initial IDS Year occurs after 2030, or (ii) the Unit experiences an IDS Gap Year during the period 2030 through the Final Deliverability Date, the Delivery Term shall be automatically reduced by five (5) years, for a maximum Delivery Term of ten (10) years.

(c) All provisions relating to invoicing, payment, delivery, settlement of other liabilities incurred pursuant to this Agreement and dispute resolution survive for the period necessary to effectuate the rights of the Party benefited by such provision except as otherwise specified herein. Notwithstanding anything to the contrary in this Agreement, (i) all rights under Sections 17.2 (Indemnities) and any other indemnity rights survive the end of the Delivery Term for an additional twelve (12) months; (ii) all rights and obligations under Article 11 (Confidentiality) survive the end of the Delivery Term for an additional two (2) years; (iii) all rights and obligations under Section 16.2(f) (Limitation on Seller's Ability to Make or Agree to Third-Party Sales from the Unit after Early Termination Date) survive early termination of this Agreement for an additional two (2) years; and (iv) all provisions relating to limitations of liability survive without limit.

2.2 Conditions Precedent to Initial Delivery Date.

Seller shall provide notice of expected Initial Delivery Date to Buyer no less than sixty (60) days in advance of such date. The Delivery Term shall not commence until Seller completes to Buyer's reasonable satisfaction each of the following conditions:

- (a) Seller shall have secured all CAISO and Governmental Approvals as are necessary for the safe and lawful operation and maintenance of the Unit and to enable Seller to deliver the Product to Buyer.
- (d) Seller shall have provided to Buyer a certification of Seller and a licensed professional engineer, substantially in the form attached hereto as Exhibit C, demonstrating that the Initial Delivery Date has occurred.
- (e) Seller shall have provided Performance Security to Buyer as required by Section 14.2.
- (f) As of the Initial Delivery Date, no Event of Default on the part of Seller shall have occurred and be continuing.
 - (g) Seller shall have obtained Interim Deliverability Status.
- (h) Subject to Section 16.2(b), Seller shall have obtained an NQC for the Unit of at least ...
- (i) In accordance with Section 3.7(a), Seller shall have (i) submitted, or caused the Unit's SC to submit, a notice to Buyer including Seller's proposed Supply Plan for the first Showing Month of the Delivery Term and (ii) submitted, or caused the Unit's SC to submit, a Supply Plan to CAISO for the first Showing Month of the Delivery Term.
- (j) Seller shall have delivered to Buyer all insurance documents required under Article 15.
- (k) As of the Initial Delivery Date, Seller shall have paid Buyer for all amounts owing under this Agreement, if any.

ARTICLE 3: TRANSACTION, DELIVERY AND PAYMENT

3.1 Resource Adequacy Capacity Product.

During the Delivery Term, Seller shall provide Buyer with RA Capacity from the Unit in the amount of the Contract Quantity of RAR Attributes, LAR Attributes, and FCR Attributes, with respect to each Showing Month (the "<u>Product</u>"). Seller's obligation to deliver the Contract Quantity of Product for each day of the Delivery Term is firm and will not be excused for any reason other than Force Majeure.

If the Unit is not available to provide the full amount of the Contract Quantity with respect to an applicable Showing Month for any reason other than Force Majeure, including, without limitation, any Outage or any adjustment of the RA Capacity of any Unit, then, Seller shall provide Buyer with Designated RA Capacity in amounts up to the Contract Quantity from one or more Replacement Units pursuant to Section 3.6. If Seller fails to provide Buyer with replacement Designated RA Capacity from Replacement Units pursuant to Section 3.6, then Seller shall be liable for damages and/or be required to indemnify Buyer for costs, penalties or fines pursuant to the terms of Sections 3.8 and 3.9.

Notwithstanding anything to the contrary herein, no energy or ancillary services associated with the Unit is required to be made available to Buyer as part of this Agreement and Buyer shall not be responsible for compensating Seller for Seller's commitments to the CAISO required by this Agreement.

3.2 Seller's and Buyer's Obligations.

Seller shall sell and deliver, or cause to be delivered, and Buyer shall purchase and receive, or cause to be received, the Designated RA Capacity of the Product as set forth in Section 3.7, and Buyer shall pay Seller the Monthly Capacity Payment for the Designated RA Capacity. Seller shall be responsible for any costs or charges imposed on or associated with the Product or its delivery of the Product up to the receipt of Product by Buyer pursuant to Section 3.7(b). Buyer shall be responsible for any costs or charges imposed on or associated with the Product or its receipt at and from Buyer's receipt of Product. For the duration of the Delivery Term, Seller shall take all commercially reasonable actions, including complying with all applicable registration and reporting requirements, and executing all documents or instruments necessary to enable Buyer to use all of the Designated RA Capacity and RAR Attributes committed by Seller to Buyer pursuant to this Agreement.

3.3 Deliverability.

The Parties acknowledge and agree that prior to the Final Deliverability Date for the Unit, Seller must obtain Interim Deliverability Status from the CAISO on a yearly basis in order to deliver Product to Buyer under this Agreement (such time period, the "Interim Deliverability Period").

(a) Beginning in the year prior to the first year of expected Commercial Operation and continuing throughout the Interim Deliverability Period, Seller shall take all commercially

reasonable actions to obtain Interim Deliverability Status for the Unit in the amount of the Contract Quantity for each year of the Interim Deliverability Period.

- (b) Seller shall provide Buyer with Notice no later than August 1 of each year as to whether it has obtained Interim Deliverability Status for all or any portion of the Contract Quantity for the following calendar year ("Interim Deliverability Notice"); provided however, if CAISO has not provided notice to Seller by August 1, Seller shall provide the Interim Deliverability Notice to Buyer within two (2) Business Days of receipt of notice from CAISO of the deliverability status of the Unit. If the Unit receives partial Interim Deliverability Status in any year, the Monthly Capacity Payment shall be based on the amount of partial Interim Deliverability Status allocated to the Unit for the applicable year.
- (c) Seller shall provide Notice to Buyer of the Final Deliverability Date along with documentation from CAISO (or other evidence reasonably acceptable to Buyer) within three (3) Business Days of receipt of notice from CAISO; provided, if notice of the Final Deliverability Date is provided in a calendar year during which the Unit does not have Interim Deliverability Status, Seller shall provide Notice at least ninety (90) days prior to the first Showing Month after the Final Deliverability Date.



(e) If this Agreement is terminated by Buyer under Section 3.3(d), neither Seller nor Seller's Affiliates may sell, market or deliver any Product associated with or attributable to the Unit to a party other than Buyer for a period of two (2) years following the date of such termination 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 to Buyer on terms and conditions materially similar to the terms and conditions contained in this Agreement (including price) and Buyer fails to accept such offer within forty-five (45) days of Buyer's receipt thereof. Neither Seller nor Seller's Affiliates may sell or transfer the Unit, or any part thereof, or land rights or interests in the Site (including the interconnection queue position of the Unit) so long as the limitations contained in this Section 3.3(e) apply, unless the transferee agrees to be bound by the terms set forth in this Section 3.3(e) pursuant to a written agreement approved by Buyer in its reasonable discretion. Seller shall indemnify and hold Buyer harmless from all benefits lost and other damages sustained by Buyer as a result of any breach by Seller of its covenants contained within this Section 3.3(e).

3.4 Delivery Point.

The "<u>Delivery Point</u>" for the Unit shall be the CAISO Control Area, and if applicable, the LAR region in which the Unit is electrically interconnected.

3.5 Planned Outages.

Seller shall schedule all Planned Outages within the time period determined by the CAISO for the Unit as a Resource Adequacy Resource that is subject to the Availability Standards to qualify for

an "Approved Maintenance Outage" under the CAISO Tariff. Seller shall reimburse Buyer for any cost Buyer incurs to provide Replacement RA, as required by the CAISO, during any Planned Outages (including the cost of procuring Replacement RA for a full calendar month during any month in which a Planned Outage is planned or scheduled). Notwithstanding anything in this Agreement to the contrary, no Planned Outages of the Unit 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.

3.6 Alternate Capacity and Replacement Units.

- (a) The "Notification Deadline" for a given Showing Month shall be fifteen (15) Business Days before the earlier of the relevant deadlines for (a) the corresponding CPUC RAR Showings, LAR Showings and/or FCR Showings, as applicable for that Showing Month, or (b) submission of the CAISO Supply Plan filings applicable to that Showing Month.
- (b) If Seller is unable to provide the full Contract Quantity for any Showing Month for any reason, or if Seller desires to provide the Contract Quantity for any Showing Month from a Replacement Unit, then Seller may, at no additional cost to Buyer, provide Buyer with Alternate Capacity from one or more Replacement Units, with the total amount of Product provided to Buyer from the Unit and any Replacement Unit(s) up to an amount equal to the Contract Quantity for the applicable Showing Month; *provided*, in each case, Seller shall notify Buyer of the amount of Product that Seller will not be able to deliver from the Unit and the portion of the Contract Quantity for which Seller intends to provide Buyer with Alternate Capacity from identified Replacement Unit(s) no later than the Notification Deadline.
- (c) If Seller fails to provide Buyer the Contract Quantity of Product from the Unit or a Replacement Unit for a given Showing Month during the Delivery Term, then Buyer may, but shall not be required to, purchase replacement Product from a third party.
- (d) In the event Seller desired to provide Buyer with the Contract Quantity from a Replacement Unit owned and/or operated by a third party, Buyer shall be permitted to disclose to any such third party Confidential Information to the extent such disclosure is necessary to affect such transaction; *provided*, such other party agrees to keep such Confidential Information confidential.

3.7 Delivery of Product.

Seller shall provide Buyer with the Designated RA Capacity of Product for each Showing Month consistent with the following:

(a) No later than the Notification Deadline corresponding to each Showing Month of the Delivery Term, Seller shall submit, or cause the Shown Unit's Scheduling Coordinator to submit, Supply Plans to identify and confirm the Designated RA Capacity provided to Buyer for each Showing Month so that the total amount of Designated RA Capacity identified and confirmed for such Showing Month equals the Designated RA Capacity, unless specifically requested not to do so by the Buyer.

- (b) The Designated RA Capacity is delivered and received when the CIRA Tool shows that the Supply Plan submitted in compliance with Buyer's instructions, including Buyer's instructions to withhold all or part of the Designated RA Capacity from Seller's Supply Plan for any Showing Month during the Delivery Term, has been accepted by the CAISO. If CAISO rejects either the Supply Plan or Buyer's Resource Adequacy Plan with respect to any part of the Designated RA Capacity in any Showing Month, the Parties will confer, make such corrections as are necessary for acceptance, and resubmit the corrected Supply Plan or Resource Adequacy Plan for validation before the applicable Notification Deadline for the relevant Showing Month.
- (c) Consistent with the Substitution Rules, take all action, or cause each Unit's Scheduling Coordinator to take all action, to allow Buyer or a subsequent purchaser under Article 12 to utilize the Contract Quantity during each Showing Month under the Substitution Rules, including, but not limited to, ensuring that the Designated RA Capacity being provided in the pertinent Showing Month will qualify for substitution under the Substitution Rules and providing Buyer or subsequent purchaser under Article 12 with all information needed to utilize the Substitution Rules.

3.8 Damages for Failure to Provide Designated RA Capacity.

If Seller fails to provide Buyer with the Designated RA Capacity of Product for any Showing Month, and such failure is not excused under the terms of this Agreement, then the following shall apply:

- Capacity not provided by Seller with capacity having equivalent RAR Attributes, LAR Attributes and/or FCR Attributes as the Designated RA Capacity not provided by Seller; *provided*, if any portion of the Designated RA Capacity that Buyer is seeking to replace is Designated RA Capacity having RAR Attributes and no LAR Attributes, and no such RAR capacity is available (such capacity shall also include FCR Attributes if this is a Flexible RA Product), then Buyer may replace such portion of the Designated RA Capacity with capacity having RAR Attributes and LAR Attributes (as well as FCR Attributes if this is a Flexible RA Product) ("Replacement Capacity"), in either case, by entering into purchase transactions with one or more third parties, including, without limitation, third parties who have purchased capacity from Buyer, so long as such transactions are done at prevailing market prices. Buyer shall use commercially reasonable efforts to minimize damages when procuring any Replacement Capacity.
- (b) Seller shall pay to Buyer, on the date payment would otherwise be due in respect of the Showing Month for which the failure occurred, an amount equal to the positive difference, if any, between (A) the product of the Capacity Replacement Price times the amount of the Designated RA Capacity not provided by Seller and (B) the product of the Contract Price times the amount of the Designated RA Capacity not provided by Seller. If Seller fails to pay these damages, then Buyer may offset those damages owed it against any future amounts it may owe to Seller pursuant to Article 6.

3.9 Indemnities for Failure to Deliver Contract Quantity.

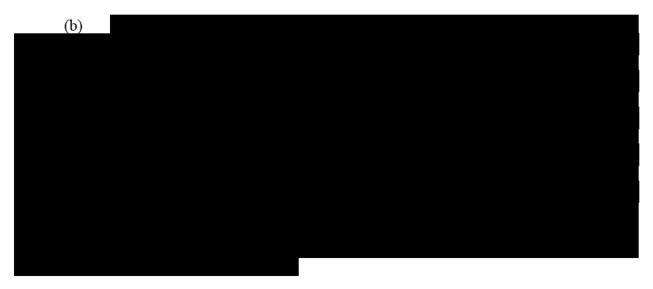
Seller agrees to indemnify, defend and hold harmless Buyer from any penalties, fines or costs assessed against Buyer by the CPUC or the CAISO, resulting from any of the following:

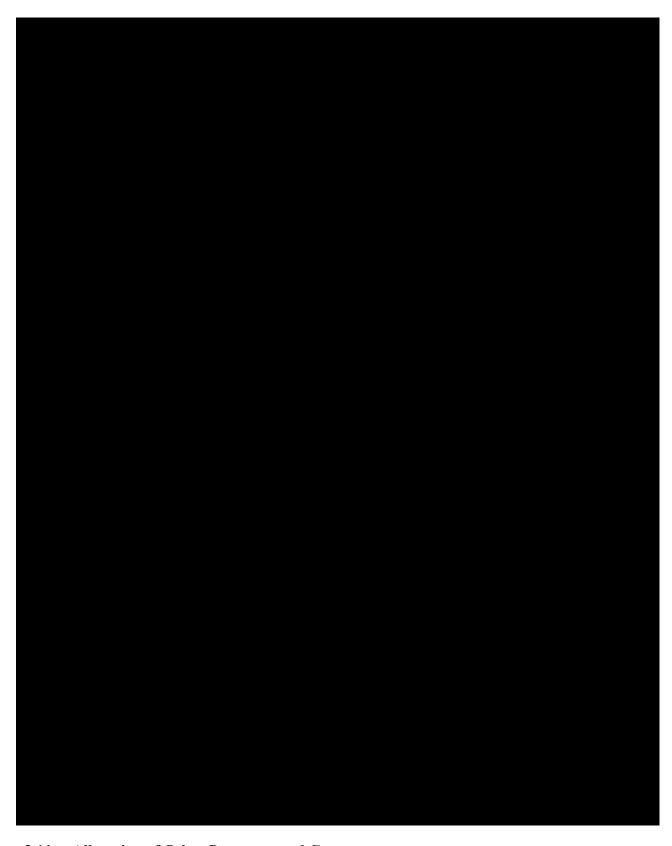
- (a) Seller's failure to provide any portion of the Designated RA Capacity for the respective Showing Month for the Delivery Term; or
- (b) A Unit Scheduling Coordinator's failure to submit accurate Supply Plans that identify Buyer's right, or a subsequent purchaser's right, to the Designated RA Capacity purchased hereunder.

With respect to the foregoing, the Parties shall use commercially reasonable efforts to minimize such penalties, fines and costs; *provided*, in no event shall Buyer be required to use or change its utilization of its owned or controlled assets or market positions to minimize these costs, penalties and fines. If Seller fails to pay the foregoing penalties, fines or costs, or fails to reimburse Buyer for those penalties, fines or costs, then Buyer may offset those penalties, fines or costs against any future amounts it may owe to Seller under this Agreement.

3.10 Monthly RA Capacity Payment.

(a) Buyer shall make a Monthly RA Capacity Payment to Seller for the Unit, in arrears, after the applicable Showing Month. The Parties agree that all invoices under this Agreement shall be due and payable on the twentieth (20th) day of the month after the Showing Month; *provided*, if such day is not a Business Day, then such invoice will be due and payable on the next Business Day. The Unit's "Monthly RA Capacity Payment" shall be equal to the product of (i) the applicable Contract Price for that Showing Month, (ii) the Contract Quantity of the Product actually delivered by Seller to Buyer for the Showing Month as set forth in Section 3.7 and (iii) 1,000. The final product of this Monthly RA Capacity Payment calculation shall be rounded to the nearest penny (i.e., two decimal places).





3.11 Allocation of Other Payments and Costs.

- (a) Seller may retain any revenues it may receive from, and shall pay all costs charged by, the CAISO or any other third party with respect to any Unit for (i) start-up, shut-down, and minimum load costs, (ii) capacity revenue for ancillary services, (iii) energy sales, (iv) any revenues for black start or reactive power services, or (v) the sale of the unit-contingent call rights on the storage capacity of the Unit to provide energy to a third party, so long as such rights do not confer on such third party the right to claim any portion of the RA Capacity sold hereunder in order to make an RAR Showing, LAR Showing, FCR Showing, or any similar capacity or resource adequacy showing with the CAISO or CPUC.
- (b) Buyer shall be entitled to receive and retain all revenues associated with the Designated RA Capacity of the Unit during the Delivery Term (including any capacity or availability revenues from RMR Contracts for any Unit, Reliability Compensation Services Tariff, and Residual Unit Commitment capacity payments, but excluding payments described in Section 3.11(a)).

(c) In accordance with Section 3.10:

- (i) all such Buyer revenues described in Section 3.11(b) received by Seller, or a Unit's Scheduling Coordinator, owner, or operator shall be remitted to Buyer, and Seller shall pay such revenues to Buyer if the Unit's Scheduling Coordinator, owner, or operator fails to remit those revenues to Buyer (and upon any such payment by Seller, Seller shall be subrogated to all rights of Buyer against such Unit's Scheduling Coordinator, owner, or operator for the amount of such revenues paid). If Seller fails to pay such revenues to Buyer, Buyer may offset any amounts owing to it for such revenues against any future amounts it may owe to Seller under this Agreement.
- (ii) all such Seller, or a Unit's Scheduling Coordinator, owner, or operator revenues described in Section 3.11(a)(i)-(v), but received by Buyer shall be remitted to Seller, and Buyer shall pay such revenues to Seller if the Unit's Scheduling Coordinator, owner, or operator fails to remit those revenues to Seller (and upon any such payment by Buyer, Buyer shall be subrogated to all rights of Seller against such Unit's Scheduling Coordinator, owner, or operator for the amount of such revenues paid). If Buyer fails to pay such revenues to Seller, Seller may offset any amounts owing to it for such revenues against any future amounts it may owe to Buyer under this Agreement.
- (d) If a centralized capacity market develops within the CAISO or WECC region, Buyer will have exclusive rights to offer, bid, or otherwise submit Designated RA Capacity provided to Buyer pursuant to this Agreement for re-sale in such market, and retain and receive any and all related revenues. Buyer shall be responsible for any material, incremental costs of offering, bidding, submitting, or re-selling Designated RA Capacity in such centralized capacity market.
- (e) Buyer acknowledges and agrees that all Availability Incentive Payments are for the benefit of Seller and for Seller's account, and that Seller shall receive, retain, or be entitled to receive all credits, payments, and revenues, if any, resulting from Seller achieving or exceeding Availability Standards. The Parties acknowledge and agree that any Non-Availability Charges are

the responsibility of Seller, and for Seller's account and Seller shall be responsible for all fees, charges, or penalties, if any, resulting from Seller failing to achieve Availability Standards.

3.12 Force Majeure.

To the extent either Party is prevented by Force Majeure from carrying out, in whole or part, its obligations under this Agreement and such Party (the "Claiming Party") gives notice and details of the Force Majeure to the other Party as soon as practicable, then, unless the terms of the Product specify otherwise, the Claiming Party shall be excused from the performance of its obligations with respect to this Agreement (other than the obligation to make payments then due or becoming due with respect to performance prior to the Force Majeure). The Claiming Party shall resume performance of its obligations under this Agreement as soon as reasonably practicable. The non-Claiming Party shall not be required to perform or resume performance of its obligations to the Claiming Party corresponding to the obligations of the Claiming Party excused by Force Majeure.

ARTICLE 4: CAISO OFFER REQUIREMENTS

During the Delivery Term, except to the extent the Unit is in an Outage, or is affected by an event of Force Majeure that results in a partial or full Outage of the Unit, Seller shall either schedule or cause the Unit's Scheduling Coordinator to schedule with, or make available to, the CAISO the Unit's Designated RA Capacity in compliance with the Tariff, including compliance with Minimum State of Charge, Day-Ahead Availability, Real-Time Availability, Must Offer Obligation, and Default Energy Bid requirements established in Article 40 of the Tariff and Seller shall perform all, or cause the Unit's Scheduling Coordinator, owner, or operator, as applicable, to perform all obligations under the Tariff that are associated with the sale of Product hereunder (the "CAISO Offer Requirements"). Buyer shall have no liability for the failure of Seller or the failure of any Unit's Scheduling Coordinator, owner, or operator to comply with such Tariff provisions, including any penalties or fines imposed on Seller or the Unit's Scheduling Coordinator, owner, or operator for such noncompliance.

ARTICLE 5: EVENTS OF DEFAULT; REMEDIES

5.1 Events of Default.

An "Event of Default" shall mean, with respect to a Party (a "Defaulting Party"), the occurrence of any of the following:

- (a) the failure to make, when due, any payment required pursuant to this Agreement if such failure is not remedied within ten (10) Business Days after written notice;
- (b) 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 Party does not fully mitigate the adverse consequences as reasonably determined by the other Party of such incorrect representation or warranty to the other Party within thirty (30) days after written notice thereof;
- (c) the failure to perform any material covenant or obligation set forth in this Agreement (except to the extent constituting a separate Event of Default, and except for such Party's obligations to deliver or receive the Product, the exclusive remedy for which is provided

in Section 3.8 and 3.9) if such failure is not remedied within thirty (30) Business Days after written notice; provided, however, that if such failure cannot be reasonably cured within such thirty (30) Business Day period, the Defaulting Party shall have such additional time as is reasonably practical to cure such failure, not to exceed an additional one hundred fifty (150) days, if the Defaulting Party has begun curative action within the aforesaid thirty (30) Business Day period and is proceeding diligently, using commercially reasonable efforts, to complete such curative action;

- (d) Seller fails to take all commercially reasonable actions in a timely manner to achieve Final Deliverability for the Unit;
- (e) Seller fails to obtain by the Initial Delivery Date market rate sales authority pursuant to Section 10.3(m);
- (f) if at any time, Seller delivers or attempts to deliver Product to the Delivery Point for sale under this Agreement that was not generated by the Unit, except for Alternate Capacity;
- (g) Seller sells, assigns, or otherwise transfers, or commits to sell, assign, or otherwise transfer, the Product, or any portion thereof, during the Term to any party other than Buyer except as expressly permitted under this Agreement;
 - (h) such Party becomes Bankrupt;
- (i) such Party assigns this Agreement or any of its rights hereunder other than in compliance with Section 17.3, if applicable;
- (j) the failure of such Party to satisfy the creditworthiness/collateral requirements agreed to pursuant to Article 14 if such failure is not remedied within ten (10) Business Days after written notice;
- (k) 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 transfere 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; or
- (l) 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:
 - (i) the issuer of the outstanding Letter of Credit shall fail to maintain a Credit Rating of at least ;
 - (ii) the issuer of such Letter of Credit becomes Bankrupt;

- (iii) 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;
- (iv) the issuer of the outstanding Letter of Credit shall fail to honor a properly documented request to draw on such Letter of Credit;
- (v) 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;
- (vi) such Letter of Credit fails or ceases to be in full force and effect at any time; or
- (vii) 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.

5.2 Declaration of an Early Termination Date and Calculation of Settlement Amounts.

If an Event of Default with respect to a Defaulting Party shall have occurred and be continuing, the other Party (the "Non-Defaulting Party") shall have the right to (i) designate a day, no earlier than the day such notice is effective and no later than twenty (20) days after such notice is effective, as an early termination date ("Early Termination Date") to accelerate all amounts owing between the Parties and to liquidate and terminate this Agreement (referred to herein as a "Terminated Transaction") between the Parties, (ii) withhold any payments due to the Defaulting Party under this Agreement; and (iii) suspend performance. If the Early Termination Date occurs before the Initial Delivery Date, then no Settlement Amount shall be owed by either Party. If the Early Termination Date occurs after the Initial Delivery Date, then as soon as reasonably practicable, the Non-Defaulting Party shall calculate, in a commercially reasonable manner, a Settlement Amount for such Terminated Transaction as of the Early Termination Date (or, to the extent that in the reasonable opinion of the Non-Defaulting Party certain of such Terminated Transaction are commercially impracticable to liquidate and terminate or may not be liquidated and terminated under applicable law on the Early Termination Date, as soon thereafter as is reasonably practicable). The Gains and Losses for a Terminated Transaction shall be determined by calculating the amount that would be incurred or realized to replace or to provide the economic equivalent of the remaining payments or deliveries in respect of the Terminated Transaction. The Non-Defaulting Party (or its agent) may determine its Gains and Losses by reference to information either available to it internally or supplied by one or more third parties 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. Third parties supplying such information may include, without limitation, dealers in the relevant markets, endusers of the relevant product, information vendors and other sources of market information. 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). Notwithstanding the foregoing, in the event of termination under Section 5.1(d), the applicable Termination Payment shall be the full amount of the Development Security.

5.3 Net Out of Settlement Amounts.

The Non-Defaulting Party shall net out (a) any Settlement Amount that is due to the Non-Defaulting Party, plus, (b) at the option of the Non-Defaulting Party, any cash or other form of security then available to the Non-Defaulting Party pursuant to Article 14, plus (c) any or all other amounts due to the Non-Defaulting Party under this Agreement against (d) all amounts that are due to the Defaulting Party, so that all such amounts shall be netted out to a single liquidated amount (the "Termination Payment") payable by one Party to the other. The Termination Payment shall be due to or due from the Non-Defaulting Party as appropriate.

5.4 Notice of Payment of Termination Payment.

As soon as practicable after a liquidation, notice shall be given by the Non-Defaulting Party to the Defaulting Party of the amount of the Termination Payment and whether the Termination Payment is due to or due from the Non-Defaulting Party. The notice shall include a written statement explaining in reasonable detail the calculation of such amount. The Termination Payment shall be made by the Party that owes it within ten (10) days after such notice is effective.

5.5 Disputes with Respect to Termination Payment.

If the Defaulting Party disputes the Non-Defaulting Party's calculation of the Termination Payment, in whole or in part, the Defaulting Party shall, within ten (10) days of receipt of Non-Defaulting Party's calculation of the Termination Payment, provide to the Non-Defaulting Party a detailed written explanation of the basis for such dispute; *provided*, *however*, that if the Termination Payment is due from Seller as the Defaulting Party, Seller (as the Defaulting Party) shall first transfer Performance Security to Buyer (as the Non-Defaulting Party) in an amount equal to the Termination Payment.

5.6 Closeout Setoffs.

After calculation of a Termination Payment in accordance with Section 5.3, if the Defaulting Party would be owed the Termination Payment, the Non-Defaulting Party shall be entitled, at its option and in its discretion, to (i) set off against such Termination Payment any amounts due and owing by the Defaulting Party to the Non-Defaulting Party under any other agreements, instruments or undertakings between the Defaulting Party and the Non-Defaulting Party and/or (ii) to the extent the Agreement is not yet liquidated in accordance with Section 5.2, withhold payment of the Termination Payment to the Defaulting Party. The remedy provided for in this Section 5.6 shall be without prejudice and in addition to any right of setoff, combination of accounts, lien or other right to which any Party is at any time otherwise entitled (whether by operation of law, contract or otherwise).

ARTICLE 6: PAYMENT AND NETTING

6.1 Billing Period.

The calendar month shall be the standard period for all payments under this Agreement (other than Termination Payments). As soon as practicable after the end of each month, each Party will render

to the other Party an invoice for the payment obligations, if any, incurred hereunder during the preceding month.

6.2 Timeliness of Payment.

Unless otherwise agreed by the Parties, all invoices under this Agreement shall be due and payable in accordance with each Party's invoice instructions on or before the later of the twentieth (20th) day of each month, or tenth (10th) day after receipt of the invoice or, if such day is not a Business Day, then on the next Business Day. Each Party will make payments by electronic funds transfer, or by other mutually agreeable method(s), to the account designated by the other Party. Any amounts not paid by the due date will be deemed delinquent and will accrue interest at the Interest Rate, such interest to be calculated from and including the due date to but excluding the date the delinquent amount is paid in full.

6.3 Disputes and Adjustments of Invoices.

A Party may, in good faith, dispute the correctness of any invoice or any adjustment to an invoice, rendered under this Agreement or adjust any invoice for any arithmetic or computational error within twelve (12) months of the date the invoice, or adjustment to an invoice, was rendered. In the event an invoice or portion thereof, or any other claim or adjustment arising hereunder, is disputed, payment of the undisputed portion of the invoice shall be required to be made when due, with notice of the objection given to the other Party. Any invoice dispute or invoice adjustment shall be in writing and shall state the basis for the dispute or adjustment. Payment of the disputed amount shall not be required until the dispute is resolved. Upon resolution of the dispute, any required payment shall be made within five (5) Business Days of such resolution along with interest accrued at the Interest Rate from and including the due date to but excluding the date paid. Inadvertent overpayments shall be returned upon request or deducted by the Party receiving such overpayment from subsequent payments, with interest accrued at the Interest Rate from and including the date of such overpayment to but excluding the date repaid or deducted by the Party receiving such overpayment. Any dispute with respect to an invoice is waived unless the other Party is notified in accordance with this Section 6.3 within twelve (12) months after the invoice is rendered or any specific adjustment to the invoice is made. If an invoice is not rendered within twelve (12) months after the close of the month during which performance occurred, the right to payment for such performance is waived.

6.4 Netting of Payments.

The Parties hereby agree that they shall discharge mutual debts and payment obligations due and owing to each other under this Agreement 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, including any related damages calculated pursuant to Sections 3.8 or 3.9, 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.

6.5 Payment Obligation Absent Netting.

If no mutual debts or payment obligations exist and only one Party owes a debt or obligation to the other during the monthly billing period, including, but not limited to, any related damage amounts calculated pursuant to Sections 3.8 or 3.9, interest, and payments or credits, that Party shall pay such sum in full when due.

6.6 Security.

Unless the Party benefiting from Performance Security notifies the other Party in writing, and except in connection with a liquidation and termination in accordance with Article 5, all amounts netted pursuant to this Article 6 shall not take into account or include any Performance Security which may be in effect to secure a Party's performance under this Agreement.

ARTICLE 7: LIMITATIONS

7.1 Limitation of Remedies, Liability and Damages.

EXCEPT AS 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. FOR BREACH OF ANY PROVISION FOR WHICH AN EXPRESS REMEDY OR MEASURE OF DAMAGES IS PROVIDED, SUCH EXPRESS REMEDY OR MEASURE OF DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY, THE OBLIGOR'S LIABILITY SHALL BE LIMITED AS SET FORTH IN SUCH PROVISION AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED. IF NO REMEDY OR MEASURE OF DAMAGES IS EXPRESSLY PROVIDED HEREIN, THE OBLIGOR'S LIABILITY SHALL BE LIMITED TO DIRECT ACTUAL DAMAGES ONLY, SUCH DIRECT ACTUAL DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED. UNLESS EXPRESSLY HEREIN PROVIDED, NEITHER PARTY SHALL BE LIABLE FOR CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY OR INDIRECT DAMAGES, LOST PROFITS OR OTHER BUSINESS INTERRUPTION DAMAGES, BY STATUTE, IN TORT OR CONTRACT, UNDER ANY INDEMNITY PROVISION OR OTHERWISE. IT IS THE INTENT OF THE PARTIES THAT THE LIMITATIONS HEREIN IMPOSED ON REMEDIES AND THE MEASURE OF DAMAGES BE WITHOUT REGARD TO THE CAUSE OR CAUSES RELATED THERETO, INCLUDING THE NEGLIGENCE OF ANY PARTY, WHETHER SUCH NEGLIGENCE BE SOLE, JOINT OR CONCURRENT, OR ACTIVE OR PASSIVE. TO THE EXTENT ANY DAMAGES REOUIRED TO BE PAID HEREUNDER ARE LIQUIDATED, THE ACKNOWLEDGE THAT THE DAMAGES ARE DIFFICULT OR IMPOSSIBLE TO DETERMINE, OR OTHERWISE OBTAINING AN **ADEQUATE** REMEDY INCONVENIENT AND THE DAMAGES CALCULATED HEREUNDER CONSTITUTE A REASONABLE APPROXIMATION OF THE HARM OR LOSS.

ARTICLE 8: GOVERNMENTAL CHARGES

8.1 Cooperation.

Each Party shall use reasonable efforts to implement the provisions of and to administer this Agreement in accordance with the intent of the parties to minimize all taxes, so long as neither Party is materially adversely affected by such efforts.

8.2 Governmental Charges.

Seller shall pay or cause to be paid all taxes imposed by any government authority ("Governmental Charges") on or with respect to the Product or a transaction arising prior to the Delivery Point. Buyer shall pay or cause to be paid all Governmental Charges on or with respect to the Product or a transaction at and from the Delivery Point (other than ad valorem, franchise or income taxes which are related to the sale of the Product and are, therefore, the responsibility of the Seller). In the event Seller is required by law or regulation to remit or pay Governmental Charges which are Buyer's responsibility hereunder, Buyer shall promptly reimburse Seller for such Governmental Charges. If Buyer is required by law or regulation to remit or pay Governmental Charges which are Seller's responsibility hereunder, Buyer may deduct the amount of any such Governmental Charges from the sums due to Seller under Article 6. Nothing shall obligate or cause a Party to pay or be liable to pay any Governmental Charges for which it is exempt under the law.

ARTICLE 9: [RESERVED]

ARTICLE 10: REPRESENTATIONS; WARRANTIES; COVENANTS

10.1 Mutual Representations and Warranties.

On the Effective Date, each Party represents and warrants to the other Party that:

- (a) it is duly organized, validly existing and in good standing under the laws of the jurisdiction of its formation;
- (b) it has all regulatory authorizations necessary for it to legally perform its obligations under this Agreement, except all permits necessary to construct, operate and maintain the Unit and sell the Product therefrom in the case of Seller;
- (c) the execution, delivery and performance of this Agreement are within its powers, have been duly authorized by all necessary action and do not violate any of the terms and conditions in its governing documents, any contracts to which it is a party or any law, rule, regulation, order or the like applicable to it;
- (d) this Agreement and each other document executed and delivered in accordance with this Agreement constitutes its legally valid and binding obligation enforceable against it in accordance with its terms; subject to any Equitable Defenses.
- (e) it is not Bankrupt and there are no proceedings pending or being contemplated by it or, to its knowledge, threatened against it which would result in it being or becoming Bankrupt;
- (f) there is not pending or, to its knowledge, threatened against it or any of its Affiliates any legal proceedings that could materially adversely affect its ability to perform its obligations under this Agreement;

- (g) it is a "forward contract merchant" within the meaning of the United States Bankruptcy Code; and
- (h) it has entered into this Agreement in connection with the conduct of its business and it has the capacity or ability to make or take delivery of Product; provided that Seller does not yet have market rate sales authority to participate in CAISO and to effectuate the transaction contemplated by this Agreement.

10.2 Buyer and Seller Covenants.

Buyer and Seller shall, throughout the Delivery Term, take all commercially reasonable actions and execute any and all documents or instruments reasonably necessary to ensure Buyer's right to the use of the Contract Quantity for the sole benefit of Buyer or any subsequent purchaser under Article 12. Such commercially reasonable actions shall include, without limitation:

- (a) Cooperating with and providing, and in the case of Seller causing the Unit's Scheduling Coordinator, owner, or operator to cooperate with and provide requested supporting documentation to the CAISO, the CPUC, or any other Governmental Body responsible for administering RAR, LAR, and/or FCR under Applicable Laws, to certify or qualify the Contract Quantity as RA Capacity and Designated RA Capacity. Such actions shall include, without limitation, providing information requested by the CAISO, CPUC, or by an LRA having jurisdiction, to demonstrate for each month of the Delivery Term the ability to deliver the Contract Quantity from the Unit to the CAISO Controlled Grid for the minimum hours required to qualify as RA Capacity, and providing information requested by the CPUC, CAISO or other Governmental Body having jurisdiction to administer RAR, LAR, or FCR to demonstrate that the Contract Quantity can be delivered to the CAISO Controlled Grid, pursuant to "deliverability" standards established by the CAISO, or other Governmental Body having jurisdiction to administer RAR, LAR and/or FCR; and
- (b) Negotiating in good faith to make necessary amendments, if any, to this Agreement to conform it to subsequent clarifications, revisions, or decisions rendered by the CAISO, CPUC, FERC, or other Governmental Body having jurisdiction to administer RAR, LAR, or FCR so as to maintain the benefits of the bargain struck by the Parties on the Effective Date; *provided*, *however*, that such commercially reasonable actions shall not include any obligation that the owner or operator of the Unit undertake capital improvements, Unit enhancements, or the construction of new facilities nor in any way limit the Parties with respect to advocacy for any regulatory policies or market changes before any entity.

10.3 Seller Representations, Warranties and Covenants.

Seller represents, warrants and covenants to Buyer that:

- (a) Throughout the Delivery Term, the Unit qualifies as a Resource Adequacy Resource that is eligible to provide the Product pursuant to the Tariff and the Resource Adequacy Rulings;
- (b) Throughout the Delivery Term, Seller owns or has the exclusive right to the RA Capacity sold under this Agreement, and shall furnish Buyer, CAISO, CPUC or other jurisdictional

LRA, or other Governmental Body with such evidence as may reasonably be requested to demonstrate such ownership or exclusive right;

- (c) Throughout the Delivery Term, no portion of the Contract Quantity has been committed by Seller to any third party in order to satisfy RAR, LAR, FCR or analogous obligations in CAISO markets, other than pursuant to an RMR Contract between the CAISO and either Seller or the Unit's owner or operator;
- (d) Throughout the Delivery Term, no portion of the Contract Quantity has been committed by Seller in order to satisfy RAR, LAR, FCR, or analogous obligations in any non-CAISO market;
- (e) The Unit is within the CAISO Control Area and Seller shall maintain Site Control throughout the Delivery Term;
- (f) Throughout the Delivery Term, the owner or operator of the Unit is obligated to comply with Applicable Laws, including the Tariff, relating to RA Capacity, RAR, LAR, and FCR;
- (g) Throughout the Delivery Term, Seller shall maintain any Governmental Approvals required to perform Seller's obligations;
- (h) Throughout the Delivery Term, the respective cumulative amounts of LAR Attributes, RAR Attributes, and FCR Attributes that Seller has sold, assigned or transferred from the Unit does not exceed that Unit's RA Capacity;
- (i) Throughout the Delivery Term, with respect to the RA Capacity provided under this Agreement, Seller shall, and the Unit's Scheduling Coordinator is obligated to, comply with Applicable Laws, including the Tariff, relating to RAR, LAR, and FCR;
- (j) Prior to the start of the Delivery Term, Seller will notify the Scheduling Coordinator of the Unit that, throughout the Delivery Term, has transferred the Designated RA Capacity to Buyer, and the Scheduling Coordinator is obligated to deliver the Supply Plans in accordance with this Agreement and the Tariff;
- (k) Prior to the start of the Delivery Term, Seller will notify the Scheduling Coordinator of the Unit that Seller is obligated, throughout the Delivery Term, to cause the Unit's Scheduling Coordinator to provide to the Buyer, at least fifteen (15) Business Days before the Notification Deadline, the Designated RA Capacity of the Unit that is to be submitted in the Supply Plan associated with this Agreement for the applicable period; and
- (l) Prior to the start of the Delivery Term, Seller will notify the Unit's Scheduling Coordinator that, throughout the Delivery Term, Buyer is entitled to the revenues set forth in Section 3.11 and that such Scheduling Coordinator is obligated to promptly deliver those revenues to Buyer, along with appropriate documentation supporting the amount of those revenues.

(m) Promptly following the Effective Date, Seller will apply to FERC for market rate sales authority to participate in CAISO and to effectuate the transaction contemplated by this Agreement and Seller will maintain such authority throughout the Delivery Term.

10.4 Buyer Representations, Warranties and Covenants.

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.).

ARTICLE 11: CONFIDENTIALITY

- (a) Neither Party shall disclose the terms or conditions of this Agreement or information exchanged between the Parties pursuant to this Agreement ("Confidential Information") to a third party (other than the Party's or its Affiliates' employees, lenders or potential lenders, investors or potential investors, counsel, accountants or advisors who have a need to know such information and have agreed to keep such terms confidential) except in order to fulfill such Party's obligations under this Agreement or to comply with any applicable law, regulation, or any exchange, control area or independent system operator rule or in connection with any court or regulatory proceeding; *provided*, *however*, each Party shall, to the extent practicable, use reasonable efforts to prevent or limit the disclosure. The Parties shall be entitled to all remedies available at law or in equity to enforce, or seek relief in connection with, this confidentiality obligation.
- (b) Notwithstanding the foregoing, the Parties agree that Buyer may disclose the information pertaining to this Agreement to any Governmental Body, the CPUC, the CAISO or any LRA having jurisdiction in order to support its LAR Showings, RAR Showings and/or FCR Showings, as applicable, and Seller may disclose the transfer of the Designated RA Capacity under this Agreement to the Scheduling Coordinator of the Unit in order for such Scheduling Coordinator to timely submit accurate Supply Plans; *provided*, each disclosing Party shall use reasonable efforts to limit, to the extent possible, the ability of any such applicable Governmental Body, CAISO, or Scheduling Coordinator to further disclose such information. In addition, in the event Buyer resells all or any portion of the Designated RA Capacity to another party, Buyer shall be permitted to disclose to the other party to such resale transaction all such information to the extent such disclosure is necessary to affect such resale transaction; *provided*, such other party agrees to keep such information confidential.
- (c) Seller acknowledges that Buyer is subject to the California Constitution Article 1, Section 3, and the California Public Records Act, Cal. Gov. Code § 6250 et seq. ("Public Records Act") in regard to the documents comprising this Agreement, which items may constitute public records subject to inspection and copying by the public under the authority of the California Constitution and the Public Records Act. Buyer shall, consistent with those laws, use reasonable

efforts to provide Seller with notice of any third-party request to inspect or copy any of the documents that comprise this Agreement, which Seller might deem confidential and exempt from disclosure, in order that Seller may timely seek to protect those documents from disclosure to the third party. Seller acknowledges and agrees that Buyer shall not be liable to Seller if Buyer makes disclosure in accordance with the California Constitution and/or the Public Records Act before Seller has timely obtained an order to prevent Buyer from making the requested disclosure to the third party.

ARTICLE 12: BUYER'S RE-SALE OF PRODUCT

No less than fifteen (15) days prior to the Notification Deadline for any Showing Month of the Delivery Term, Buyer may provide written notice to Seller of Buyer's intent to re-sell all or a portion of the Product and any associated rights, in each case, acquired under this Agreement. If Buyer re-sells all or a portion of the Product and any associated rights acquired under this Agreement in accordance with this Article 12 ("Resold Product"), Seller agrees, and agrees to cause the Unit's Scheduling Coordinator, to follow Buyer's reasonable instructions with respect to providing such Resold Product to subsequent purchasers of such Resold Product to the extent such instructions are consistent with Seller's obligations under this Agreement. Seller further agrees, and agrees to cause the Unit's Scheduling Coordinator, to take all commercially reasonable actions and execute any and all documents or instruments reasonably necessary to allow such subsequent purchasers to use such Resold Product in a manner consistent with Buyer's rights under this Agreement. If Buyer incurs any liability to any purchaser of such Resold Product directly due to the failure of Seller or the Unit's Scheduling Coordinator to comply with the terms of this Agreement, then Seller shall be liable to Buyer for any liabilities Seller would have incurred under this Agreement if Buyer had not resold the Product, including without limitation, pursuant to Sections 3.8 and 3.9.

In the event there is any Resold Product, Buyer agrees to notify Seller that such a sale has occurred and agrees to provide Seller with the information specified below promptly following such sale (and any other information reasonably requested by Seller so that Seller may perform its obligations in this Article 12) and promptly notify Seller of any subsequent changes to such information with respect to any particular sale: (i) benefitting load serving entity SC identification number (SCID), (ii) volume (in MW) of Resold Product, and (iii) subsequent sale delivery period for Resold Product.

ARTICLE 13: COMPLIANCE OBLIGATION

The Parties acknowledge and agree that a material purpose of this Agreement is to enable Buyer to satisfy its Compliance Obligation. If, at any time during the Term, the Unit is not qualified to produce Product, including RAR Attributes, LAR Attributes, and FCR Attributes, as applicable, including due to any action by the CPUC, CAISO or any Governmental Body having jurisdiction that results in any change in Applicable Law occurring after the Effective Date that changes the Resource Adequacy Requirements such that the Product can no longer be counted towards Buyer's Compliance Obligation (a "Compliance Issue"), the Parties shall work in good faith to revise this Agreement so that the Parties can perform their obligations regarding the purchase and sale of Product sold hereunder in order to maintain the original intent; provided, however, in no event shall Seller be obligated to undertake capital improvements, Unit enhancements, or the construction of

new facilities. If a Compliance Issue results in the Product not being able to be counted towards Buyer's Compliance Obligation, and the Parties have not reached agreement on amendments within thirty (30) days after the initiation of discussions regarding the Compliance Issue that would allow the Product to be able to be counted towards Buyer's Compliance Obligation, Buyer may terminate this Agreement upon written notice to Seller, which shall be effective the next Business Day after such notice is received, and any such termination shall be without liability to either Party, subject to payment of any amounts owing as of the effective date of such termination.

ARTICLE 14: COLLATERAL REQUIREMENTS

14.1 [Reserved].

14.2 Performance Security.

Seller shall deliver Performance Security to Buyer on or before the Initial Delivery Date. Seller shall maintain the Performance Security in full force and effect, and shall within ten (10) Business Days after any draws made by Buyer in accordance with this Agreement replenish the Performance Security, until the following have occurred: (a) the Delivery Term has expired or terminated early; and (b) all payment obligations of Seller then due and payable under this Agreement, including compensation for penalties, termination damages, indemnification payments orother 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 end of the Delivery Term, or (iii) fails to honor Buyer's properly documented request todraw 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.

14.3 First Priority Security Interest in Cash or Cash Equivalent Collateral.

- (a) 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 the Performance Security, any other cash collateral and cash equivalent collateral posted under this Agreement, 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.
- (b) Upon or any time after the occurrence 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 Performance Security, Buyer may do any one or more of the following:

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- (i) Exercise any of its rights and remedies with respect to the Performance Security, as applicable, including any such rights and remedies under Applicable Law then in effect:
- (ii) Draw on any outstanding Letter of Credit issued for its benefit and retain any cash held by Buyer as Performance Security; and
- (iii) Liquidate Performance Security 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.

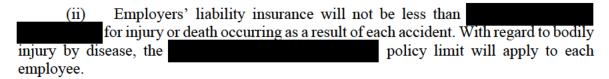
ARTICLE 15: INSURANCE

15.1 Insurance.

Throughout the Term, Seller shall procure and maintain the following insurance coverage and require and cause its contractors to maintain the same levels of coverage. For the avoidance of doubt, the obligations of the Seller in this Section 15.1 constitute a material obligation of this Agreement.

(a) Workers' Compensation and Employers' Liability.

(i) If it has employees, workers' compensation insurance indicating compliance with any applicable labor codes, acts, Applicable Laws or statutes, California state or federal, where Seller performs Work.



(b) <u>Commercial General Liability.</u>

(i) Commercial general liability insurance, including products and completed operations and personal injury insurance, in a minimum amount of per occurrence, and an annual aggregate of not less than , endorsed to provide contractual liability in said amount (subject to policy terms and conditions), specifically covering Seller's insurable indemnity obligations under this Agreement and including Buyer as an additional insured but only to the extent of Seller's insurable indemnity obligations under this Agreement. Limits may be satisfied through a combination of primary and excess policies.

- (ii) An umbrella insurance policy in a minimum limit of liability of
- (iii) Defense costs shall be provided as an additional benefit and not included within the limits of liability. Such insurance shall contain standard cross-liability and severability of interest provisions.

(c) Business Auto.

- (i) Business auto insurance for bodily injury and property damage with limits of per occurrence.
- (ii) 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.

(d) <u>Construction All-Risk Insurance.</u>

(i) During the construction of the Unit prior to the Initial Delivery Date, construction all-risk form property insurance covering the Unit during such construction periods, and naming Seller (and Lender if any) as the loss payee.

(e) Contractor's Pollution Liability.

- (i) If the scope of Work involves areas of known pollutants or contaminants, Seller shall maintain or require to be maintained, pollution liability coverage for bodily injury, property damage, including clean-up costs and defense costs resulting from sudden, and accidental conditions, including the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, hydrocarbons, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water shall be maintained.
- (ii) The limit will be at least each occurrence for bodily injury and property damage.
- (iii) The policy will endorse Buyer as additional insured but only to the extent of Seller's insurable indemnity obligations under this Agreement.

15.2 Evidence of Insurance.

Within ten (10) days after the Effective Date and upon annual renewal thereafter, Seller shall deliver to Buyer certificates of insurance evidencing the coverage required under this Agreement. These certificates shall specify that Buyer shall be given at least thirty (30) days prior notice by Seller in the event of any cancellation or termination of coverage, except ten (10) days for nonpayment of premium. With the exception of Workers Compensation/Employers Liability, such insurance shall be primary coverage without right of contribution from any insurance of Buyer.

ARTICLE 16: UNIT CONSTRUCTION AND INITIAL DELIVERY DATE

16.1 Construction of the Unit.

- (a) <u>Construction Start</u>. "<u>Construction Start</u>" will occur upon satisfaction of the following: (i) Seller has acquired the applicable regulatory authorizations, approvals and permits required for the commencement of construction of the Unit, (ii) Seller has engaged all contractors and ordered all essential equipment and supplies as, in each case, can reasonably be considered necessary so that physical construction of the Unit may begin and proceed to completion without foreseeable interruption of material duration, and (iii) Seller has executed an engineering, procurement, and construction contract (or equivalent agreements) and issued thereunder a notice to proceed or its equivalent that authorizes the contractor to mobilize to Site and begin physical construction of the Unit 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 Exhibit B hereto, and the date certified therein shall be the "Construction Start Date."
- (b) <u>Progress Reports.</u> The Parties agree time is of the essence in regard to the Agreement. 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 Initial Delivery Date, Seller shall provide to Buyer a Progress Report and agree to 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 Exhibit F. 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. Seller shall also provide Buyer with any information in Seller's possession that is reasonably requested by Buyer for Buyer to demonstrate to the CPUC, CAISO, or other Governmental Bodies that Buyer has met its applicable resource adequacy requirements, including providing status reports to the CPUC with respect to the Unit.

16.2 Initial Delivery Date.

- (a) <u>Initial Delivery</u>. "<u>Initial Delivery</u>" means the condition existing when Seller has fulfilled all of the conditions precedent in Section 2.2 of the Agreement and provided notice to Buyer substantially in the form of Exhibit C. Seller shall cause Initial Delivery for the Unit to occur by the Guaranteed Initial Delivery Date, as such date may be extended by a Development Cure Period pursuant to Section 16.2(c), subject to the limitations in Section 16.2(d).
- (b) Reduction to Contract Quantity. If, on the Initial Delivery Date, Seller shall have obtained an NQC and/or EFC, as applicable, for the Unit from the CPUC that is less than the Contract Quantity of RAR Attributes and/or FCR Attributes set forth on the Cover Sheet as of the Effective Date, as applicable, then the following sections of this Agreement shall be automatically amended: (i) the Unit NQC and/or Unit EFC in Section B of the Cover Sheet shall be revised to equal the maximum amount of NQC and/or EFC, as applicable, established for the Unit by the CPUC; (ii) the Contract Quantities in Section F of the Cover Sheet shall be revised to equal the maximum amount of NQC and/or EFC, as applicable, established for the Unit by the CPUC; (iii) the Contract Quantity of LAR Attributes, if applicable, shall equal the revised Contract Quantity

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of RAR Attributes; and (iv) the quantity of NQC set forth in Section 2.2(h) shall be revised to equal the maximum amount of NQC established for the Unit by the CPUC, if such amount is less than the amount set forth in Section 2.2(h) as of the Effective Date.



- (e) <u>Termination for Failure to Achieve Initial Delivery Date</u>. If the Unit has not achieved Initial Delivery on or before the Guaranteed Initial Delivery Date, as such date may be extended by a Development Cure Period pursuant to pursuant to Section 16.2(c) subject to the limitations in Section 16.2(d), then Buyer may terminate this Agreement upon written notice to Seller, which termination shall be effective the next Business Day after such notice is received, and any such termination shall be without liability to Seller, subject to payment of any amounts owing as of the effective date of such termination and provided that Seller shall be subject to Section 16.2(f).
- (f) <u>Limitation on Seller's Ability to Make or Agree to Third-Party Sales from the Unit after Early Termination Date</u>. If this Agreement is terminated by either Party prior to the Initial Delivery Date for any reason other than a Buyer Event of Default, neither Seller nor Seller's Affiliates may sell, market or deliver any Product associated with or attributable to the Unit to a party other than Buyer for a period of two (2) years following such termination, 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 on terms and conditions materially similar to the terms and conditions contained in this Agreement (including price) and Buyer fails to accept such offer within forty-five (45) days of Buyer's receipt thereof. Neither Seller nor Seller's Affiliates may sell or transfer the Unit, or any part thereof, or land rights or interests in the Site (including the interconnection queue position of the Unit) so long as the limitations contained in this Section 16.2(f) apply, unless the transferee agrees to be bound by the terms set forth in this Section 16.2(f)

pursuant to a written agreement approved by Buyer in its reasonable discretion. Seller shall indemnify and hold Buyer harmless from all benefits lost and other damages sustained by Buyer as a result of any breach by Seller of its covenants contained within this Section 16.2(f).

ARTICLE 17: MISCELLANEOUS

17.1 Title and Risk of Loss.

Title to and risk of loss related to the Product shall transfer from Seller to Buyer at the Delivery Point. Seller warrants that it will deliver to Buyer the Designated RA Capacity free and clear of all liens, security interests, claims and encumbrances or any interest therein or thereto by any person arising prior to the Delivery Point.

17.2 Indemnity.

- (a) <u>Indemnity by Seller</u>. Seller shall release, indemnify and hold harmless Buyer or Buyers' respective directors, officers, agents, and representatives against and from any and all loss, Claims, actions or suits, including costs and attorney's fees associated with damage to third parties resulting from, or arising out of or in any way connected with Seller's operation and/or maintenance of the Unit, including without limitation any loss, Claim, action or suit, for or on account of injury to, bodily or otherwise, or death of persons, or for damage to or destruction of property belonging to such third parties, excepting only such loss, Claim, action or suit as may be caused solely by the willful misconduct or gross negligence of Buyer, its Affiliates, or Buyers' and Affiliates' respective agents, employees, directors, or officers.
- (b) <u>Indemnity by Buyer</u>. Buyer shall release, indemnify and hold harmless Seller, its directors, officers, agents, and representatives against and from any and all loss, Claims, actions or suits, including costs and attorney's fees associated with damage to third parties resulting from, or arising out of or in any way connected with Buyer's access to the Unit site, including any loss, Claim, action or suit, for or on account of injury to, bodily or otherwise, or death of persons, or for damage to or destruction of property belonging to such third parties, excepting only such loss, Claim, action or suit as may be caused solely by the willful misconduct or gross negligence of Seller, its Affiliates, or Seller's and Affiliates' respective agents, employees, directors or officers.
- (c) <u>No Dedication</u>. Without limitation of each Party's obligations under Sections 17.2(a) and 17.2(b), nothing in this Agreement shall be construed to create any duty to, any standard of care with reference to, or any liability to any person or entity not a Party to this Agreement. No undertaking by one Party to the other under any provision of this Agreement shall constitute the dedication of that Party's system or any portion thereof to the other Party or the public, nor affect the status of Buyer as an independent public utility corporation or Seller as an independent individual or entity.

17.3 Assignment.

(a) Neither Party shall assign this Agreement or its rights hereunder without the prior written consent of the other Party, which consent shall not be unreasonably withheld, conditioned, or delayed; *provided*, *however*, Seller may, without the consent of Buyer (and without relieving

itself from liability hereunder), (i) transfer, sell, pledge, encumber or assign this Agreement or the accounts, revenues or proceeds hereof in connection with any financing or other financial arrangements, (ii) transfer or assign this Agreement to an affiliate of such Party which affiliate's creditworthiness is equal to or higher than that of such Party, or (iii) transfer or assign this Agreement to any person or entity succeeding to all or substantially all of the assets whose creditworthiness is equal to or higher than that of such Party; provided, however, that in the case of any such assignment pursuant to clause (ii) or clause (iii), any such assignee shall agree in writing to be bound by the terms and conditions hereof and so long as the transferring Party delivers such tax and enforceability assurance as the non-transferring Party may reasonably request. In connection with any financing or refinancing of the Unit by Seller, Buyer shall in good faith negotiate and agree upon a consent to collateral assignment of this Agreement substantially in the form of Exhibit H..

(b) In addition, Buyer shall work in good faith to: (i) agree upon and enter into such amendments to this Agreement as are reasonably requested by the Financing Parties in connection with the financing provided by such Financing Parties, provided that any such amendments: (A) do not materially reduce the benefits or materially increase the risk of Buyer hereunder; and (B) are reasonably acceptable to Buyer; (ii) agree upon and deliver a duly executed estoppel certificate and dating acknowledgement related to this Agreement, in form and substance satisfactory to Buyer, Seller and Seller's Financing Parties, in conjunction with the financing provided by such Financing Parties; and (iii) provide such other documents and technical assistance as Seller may reasonably request in connection with obtaining financing for the Unit. Seller shall pay Buyer's reasonable expenses, including attorneys' fees, incurred to provide consents, estoppels, or other required documentation in connection with Seller's financing of the Facility. Buyer shall have no obligation to provide any consent or estoppel, or enter into any agreement related to the financing of the Unit that materially and adversely affects any of Buyer's rights, benefits, risks or obligations under this Agreement, or to materially modify this Agreement.

17.4 Governing Law and Venue.

This Agreement and the rights and duties of the Parties hereunder shall be governed by and construed, enforced and performed in accordance with the laws of the state of California, without regard to principles of conflicts of Law. 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. Each of the Parties irrevocably and unconditionally agrees that any suit, action or other proceeding arising out of or relating to this Agreement, the transactions contemplated hereby, any provision hereof or the breach, performance, enforcement or validity or invalidity of this Agreement or any provision hereof shall be filed in either the United States District Court for the Southern District of California or the Superior Court of California, County of San Diego, as appropriate (and agrees not to commence any suit, action or proceeding relating thereto except in such courts). Each of the Parties irrevocably and unconditionally waives any objection to the laying of venue of any suit, action or proceeding arising out of or relating to this Agreement, the transactions contemplated hereby, any provision hereof or the breach, performance, enforcement or validity or invalidity of this Agreement or any provision hereof in the United States District Court for the Southern District of California or the Superior Court of California, County of San Diego, as appropriate, and hereby further irrevocably and unconditionally waives and agrees not to plead or claim in any such court that any such suit, action or proceeding brought in any such court has been brought in an inconvenient forum.

Notwithstanding the foregoing, each Party agrees that a final judgment (i.e., judgment after any appeals that may be duly made) in any suit, action or proceeding so brought shall be conclusive and may be enforced by suit on the judgment in any jurisdiction or in any other manner provided in law or in equity.

17.5 Notices.

All notices, requests, statements or payments shall be made as specified in Exhibit G. Notices (other than scheduling requests) shall, unless otherwise specified herein, be in writing and may be delivered by hand delivery, United States mail, overnight courier service or facsimile. Notice by facsimile or hand delivery shall be effective at the close of business on the day actually received, if received during business hours on a Business Day, and otherwise shall be effective at the close of business on the next Business Day. Notice by overnight United States mail or courier shall be effective on the next Business Day after it was sent. A Party may change its addresses by providing notice of same in accordance herewith.

17.6 Mobile-Sierra.

Absent the agreement of all Parties to the proposed change, the standard of review for changes to any rate, charge, classification, term or condition of this Agreement, whether proposed by a Party (to the extent that any waiver below is unenforceable or ineffective as to such Party), a non-party or FERC acting *sua sponte*, shall be the 'public interest' standard of review set forth in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956), and clarified by *Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1 of Snohomish*, 554 U.S. 527 (2008); *NRG Power Marketing LLC v. Maine Public Utility Commission*, 558 U.S. 527 (2010.

Notwithstanding any provision of this Agreement, and absent the prior written agreement of the Parties, each Party, to the fullest extent permitted by Applicable Laws, for itself and its respective successors and assigns, hereby also expressly and irrevocably waives any rights it can or may have, now or in the future, whether under Sections 205, 206, or 306 of the Federal Power Act or otherwise, to seek to obtain from FERC by any means, directly or indirectly (through complaint, investigation, supporting a third party seeking to obtain or otherwise), and each hereby covenants and agrees not at any time to seek to so obtain, an order from FERC changing any section of this Agreement specifying any rate or other material economic terms and conditions agreed to by the Parties.

17.7 General.

This Agreement (including the exhibits, schedules and any written supplements hereto, if any) constitutes the entire agreement between the Parties relating to the subject matter. Notwithstanding the foregoing, any collateral, credit support or margin agreement or similar arrangement between the Parties shall, upon designation by the Parties, be deemed part of this Agreement and shall be incorporated herein by reference. This Agreement shall be considered for all purposes as prepared through the joint efforts of the parties and shall not be construed against one party or the other as a result of the preparation, substitution, submission or other event of negotiation, drafting or execution hereof. Except to the extent herein provided for, no amendment or modification to this Agreement shall be enforceable unless reduced to writing and executed by

both Parties. Each Party agrees if it seeks to amend any applicable wholesale power sales tariff during the term of this Agreement, such amendment will not in any way affect outstanding transactions under this Agreement without the prior written consent of the other Party. Each Party further agrees that it will not assert, or defend itself, on the basis that any applicable tariff is inconsistent with this Agreement. This Agreement shall not impart any rights enforceable by any third party (other than a permitted successor or assignee bound to this Agreement). Waiver by a Party of any default by the other Party shall not be construed as a waiver of any other default. Any provision declared or rendered unlawful by any applicable court of law or regulatory agency or deemed unlawful because of a statutory change (individually or collectively, such events referred to as "Regulatory Event") will not otherwise affect the remaining lawful obligations that arise under this Agreement; provided, further, that if a Regulatory Event occurs, the Parties shall use commercially reasonable efforts to reform this Agreement in order to give effect to the original intention of the Parties. The term "including" when used in this Agreement shall be by way of example only and shall not be considered in any way to be in limitation. The headings used herein are for convenience and reference purposes only. All indemnity and audit rights shall survive the termination of this Agreement for twelve (12) months. This Agreement shall be binding on each Party's successors and permitted assigns.

17.8 Audit.

Each Party has the right, at its sole expense and during normal working hours, to examine the records of the other Party to the extent reasonably necessary to verify the accuracy of any statement, charge or computation made pursuant to this Agreement. If requested, a Party shall provide to the other Party statements evidencing the Designated RA Capacity delivered hereunder. If any such examination reveals any inaccuracy in any statement, the necessary adjustments in such statement and the payments thereof will be made promptly and shall bear interest calculated at the Interest Rate from the date the overpayment or underpayment was made until paid; provided, however, that no adjustment for any statement or payment will be made unless objection to the accuracy thereof was made prior to the lapse of twelve (12) months from the rendition thereof, and thereafter any objection shall be deemed waived.

17.9 Forward Contract.

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

17.10 Dispute Resolution.

(a) In the event of any claim, controversy or dispute between the Parties arising out of or relating to or in connection with this Agreement (including any dispute concerning the validity of this Agreement or the scope and interpretation of this Section 17.10) (a "<u>Dispute</u>"), any Party (the "<u>Notifying Party</u>") may deliver to the other Parties (the "<u>Recipient Party</u>") notice of the Dispute with a detailed description of the underlying circumstances of such Dispute (a "<u>Dispute Notice</u>"). The Dispute Notice shall include a schedule of the availability of the Notifying Party's senior officers (having a title of senior vice president (or its equivalent) or higher) duly authorized to settle the Dispute during the thirty (30) day period following the delivery of the Dispute Notice.

- (b) The Recipient Party shall, within five (5) Business Days following receipt of the Dispute Notice, provide to the Notifying Party a brief summary of the Recipient Party's position on the Dispute and a parallel schedule of availability of the Recipient Party's senior officers (having a title of senior vice president (or its equivalent) or higher) duly authorized to settle the Dispute. Following delivery of the respective senior officers' schedules of availability, the senior officers of the Parties shall meet and confer as often as they deem reasonably necessary during the remainder of the thirty (30) day period in good faith negotiations to resolve the Dispute to the satisfaction of each Party.
- (c) In the event a Dispute is not resolved pursuant to the procedures set forth in Sections 17.10(a) and (b) by the expiration of the thirty (30) day period set forth in Section 17.10(b), then a Party may pursue any legal remedy available to it in accordance with this Agreement.

17.11 Further Assurances.

For the duration of the Delivery Term, each Party shall take all commercially reasonable actions, including complying with all applicable registration and reporting requirements, and execute all documents or instruments necessary to perform the transactions contemplated by this Agreement, including to enable Buyer to use all of the RA Capacity and RAR Attributes committed by Seller to Buyer pursuant to this Agreement.

17.12 Execution.

A signature received via facsimile or email shall have the same legal effect as an original.

17.13 Joint Powers Authority.

Seller acknowledges and agrees that Buyer is organized as a Joint Powers Authority in accordance with the Joint Powers Act of the State of California (Government Code Section 6500 et seq.) pursuant to a Joint Powers Agreement and is a public entity separate from its members. Buyer shall solely be responsible for all debts, obligations and liabilities accruing and arising out of this Agreement and Seller agrees that it shall have no rights and shall not make any claim, take any actions or assert any remedies against any of Buyer's members in connection with this Agreement.

17.14 Dodd-Frank Act

The Parties intend this Agreement to be a "customary commercial arrangement" as described in Section II.A.1 of Commodity Futures Trading Commission, *Proposed Guidance, Certain Natural Gas and Electric Power Contracts*, 81 Fed. Reg. 20583 at 20586 (Apr. 8, 2016) and a "Forward Capacity Transaction" within the meaning of Commodity Futures Trading Commission, *Final Order in Response to a Petition From Certain Independent System Operators and Regional Transmission Organizations To Exempt Specified Transactions Authorized by a Tariff or Protocol Approved by the Federal Energy Regulatory Commission, 78 Fed. Reg. 19,880 (Apr. 2, 2013).*

17.15 Market-Based Rate Authority.

In addition to the covenant in Section 10.3(m), Seller shall, in accordance with Federal Energy Regulatory Commission (FERC) Order No. 697, upon request of Buyer, submit a letter of concurrence in support of any affirmative statement by Buyer that this Agreement does not transfer

"ownership or control of generation capacity" from Seller to Buyer as the term "ownership or control of generation capacity" is used in 18 CFR Section 35.42. Seller also shall not, in filings, if any, made subject to Order Nos. 652 and 697, claim that this Agreement conveys ownership or control of generation capacity from Seller to Buyer.

17.16 Rules of Interpretation.

In this Agreement, except as expressly stated otherwise or unless the context otherwise requires:

- (a) headings and the rendering of text in bold and italics are for convenience and reference purposes only and do not affect the meaning or interpretation of this Agreement;
- (b) words importing the singular include the plural and vice versa and the masculine, feminine and neuter genders include all genders;
- (c) the words "hereof", "herein", and "hereunder" and words of similar import shall refer to this Agreement as a whole and not to any particular provision of this Agreement;
- (d) a reference to an Article, Section, paragraph, clause, Party, or Exhibit is a reference to that Article, Section, paragraph, clause of, or that Party or Exhibit to, this Agreement unless otherwise specified;
- (e) a reference to a document or agreement, including this Agreement shall mean such document, agreement or this Agreement including any amendment or supplement to, or replacement, novation or modification of this Agreement, but disregarding any amendment, supplement, replacement, novation or modification made in breach of such document, agreement or this Agreement;
 - (f) a reference to a Person includes that Person's successors and permitted assigns;
- (g) the terms "include" and "including" mean "include or including (as applicable) without limitation" and any list of examples following such term shall in no way restrict or limit the generality of the word or provision in respect of which such examples are provided;
- (h) references to any statute, code or statutory provision are to be construed as a reference to the same as it may have been, or may from time to time be, amended, modified or reenacted, and include references to all bylaws, instruments, orders and regulations for the time being made thereunder or deriving validity therefrom unless the context otherwise requires;
- (i) in the event of a conflict, a mathematical formula or other precise description of a concept or a term shall prevail over words providing a more general description of a concept or a term:
- (j) references to any amount of money shall mean a reference to the amount in United States Dollars;
 - (k) the expression "and/or" when used as a conjunction shall connote "any or all of";

- (l) words, phrases or expressions not otherwise defined herein that (i) have a generally accepted meaning shall have such meaning in this Agreement or (ii) do not have well known and generally accepted meaning 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.

[Remainder of Page Intentionally Left Blank]

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

ENERSMART EL CAJON BESS LLC, a California limited liability company	SAN DIEGO COMMUNITY POWER, a California joint powers authority
By:	By:
Name:	Name:
Title:	Title:

EXHIBIT A: FORM OF LETTER OF CREDIT

[Issuing Bank Letterhead and Address]

IRREVOCABLE STANDBY LETTER OF CREDIT NO. [XXXXXXX]

Date:	
Bank Re	f.:
Amount:	US\$[XXXXXXXX]
Expiry D	ate:

APPLICANT DETAILS TO BE PROVIDED

Beneficiary:
[Buyer], a California joint powers authority

Ladies and Gentlemen:

[Address]

By the order of ______ ("Applicant"), we, [insert bank name and address] ("Issuer") hereby issue our Irrevocable Standby Letter of Credit No. [XXXXXXX] (the "Letter of Credit") in favor of [Buyer], a California joint powers authority ("Beneficiary"), [Address], for an amount not to exceed the aggregate sum of U.S. \$[XXXXXX] (United States Dollars [XXXXX] and 00/100), pursuant to that certain Agreement dated as of ______ and as amended (the "Agreement") between [Applicant] and Beneficiary. This Letter of Credit shall become effective immediately and shall expire on [XXXXXX] 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 "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, or (b) facsimile to [bank fax number [XXX-XXXXX]] confirmed by [e-mail to [bank email address]] (if presented by fax it must be followed up by a phone call to us at [XXXXXXX] or [XXXXXXX] to confirm receipt) with the originals to follow via courier. The drawing will be effective upon our receipt of the original documents at the above noted address.

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 documents presented under and in compliance with the terms of this Letter of Credit 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 registered mail or 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 is subject to the Uniform Customs and Practice for Documentary Credits (2007 Revision) International Chamber of Commerce Publication No. 600 (the "UCP"), except to the extent that the terms hereof are inconsistent with the provisions of the UCP, including but not limited to Articles 14(b) and 36 of the UCP, in which case the terms of this Letter of Credit shall govern. In the event of an act of God, riot, civil commotion, insurrection, war or any other cause beyond Issuer's control (as defined in Article 36 of the UCP) that interrupts Issuer's business and causes the place for presentation of the Letter of Credit to be closed for business on the last day for presentation, the Expiration Date of the Letter of Credit will be automatically extended without amendment to a date thirty (30) calendar days after the place for presentation reopens for business.

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. [XXXXXXXX]. For telephone assistance, please contact Issuer's Standby Letter of Credit Department at [XXX-XXX-XXXX] and have this Letter of Credit available.

All notices to Beneficiary shall be in writing and are required to be sent by certified letter, overnight courier, or delivered in person to: [Buyer], Chief Operating Officer, [Address]. Only notices to Beneficiary meeting the requirements of this paragraph shall be considered valid. Any notice to Beneficiary which is not in accordance with this paragraph shall be void and of no force or effect.

[Bank Name]	
[Insert officer name]	

[Insert officer title]

Exhibit A: (DRAW REQUEST SHOULD BE ON BENEFICIARY'S LETTERHEAD) **Drawing Certificate** [Insert Bank Name and Address] Ladies and Gentlemen: The undersigned, a duly authorized representative of [Buyer], a California joint powers authority, [Buyer address], as beneficiary (the "Beneficiary") of the Irrevocable Letter of Credit No. [XXXXXXX] (the "Letter of Credit") issued by [insert bank name] (the "Bank") by order of (the "Applicant"), hereby certifies to the Bank as follows: Applicant and Beneficiary are party to that certain Agreement dated as of 1. (the "Agreement"). 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) or \$ other occasion provided for in the Agreement where Beneficiary is authorized to draw on the letter of credit has occurred. OR Beneficiary is making a drawing under this Letter of Credit in the amount of U.S. \$ which equals the full available amount under the Letter of Credit, because we have received notice from the Bank that you have elected not to extend the Expiration Date of the Letter of Credit beyond its current Expiration Date and Applicant is required to maintain the Letter of Credit in force and effect beyond the expiration date of the Letter of Credit but has failed to provide Beneficiary with a replacement Letter of Credit or other acceptable instrument within thirty (30) days prior to such expiration date. The undersigned is a duly authorized representative of [Buyer], a California joint powers authority and is authorized to execute and deliver this Drawing Certificate on behalf of Beneficiary. You are hereby directed to make payment of the requested amount to [Buyer], a California joint powers authority by wire transfer in immediately available funds to the following account: [Specify account information] [Buyer] Name and Title of Authorized Representative Date

EXHIBIT B: FORM OF CONSTRUCTION START DATE CERTIFICATE

This certification of Construction Start Date ("Certification") is delivered by [Seller] ("Seller") to San Diego Community Power, a California joint powers authority ("Buyer") in accordance with the terms of that certain Agreement dated [date] ("Agreement") by and between Seller and Buyer. All capitalized terms used in this Certification but not otherwise defined herein shall have the respective meanings assigned to such terms in the Agreement.

Seller hereby certifies and represents to Buyer that the Construction Start (as defined in 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.

IN WITNESS WHEREOF, the under of the day of	rsigned has executed this Certification on behalf of Seller	as
[Seller]		
By:		
Its:		
Date:		

EXHIBIT C: FORM OF INITIAL DELIVERY DATE CERTIFICATE

This certification ("Certification") of Initial Delivery is delivered by [Seller] ("Seller") to San Diego Community Power, a California joint powers authority ("Buyer") in accordance with the terms of that Agreement dated [date] ("Agreement") by and between Seller and Buyer. All capitalized terms used in this Certification but not otherwise defined herein shall have the respective meanings assigned to such terms in the Agreement.

As of [DATE] , Seller hereby certifies and represents to Buyer the following:

a)	The Unit is fully operational, reliable and interconnected, fully integrated and synchronized with
	the Transmission System.
b)	Seller has installed equipment for the Unit with a nameplate capacity of no less than 3 MW.
c)	The Unit is fully capable of charging, storing and discharging energy up to no less than 3 MW and receiving instructions to charge, store and discharge energy.
d)	Seller's Interconnection Agreement provides for a maximum instantaneous discharge capability of
Í	no less than 3 MW.
e)	Authorization to parallel the Unit was obtained by the Participating Transmission Owner, SDG&E
	on <u>[DATE]</u>
SELL	ER:
Signat	ure:
Name:	·
Date:	
_	
ENGI	NEER
Signat	ure:
Date:	

EXHIBIT D: DESCRIPTION OF UNIT

The following describes the Unit to be constructed, operated and maintained by Seller through the Term in accordance with the Agreement.

Unit name: EnerSmart El Cajon

Resource type: Battery Energy Storage

Nameplate capacity: 3 MW / 19.784 MWh

Location: El Cajon, CA

Unit physical address: 1523 E Main St. El Cajon, CA

Unit elevation: 500'

Unit latitude: 32 48' 14" N

Unit longitude: -116 55' 30" W

Interconnection: SDG&E

CAISO transmission access charge area (e.g. SDG&E): SDG&E

Point of interconnection: adjacent to site

Point of interconnection address: same as site address

Existing zone (e.g. SP-15): SP-15

PNode: GRANITE 6 N001

CAISO Resource ID: 21NGR18729

Substation: GRANITE

EXHIBIT E: [RESERVED]

EXHIBIT F: PROGRESS REPORTING FORM

Each Progress Report must include the following items:

- 1. Executive summary.
- 2. Unit description.
- 3. Site plan of the Unit.
- 4. Description of any material planned changes to the Unit or the Site.
- 5. Schedule showing progress on Unit construction generally and achieving each of the Milestones and the Initial Delivery Date.
- 6. Summary of activities during the previous month, including any OSHA labor hour reports.
- 7. Forecast of activities scheduled for the current calendar quarter.
- 8. Written description about the progress relative to the Milestones and the Initial Delivery Date, including whether Seller is on schedule with respect to the same.
- 9. List of issues that are likely to potentially affect achievement of the Milestones and the Initial Delivery Date.
- 10. Progress and schedule of the EPC Contract, all major equipment supply agreements, Governmental Approvals, technical studies, and financing arrangements.
- 11. Pictures, in sufficient quantity and of appropriate detail, in order to document construction and interconnection progress.
- 12. Any other documentation reasonably requested by Buyer.

CONFIDENTIAL EXECUTION VERSION

EXHIBIT G: NOTICES

ENERSMART EL CAJON BESS LLC, a California limited liability company ("Seller")	SAN DIEGO COMMUNITY POWER, a California joint powers authority ("Buyer")
All Notices:	All Notices:
Street: 400 S. Sierra Ave. Suite 100	P.O. Box 12716
City: Solana Beach, CA. 92075	San Diego, CA 92112
Attn: Skyler Tennis	Attn: Byron Vosburg, Chief Commercial
Phone: 951-317-4757	Officer
Email: skyler@enersmartstorage.com	Phone: (619) 880-6545
	Email: bvosburg@sdcommunitypower.org
Reference Numbers:	Reference Numbers:
Duns: n/a	Duns:
Federal Tax ID Number:	Federal Tax ID Number:
Invoices:	Invoices:
Attn: Eric Wheatley, VP Finance	Attn: SDCP Settlements
Phone: 704-763-8642	Phone: (619) 880-6545
E-mail: eric.wheatley@enersmartstorage.com	Email: settlements@sdcommunitypower.org
Scheduling:	Scheduling:
	Tenaska Power Services Co.
	Attn: Kara Whillock
	Phone: (972) 333-6122
	Email: kwhillock@tnsk.com
	Day Ahead: (817) 303-1115
	Real Time: (817) 303-1852
	Facsimile: (817) 303-1104
Payments:	Payments:
Attn: Eric Wheatley, VP Finance	Attn: Michael Maher
Phone: 704-763-8642	Phone: (415) 526-3020
E-mail:eric.wheatley@enersmartstorage.com	Email: mmaher@mahercpa.com
Wire Transfer:	Wire Transfer:

ENERSMART EL CAJON BESS LLC, a California limited liability company ("Seller")	SAN DIEGO COMMUNITY POWER, a California joint powers authority ("Buyer")
With additional Notices of an Event of	With additional Notices of an Event of
Default to:	Default to:
	Attn: SDCP General Counsel
	PO Box 12716
	San Diego, CA 92112
	Email: legal@sdcommunitypower.org
Emergency Contact:	Emergency Contact:
·	Attn: Byron Vosburg, Chief Commercial
	Officer
	Phone: (619) 880-6545
	Email: bvosburg@sdcommunitypower.org

EXHIBIT H: FORM OF CONSENT TO COLLATERAL ASSIGNMENT

This Consent to Collateral Assignment (this "Consent") is entered into among (i) San Diego Community Power, a California joint powers authority ("SDCP"), (ii) [Name of Seller], a [Legal Status of Seller] (the "Project Company"), and (iii) [Name of Collateral Agent], a [Legal Status of Collateral Agent], as Collateral Agent for the secured parties under the Financing Documents referred to below (such secured parties together with their successors permitted under this Consent in such capacity, the "Secured Parties", and, such agent, together with its successors in such capacity, the "Collateral Agent"). SDCP, Project Company and Collateral Agent are hereinafter sometimes referred to individually as a "Party" and jointly as the "Parties". Capitalized terms used but not otherwise defined in this Consent shall have the meanings ascribed to them in the ESSA (as defined below).

RECITALS

The Parties enter into this Consent with reference to the following facts:

- A. Project Company and SDCP have entered into that certain Energy Storage Service Agreement, dated as of [Date] [List all amendments as contemplated by Section 3.4] ("ESSA"), pursuant to which Project Company will develop, construct, commission, test and operate the Facility (the "Project") and sell the Product to SDCP, and SDCP will purchase the Product from Project Company;
- B. As collateral for Project Company's obligations under the ESSA, Project Company has agreed to provide to SDCP certain collateral, which may include Performance Security and Development Security and other collateral described in the ESSA (collectively, the "ESSA Collateral");
- C. Project Company has entered into that certain [Insert description of financing arrangements with Lender], dated as of [Date], among Project Company, the Lenders party thereto and the Collateral Agent (the "Financing Agreement"), pursuant to which, among other things, the Lenders have extended commitments to make loans to Project Company;
- D. As collateral security for Project Company's obligations under the Financing Agreement and related agreements (collectively, the "Financing Documents"), Project Company has, among other things, assigned all of its right, title and interest in, to and under the ESSA and Project's Company's owners have pledged their ownership interest in Project Company (collectively, the "Assigned Interest") to the Collateral Agent pursuant to the Financing Documents; and
- E. It is a requirement under the Financing Agreement and the ESSA that SDCP and the other Parties hereto shall have executed and delivered this Consent.

AGREEMENT

In consideration of the foregoing, and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, and intending to be legally bound, the Parties hereto hereby agree as follows:

SECTION 1. CONSENT TO ASSIGNMENT, ETC.

1.1 Consent and Agreement.

SDCP hereby acknowledges:

- (a) Notice of and consents to the assignment as collateral security to Collateral Agent, for the benefit of the Secured Parties, of the Assigned Interest; and
- (b) The right (but not the obligation) of Collateral Agent in the exercise of its rights and remedies under the Financing Documents, to make all demands, give all notices, take all actions and exercise all rights of Project Company permitted under the ESSA (subject to SDCP's rights and defenses under the ESSA and the terms of this Consent) and accepts any such exercise; provided, insofar as the Collateral Agent exercises any such rights under the ESSA or makes any claims with respect to payments or other obligations under the ESSA, the terms and conditions of the ESSA applicable to such exercise of rights or claims shall apply to Collateral Agent to the same extent as to Project Company.

1.2 Project Company's Acknowledgement.

Each of Project Company and Collateral Agent hereby acknowledges and agrees that SDCP is authorized to act in accordance with Collateral Agent's instructions, and that SDCP shall bear no liability to Project Company or Collateral Agent in connection therewith, including any liability for failing to act in accordance with Project Company's instructions.

1.3 Right to Cure.

If Project Company defaults in the performance of any of its obligations under the ESSA, or upon the occurrence or non-occurrence of any event or condition under the ESSA which would immediately or with the passage of any applicable grace period or the giving of notice, or both, enable SDCP to terminate or suspend its performance under the ESSA (a "ESSA Default"), SDCP will not terminate or suspend its performance under the ESSA until it first gives written notice of such ESSA Default to Collateral Agent and affords Collateral Agent the right to cure such ESSA Default within the applicable cure period under the ESSA, which cure period shall run concurrently with that afforded Project Company under the ESSA. In addition, if Collateral Agent gives SDCP written notice prior to the expiration of the applicable cure period under the ESSA of Collateral Agent's intention to cure such ESSA Default (which notice shall include a reasonable description of the time during which it anticipates to cure such ESSA Default) and is diligently proceeding to cure such ESSA Default, notwithstanding the applicable cure period under the ESSA, Collateral Agent shall have a period of sixty (60) days (or, if such ESSA Default is for failure by the Project Company to pay an amount to SDCP which is due and payable under the ESSA other than to

provide ESSA Collateral, thirty (30) days, or, if such ESSA Default is for failure by Project Company to provide ESSA Collateral, ten (10) Business Days) from the Collateral Agent's receipt of the notice of such ESSA Default from SDCP to cure such ESSA Default; *provided*, (a) if possession of the Project is necessary to cure any such non-monetary ESSA Default and Collateral Agent has commenced foreclosure proceedings within sixty (60) days after notice of the ESSA Default and is diligently pursuing such foreclosure proceedings, Collateral Agent will be allowed a reasonable time, not to exceed one hundred eighty (180) days after the notice of the ESSA Default, to complete such proceedings and cure such ESSA Default, and (b) if Collateral Agent is prohibited from curing any such ESSA Default by any process, stay or injunction issued by any Governmental Authority or pursuant to any bankruptcy or insolvency proceeding or other similar proceeding involving Project Company, then the time periods specified herein for curing a ESSA Default shall be extended for the period of such prohibition, so long as Collateral Agent has diligently pursued removal of such process, stay or injunction. Collateral Agent shall provide SDCP with reports concerning the status of efforts to cure a ESSA Default upon SDCP's reasonable request.

1.4 Substitute Owner.

Subject to Section 1.7, the Parties agree that if Collateral Agent notifies (such notice, a "Financing Document Default Notice") SDCP that an event of default has occurred and is continuing under the Financing Documents (a "Financing Document Event of Default") then, upon a judicial foreclosure sale, non-judicial foreclosure sale, deed in lieu of foreclosure or other transfer following a Financing Document Event of Default, Collateral Agent (or its designee) shall be substituted for Project Company (the "Substitute Owner") under the ESSA, and, subject to Sections 1.7(b) and 1.7(c) below, SDCP and Substitute Owner will recognize each other as counterparties under the ESSA and will continue to perform their respective obligations (including those obligations accruing to SDCP and the Project Company prior to the existence of the Substitute Owner) under the ESSA in favor of each other in accordance with the terms thereof; provided, before SDCP is required to recognize the Substitute Owner, the Substitute Owner must (i) be a permitted assignee under the ESSA or (ii) have demonstrated to SDCP's reasonable satisfaction that the Substitute Owner has financial qualifications and operating experience [TBD] (a "Permitted Transferee"). For purposes of the foregoing, SDCP shall be entitled to assume that any such purported exercise of rights by Collateral Agent that results in substitution of a Substitute Owner under the ESSA is in accordance with the Financing Documents without independent investigation thereof but shall have the right to require that the Collateral Agent and its designee (if applicable) provide reasonable evidence demonstrating the same.

1.5 Replacement Agreements.

Subject to Section 1.7, if the ESSA is terminated, rejected or otherwise invalidated as a result of any bankruptcy, insolvency, reorganization or similar proceeding affecting Project Company, its owner(s) or guarantor(s), and if Collateral Agent or its designee directly or indirectly takes possession of, or title to, the Project (including possession by a receiver or title by foreclosure or deed in lieu of foreclosure) ("Replacement Owner"), SDCP shall, and Collateral Agent shall cause Replacement Owner to, enter into a new agreement with one another for the balance of the obligations under the ESSA remaining to be performed having terms substantially the same as the terms of the ESSA with respect to the remaining Term ("Replacement ESSA"); provided, before

SDCP is required to enter into a Replacement ESSA, the Replacement Owner must have demonstrated to SDCP's reasonable satisfaction that the Replacement Owner satisfies the requirements of a Permitted Transferee. For purposes of the foregoing, SDCP is entitled to assume that any such purported exercise of rights by Collateral Agent that results in a Replacement Owner is in accordance with the Financing Documents without independent investigation thereof but shall have the right to require that the Collateral Agent and its designee (if applicable) provide reasonable evidence demonstrating the same. Notwithstanding the execution and delivery of a Replacement ESSA, to the extent SDCP is, or was otherwise prior to its termination as described in this Section 1.5, entitled under the ESSA, SDCP may suspend performance of its obligations under such Replacement ESSA, unless and until all ESSA Defaults of Project Company under the ESSA or Replacement ESSA have been cured.

1.6 Transfer.

Subject to Section 1.7, a Substitute Owner or a Replacement Owner may assign all of its interest in the Project and the ESSA and a Replacement ESSA to a natural person, corporation, trust, business trust, joint venture, joint stock company, association, company, limited liability company, partnership, Governmental Authority or other entity (a "Person") to which the Project is transferred; *provided*, the proposed transferee shall have demonstrated to SDCP's reasonable satisfaction that such proposed transferee satisfies the requirements of a Permitted Transferee.

1.7 <u>Assumption of Obligations</u>.

(a) <u>Transferee</u>.

Any transferee under Section 1.6 shall expressly assume in a writing reasonably satisfactory to SDCP all of the obligations of Project Company, Substitute Owner or Replacement Owner under the ESSA or Replacement ESSA, as applicable, including posting and collateral assignment of the ESSA Collateral. Upon such assignment and the cure of any outstanding ESSA Default, and payment of all other amounts due and payable to SDCP in respect of the ESSA or such Replacement ESSA, the transferor shall be released from any further liability under the ESSA or Replacement ESSA, as applicable.

(b) Substitute Owner.

Subject to Section 1.7(c), any Substitute Owner pursuant to Section 1.4 shall be required to perform Project Company's obligations under the ESSA, including posting and collateral assignment of the ESSA Collateral; *provided*, the obligations of such Substitute Owner shall be no more than those of Project Company under the ESSA.

(c) No Liability.

SDCP acknowledges and agrees that neither Collateral Agent nor any Secured Party shall have any liability or obligation under the ESSA as a result of this Consent (except to the extent Collateral Agent or a Secured Party is a Substitute Owner or Replacement Owner) nor shall Collateral Agent or any other Secured Party be obligated or required to (i) perform any of Project Company's obligations under the ESSA, except as provided in Sections 1.7(a) and 1.7(b) and to

the extent Collateral Agent or a Secured Party is a Substitute Owner or Replacement Owner, or (ii) take any action to collect or enforce any claim for payment assigned under the Financing Documents. If Collateral Agent becomes a Substitute Owner pursuant to Section 1.4 or enters into a Replacement ESSA, Collateral Agent shall not have any personal liability to SDCP under the ESSA or Replacement ESSA and the sole recourse of SDCP in seeking enforcement of such obligations against Collateral Agent shall be to the aggregate interest of the Secured Parties in the Project; *provided*, such limited recourse shall not limit SDCP's right to seek equitable or injunctive relief against Collateral Agent, or SDCP's rights with respect to any offset rights expressly allowed under the ESSA, a Replacement ESSA or the ESSA Collateral.

1.8 Delivery of Notices.

SDCP shall deliver to Collateral Agent, concurrently with the delivery thereof to Project Company, a copy of each notice, request or demand given by SDCP to Project Company pursuant to the ESSA relating to (a) a ESSA Default by Project Company under the ESSA, (b) any claim regarding Force Majeure by SDCP under the ESSA, (c) any notice of dispute under the ESSA, (d) any notice of intent to terminate or any termination notice, and (e) any matter that would require the consent of Collateral Agent pursuant to Section 1.11 or any other provision of this Consent. Collateral Agent acknowledges that delivery of such notice, request and demand shall satisfy SDCP's obligation to give Collateral Agent a notice of ESSA Default under Section 1.3. Collateral Agent shall deliver to SDCP, concurrently with delivery thereof to Project Company, a copy of each notice, request or demand given by Collateral Agent to Project Company pursuant to the Financing Documents relating to a default by Project Company under the Financing Documents.

1.9 Confirmations.

SDCP will, as and when reasonably requested by Collateral Agent from time to time, confirm in writing matters relating to the ESSA (including the performance of same by Project Company); provided, such confirmation may be limited to matters of which SDCP is aware as of the time the confirmation is given and such confirmations shall be without prejudice to any rights of SDCP under the ESSA as between SDCP and Project Company.

1.10 Exclusivity of Dealings.

Except as provided in Sections 1.3, 1.4, 1.8, 1.9 and 2.1, unless and until SDCP receives a Financing Document Default Notice, SDCP shall deal exclusively with Project Company in connection with the performance of SDCP's obligations under the ESSA. From and after such time as SDCP receives a Financing Document Default Notice and until a Substitute Owner is substituted for Project Company pursuant to Section 1.4, a Replacement ESSA is entered into or the ESSA is transferred to a Person to whom the Project is transferred pursuant to Section 1.6, SDCP shall, until Collateral Agent confirms to SDCP in writing that all obligations under the Financing Documents are no longer outstanding, deal exclusively with Collateral Agent in connection with the performance of SDCP's obligations under the ESSA, and SDCP may irrevocably rely on instructions provided by Collateral Agent in accordance therewith to the exclusion of those provided by any other Person.

1.11 No Amendments.

To the extent permitted by Laws, SDCP agrees that it will not, without the Project Company obtaining prior written consent of Collateral Agent (not to be unreasonably withheld, delayed or conditioned) (a) enter into any material supplement, restatement, novation, extension, amendment or modification of the ESSA (b) terminate or suspend its performance under the ESSA (except in accordance with Section 1.3) or (c) consent to or accept any termination or cancellation of the ESSA by Project Company.

SECTION 2. PAYMENTS UNDER THE ESSA

2.1 <u>Payments</u>.

Unless and until SDCP receives written notice to the contrary from Collateral Agent, SDCP will make all payments to be made by it to Project Company under or by reason of the ESSA directly to Project Company. SDCP, Project Company, and Collateral Agent acknowledge that SDCP will be deemed to be in compliance with the payment terms of the ESSA to the extent that SDCP makes payments in accordance with Collateral Agent's instructions.

2.2 No Offset, Etc.

All payments required to be made by SDCP under the ESSA shall be made without any offset, recoupment, abatement, withholding, reduction or defense whatsoever, other than that expressly allowed by the terms of the ESSA.

SECTION 3. REPRESENTATIONS AND WARRANTIES OF SDCP

SDCP makes the following representations and warranties as of the date hereof in favor of Collateral Agent:

3.1 Organization.

SDCP is a joint powers authority and community choice aggregator duly organized and validly existing 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 its jurisdiction. SDCP has all requisite power and authority, corporate and otherwise, to enter into and to perform its obligations hereunder and under the ESSA, and to carry out the terms hereof and thereof and the transactions contemplated hereby and thereby.

3.2 <u>Authorization</u>.

The execution, delivery and performance by SDCP of this Consent and the ESSA have been duly authorized by all necessary corporate or other action on the part of SDCP and do not require any approval or consent of any holder (or any trustee for any holder) of any indebtedness or other obligation of SDCP which, if not obtained, will prevent SDCP from performing its obligations hereunder or under the ESSA except approvals or consents which have previously been obtained and which are in full force and effect.

3.3 Execution and Delivery; Binding Agreements.

Each of this Consent and the ESSA is in full force and effect, have been duly executed and delivered on behalf of SDCP by the appropriate officers of SDCP, and constitute the legal, valid and binding obligation of SDCP, enforceable against SDCP in accordance with its terms, except as the enforceability thereof may be limited by (a) bankruptcy, insolvency, reorganization, moratorium or other similar laws of general application affecting the enforcement of creditors' rights generally and (b) general equitable principles (whether considered in a proceeding in equity or at law).

3.4 No Default or Amendment.

Except as set forth in Schedule A attached hereto: (a) Neither SDCP nor, to SDCP's actual knowledge, Project Company, is in default of any of its obligations under the ESSA; (b) SDCP and, to SDCP's actual knowledge, Project Company, has complied with all conditions precedent to the effectiveness of its obligations under the ESSA; (c) to SDCP's actual knowledge, no event or condition exists which would either immediately or with the passage of any applicable grace period or giving of notice, or both, enable either SDCP or Project Company to terminate or suspend its obligations under the ESSA; and (d) the ESSA has not been amended, modified or supplemented in any manner except as set forth herein and in the recitals hereto.

3.5 <u>No Previous Assignments.</u>

SDCP has no notice of, and has not consented to, any previous assignment by Project Company of all or any part of its rights under the ESSA, except as previously disclosed in writing and consented to by SDCP.

SECTION 4. REPRESENTATIONS AND WARRANTIES OF PROJECT COMPANY

Project Company makes the following representations and warranties as of the date hereof in favor of the Collateral Agent and SDCP:

4.1 Organization.

Project Company is a [Legal Status of Seller] duly organized and validly existing under the laws of the state of its organization, and is duly qualified, authorized to do business and in good standing in every jurisdiction in which it owns or leases real property or in which the nature of its business requires it to be so qualified, except where the failure to so qualify would not have a material adverse effect on its financial condition, its ability to own its properties or its ability to transact its business. Project Company has all requisite power and authority, corporate and otherwise, to enter into and to perform its obligations hereunder and under the ESSA, and to carry out the terms hereof and thereof and the transactions contemplated hereby and thereby.

4.2 Authorization.

The execution, delivery and performance of this Consent by Project Company, and Project Company's assignment of its right, title and interest in, to and under the ESSA to the Collateral Agent pursuant to the Financing Documents, have been duly authorized by all necessary corporate or other action on the part of Project Company.

4.3 Execution and Delivery; Binding Agreement.

This Consent is in full force and effect, has been duly executed and delivered on behalf of Project Company by the appropriate officers of Project Company, and constitutes the legal, valid and binding obligation of Project Company, enforceable against Project Company in accordance with its terms, except as the enforceability thereof may be limited by (a) bankruptcy, insolvency, reorganization, moratorium or other similar laws of general application affecting the enforcement of creditors' rights generally and (b) general equitable principles (whether considered in a proceeding in equity or at law).

4.4 No Default or Amendment.

Except as set forth in Schedule B attached hereto: (a) neither Project Company nor, to Project Company's actual knowledge, SDCP, is in default of any of its obligations thereunder; (b) Project Company and, to Project Company's actual knowledge, SDCP, has complied with all conditions precedent to the effectiveness of its obligations under the ESSA; (c) to Project Company's actual knowledge, no event or condition exists which would either immediately or with the passage of any applicable grace period or giving of notice, or both, enable either SDCP or Project Company to terminate or suspend its obligations under the ESSA; and (d) the ESSA has not been amended, modified or supplemented in any manner except as set forth herein and in the recitals hereto.

4.5 No Previous Assignments.

Project Company has not previously assigned all or any part of its rights under the ESSA.

SECTION 5. REPRESENTATIONS AND WARRANTIES OF COLLATERAL AGENT

Collateral Agent makes the following representations and warranties as of the date hereof in favor of SDCP and Project Company:

5.1 <u>Authorization</u>.

The execution, delivery and performance of this Consent by Collateral Agent have been duly authorized by all necessary corporate or other action on the part of Collateral Agent and Secured Parties.

5.2 Execution and Delivery; Binding Agreement.

This Consent is in full force and effect, has been duly executed and delivered on behalf of Collateral Agent by the appropriate officers of Collateral Agent, and constitutes the legal, valid and binding obligation of Collateral Agent as Collateral Agent for the Secured Parties, enforceable against Collateral Agent (and the Secured Parties to the extent applicable) in accordance with its terms, except as the enforceability thereof may be limited by (a) bankruptcy, insolvency, reorganization, moratorium or other similar laws of general application affecting the enforcement of creditors' rights generally and (b) general equitable principles (whether considered in a proceeding in equity or at law).

SECTION 6. MISCELLANEOUS

6.1 Notices.

All notices and other communications hereunder shall be in writing, shall be deemed given upon receipt thereof by the Party or Parties to whom such notice is addressed, shall refer on their face to the ESSA (although failure to so refer shall not render any such notice or communication ineffective), shall be sent by first class mail, by personal delivery or by a nationally recognized courier service, and shall be directed (a) if to SDCP or Project Company, in accordance with [Notice Section of the ESSA] of the ESSA, (b) if to Collateral Agent, to [Collateral Agent Name], [Collateral Agent Address], Attn: [Collateral Agent Contact Information], Telephone: [___], Fax: [__], and (c) to such other address or addressee as any such Party may designate by notice given pursuant hereto.

6.2 Governing Law; Submission to Jurisdiction.

- (a) THIS CONSENT SHALL BE CONSTRUED IN ACCORDANCE WITH, AND THIS CONSENT AND ALL MATTERS ARISING OUT OF THIS CONSENT AND THE TRANSACTIONS CONTEMPLATED HEREBY SHALL BE GOVERNED BY, THE LAW OF THE STATE OF CALIFORNIA WITHOUT REGARD TO ANY CONFLICTS OF LAWS PROVISIONS THEREOF THAT WOULD RESULT IN THE APPLICATION OF THE LAW OF ANOTHER JURISDICTION.
- All disputes, claims or controversies arising out of, relating to, concerning or pertaining to the terms of this Consent shall be governed by the dispute resolution provisions of the ESSA. Subject to the foregoing, any legal action or proceeding with respect to this Consent and any action for enforcement of any judgment in respect thereof may be brought in the courts of the State of California or of the United States of America for the Central District of California, and, by execution and delivery of this Consent, each Party hereby accepts for itself and in respect of its property, generally and unconditionally, the non-exclusive jurisdiction of the aforesaid courts and appellate courts from any appeal thereof. Each Party further irrevocably consents to the service of process out of any of the aforementioned courts in any such action or proceeding by the mailing of copies thereof by registered or certified mail, postage prepaid, to its notice address provided pursuant to Section 6.1 hereof. Each Party hereby irrevocably waives any objection which it may now or hereafter have to the laying of venue of any of the aforesaid actions or proceedings arising out of or in connection with this Consent brought in the courts referred to above and hereby further irrevocably waives and agrees not to plead or claim in any such court that any such action or proceeding brought in any such court has been brought in an inconvenient forum. Nothing herein shall affect the right of any Party to serve process in any other manner permitted by law.

6.3 <u>Headings Descriptive</u>.

The headings of the several sections and subsections of this Consent are inserted for convenience only and shall not in any way affect the meaning or construction of any provision of this Consent.

6.4 <u>Severability</u>.

In case any provision in or obligation under this Consent shall be invalid, illegal or unenforceable in any jurisdiction, the validity, legality and enforceability of the remaining provisions or obligations, or of such provision or obligation in any other jurisdiction, shall not in any way be affected or impaired thereby.

6.5 Amendment, Waiver.

Neither this Consent nor any of the terms hereof may (a) be terminated, amended, supplemented or modified, except by an instrument in writing signed by SDCP, Project Company and Collateral Agent or (b) waived, except by an instrument in writing signed by the waiving Party.

6.6 Termination.

Each Party's obligations hereunder are absolute and unconditional, and no Party has any right, and shall have no right, to terminate this Consent or to be released, relieved or discharged from any obligation or liability hereunder until SDCP has been notified by Collateral Agent that all of the obligations under the Financing Documents shall have been satisfied in full (other than contingent indemnification obligations) or, with respect to the ESSA or any Replacement ESSA, its obligations under such ESSA or Replacement ESSA have been fully performed.

6.7 Successors and Assigns.

This Consent shall be binding upon each Party and its successors and assigns permitted under and in accordance with this Consent, and shall inure to the benefit of the other Parties and their respective successors and assignee permitted under and in accordance with this Consent. Each reference to a Person herein shall include such Person's successors and assigns permitted under and in accordance with this Consent.

6.8 Further Assurances.

SDCP hereby agrees to execute and deliver all such instruments and take all such action as may be necessary to effectuate fully the purposes of this Consent.

6.9 Waiver of Trial by Jury.

TO THE EXTENT PERMITTED BY APPLICABLE LAWS, THE PARTIES HEREBY IRREVOCABLY WAIVE ALL RIGHT OF TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM ARISING OUT OF OR IN CONNECTION WITH THIS CONSENT OR ANY MATTER ARISING HEREUNDER. EACH PARTY FURTHER WARRANTS AND REPRESENTS THAT IT HAS REVIEWED THIS WAIVER WITH ITS LEGAL COUNSEL, AND THAT IT KNOWINGLY AND VOLUNTARILY WAIVES ITS JURY TRIAL RIGHTS FOLLOWING CONSULTATION WITH LEGAL COUNSEL.

6.10 Entire Agreement.

This Consent and any agreement, document or instrument attached hereto or referred to herein integrate all the terms and conditions mentioned herein or incidental hereto and supersede all oral negotiations and prior writings in respect to the subject matter hereof. In the event of any conflict

between the terms, conditions and provisions of this Consent and any such agreement, document or instrument, the terms, conditions and provisions of this Consent shall prevail.

6.11 Effective Date.

This Consent shall be deemed effective as of the date upon which the last Party executes this Consent.

6.12 Counterparts; Electronic Signatures.

This Consent may be executed in one or more counterparts, each of which will be deemed to be an original of this Consent and all of which, when taken together, will be deemed to constitute one and the same agreement. The exchange of copies of this Consent and of signature pages by facsimile transmission, Portable Document Format (i.e., PDF), or by other electronic means shall constitute effective execution and delivery of this Consent as to the Parties and may be used in lieu of the original Consent for all purposes.

[Remainder of Page Left Intentionally Blank.]

IN WITNESS WHEREOF, the Parties hereto have caused this Consent to be duly executed and delivered by their duly authorized officers on the dates indicated below their respective signatures.

[NAME OF PROJECT COMPANY],	SAN DIEGO COMMUNITY POWER,
[Legal Status of Project Company].	a California joint powers authority.
By:	By:
[Name] [Title]	[Name] [Title]
Date:	Date:
[NAME OF COLLATERAL AGENT], [Legal Status of Collateral Agent].	
By:	
[Name] [Title]	
Date:	

SCHEDULE A

[Describe any disclosures relevant to representati	ions and warranties made in Section 3.4]
--	--

SCHEDULE B

[Describe any disclosures relevant to representations and warranties made in Section 4.4]

ITEM 15 ATTACHMENT B

AMENDED AND RESTATED RESOURCE ADEQUACY AGREEMENT **COVER SHEET**

A. Parties

Seller: EnerSmart Imperial Beach BESS LLC, a California limited liability company

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

B. Unit Information

Unit Name:	EnerSmart Imperial Beach
Location:	1705 Palm Ave. San Diego, CA 92111
CAISO Resource ID:	23NGR25823
Unit SCID:	AESM
Unit NQC:	3 MW
Unit EFC:	3 MW
Resource Type:	Battery Energy Storage System
Resource Category (1, 2, 3 or 4):	4
FCR Category (1, 2 or 3):	2
Path 26 (North or South):	SP26
Local Capacity Area (if any, as of Effective Date):	SDGE
Deliverability restrictions, if any, as described in most recent CAISO deliverability assessment:	TBD
Run Hour Restrictions	N/A

C. Resource Duration

Contract Year	Resource Duration	
1		
2		
3		
4		
5		
6		

CONFIDENTIAL **EXECUTION VERSION**

7		
8		
9		
10		
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12		
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15		

D.

D.	RA Product and Attributes
	Throughout the Delivery Term, Seller shall provide Buyer with the Designated RA Capacity of Product having the following attributes:
	☐ RAR Attributes
	☐ RAR Attributes with FCR Attributes
	□ LAR Attributes
	☑ LAR Attributes with FCR Attributes
	☐ FCR Attributes
E.	Delivery Term
	The Delivery Term is fifteen (15) Contract Years, subject to adjustment as set forth in Section 2.1(b).
F.	Contract Quantities
	The Contract Quantities for each Showing Month of the Delivery Term shall be:
	RAR Attributes:
	LAR Attributes:
	FCR Attributes:
G.	Contract Price
Th	e Contract Price shall be:

H. Seller's Security Amounts

Performance Security: \$20/kW multiplied by the Contract Quantity of RAR Attributes.

I. Milestones

Milestone	Date for Completion
Site Control obtained	October 2021
Interconnection Agreement executed	July 2022
Expected Construction Start Date	September 2025
Full Capacity Deliverability Status obtained	
Guaranteed Initial Delivery Date	

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PREAMBLE

This Amended and Restated Resource Adequacy Agreement ("<u>Agreement</u>") is entered into between EnerSmart Imperial Beach BESS LLC, a California limited liability company ("<u>Seller</u>") and **San Diego Community Power**, a California joint powers authority ("<u>Buyer</u>"), each individually a "<u>Party</u>" and together the "<u>Parties</u>," as of March ___, 2025 (the "<u>Effective Date</u>"). All capitalized terms used in this Agreement are used with the meanings ascribed to them in Article 1 to this Agreement.

RECITALS

WHEREAS, the Parties entered into that certain Resource Adequacy Agreement dated October 5, 2023 for the purchase and sale of Product from the Unit ("Original Agreement");

WHEREAS, the Parties hereby agree to amend, restate, replace and supersede the terms of the Original Agreement as set forth herein;

WHEREAS, Seller intends to develop, design, construct, own, and operate the Unit; 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 "Affiliate" means, with respect to any person, any other person (other than an individual) that, directly or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control with, such person. For this purpose, "control" means the direct or indirect ownership of fifty percent (50%) or more of the outstanding capital stock or other equity interests having ordinary voting power.
- 1.2 "Agreement" has the meaning set forth in the Preamble.
- 1.3 "Alternate Capacity" means any replacement RA Capacity having at least equivalent RAR Attributes, LAR Attributes and/or FCR Attributes as the Product provided by the Unit, including the same Slice-of-Day (as defined in the Resource Adequacy Rulings) and related characteristics, and any successor criteria applicable to the Unit; provided, if any portion of the Designated RA Capacity that Seller is seeking to replace is Designated RA Capacity having RAR Attributes and no LAR Attributes, and no such RAR capacity is available (such capacity shall also include FCR Attributes if this is a Flexible RA Product), then Seller may replace such portion of the Designated RA Capacity with capacity having RAR Attributes and LAR Attributes (as well as FCR Attributes if this is a Flexible RA Product).

CONFIDENTIAL EXECUTION VERSION

- 1.4 "Applicable Laws" means any law, rule, regulation, order, decision, judgment, or other legal or regulatory determination by any Governmental Body having jurisdiction over one or both Parties or this Agreement, including without limitation, the Tariff.
- 1.5 "Availability Incentive Payments" means Availability Incentive Payments as defined in the Tariff.
- 1.6 "Availability Standards" means Availability Standards as defined in the Tariff.
- 1.7 "Bankrupt" means with respect to any entity, such entity (a) files a petition or otherwise commences, authorizes or acquiesces in the commencement of a proceeding or cause of action under any bankruptcy, insolvency, reorganization or similar law, or has any such petition filed or commenced against it and such petition filed or commenced against it is not stayed or dismissed within ninety (90) days thereafter, (b) makes an assignment or any general arrangement for the benefit of creditors, (c) otherwise becomes bankrupt or insolvent (however evidenced), (d) has a liquidator, administrator, receiver, trustee, conservator or similar official appointed with respect to it or any substantial portion of its property or assets, or (e) is generally unable to pay its debts as they fall due.
- **1.8** "Business Day" means any day except a Saturday, Sunday, or a Federal Reserve Bank holiday in California.
- 1.9 "Buyer" has the meaning set forth in the Preamble.
- 1.10 "CAISO" means the California Independent System Operator or its successor.
- **1.11** "<u>CAISO Control Area</u>" means the Control Area (as defined in the Tariff) that is operated by the CAISO.
- 1.12 "CAISO Controlled Grid" has the meaning set forth in the Tariff.
- 1.13 "CAISO Offer Requirements" has the meaning set forth in Article 4.



- 1.15 "CIRA Tool" means the CAISO Customer Interface for Resource Adequacy.
- 1.16 "Claiming Party" has the meaning set forth in Section 3.12.
- 1.17 "Claims" means all third party claims or actions, threatened or filed and, whether groundless, false, fraudulent or otherwise, that directly or indirectly relate to the subject

matter of an indemnity, and the resulting losses, damages, expenses, attorneys' fees and court costs, whether incurred by settlement or otherwise, and whether such claims or actions are threatened or filed prior to or after the termination of this Agreement.

- 1.18 "Compliance Issue" has the meaning set forth in Article 13.
- 1.19 "Compliance Obligation" means the RAR, Local RAR, FCR, and any other resource adequacy or capacity procurement requirements imposed on LSEs by the CPUC pursuant to the Resource Adequacy Rulings, by the CAISO, by the WECC, or by any other Governmental Body having jurisdiction.
- 1.20 "Confidential Information" has the meaning set forth in Article 11.
- 1.21 "Construction Start" has the meaning set forth in Section 16.1(a).
- 1.22 "Construction Start Date" has the meaning set forth in Section 16.1(a).
- 1.23 "Contract Price" has the meaning set forth in Section G of the Cover Sheet.
- "Contract Quantity" means, with respect to any particular Showing Month of the Delivery Term, the amount of Product (in MWs) set forth in Section F of the Cover Sheet, which Seller has agreed to provide to Buyer from the Unit for such Showing Month, which amount may be amended in accordance with Section 16.2(b).
- 1.25 "Contract Year" means a period of twelve (12) consecutive months; the first Contract Year shall commence on the Initial Delivery Date; and each subsequent Contract Year shall commence on the anniversary of the Initial Delivery Date.
- 1.26 "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 a Terminated Transaction; and all reasonable attorneys' fees and expenses incurred by the Non-Defaulting Party in connection with the Terminated Transaction.
- 1.27 "CPUC" means the California Public Utilities Commission or its successor.
- 1.28 "<u>CPUC Filing Guide</u>" means the annual document issued by the CPUC which sets forth the guidelines, requirements and instructions for LSE's to demonstrate compliance with the CPUC's resource adequacy program.
- 1.29 "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.
- 1.30 "Defaulting Party" has the meaning set forth in Section 5.1.

- 1.31 "Delivery Point" has the meaning set forth in Section 3.4.
- 1.32 "<u>Delivery Term</u>" means the period of Contract Years set forth on the Cover Sheet beginning on the Initial Delivery Date as such period may be amended pursuant to Section 2.1(b), unless terminated earlier in accordance with the terms and conditions of this Agreement.
- 1.33 "<u>Designated RA Capacity</u>" shall be equal to, with respect to each Showing Month of the Delivery Term, the Contract Quantity of Product for each hour of the Resource Duration in such Showing Month able to be shown on Buyer's monthly or annual Supply Plan, including the amount of Contract Quantity that Seller has elected to provide as Alternate Capacity from one or more Replacement Units in accordance with Section 3.6.
- 1.34 "Development Cure Period" has the meaning set forth in Section 16.2(c).
- 1.35 "Dispute" has the meaning set forth in Section 17.10(a).
- 1.36 "Dispute Notice" has the meaning set forth in Section 17.10(a).
- 1.37 "Early Termination Date" has the meaning set forth in Section 5.2.
- **1.38** "Effective Date" is the date set forth in the Preamble.
- 1.39 "<u>Effective Flexible Capacity</u>" or "<u>EFC</u>" means the capacity of a resource that can be counted towards an LSE's Flexible Capacity Requirements, as identified from time to time by the Tariff, the Resource Adequacy Rulings, LRA, or other Governmental Body having jurisdiction.
- **1.40** "EPC Contract" means the Seller's engineering, procurement and construction contract with the EPC Contractor.
- **1.41** "EPC Contractor" means Seller's engineering, procurement and construction contractor or such Person performing those functions.
- 1.42 "Equitable Defenses" means any bankruptcy, insolvency, reorganization and other laws affecting creditors' rights generally, and with regard to equitable remedies, the discretion of the court before which proceedings to obtain same may be pending.
- 1.43 "Event of Default" has the meaning set forth in Section 5.1.
- 1.44 "FCR Attributes" means, with respect to a Resource Adequacy Resource, any and all flexible resource adequacy attributes that can be counted toward an LSE's FCR, as they are identified from time to time by the Resource Adequacy Rulings, the Tariff, an LRA, or other Governmental Body having jurisdiction including any Resource Duration attributes, exclusive of any LAR Attributes and any RAR Attributes.
- 1.45 "FCR Showings" means the FCR compliance showings (or similar or successor showings) an LSE is required to make to the CPUC (and, to the extent authorized by the CPUC, to

- the CAISO) pursuant to the Resource Adequacy Rulings and the Tariff, or to an LRA having jurisdiction over the LSE.
- **1.46** "FERC" means the Federal Energy Regulatory Commission or any successor government agency.
- 1.47 "<u>Final Deliverability</u>" means the condition existing when all network upgrades (which may include certain transmission plan upgrades) are completed and all transmission contingencies are resolved such that the Unit no longer requires annual Interim Deliverability Status allocations in order to deliver the Contract Quantity of RAR Attributes to Buyer from the Unit.
- **1.48** "Final Deliverability Date" means the date on which Final Deliverability occurs as evidenced in the Notice provided by Seller to Buyer pursuant to Section 3.3(c).
- 1.49 "<u>Financing Parties</u>" means the person(s) or entity(ies), if any, from time to time issuing or providing any construction, term, back leverage, working capital, bond or other financing, credit support, credit enhancements, interest rate hedging or other permanent debt, lease financing, cash equity, mezzanine or tax equity funding for the Unit, Seller, or any Affiliate of Seller, including any applicable trustee, collateral agent or similar person or entity.
- **1.50** "Flexible Capacity Category" has the meaning set forth in the Resource Adequacy Resource.
- 1.51 "Flexible Capacity Requirements" or "FCR" means the flexible capacity requirements established for LSEs by the CPUC pursuant to the Resource Adequacy Rulings, or by an LRA or other Governmental Body having jurisdiction.
- **1.52** "Flexible RA Product" means that the Product includes FCR Attributes, if applicable, as specified in Sections D and F of the Cover Sheet.
- 1.53 "Force Majeure" means an event or circumstance which prevents one Party from performing its obligations under the Agreement, which event or circumstance was not anticipated as of the Effective Date, which is not within the reasonable control of, or the result of the negligence of, the Claiming Party, and which, by the exercise of due diligence, the Claiming Party is unable to overcome or avoid or cause to be avoided. Force Majeure shall not be based on (i) the loss of Buyer's markets; (ii) Buyer's inability economically to use or resell the Product purchased hereunder; (iii) the loss or failure of Seller's supply (except to the extent due to a Force Majeure); or (iv) Seller's ability to sell the Product at a price greater than the Contract Price. Neither Party may raise a claim of Force Majeure based in whole or in part on curtailment by a Transmission Provider (i) unless such Party has contracted for firm transmission with a Transmission Provider for the Product to be delivered to or received at the Delivery Point and (ii) except to the extent such curtailment is due to Transmission Provider; provided, however, that existence of the foregoing factors shall not be sufficient to conclusively or presumptively prove the existence of a Force Majeure absent a showing of other facts and circumstances which in the aggregate with such factors establish that a Force Majeure as defined in the first sentence hereof has occurred.

- 1.54 "Full Capacity Deliverability Status" or "FCDS" has the meaning set forth in the Tariff.
- 1.55 "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 a Terminated Transaction, determined in a commercially reasonable manner.
- 1.56 "Governmental Approvals" means all authorizations, consents, approvals, waivers, exceptions, variances, filings, permits, orders, licenses, exemptions, notices to and declarations of or with any Governmental Body and shall include those siting and operating permits and licenses, and any of the foregoing under any applicable environmental law, that are required for the use and operation of the Unit.
- 1.57 "Governmental Body" means (a) any federal, state, local, municipal or other government; (b) any governmental, regulatory or administrative agency, commission or other authority lawfully exercising or entitled to exercise any administrative, executive, judicial, legislative, police, regulatory or taxing authority or power; (c) any court or governmental tribunal, but in all cases, excludes both Parties; and (d) CAISO.
- 1.58 "Governmental Charges" has the meaning set forth in Section 8.2.
- 1.59 "Guaranteed Initial Delivery Date" is the date set forth in Section I of the Cover Sheet, subject to extension pursuant to Section 16.2(c), but as limited by Section 16.2(d).
- 1.61
- 1.62 "Initial Delivery" has the meaning set forth in Section 16.2(a).

with the Transmission System during the Delivery Term.

1.64

- 1.63 "<u>Initial Delivery Date</u>" means the date on which Initial Delivery is achieved.
- 1.65 "Interconnection Agreement" means the interconnection agreement entered into by Seller pursuant to which the Unit and Seller's Interconnection Facilities will be interconnected
- 1.66 "<u>Interconnection Facilities</u>" means the interconnection facilities, control and protective devices and metering facilities required to connect the Unit with the Transmission System in accordance with the Interconnection Agreement.
- 1.67 "Interest Rate" means, for any date, the lesser of (a) the per annum rate of interest equal to the prime lending rate as may from time to time be published in *The Wall Street Journal* under "Money Rates" on such day (or if not published on such day on the most recent preceding day on which published), plus two percent (2%) and (b) the maximum rate permitted by applicable law.
- 1.68 "Interim Deliverability Notice" has the meaning set forth in Section 3.3(b).

- 1.69 "Interim Deliverability Period" has the meaning set forth in Section 3.3.
- 1.70 "Interim Deliverability Status" or "IDS" has the meaning set forth in the CAISO Tariff.
- 1.71 "Investment Grade" means a Credit Rating of at least (or, if such entities cease to provide Credit Ratings, from another comparable rating agency that is reasonably acceptable to the Parties).
- 1.72 "Joint Powers Act" means the Joint Exercise of Powers Act of the State of California (Government Code Section 6500 et seq.).
- 1.73 "Joint Powers Agreement" means that certain Joint Powers Agreement dated October 1, 2019, as amended from time to time, under which Buyer is organized as a Joint Powers Authority in accordance with the Joint Powers Act.
- 1.74 "<u>LAR</u>" means local area reliability, which is any program of localized resource adequacy requirements established for jurisdictional LSEs by the CPUC pursuant to the Resource Adequacy Rulings, or by another LRA having jurisdiction over the LSE, as implemented in the Tariff. LAR may also be known as local resource adequacy, local RAR, or local capacity requirement in other regulatory proceedings or legislative actions.
- 1.75 "LAR Attributes" means, with respect to a Unit, any and all resource adequacy attributes (or other locational attributes related to system reliability), as they are identified from time to time by the Resource Adequacy Rulings, CAISO, LRA, or other Governmental Body having jurisdiction, associated with the physical location or point of electrical interconnection of the Unit within the CAISO Control Area, that can be counted toward LAR, including any Resource Duration attributes, but exclusive of any RAR Attributes which are not associated with where in the CAISO Control Area the Unit is physically located or electrically interconnected. For clarity, it should be understood that if the CAISO, LRA, or other Governmental Body, defines new or re-defines existing local areas, then such change will not result in a change in payments made pursuant to this Agreement.
- 1.76 "LAR Showings" means the LAR compliance showings (or similar or successor showings) an LSE is required to make to the CPUC (and, to the extent authorized by the CPUC, to the CAISO) pursuant to the Resource Adequacy Rulings and the Tariff, or to an LRA having jurisdiction over the LSE.
- 1.77 "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 having a Credit Rating of at least with an outlook designation of outlook designation of from Moody's, in a form as set forth in Exhibit A or as otherwise acceptable to Buyer.
- **1.78** "<u>Losses</u>" 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 a Terminated Transaction, determined in a commercially reasonable manner.
- 1.79 "<u>LRA</u>" has the meaning set forth in the Tariff.

- **1.80** "LSE" means load-serving entity. LSEs may be an investor-owned utility, an electric service provider, a community aggregator or community choice aggregator, or a municipality serving load in the CAISO Control Area (excluding exports).
- 1.81 "Milestones" has the meaning set forth in Section I of the Cover Sheet.
- 1.82 "Monthly RA Capacity Payment" has the meaning specified in Section 3.10(a).
- 1.83 "Moody's" means Moody's Investor Services, Inc. or its successor.
- 1.84 "NERC" means the North American Electric Reliability Corporation, or its successor.
- 1.85 "Net Qualifying Capacity" or "NQC" has the meaning set forth in the Tariff.
- 1.86 "Non-Availability Charges" has the meaning set forth in the Tariff.
- 1.87 "Non-Defaulting Party" has the meaning set forth in Section 5.2.
- 1.88 "Notification Deadline" has the meaning set forth in Section 3.6(a).
- 1.89 "Notifying Party" has the meaning set forth in Section 17.10(a).
- 1.90 "Outage" means any CAISO approved disconnection, separation, or reduction in the capacity of any Unit that relieves all or part of the obligations of the Unit under the CAISO Offer Requirements consistent with the Tariff. For the avoidance of doubt, Outage shall be deemed to include Planned Outage.
- 1.91 "Participating Transmission Owner" means an entity that (a) owns, operates and maintains transmission lines and associated facilities and/or has entitlements to use certain transmission lines and associated facilities and (b) has transferred to the CAISO operational control of such facilities and/or entitlements to be made part of the CAISO Grid. The Participating Transmission Owner for purposes of this Agreement is San Diego Gas & Electric.
- **1.92** "Performance Security" means collateral in the form of cash or a Letter of Credit in an amount set forth in Section G of the Cover Sheet.
- 1.93 "Planned Outage" means, subject to and as further described in the Tariff, a CAISO-approved planned or scheduled disconnection, separation or reduction in capacity of the Unit that is conducted for the purposes of carrying out routine repair or maintenance of such Unit, or for the purposes of new construction work for such Unit.
- 1.94 "Product" has the meaning set forth in Section 3.1.
- 1.95 "Progress Report" means a report substantially in the form set forth in Exhibit F, the requirements for which are further set forth in Section 16.1(b).
- 1.96 "RA Capacity" means the qualifying and deliverable capacity of the Unit for the number of hours corresponding to the applicable Resource Duration for RAR, LAR, and FCR

- purposes, as applicable, for the Delivery Term, as determined by the CPUC, CAISO, or other Governmental Body authorized to make such determination under Applicable Laws, including the Resource Adequacy Rulings. RA Capacity encompasses the applicable RAR Attributes, LAR Attributes and FCR Attributes of the capacity provided by a Unit.
- 1.97 "<u>RAR</u>" means the resource adequacy requirements, exclusive of LAR and FCR, established for LSEs by the CPUC pursuant to the Resource Adequacy Rulings, or by an LRA or other Governmental Body having jurisdiction.
- 1.98 "RAR Attributes" means, with respect to a Resource Adequacy Resource, any and all resource adequacy attributes, as they are identified from time to time by the Tariff, Resource Adequacy Rulings, LRA, or any Governmental Body having jurisdiction that can be counted toward RAR, including any Resource Duration attributes, exclusive of any LAR Attributes and FCR Attributes.
- 1.99 "RAR Showings" means the RAR compliance showings (or similar or successor showings) an LSE is required to make to the CPUC (and/or, to the extent authorized by the CPUC, to the CAISO), pursuant to the Tariff or Resource Adequacy Rulings, or to an LRA having jurisdiction.
- 1.100 "Recipient Party" has the meaning set forth in Section 17.10(a).
- 1.101 "Regulatory Event" has the meaning set forth in Section 17.7.
- 1.102 "Reliability Compensation Services Tariff" has the meaning set forth in the Tariff.
- 1.103 "Replacement Capacity" has the meaning specified in Section 3.8(a).
- 1.104 "Replacement Unit" means a unit that (i) has the same operational and locational characteristics set forth in Section B of the Cover Sheet, (ii) provides equivalent RAR Attributes, LAR Attributes and FCR Attributes, as applicable, as the Unit under the RAR counting rules established by the CPUC, CAISO, or other Governmental Body with jurisdiction; *provided however*, Seller may provide Replacement RA from a unit that does not have equivalent RAR Attributes, LAR Attributes and FCR Attributes, as applicable, with the prior consent of Buyer, and (iii) is capable of providing Alternate Capacity. A Replacement Unit may not be a coal-fired or nuclear generating resource.
- 1.105 "Required TPD Allocation" means an allocation of TP Deliverability from the CAISO that is sufficient for the Unit to obtain Full Capacity Deliverability Status for at least the Contract Quantity.
- 1.106 "Residual Unit Commitment" has the meaning set forth in the Tariff.
- 1.107 "Resold Product" has the meaning set forth in Article 12.
- **1.108** "Resource Adequacy Plan" has the meaning specified in the Tariff.

- 1.109 "Resource Adequacy Rulings" means any applicable CPUC ruling or decision relating to resource adequacy, and any other existing or subsequent 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 Term.
- 1.110 "Resource Adequacy Resource" has the meaning set forth in the Tariff.
- **1.111** "Resource Category" shall be as described in the CPUC Filing Guide, as such may be modified, amended, supplemented or updated from time to time.
- **1.112** "Resource Duration" means, for each Contract Year, the number of continuous hours of discharge as set forth on the Cover Sheet.
- **1.113** "RMR Contracts" has the meaning set forth in the Tariff.
- **1.114** "<u>S&P</u>" means the Standard & Poor's Rating Group (a division of McGraw-Hill, Inc.) or its successor.
- 1.115 "Schedule" or "Scheduling" means the actions of Seller, Buyer and/or their designated representatives, including each Party's Transmission Providers, if applicable, of notifying, requesting and confirming to each other the quantity and type of Product to be delivered on any given day or days during the Delivery Term at a specified Delivery Point.
- 1.116 "Scheduling Coordinator" has the same meaning as in the Tariff.
- 1.117 "Security Interest" has the meaning set forth in Section 14.3(a).
- 1.118 "Seller" has the meaning set forth in the Preamble.
- 1.119 "Settlement Amount" means, with respect to the Non-Defaulting Party, the aggregate Losses or Gains, and Costs, expressed in U.S. Dollars, which such party incurs as a result of a Terminated Transaction pursuant to Section 5.2.
- 1.120 "Showing Month" shall be the calendar month during the Delivery Term that is the subject of the RAR Showing, LAR Showing, and/or FCR Showing, as applicable, as set forth in the Resource Adequacy Rulings or Tariff. For illustrative purposes only, pursuant to the Resource Adequacy Rulings in effect as of the Effective Date, the monthly RAR Showing made in June is for the Showing Month of August.
- **1.121** "Shown Unit" means the Unit and any Replacement Units, from which Product is provided by Seller to Buyer.
- 1.122 "Site" means the real property on which the Unit is located as identified in Appendix D.
- 1.123 "Site Control" means that, for the Term, 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.

- **1.124** "Substitution Rules" has the meaning specified in the Tariff.
- 1.125 "Supply Plan" means the supply plans, or similar or successor filings, that each Scheduling Coordinator representing RA Capacity submits to the CAISO, LRA, or other Governmental Body, pursuant to Applicable Laws, in order for that RA Capacity to count, as applicable, for RAR Attributes, LAR Attributes, and/or FCR Attributes.
- **1.126** "Tariff" means the tariff and protocol provisions of the CAISO, including associated rules, procedures and business practice manuals, as amended or supplemented from time to time.
- 1.127 "Term" has the meaning set forth in Section 2.1.
- **1.128** "Terminated Transaction" has the meaning set forth in Section 5.2.
- 1.129 "Termination Payment" has the meaning set forth in Section 5.3.
- 1.130 "TP Deliverability" has the meaning set forth in the CAISO Tariff.
- 1.131 "Transmission Provider" means the CAISO.
- **1.132** "<u>Transmission System</u>" means the transmission facilities operated by the CAISO, which provide energy transmission service within the CAISO grid from the Delivery Point.
- 1.133 "<u>Unit</u>" shall mean the storage asset described in Section B of the Cover Sheet and Exhibit D.
- 1.134 "Work" means (a) work or operations performed by a Party or on a Party's behalf; and (b) materials, parts or equipment furnished in connection with such work or operations; including (i) warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "a Party's work"; and (ii) the providing of or failure to provide warnings or instructions.

ARTICLE 2: TERM; DELIVERY TERM; CONDITIONS PRECEDENT

2.1 Term.

- (a) The term of this Agreement shall commence upon the Effective Date and shall continue until the expiration of the Delivery Term, provided that this Agreement shall thereafter remain in effect until the Parties have fulfilled all obligations arising under this Agreement, including any compensation for the Product, Termination Payment, then-owing indemnification payments or other damages, are paid in full (whether directly or indirectly, such as through set-off or netting) and the Performance Security is released and/or returned (the "Term"). Upon Seller's request, Buyer will promptly confirm in writing the Initial Delivery Date following Seller's completion of all conditions precedent hereto.
- (b) If (i) the Initial IDS Year occurs after 2030, or (ii) the Unit experiences an IDS Gap Year during the period 2030 through the Final Deliverability Date, the Delivery Term shall be automatically reduced by five (5) years, for a maximum Delivery Term of ten (10) years.

(c) All provisions relating to invoicing, payment, delivery, settlement of other liabilities incurred pursuant to this Agreement and dispute resolution survive for the period necessary to effectuate the rights of the Party benefited by such provision except as otherwise specified herein. Notwithstanding anything to the contrary in this Agreement, (i) all rights under Sections 17.2 (Indemnities) and any other indemnity rights survive the end of the Delivery Term for an additional twelve (12) months; (ii) all rights and obligations under Article 11 (Confidentiality) survive the end of the Delivery Term for an additional two (2) years; (iii) all rights and obligations under Section 16.2(f) (Limitation on Seller's Ability to Make or Agree to Third-Party Sales from the Unit after Early Termination Date) survive early termination of this Agreement for an additional two (2) years; and (iv) all provisions relating to limitations of liability survive without limit.

2.2 Conditions Precedent to Initial Delivery Date.

Seller shall provide notice of expected Initial Delivery Date to Buyer no less than sixty (60) days in advance of such date. The Delivery Term shall not commence until Seller completes to Buyer's reasonable satisfaction each of the following conditions:

- (a) Seller shall have secured all CAISO and Governmental Approvals as are necessary for the safe and lawful operation and maintenance of the Unit and to enable Seller to deliver the Product to Buyer.
- (d) Seller shall have provided to Buyer a certification of Seller and a licensed professional engineer, substantially in the form attached hereto as Exhibit C, demonstrating that the Initial Delivery Date has occurred.
- (e) Seller shall have provided Performance Security to Buyer as required by Section 14.2.
- (f) As of the Initial Delivery Date, no Event of Default on the part of Seller shall have occurred and be continuing.
 - (g) Seller shall have obtained Interim Deliverability Status.
- (h) Subject to Section 16.2(b), Seller shall have obtained an NQC for the Unit of at least ...
- (i) In accordance with Section 3.7(a), Seller shall have (i) submitted, or caused the Unit's SC to submit, a notice to Buyer including Seller's proposed Supply Plan for the first Showing Month of the Delivery Term and (ii) submitted, or caused the Unit's SC to submit, a Supply Plan to CAISO for the first Showing Month of the Delivery Term.
- (j) Seller shall have delivered to Buyer all insurance documents required under Article 15.
- (k) As of the Initial Delivery Date, Seller shall have paid Buyer for all amounts owing under this Agreement, if any.

ARTICLE 3: TRANSACTION, DELIVERY AND PAYMENT

3.1 Resource Adequacy Capacity Product.

During the Delivery Term, Seller shall provide Buyer with RA Capacity from the Unit in the amount of the Contract Quantity of RAR Attributes, LAR Attributes, and FCR Attributes, with respect to each Showing Month (the "<u>Product</u>"). Seller's obligation to deliver the Contract Quantity of Product for each day of the Delivery Term is firm and will not be excused for any reason other than Force Majeure.

If the Unit is not available to provide the full amount of the Contract Quantity with respect to an applicable Showing Month for any reason other than Force Majeure, including, without limitation, any Outage or any adjustment of the RA Capacity of any Unit, then, Seller shall provide Buyer with Designated RA Capacity in amounts up to the Contract Quantity from one or more Replacement Units pursuant to Section 3.6. If Seller fails to provide Buyer with replacement Designated RA Capacity from Replacement Units pursuant to Section 3.6, then Seller shall be liable for damages and/or be required to indemnify Buyer for costs, penalties or fines pursuant to the terms of Sections 3.8 and 3.9.

Notwithstanding anything to the contrary herein, no energy or ancillary services associated with the Unit is required to be made available to Buyer as part of this Agreement and Buyer shall not be responsible for compensating Seller for Seller's commitments to the CAISO required by this Agreement.

3.2 Seller's and Buyer's Obligations.

Seller shall sell and deliver, or cause to be delivered, and Buyer shall purchase and receive, or cause to be received, the Designated RA Capacity of the Product as set forth in Section 3.7, and Buyer shall pay Seller the Monthly Capacity Payment for the Designated RA Capacity. Seller shall be responsible for any costs or charges imposed on or associated with the Product or its delivery of the Product up to the receipt of Product by Buyer pursuant to Section 3.7(b). Buyer shall be responsible for any costs or charges imposed on or associated with the Product or its receipt at and from Buyer's receipt of Product. For the duration of the Delivery Term, Seller shall take all commercially reasonable actions, including complying with all applicable registration and reporting requirements, and executing all documents or instruments necessary to enable Buyer to use all of the Designated RA Capacity and RAR Attributes committed by Seller to Buyer pursuant to this Agreement.

3.3 Deliverability.

The Parties acknowledge and agree that prior to the Final Deliverability Date for the Unit, Seller must obtain Interim Deliverability Status from the CAISO on a yearly basis in order to deliver Product to Buyer under this Agreement (such time period, the "Interim Deliverability Period").

(a) Beginning in the year prior to the first year of expected Commercial Operation and continuing throughout the Interim Deliverability Period, Seller shall take all commercially

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reasonable actions to obtain Interim Deliverability Status for the Unit in the amount of the Contract Quantity for each year of the Interim Deliverability Period.

- (b) Seller shall provide Buyer with Notice no later than August 1 of each year as to whether it has obtained Interim Deliverability Status for all or any portion of the Contract Quantity for the following calendar year ("Interim Deliverability Notice"); provided however, if CAISO has not provided notice to Seller by August 1, Seller shall provide the Interim Deliverability Notice to Buyer within two (2) Business Days of receipt of notice from CAISO of the deliverability status of the Unit. If the Unit receives partial Interim Deliverability Status in any year, the Monthly Capacity Payment shall be based on the amount of partial Interim Deliverability Status allocated to the Unit for the applicable year.
- (c) Seller shall provide Notice to Buyer of the Final Deliverability Date along with documentation from CAISO (or other evidence reasonably acceptable to Buyer) within three (3) Business Days of receipt of notice from CAISO; provided, if notice of the Final Deliverability Date is provided in a calendar year during which the Unit does not have Interim Deliverability Status, Seller shall provide Notice at least ninety (90) days prior to the first Showing Month after the Final Deliverability Date.



(e) If this Agreement is terminated by Buyer under Section 3.3(d), neither Seller nor Seller's Affiliates may sell, market or deliver any Product associated with or attributable to the Unit to a party other than Buyer for a period of two (2) years following the date of such termination 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 to Buyer on terms and conditions materially similar to the terms and conditions contained in this Agreement (including price) and Buyer fails to accept such offer within forty-five (45) days of Buyer's receipt thereof. Neither Seller nor Seller's Affiliates may sell or transfer the Unit, or any part thereof, or land rights or interests in the Site (including the interconnection queue position of the Unit) so long as the limitations contained in this Section 3.3(e) apply, unless the transferee agrees to be bound by the terms set forth in this Section 3.3(e) pursuant to a written agreement approved by Buyer in its reasonable discretion. Seller shall indemnify and hold Buyer harmless from all benefits lost and other damages sustained by Buyer as a result of any breach by Seller of its covenants contained within this Section 3.3(e).

3.4 Delivery Point.

The "<u>Delivery Point</u>" for the Unit shall be the CAISO Control Area, and if applicable, the LAR region in which the Unit is electrically interconnected.

3.5 Planned Outages.

Seller shall schedule all Planned Outages within the time period determined by the CAISO for the Unit as a Resource Adequacy Resource that is subject to the Availability Standards to qualify for

an "Approved Maintenance Outage" under the CAISO Tariff. Seller shall reimburse Buyer for any cost Buyer incurs to provide Replacement RA, as required by the CAISO, during any Planned Outages (including the cost of procuring Replacement RA for a full calendar month during any month in which a Planned Outage is planned or scheduled). Notwithstanding anything in this Agreement to the contrary, no Planned Outages of the Unit 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.

3.6 Alternate Capacity and Replacement Units.

- (a) The "Notification Deadline" for a given Showing Month shall be fifteen (15) Business Days before the earlier of the relevant deadlines for (a) the corresponding CPUC RAR Showings, LAR Showings and/or FCR Showings, as applicable for that Showing Month, or (b) submission of the CAISO Supply Plan filings applicable to that Showing Month.
- (b) If Seller is unable to provide the full Contract Quantity for any Showing Month for any reason, or if Seller desires to provide the Contract Quantity for any Showing Month from a Replacement Unit, then Seller may, at no additional cost to Buyer, provide Buyer with Alternate Capacity from one or more Replacement Units, with the total amount of Product provided to Buyer from the Unit and any Replacement Unit(s) up to an amount equal to the Contract Quantity for the applicable Showing Month; *provided*, in each case, Seller shall notify Buyer of the amount of Product that Seller will not be able to deliver from the Unit and the portion of the Contract Quantity for which Seller intends to provide Buyer with Alternate Capacity from identified Replacement Unit(s) no later than the Notification Deadline.
- (c) If Seller fails to provide Buyer the Contract Quantity of Product from the Unit or a Replacement Unit for a given Showing Month during the Delivery Term, then Buyer may, but shall not be required to, purchase replacement Product from a third party.
- (d) In the event Seller desired to provide Buyer with the Contract Quantity from a Replacement Unit owned and/or operated by a third party, Buyer shall be permitted to disclose to any such third party Confidential Information to the extent such disclosure is necessary to affect such transaction; *provided*, such other party agrees to keep such Confidential Information confidential.

3.7 Delivery of Product.

Seller shall provide Buyer with the Designated RA Capacity of Product for each Showing Month consistent with the following:

(a) No later than the Notification Deadline corresponding to each Showing Month of the Delivery Term, Seller shall submit, or cause the Shown Unit's Scheduling Coordinator to submit, Supply Plans to identify and confirm the Designated RA Capacity provided to Buyer for each Showing Month so that the total amount of Designated RA Capacity identified and confirmed for such Showing Month equals the Designated RA Capacity, unless specifically requested not to do so by the Buyer.

- (b) The Designated RA Capacity is delivered and received when the CIRA Tool shows that the Supply Plan submitted in compliance with Buyer's instructions, including Buyer's instructions to withhold all or part of the Designated RA Capacity from Seller's Supply Plan for any Showing Month during the Delivery Term, has been accepted by the CAISO. If CAISO rejects either the Supply Plan or Buyer's Resource Adequacy Plan with respect to any part of the Designated RA Capacity in any Showing Month, the Parties will confer, make such corrections as are necessary for acceptance, and resubmit the corrected Supply Plan or Resource Adequacy Plan for validation before the applicable Notification Deadline for the relevant Showing Month.
- (c) Consistent with the Substitution Rules, take all action, or cause each Unit's Scheduling Coordinator to take all action, to allow Buyer or a subsequent purchaser under Article 12 to utilize the Contract Quantity during each Showing Month under the Substitution Rules, including, but not limited to, ensuring that the Designated RA Capacity being provided in the pertinent Showing Month will qualify for substitution under the Substitution Rules and providing Buyer or subsequent purchaser under Article 12 with all information needed to utilize the Substitution Rules.

3.8 Damages for Failure to Provide Designated RA Capacity.

If Seller fails to provide Buyer with the Designated RA Capacity of Product for any Showing Month, and such failure is not excused under the terms of this Agreement, then the following shall apply:

- Capacity not provided by Seller with capacity having equivalent RAR Attributes, LAR Attributes and/or FCR Attributes as the Designated RA Capacity not provided by Seller; *provided*, if any portion of the Designated RA Capacity that Buyer is seeking to replace is Designated RA Capacity having RAR Attributes and no LAR Attributes, and no such RAR capacity is available (such capacity shall also include FCR Attributes if this is a Flexible RA Product), then Buyer may replace such portion of the Designated RA Capacity with capacity having RAR Attributes and LAR Attributes (as well as FCR Attributes if this is a Flexible RA Product) ("Replacement Capacity"), in either case, by entering into purchase transactions with one or more third parties, including, without limitation, third parties who have purchased capacity from Buyer, so long as such transactions are done at prevailing market prices. Buyer shall use commercially reasonable efforts to minimize damages when procuring any Replacement Capacity.
- (b) Seller shall pay to Buyer, on the date payment would otherwise be due in respect of the Showing Month for which the failure occurred, an amount equal to the positive difference, if any, between (A) the product of the Capacity Replacement Price times the amount of the Designated RA Capacity not provided by Seller and (B) the product of the Contract Price times the amount of the Designated RA Capacity not provided by Seller. If Seller fails to pay these damages, then Buyer may offset those damages owed it against any future amounts it may owe to Seller pursuant to Article 6.

3.9 Indemnities for Failure to Deliver Contract Quantity.

Seller agrees to indemnify, defend and hold harmless Buyer from any penalties, fines or costs assessed against Buyer by the CPUC or the CAISO, resulting from any of the following:

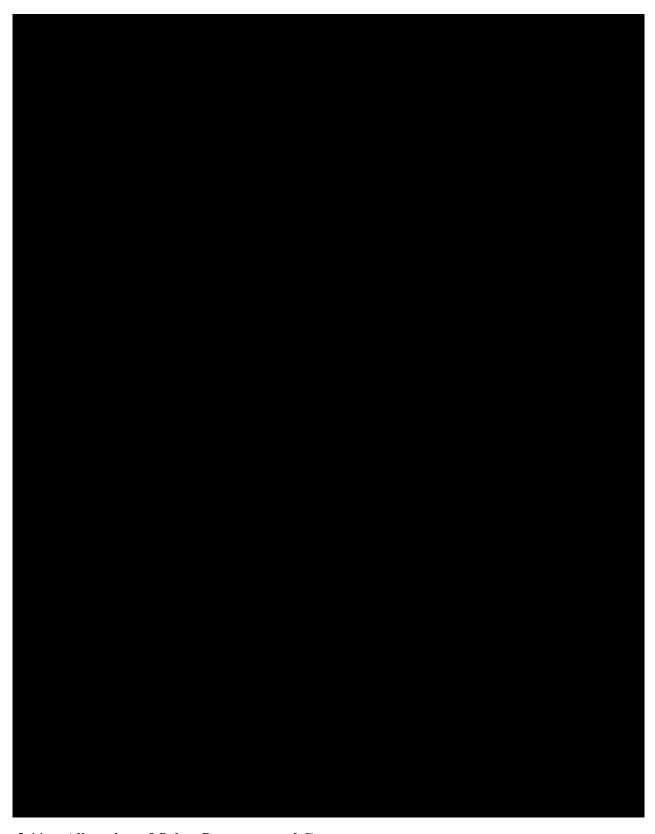
- (a) Seller's failure to provide any portion of the Designated RA Capacity for the respective Showing Month for the Delivery Term; or
- (b) A Unit Scheduling Coordinator's failure to submit accurate Supply Plans that identify Buyer's right, or a subsequent purchaser's right, to the Designated RA Capacity purchased hereunder.

With respect to the foregoing, the Parties shall use commercially reasonable efforts to minimize such penalties, fines and costs; *provided*, in no event shall Buyer be required to use or change its utilization of its owned or controlled assets or market positions to minimize these costs, penalties and fines. If Seller fails to pay the foregoing penalties, fines or costs, or fails to reimburse Buyer for those penalties, fines or costs, then Buyer may offset those penalties, fines or costs against any future amounts it may owe to Seller under this Agreement.

3.10 Monthly RA Capacity Payment.

(a) Buyer shall make a Monthly RA Capacity Payment to Seller for the Unit, in arrears, after the applicable Showing Month. The Parties agree that all invoices under this Agreement shall be due and payable on the twentieth (20th) day of the month after the Showing Month; *provided*, if such day is not a Business Day, then such invoice will be due and payable on the next Business Day. The Unit's "Monthly RA Capacity Payment" shall be equal to the product of (i) the applicable Contract Price for that Showing Month, (ii) the Contract Quantity of the Product actually delivered by Seller to Buyer for the Showing Month as set forth in Section 3.7 and (iii) 1,000. The final product of this Monthly RA Capacity Payment calculation shall be rounded to the nearest penny (i.e., two decimal places).





3.11 Allocation of Other Payments and Costs.

- (a) Seller may retain any revenues it may receive from, and shall pay all costs charged by, the CAISO or any other third party with respect to any Unit for (i) start-up, shut-down, and minimum load costs, (ii) capacity revenue for ancillary services, (iii) energy sales, (iv) any revenues for black start or reactive power services, or (v) the sale of the unit-contingent call rights on the storage capacity of the Unit to provide energy to a third party, so long as such rights do not confer on such third party the right to claim any portion of the RA Capacity sold hereunder in order to make an RAR Showing, LAR Showing, FCR Showing, or any similar capacity or resource adequacy showing with the CAISO or CPUC.
- (b) Buyer shall be entitled to receive and retain all revenues associated with the Designated RA Capacity of the Unit during the Delivery Term (including any capacity or availability revenues from RMR Contracts for any Unit, Reliability Compensation Services Tariff, and Residual Unit Commitment capacity payments, but excluding payments described in Section 3.11(a)).

(c) In accordance with Section 3.10:

- (i) all such Buyer revenues described in Section 3.11(b) received by Seller, or a Unit's Scheduling Coordinator, owner, or operator shall be remitted to Buyer, and Seller shall pay such revenues to Buyer if the Unit's Scheduling Coordinator, owner, or operator fails to remit those revenues to Buyer (and upon any such payment by Seller, Seller shall be subrogated to all rights of Buyer against such Unit's Scheduling Coordinator, owner, or operator for the amount of such revenues paid). If Seller fails to pay such revenues to Buyer, Buyer may offset any amounts owing to it for such revenues against any future amounts it may owe to Seller under this Agreement.
- (ii) all such Seller, or a Unit's Scheduling Coordinator, owner, or operator revenues described in Section 3.11(a)(i)-(v), but received by Buyer shall be remitted to Seller, and Buyer shall pay such revenues to Seller if the Unit's Scheduling Coordinator, owner, or operator fails to remit those revenues to Seller (and upon any such payment by Buyer, Buyer shall be subrogated to all rights of Seller against such Unit's Scheduling Coordinator, owner, or operator for the amount of such revenues paid). If Buyer fails to pay such revenues to Seller, Seller may offset any amounts owing to it for such revenues against any future amounts it may owe to Buyer under this Agreement.
- (d) If a centralized capacity market develops within the CAISO or WECC region, Buyer will have exclusive rights to offer, bid, or otherwise submit Designated RA Capacity provided to Buyer pursuant to this Agreement for re-sale in such market, and retain and receive any and all related revenues. Buyer shall be responsible for any material, incremental costs of offering, bidding, submitting, or re-selling Designated RA Capacity in such centralized capacity market.
- (e) Buyer acknowledges and agrees that all Availability Incentive Payments are for the benefit of Seller and for Seller's account, and that Seller shall receive, retain, or be entitled to receive all credits, payments, and revenues, if any, resulting from Seller achieving or exceeding Availability Standards. The Parties acknowledge and agree that any Non-Availability Charges are

the responsibility of Seller, and for Seller's account and Seller shall be responsible for all fees, charges, or penalties, if any, resulting from Seller failing to achieve Availability Standards.

3.12 Force Majeure.

To the extent either Party is prevented by Force Majeure from carrying out, in whole or part, its obligations under this Agreement and such Party (the "Claiming Party") gives notice and details of the Force Majeure to the other Party as soon as practicable, then, unless the terms of the Product specify otherwise, the Claiming Party shall be excused from the performance of its obligations with respect to this Agreement (other than the obligation to make payments then due or becoming due with respect to performance prior to the Force Majeure). The Claiming Party shall resume performance of its obligations under this Agreement as soon as reasonably practicable. The non-Claiming Party shall not be required to perform or resume performance of its obligations to the Claiming Party corresponding to the obligations of the Claiming Party excused by Force Majeure.

ARTICLE 4: CAISO OFFER REQUIREMENTS

During the Delivery Term, except to the extent the Unit is in an Outage, or is affected by an event of Force Majeure that results in a partial or full Outage of the Unit, Seller shall either schedule or cause the Unit's Scheduling Coordinator to schedule with, or make available to, the CAISO the Unit's Designated RA Capacity in compliance with the Tariff, including compliance with Minimum State of Charge, Day-Ahead Availability, Real-Time Availability, Must Offer Obligation, and Default Energy Bid requirements established in Article 40 of the Tariff and Seller shall perform all, or cause the Unit's Scheduling Coordinator, owner, or operator, as applicable, to perform all obligations under the Tariff that are associated with the sale of Product hereunder (the "CAISO Offer Requirements"). Buyer shall have no liability for the failure of Seller or the failure of any Unit's Scheduling Coordinator, owner, or operator to comply with such Tariff provisions, including any penalties or fines imposed on Seller or the Unit's Scheduling Coordinator, owner, or operator for such noncompliance.

ARTICLE 5: EVENTS OF DEFAULT; REMEDIES

5.1 Events of Default.

An "Event of Default" shall mean, with respect to a Party (a "Defaulting Party"), the occurrence of any of the following:

- (a) the failure to make, when due, any payment required pursuant to this Agreement if such failure is not remedied within ten (10) Business Days after written notice;
- (b) 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 Party does not fully mitigate the adverse consequences as reasonably determined by the other Party of such incorrect representation or warranty to the other Party within thirty (30) days after written notice thereof;
- (c) the failure to perform any material covenant or obligation set forth in this Agreement (except to the extent constituting a separate Event of Default, and except for such Party's obligations to deliver or receive the Product, the exclusive remedy for which is provided

in Section 3.8 and 3.9) if such failure is not remedied within thirty (30) Business Days after written notice; provided, however, that if such failure cannot be reasonably cured within such thirty (30) Business Day period, the Defaulting Party shall have such additional time as is reasonably practical to cure such failure, not to exceed an additional one hundred fifty (150) days, if the Defaulting Party has begun curative action within the aforesaid thirty (30) Business Day period and is proceeding diligently, using commercially reasonable efforts, to complete such curative action;

- (d) Seller fails to take all commercially reasonable actions in a timely manner to achieve Final Deliverability for the Unit;
- (e) Seller fails to obtain by the Initial Delivery Date market rate sales authority pursuant to Section 10.3(m);
- (f) if at any time, Seller delivers or attempts to deliver Product to the Delivery Point for sale under this Agreement that was not generated by the Unit, except for Alternate Capacity;
- (g) Seller sells, assigns, or otherwise transfers, or commits to sell, assign, or otherwise transfer, the Product, or any portion thereof, during the Term to any party other than Buyer except as expressly permitted under this Agreement;
 - (h) such Party becomes Bankrupt;
- (i) such Party assigns this Agreement or any of its rights hereunder other than in compliance with Section 17.3, if applicable;
- (j) the failure of such Party to satisfy the creditworthiness/collateral requirements agreed to pursuant to Article 14 if such failure is not remedied within ten (10) Business Days after written notice;
- (k) 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 transfere 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; or
- (l) 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:
 - (i) the issuer of the outstanding Letter of Credit shall fail to maintain a Credit Rating of at least ;
 - (ii) the issuer of such Letter of Credit becomes Bankrupt;

- (iii) 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;
- (iv) the issuer of the outstanding Letter of Credit shall fail to honor a properly documented request to draw on such Letter of Credit;
- (v) 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;
- (vi) such Letter of Credit fails or ceases to be in full force and effect at any time; or
- (vii) 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.

5.2 Declaration of an Early Termination Date and Calculation of Settlement Amounts.

If an Event of Default with respect to a Defaulting Party shall have occurred and be continuing, the other Party (the "Non-Defaulting Party") shall have the right to (i) designate a day, no earlier than the day such notice is effective and no later than twenty (20) days after such notice is effective, as an early termination date ("Early Termination Date") to accelerate all amounts owing between the Parties and to liquidate and terminate this Agreement (referred to herein as a "Terminated Transaction") between the Parties, (ii) withhold any payments due to the Defaulting Party under this Agreement; and (iii) suspend performance. If the Early Termination Date occurs before the Initial Delivery Date, then no Settlement Amount shall be owed by either Party. If the Early Termination Date occurs after the Initial Delivery Date, then as soon as reasonably practicable, the Non-Defaulting Party shall calculate, in a commercially reasonable manner, a Settlement Amount for such Terminated Transaction as of the Early Termination Date (or, to the extent that in the reasonable opinion of the Non-Defaulting Party certain of such Terminated Transaction are commercially impracticable to liquidate and terminate or may not be liquidated and terminated under applicable law on the Early Termination Date, as soon thereafter as is reasonably practicable). The Gains and Losses for a Terminated Transaction shall be determined by calculating the amount that would be incurred or realized to replace or to provide the economic equivalent of the remaining payments or deliveries in respect of the Terminated Transaction. The Non-Defaulting Party (or its agent) may determine its Gains and Losses by reference to information either available to it internally or supplied by one or more third parties 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. Third parties supplying such information may include, without limitation, dealers in the relevant markets, endusers of the relevant product, information vendors and other sources of market information. 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). Notwithstanding the foregoing, in the event of termination under Section 5.1(d), the applicable Termination Payment shall be the full amount of the Development Security.

5.3 Net Out of Settlement Amounts.

The Non-Defaulting Party shall net out (a) any Settlement Amount that is due to the Non-Defaulting Party, plus, (b) at the option of the Non-Defaulting Party, any cash or other form of security then available to the Non-Defaulting Party pursuant to Article 14, plus (c) any or all other amounts due to the Non-Defaulting Party under this Agreement against (d) all amounts that are due to the Defaulting Party, so that all such amounts shall be netted out to a single liquidated amount (the "Termination Payment") payable by one Party to the other. The Termination Payment shall be due to or due from the Non-Defaulting Party as appropriate.

5.4 Notice of Payment of Termination Payment.

As soon as practicable after a liquidation, notice shall be given by the Non-Defaulting Party to the Defaulting Party of the amount of the Termination Payment and whether the Termination Payment is due to or due from the Non-Defaulting Party. The notice shall include a written statement explaining in reasonable detail the calculation of such amount. The Termination Payment shall be made by the Party that owes it within ten (10) days after such notice is effective.

5.5 Disputes with Respect to Termination Payment.

If the Defaulting Party disputes the Non-Defaulting Party's calculation of the Termination Payment, in whole or in part, the Defaulting Party shall, within ten (10) days of receipt of Non-Defaulting Party's calculation of the Termination Payment, provide to the Non-Defaulting Party a detailed written explanation of the basis for such dispute; *provided*, *however*, that if the Termination Payment is due from Seller as the Defaulting Party, Seller (as the Defaulting Party) shall first transfer Performance Security to Buyer (as the Non-Defaulting Party) in an amount equal to the Termination Payment.

5.6 Closeout Setoffs.

After calculation of a Termination Payment in accordance with Section 5.3, if the Defaulting Party would be owed the Termination Payment, the Non-Defaulting Party shall be entitled, at its option and in its discretion, to (i) set off against such Termination Payment any amounts due and owing by the Defaulting Party to the Non-Defaulting Party under any other agreements, instruments or undertakings between the Defaulting Party and the Non-Defaulting Party and/or (ii) to the extent the Agreement is not yet liquidated in accordance with Section 5.2, withhold payment of the Termination Payment to the Defaulting Party. The remedy provided for in this Section 5.6 shall be without prejudice and in addition to any right of setoff, combination of accounts, lien or other right to which any Party is at any time otherwise entitled (whether by operation of law, contract or otherwise).

ARTICLE 6: PAYMENT AND NETTING

6.1 Billing Period.

The calendar month shall be the standard period for all payments under this Agreement (other than Termination Payments). As soon as practicable after the end of each month, each Party will render

to the other Party an invoice for the payment obligations, if any, incurred hereunder during the preceding month.

6.2 Timeliness of Payment.

Unless otherwise agreed by the Parties, all invoices under this Agreement shall be due and payable in accordance with each Party's invoice instructions on or before the later of the twentieth (20th) day of each month, or tenth (10th) day after receipt of the invoice or, if such day is not a Business Day, then on the next Business Day. Each Party will make payments by electronic funds transfer, or by other mutually agreeable method(s), to the account designated by the other Party. Any amounts not paid by the due date will be deemed delinquent and will accrue interest at the Interest Rate, such interest to be calculated from and including the due date to but excluding the date the delinquent amount is paid in full.

6.3 Disputes and Adjustments of Invoices.

A Party may, in good faith, dispute the correctness of any invoice or any adjustment to an invoice, rendered under this Agreement or adjust any invoice for any arithmetic or computational error within twelve (12) months of the date the invoice, or adjustment to an invoice, was rendered. In the event an invoice or portion thereof, or any other claim or adjustment arising hereunder, is disputed, payment of the undisputed portion of the invoice shall be required to be made when due, with notice of the objection given to the other Party. Any invoice dispute or invoice adjustment shall be in writing and shall state the basis for the dispute or adjustment. Payment of the disputed amount shall not be required until the dispute is resolved. Upon resolution of the dispute, any required payment shall be made within five (5) Business Days of such resolution along with interest accrued at the Interest Rate from and including the due date to but excluding the date paid. Inadvertent overpayments shall be returned upon request or deducted by the Party receiving such overpayment from subsequent payments, with interest accrued at the Interest Rate from and including the date of such overpayment to but excluding the date repaid or deducted by the Party receiving such overpayment. Any dispute with respect to an invoice is waived unless the other Party is notified in accordance with this Section 6.3 within twelve (12) months after the invoice is rendered or any specific adjustment to the invoice is made. If an invoice is not rendered within twelve (12) months after the close of the month during which performance occurred, the right to payment for such performance is waived.

6.4 Netting of Payments.

The Parties hereby agree that they shall discharge mutual debts and payment obligations due and owing to each other under this Agreement 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, including any related damages calculated pursuant to Sections 3.8 or 3.9, 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.

6.5 Payment Obligation Absent Netting.

If no mutual debts or payment obligations exist and only one Party owes a debt or obligation to the other during the monthly billing period, including, but not limited to, any related damage amounts calculated pursuant to Sections 3.8 or 3.9, interest, and payments or credits, that Party shall pay such sum in full when due.

6.6 Security.

Unless the Party benefiting from Performance Security notifies the other Party in writing, and except in connection with a liquidation and termination in accordance with Article 5, all amounts netted pursuant to this Article 6 shall not take into account or include any Performance Security which may be in effect to secure a Party's performance under this Agreement.

ARTICLE 7: LIMITATIONS

7.1 Limitation of Remedies, Liability and Damages.

EXCEPT AS 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. FOR BREACH OF ANY PROVISION FOR WHICH AN EXPRESS REMEDY OR MEASURE OF DAMAGES IS PROVIDED, SUCH EXPRESS REMEDY OR MEASURE OF DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY, THE OBLIGOR'S LIABILITY SHALL BE LIMITED AS SET FORTH IN SUCH PROVISION AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED. IF NO REMEDY OR MEASURE OF DAMAGES IS EXPRESSLY PROVIDED HEREIN, THE OBLIGOR'S LIABILITY SHALL BE LIMITED TO DIRECT ACTUAL DAMAGES ONLY, SUCH DIRECT ACTUAL DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED. UNLESS EXPRESSLY HEREIN PROVIDED, NEITHER PARTY SHALL BE LIABLE FOR CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY OR INDIRECT DAMAGES, LOST PROFITS OR OTHER BUSINESS INTERRUPTION DAMAGES, BY STATUTE, IN TORT OR CONTRACT, UNDER ANY INDEMNITY PROVISION OR OTHERWISE. IT IS THE INTENT OF THE PARTIES THAT THE LIMITATIONS HEREIN IMPOSED ON REMEDIES AND THE MEASURE OF DAMAGES BE WITHOUT REGARD TO THE CAUSE OR CAUSES RELATED THERETO, INCLUDING THE NEGLIGENCE OF ANY PARTY, WHETHER SUCH NEGLIGENCE BE SOLE, JOINT OR CONCURRENT, OR ACTIVE OR PASSIVE. TO THE EXTENT ANY DAMAGES REOUIRED TO BE PAID HEREUNDER ARE LIQUIDATED, THE ACKNOWLEDGE THAT THE DAMAGES ARE DIFFICULT OR IMPOSSIBLE TO DETERMINE, OR OTHERWISE OBTAINING AN **ADEQUATE** REMEDY INCONVENIENT AND THE DAMAGES CALCULATED HEREUNDER CONSTITUTE A REASONABLE APPROXIMATION OF THE HARM OR LOSS.

ARTICLE 8: GOVERNMENTAL CHARGES

8.1 Cooperation.

Each Party shall use reasonable efforts to implement the provisions of and to administer this Agreement in accordance with the intent of the parties to minimize all taxes, so long as neither Party is materially adversely affected by such efforts.

8.2 Governmental Charges.

Seller shall pay or cause to be paid all taxes imposed by any government authority ("Governmental Charges") on or with respect to the Product or a transaction arising prior to the Delivery Point. Buyer shall pay or cause to be paid all Governmental Charges on or with respect to the Product or a transaction at and from the Delivery Point (other than ad valorem, franchise or income taxes which are related to the sale of the Product and are, therefore, the responsibility of the Seller). In the event Seller is required by law or regulation to remit or pay Governmental Charges which are Buyer's responsibility hereunder, Buyer shall promptly reimburse Seller for such Governmental Charges. If Buyer is required by law or regulation to remit or pay Governmental Charges which are Seller's responsibility hereunder, Buyer may deduct the amount of any such Governmental Charges from the sums due to Seller under Article 6. Nothing shall obligate or cause a Party to pay or be liable to pay any Governmental Charges for which it is exempt under the law.

ARTICLE 9: [RESERVED]

ARTICLE 10: REPRESENTATIONS; WARRANTIES; COVENANTS

10.1 Mutual Representations and Warranties.

On the Effective Date, each Party represents and warrants to the other Party that:

- (a) it is duly organized, validly existing and in good standing under the laws of the jurisdiction of its formation;
- (b) it has all regulatory authorizations necessary for it to legally perform its obligations under this Agreement, except all permits necessary to construct, operate and maintain the Unit and sell the Product therefrom in the case of Seller;
- (c) the execution, delivery and performance of this Agreement are within its powers, have been duly authorized by all necessary action and do not violate any of the terms and conditions in its governing documents, any contracts to which it is a party or any law, rule, regulation, order or the like applicable to it;
- (d) this Agreement and each other document executed and delivered in accordance with this Agreement constitutes its legally valid and binding obligation enforceable against it in accordance with its terms; subject to any Equitable Defenses.
- (e) it is not Bankrupt and there are no proceedings pending or being contemplated by it or, to its knowledge, threatened against it which would result in it being or becoming Bankrupt;
- (f) there is not pending or, to its knowledge, threatened against it or any of its Affiliates any legal proceedings that could materially adversely affect its ability to perform its obligations under this Agreement;

- (g) it is a "forward contract merchant" within the meaning of the United States Bankruptcy Code; and
- (h) it has entered into this Agreement in connection with the conduct of its business and it has the capacity or ability to make or take delivery of Product; provided that Seller does not yet have market rate sales authority to participate in CAISO and to effectuate the transaction contemplated by this Agreement.

10.2 Buyer and Seller Covenants.

Buyer and Seller shall, throughout the Delivery Term, take all commercially reasonable actions and execute any and all documents or instruments reasonably necessary to ensure Buyer's right to the use of the Contract Quantity for the sole benefit of Buyer or any subsequent purchaser under Article 12. Such commercially reasonable actions shall include, without limitation:

- (a) Cooperating with and providing, and in the case of Seller causing the Unit's Scheduling Coordinator, owner, or operator to cooperate with and provide requested supporting documentation to the CAISO, the CPUC, or any other Governmental Body responsible for administering RAR, LAR, and/or FCR under Applicable Laws, to certify or qualify the Contract Quantity as RA Capacity and Designated RA Capacity. Such actions shall include, without limitation, providing information requested by the CAISO, CPUC, or by an LRA having jurisdiction, to demonstrate for each month of the Delivery Term the ability to deliver the Contract Quantity from the Unit to the CAISO Controlled Grid for the minimum hours required to qualify as RA Capacity, and providing information requested by the CPUC, CAISO or other Governmental Body having jurisdiction to administer RAR, LAR, or FCR to demonstrate that the Contract Quantity can be delivered to the CAISO Controlled Grid, pursuant to "deliverability" standards established by the CAISO, or other Governmental Body having jurisdiction to administer RAR, LAR and/or FCR; and
- (b) Negotiating in good faith to make necessary amendments, if any, to this Agreement to conform it to subsequent clarifications, revisions, or decisions rendered by the CAISO, CPUC, FERC, or other Governmental Body having jurisdiction to administer RAR, LAR, or FCR so as to maintain the benefits of the bargain struck by the Parties on the Effective Date; *provided*, *however*, that such commercially reasonable actions shall not include any obligation that the owner or operator of the Unit undertake capital improvements, Unit enhancements, or the construction of new facilities nor in any way limit the Parties with respect to advocacy for any regulatory policies or market changes before any entity.

10.3 Seller Representations, Warranties and Covenants.

Seller represents, warrants and covenants to Buyer that:

- (a) Throughout the Delivery Term, the Unit qualifies as a Resource Adequacy Resource that is eligible to provide the Product pursuant to the Tariff and the Resource Adequacy Rulings;
- (b) Throughout the Delivery Term, Seller owns or has the exclusive right to the RA Capacity sold under this Agreement, and shall furnish Buyer, CAISO, CPUC or other jurisdictional

LRA, or other Governmental Body with such evidence as may reasonably be requested to demonstrate such ownership or exclusive right;

- (c) Throughout the Delivery Term, no portion of the Contract Quantity has been committed by Seller to any third party in order to satisfy RAR, LAR, FCR or analogous obligations in CAISO markets, other than pursuant to an RMR Contract between the CAISO and either Seller or the Unit's owner or operator;
- (d) Throughout the Delivery Term, no portion of the Contract Quantity has been committed by Seller in order to satisfy RAR, LAR, FCR, or analogous obligations in any non-CAISO market;
- (e) The Unit is within the CAISO Control Area and Seller shall maintain Site Control throughout the Delivery Term;
- (f) Throughout the Delivery Term, the owner or operator of the Unit is obligated to comply with Applicable Laws, including the Tariff, relating to RA Capacity, RAR, LAR, and FCR;
- (g) Throughout the Delivery Term, Seller shall maintain any Governmental Approvals required to perform Seller's obligations;
- (h) Throughout the Delivery Term, the respective cumulative amounts of LAR Attributes, RAR Attributes, and FCR Attributes that Seller has sold, assigned or transferred from the Unit does not exceed that Unit's RA Capacity;
- (i) Throughout the Delivery Term, with respect to the RA Capacity provided under this Agreement, Seller shall, and the Unit's Scheduling Coordinator is obligated to, comply with Applicable Laws, including the Tariff, relating to RAR, LAR, and FCR;
- (j) Prior to the start of the Delivery Term, Seller will notify the Scheduling Coordinator of the Unit that, throughout the Delivery Term, has transferred the Designated RA Capacity to Buyer, and the Scheduling Coordinator is obligated to deliver the Supply Plans in accordance with this Agreement and the Tariff;
- (k) Prior to the start of the Delivery Term, Seller will notify the Scheduling Coordinator of the Unit that Seller is obligated, throughout the Delivery Term, to cause the Unit's Scheduling Coordinator to provide to the Buyer, at least fifteen (15) Business Days before the Notification Deadline, the Designated RA Capacity of the Unit that is to be submitted in the Supply Plan associated with this Agreement for the applicable period; and
- (l) Prior to the start of the Delivery Term, Seller will notify the Unit's Scheduling Coordinator that, throughout the Delivery Term, Buyer is entitled to the revenues set forth in Section 3.11 and that such Scheduling Coordinator is obligated to promptly deliver those revenues to Buyer, along with appropriate documentation supporting the amount of those revenues.

(m) Promptly following the Effective Date, Seller will apply to FERC for market rate sales authority to participate in CAISO and to effectuate the transaction contemplated by this Agreement and Seller will maintain such authority throughout the Delivery Term.

10.4 Buyer Representations, Warranties and Covenants.

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.).

ARTICLE 11: CONFIDENTIALITY

- (a) Neither Party shall disclose the terms or conditions of this Agreement or information exchanged between the Parties pursuant to this Agreement ("Confidential Information") to a third party (other than the Party's or its Affiliates' employees, lenders or potential lenders, investors or potential investors, counsel, accountants or advisors who have a need to know such information and have agreed to keep such terms confidential) except in order to fulfill such Party's obligations under this Agreement or to comply with any applicable law, regulation, or any exchange, control area or independent system operator rule or in connection with any court or regulatory proceeding; *provided*, *however*, each Party shall, to the extent practicable, use reasonable efforts to prevent or limit the disclosure. The Parties shall be entitled to all remedies available at law or in equity to enforce, or seek relief in connection with, this confidentiality obligation.
- (b) Notwithstanding the foregoing, the Parties agree that Buyer may disclose the information pertaining to this Agreement to any Governmental Body, the CPUC, the CAISO or any LRA having jurisdiction in order to support its LAR Showings, RAR Showings and/or FCR Showings, as applicable, and Seller may disclose the transfer of the Designated RA Capacity under this Agreement to the Scheduling Coordinator of the Unit in order for such Scheduling Coordinator to timely submit accurate Supply Plans; *provided*, each disclosing Party shall use reasonable efforts to limit, to the extent possible, the ability of any such applicable Governmental Body, CAISO, or Scheduling Coordinator to further disclose such information. In addition, in the event Buyer resells all or any portion of the Designated RA Capacity to another party, Buyer shall be permitted to disclose to the other party to such resale transaction all such information to the extent such disclosure is necessary to affect such resale transaction; *provided*, such other party agrees to keep such information confidential.
- (c) Seller acknowledges that Buyer is subject to the California Constitution Article 1, Section 3, and the California Public Records Act, Cal. Gov. Code § 6250 et seq. ("Public Records Act") in regard to the documents comprising this Agreement, which items may constitute public records subject to inspection and copying by the public under the authority of the California Constitution and the Public Records Act. Buyer shall, consistent with those laws, use reasonable

efforts to provide Seller with notice of any third-party request to inspect or copy any of the documents that comprise this Agreement, which Seller might deem confidential and exempt from disclosure, in order that Seller may timely seek to protect those documents from disclosure to the third party. Seller acknowledges and agrees that Buyer shall not be liable to Seller if Buyer makes disclosure in accordance with the California Constitution and/or the Public Records Act before Seller has timely obtained an order to prevent Buyer from making the requested disclosure to the third party.

ARTICLE 12: BUYER'S RE-SALE OF PRODUCT

No less than fifteen (15) days prior to the Notification Deadline for any Showing Month of the Delivery Term, Buyer may provide written notice to Seller of Buyer's intent to re-sell all or a portion of the Product and any associated rights, in each case, acquired under this Agreement. If Buyer re-sells all or a portion of the Product and any associated rights acquired under this Agreement in accordance with this Article 12 ("Resold Product"), Seller agrees, and agrees to cause the Unit's Scheduling Coordinator, to follow Buyer's reasonable instructions with respect to providing such Resold Product to subsequent purchasers of such Resold Product to the extent such instructions are consistent with Seller's obligations under this Agreement. Seller further agrees, and agrees to cause the Unit's Scheduling Coordinator, to take all commercially reasonable actions and execute any and all documents or instruments reasonably necessary to allow such subsequent purchasers to use such Resold Product in a manner consistent with Buyer's rights under this Agreement. If Buyer incurs any liability to any purchaser of such Resold Product directly due to the failure of Seller or the Unit's Scheduling Coordinator to comply with the terms of this Agreement, then Seller shall be liable to Buyer for any liabilities Seller would have incurred under this Agreement if Buyer had not resold the Product, including without limitation, pursuant to Sections 3.8 and 3.9.

In the event there is any Resold Product, Buyer agrees to notify Seller that such a sale has occurred and agrees to provide Seller with the information specified below promptly following such sale (and any other information reasonably requested by Seller so that Seller may perform its obligations in this Article 12) and promptly notify Seller of any subsequent changes to such information with respect to any particular sale: (i) benefitting load serving entity SC identification number (SCID), (ii) volume (in MW) of Resold Product, and (iii) subsequent sale delivery period for Resold Product.

ARTICLE 13: COMPLIANCE OBLIGATION

The Parties acknowledge and agree that a material purpose of this Agreement is to enable Buyer to satisfy its Compliance Obligation. If, at any time during the Term, the Unit is not qualified to produce Product, including RAR Attributes, LAR Attributes, and FCR Attributes, as applicable, including due to any action by the CPUC, CAISO or any Governmental Body having jurisdiction that results in any change in Applicable Law occurring after the Effective Date that changes the Resource Adequacy Requirements such that the Product can no longer be counted towards Buyer's Compliance Obligation (a "Compliance Issue"), the Parties shall work in good faith to revise this Agreement so that the Parties can perform their obligations regarding the purchase and sale of Product sold hereunder in order to maintain the original intent; provided, however, in no event shall Seller be obligated to undertake capital improvements, Unit enhancements, or the construction of

new facilities. If a Compliance Issue results in the Product not being able to be counted towards Buyer's Compliance Obligation, and the Parties have not reached agreement on amendments within thirty (30) days after the initiation of discussions regarding the Compliance Issue that would allow the Product to be able to be counted towards Buyer's Compliance Obligation, Buyer may terminate this Agreement upon written notice to Seller, which shall be effective the next Business Day after such notice is received, and any such termination shall be without liability to either Party, subject to payment of any amounts owing as of the effective date of such termination.

ARTICLE 14: COLLATERAL REQUIREMENTS

14.1 [Reserved].

14.2 Performance Security.

Seller shall deliver Performance Security to Buyer on or before the Initial Delivery Date. Seller shall maintain the Performance Security in full force and effect, and shall within ten (10) Business Days after any draws made by Buyer in accordance with this Agreement replenish the Performance Security, until the following have occurred: (a) the Delivery Term has expired or terminated early; and (b) all payment obligations of Seller then due and payable under this Agreement, including compensation for penalties, termination damages, indemnification payments orother 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 end of the Delivery Term, or (iii) fails to honor Buyer's properly documented request todraw 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.

14.3 First Priority Security Interest in Cash or Cash Equivalent Collateral.

- (a) 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 the Performance Security, any other cash collateral and cash equivalent collateral posted under this Agreement, 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.
- (b) Upon or any time after the occurrence 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 Performance Security, Buyer may do any one or more of the following:

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- (i) Exercise any of its rights and remedies with respect to the Performance Security, as applicable, including any such rights and remedies under Applicable Law then in effect:
- (ii) Draw on any outstanding Letter of Credit issued for its benefit and retain any cash held by Buyer as Performance Security; and
- (iii) Liquidate Performance Security 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.

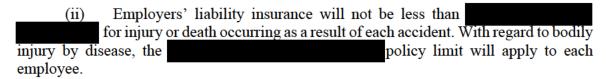
ARTICLE 15: INSURANCE

15.1 Insurance.

Throughout the Term, Seller shall procure and maintain the following insurance coverage and require and cause its contractors to maintain the same levels of coverage. For the avoidance of doubt, the obligations of the Seller in this Section 15.1 constitute a material obligation of this Agreement.

(a) Workers' Compensation and Employers' Liability.

(i) If it has employees, workers' compensation insurance indicating compliance with any applicable labor codes, acts, Applicable Laws or statutes, California state or federal, where Seller performs Work.



(b) <u>Commercial General Liability.</u>

(i) Commercial general liability insurance, including products and completed operations and personal injury insurance, in a minimum amount of per occurrence, and an annual aggregate of not less than , endorsed to provide contractual liability in said amount (subject to policy terms and conditions), specifically covering Seller's insurable indemnity obligations under this Agreement and including Buyer as an additional insured but only to the extent of Seller's insurable indemnity obligations under this Agreement. Limits may be satisfied through a combination of primary and excess policies.

- (ii) An umbrella insurance policy in a minimum limit of liability of
- (iii) Defense costs shall be provided as an additional benefit and not included within the limits of liability. Such insurance shall contain standard cross-liability and severability of interest provisions.

(c) Business Auto.

- (i) Business auto insurance for bodily injury and property damage with limits of per occurrence.
- (ii) 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.

(d) <u>Construction All-Risk Insurance.</u>

(i) During the construction of the Unit prior to the Initial Delivery Date, construction all-risk form property insurance covering the Unit during such construction periods, and naming Seller (and Lender if any) as the loss payee.

(e) Contractor's Pollution Liability.

- (i) If the scope of Work involves areas of known pollutants or contaminants, Seller shall maintain or require to be maintained, pollution liability coverage for bodily injury, property damage, including clean-up costs and defense costs resulting from sudden, and accidental conditions, including the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, hydrocarbons, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water shall be maintained.
- (ii) The limit will be at least each occurrence for bodily injury and property damage.
- (iii) The policy will endorse Buyer as additional insured but only to the extent of Seller's insurable indemnity obligations under this Agreement.

15.2 Evidence of Insurance.

Within ten (10) days after the Effective Date and upon annual renewal thereafter, Seller shall deliver to Buyer certificates of insurance evidencing the coverage required under this Agreement. These certificates shall specify that Buyer shall be given at least thirty (30) days prior notice by Seller in the event of any cancellation or termination of coverage, except ten (10) days for nonpayment of premium. With the exception of Workers Compensation/Employers Liability, such insurance shall be primary coverage without right of contribution from any insurance of Buyer.

ARTICLE 16: UNIT CONSTRUCTION AND INITIAL DELIVERY DATE

16.1 Construction of the Unit.

- (a) <u>Construction Start</u>. "<u>Construction Start</u>" will occur upon satisfaction of the following: (i) Seller has acquired the applicable regulatory authorizations, approvals and permits required for the commencement of construction of the Unit, (ii) Seller has engaged all contractors and ordered all essential equipment and supplies as, in each case, can reasonably be considered necessary so that physical construction of the Unit may begin and proceed to completion without foreseeable interruption of material duration, and (iii) Seller has executed an engineering, procurement, and construction contract (or equivalent agreements) and issued thereunder a notice to proceed or its equivalent that authorizes the contractor to mobilize to Site and begin physical construction of the Unit 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 Exhibit B hereto, and the date certified therein shall be the "Construction Start Date."
- (b) <u>Progress Reports.</u> The Parties agree time is of the essence in regard to the Agreement. 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 Initial Delivery Date, Seller shall provide to Buyer a Progress Report and agree to 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 Exhibit F. 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. Seller shall also provide Buyer with any information in Seller's possession that is reasonably requested by Buyer for Buyer to demonstrate to the CPUC, CAISO, or other Governmental Bodies that Buyer has met its applicable resource adequacy requirements, including providing status reports to the CPUC with respect to the Unit.

16.2 Initial Delivery Date.

- (a) <u>Initial Delivery</u>. "<u>Initial Delivery</u>" means the condition existing when Seller has fulfilled all of the conditions precedent in Section 2.2 of the Agreement and provided notice to Buyer substantially in the form of Exhibit C. Seller shall cause Initial Delivery for the Unit to occur by the Guaranteed Initial Delivery Date, as such date may be extended by a Development Cure Period pursuant to Section 16.2(c), subject to the limitations in Section 16.2(d).
- (b) Reduction to Contract Quantity. If, on the Initial Delivery Date, Seller shall have obtained an NQC and/or EFC, as applicable, for the Unit from the CPUC that is less than the Contract Quantity of RAR Attributes and/or FCR Attributes set forth on the Cover Sheet as of the Effective Date, as applicable, then the following sections of this Agreement shall be automatically amended: (i) the Unit NQC and/or Unit EFC in Section B of the Cover Sheet shall be revised to equal the maximum amount of NQC and/or EFC, as applicable, established for the Unit by the CPUC; (ii) the Contract Quantities in Section F of the Cover Sheet shall be revised to equal the maximum amount of NQC and/or EFC, as applicable, established for the Unit by the CPUC; (iii) the Contract Quantity of LAR Attributes, if applicable, shall equal the revised Contract Quantity

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of RAR Attributes; and (iv) the quantity of NQC set forth in Section 2.2(h) shall be revised to equal the maximum amount of NQC established for the Unit by the CPUC, if such amount is less than the amount set forth in Section 2.2(h) as of the Effective Date.



- (e) <u>Termination for Failure to Achieve Initial Delivery Date</u>. If the Unit has not achieved Initial Delivery on or before the Guaranteed Initial Delivery Date, as such date may be extended by a Development Cure Period pursuant to pursuant to Section 16.2(c) subject to the limitations in Section 16.2(d), then Buyer may terminate this Agreement upon written notice to Seller, which termination shall be effective the next Business Day after such notice is received, and any such termination shall be without liability to Seller, subject to payment of any amounts owing as of the effective date of such termination and provided that Seller shall be subject to Section 16.2(f).
- (f) <u>Limitation on Seller's Ability to Make or Agree to Third-Party Sales from the Unit after Early Termination Date</u>. If this Agreement is terminated by either Party prior to the Initial Delivery Date for any reason other than a Buyer Event of Default, neither Seller nor Seller's Affiliates may sell, market or deliver any Product associated with or attributable to the Unit to a party other than Buyer for a period of two (2) years following such termination, 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 on terms and conditions materially similar to the terms and conditions contained in this Agreement (including price) and Buyer fails to accept such offer within forty-five (45) days of Buyer's receipt thereof. Neither Seller nor Seller's Affiliates may sell or transfer the Unit, or any part thereof, or land rights or interests in the Site (including the interconnection queue position of the Unit) so long as the limitations contained in this Section 16.2(f) apply, unless the transferee agrees to be bound by the terms set forth in this Section 16.2(f)

pursuant to a written agreement approved by Buyer in its reasonable discretion. Seller shall indemnify and hold Buyer harmless from all benefits lost and other damages sustained by Buyer as a result of any breach by Seller of its covenants contained within this Section 16.2(f).

ARTICLE 17: MISCELLANEOUS

17.1 Title and Risk of Loss.

Title to and risk of loss related to the Product shall transfer from Seller to Buyer at the Delivery Point. Seller warrants that it will deliver to Buyer the Designated RA Capacity free and clear of all liens, security interests, claims and encumbrances or any interest therein or thereto by any person arising prior to the Delivery Point.

17.2 Indemnity.

- (a) <u>Indemnity by Seller</u>. Seller shall release, indemnify and hold harmless Buyer or Buyers' respective directors, officers, agents, and representatives against and from any and all loss, Claims, actions or suits, including costs and attorney's fees associated with damage to third parties resulting from, or arising out of or in any way connected with Seller's operation and/or maintenance of the Unit, including without limitation any loss, Claim, action or suit, for or on account of injury to, bodily or otherwise, or death of persons, or for damage to or destruction of property belonging to such third parties, excepting only such loss, Claim, action or suit as may be caused solely by the willful misconduct or gross negligence of Buyer, its Affiliates, or Buyers' and Affiliates' respective agents, employees, directors, or officers.
- (b) <u>Indemnity by Buyer</u>. Buyer shall release, indemnify and hold harmless Seller, its directors, officers, agents, and representatives against and from any and all loss, Claims, actions or suits, including costs and attorney's fees associated with damage to third parties resulting from, or arising out of or in any way connected with Buyer's access to the Unit site, including any loss, Claim, action or suit, for or on account of injury to, bodily or otherwise, or death of persons, or for damage to or destruction of property belonging to such third parties, excepting only such loss, Claim, action or suit as may be caused solely by the willful misconduct or gross negligence of Seller, its Affiliates, or Seller's and Affiliates' respective agents, employees, directors or officers.
- (c) <u>No Dedication</u>. Without limitation of each Party's obligations under Sections 17.2(a) and 17.2(b), nothing in this Agreement shall be construed to create any duty to, any standard of care with reference to, or any liability to any person or entity not a Party to this Agreement. No undertaking by one Party to the other under any provision of this Agreement shall constitute the dedication of that Party's system or any portion thereof to the other Party or the public, nor affect the status of Buyer as an independent public utility corporation or Seller as an independent individual or entity.

17.3 Assignment.

(a) Neither Party shall assign this Agreement or its rights hereunder without the prior written consent of the other Party, which consent shall not be unreasonably withheld, conditioned, or delayed; *provided*, *however*, Seller may, without the consent of Buyer (and without relieving

itself from liability hereunder), (i) transfer, sell, pledge, encumber or assign this Agreement or the accounts, revenues or proceeds hereof in connection with any financing or other financial arrangements, (ii) transfer or assign this Agreement to an affiliate of such Party which affiliate's creditworthiness is equal to or higher than that of such Party, or (iii) transfer or assign this Agreement to any person or entity succeeding to all or substantially all of the assets whose creditworthiness is equal to or higher than that of such Party; provided, however, that in the case of any such assignment pursuant to clause (ii) or clause (iii), any such assignee shall agree in writing to be bound by the terms and conditions hereof and so long as the transferring Party delivers such tax and enforceability assurance as the non-transferring Party may reasonably request. In connection with any financing or refinancing of the Unit by Seller, Buyer shall in good faith negotiate and agree upon a consent to collateral assignment of this Agreement substantially in the form of Exhibit H..

(b) In addition, Buyer shall work in good faith to: (i) agree upon and enter into such amendments to this Agreement as are reasonably requested by the Financing Parties in connection with the financing provided by such Financing Parties, provided that any such amendments: (A) do not materially reduce the benefits or materially increase the risk of Buyer hereunder; and (B) are reasonably acceptable to Buyer; (ii) agree upon and deliver a duly executed estoppel certificate and dating acknowledgement related to this Agreement, in form and substance satisfactory to Buyer, Seller and Seller's Financing Parties, in conjunction with the financing provided by such Financing Parties; and (iii) provide such other documents and technical assistance as Seller may reasonably request in connection with obtaining financing for the Unit. Seller shall pay Buyer's reasonable expenses, including attorneys' fees, incurred to provide consents, estoppels, or other required documentation in connection with Seller's financing of the Facility. Buyer shall have no obligation to provide any consent or estoppel, or enter into any agreement related to the financing of the Unit that materially and adversely affects any of Buyer's rights, benefits, risks or obligations under this Agreement, or to materially modify this Agreement.

17.4 Governing Law and Venue.

This Agreement and the rights and duties of the Parties hereunder shall be governed by and construed, enforced and performed in accordance with the laws of the state of California, without regard to principles of conflicts of Law. 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. Each of the Parties irrevocably and unconditionally agrees that any suit, action or other proceeding arising out of or relating to this Agreement, the transactions contemplated hereby, any provision hereof or the breach, performance, enforcement or validity or invalidity of this Agreement or any provision hereof shall be filed in either the United States District Court for the Southern District of California or the Superior Court of California, County of San Diego, as appropriate (and agrees not to commence any suit, action or proceeding relating thereto except in such courts). Each of the Parties irrevocably and unconditionally waives any objection to the laying of venue of any suit, action or proceeding arising out of or relating to this Agreement, the transactions contemplated hereby, any provision hereof or the breach, performance, enforcement or validity or invalidity of this Agreement or any provision hereof in the United States District Court for the Southern District of California or the Superior Court of California, County of San Diego, as appropriate, and hereby further irrevocably and unconditionally waives and agrees not to plead or claim in any such court that any such suit, action or proceeding brought in any such court has been brought in an inconvenient forum.

Notwithstanding the foregoing, each Party agrees that a final judgment (i.e., judgment after any appeals that may be duly made) in any suit, action or proceeding so brought shall be conclusive and may be enforced by suit on the judgment in any jurisdiction or in any other manner provided in law or in equity.

17.5 Notices.

All notices, requests, statements or payments shall be made as specified in Exhibit G. Notices (other than scheduling requests) shall, unless otherwise specified herein, be in writing and may be delivered by hand delivery, United States mail, overnight courier service or facsimile. Notice by facsimile or hand delivery shall be effective at the close of business on the day actually received, if received during business hours on a Business Day, and otherwise shall be effective at the close of business on the next Business Day. Notice by overnight United States mail or courier shall be effective on the next Business Day after it was sent. A Party may change its addresses by providing notice of same in accordance herewith.

17.6 Mobile-Sierra.

Absent the agreement of all Parties to the proposed change, the standard of review for changes to any rate, charge, classification, term or condition of this Agreement, whether proposed by a Party (to the extent that any waiver below is unenforceable or ineffective as to such Party), a non-party or FERC acting *sua sponte*, shall be the 'public interest' standard of review set forth in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956), and clarified by *Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1 of Snohomish*, 554 U.S. 527 (2008); *NRG Power Marketing LLC v. Maine Public Utility Commission*, 558 U.S. 527 (2010.

Notwithstanding any provision of this Agreement, and absent the prior written agreement of the Parties, each Party, to the fullest extent permitted by Applicable Laws, for itself and its respective successors and assigns, hereby also expressly and irrevocably waives any rights it can or may have, now or in the future, whether under Sections 205, 206, or 306 of the Federal Power Act or otherwise, to seek to obtain from FERC by any means, directly or indirectly (through complaint, investigation, supporting a third party seeking to obtain or otherwise), and each hereby covenants and agrees not at any time to seek to so obtain, an order from FERC changing any section of this Agreement specifying any rate or other material economic terms and conditions agreed to by the Parties.

17.7 General.

This Agreement (including the exhibits, schedules and any written supplements hereto, if any) constitutes the entire agreement between the Parties relating to the subject matter. Notwithstanding the foregoing, any collateral, credit support or margin agreement or similar arrangement between the Parties shall, upon designation by the Parties, be deemed part of this Agreement and shall be incorporated herein by reference. This Agreement shall be considered for all purposes as prepared through the joint efforts of the parties and shall not be construed against one party or the other as a result of the preparation, substitution, submission or other event of negotiation, drafting or execution hereof. Except to the extent herein provided for, no amendment or modification to this Agreement shall be enforceable unless reduced to writing and executed by

both Parties. Each Party agrees if it seeks to amend any applicable wholesale power sales tariff during the term of this Agreement, such amendment will not in any way affect outstanding transactions under this Agreement without the prior written consent of the other Party. Each Party further agrees that it will not assert, or defend itself, on the basis that any applicable tariff is inconsistent with this Agreement. This Agreement shall not impart any rights enforceable by any third party (other than a permitted successor or assignee bound to this Agreement). Waiver by a Party of any default by the other Party shall not be construed as a waiver of any other default. Any provision declared or rendered unlawful by any applicable court of law or regulatory agency or deemed unlawful because of a statutory change (individually or collectively, such events referred to as "Regulatory Event") will not otherwise affect the remaining lawful obligations that arise under this Agreement; provided, further, that if a Regulatory Event occurs, the Parties shall use commercially reasonable efforts to reform this Agreement in order to give effect to the original intention of the Parties. The term "including" when used in this Agreement shall be by way of example only and shall not be considered in any way to be in limitation. The headings used herein are for convenience and reference purposes only. All indemnity and audit rights shall survive the termination of this Agreement for twelve (12) months. This Agreement shall be binding on each Party's successors and permitted assigns.

17.8 Audit.

Each Party has the right, at its sole expense and during normal working hours, to examine the records of the other Party to the extent reasonably necessary to verify the accuracy of any statement, charge or computation made pursuant to this Agreement. If requested, a Party shall provide to the other Party statements evidencing the Designated RA Capacity delivered hereunder. If any such examination reveals any inaccuracy in any statement, the necessary adjustments in such statement and the payments thereof will be made promptly and shall bear interest calculated at the Interest Rate from the date the overpayment or underpayment was made until paid; *provided*, *however*, that no adjustment for any statement or payment will be made unless objection to the accuracy thereof was made prior to the lapse of twelve (12) months from the rendition thereof, and thereafter any objection shall be deemed waived.

17.9 Forward Contract.

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

17.10 Dispute Resolution.

(a) In the event of any claim, controversy or dispute between the Parties arising out of or relating to or in connection with this Agreement (including any dispute concerning the validity of this Agreement or the scope and interpretation of this Section 17.10) (a "<u>Dispute</u>"), any Party (the "<u>Notifying Party</u>") may deliver to the other Parties (the "<u>Recipient Party</u>") notice of the Dispute with a detailed description of the underlying circumstances of such Dispute (a "<u>Dispute Notice</u>"). The Dispute Notice shall include a schedule of the availability of the Notifying Party's senior officers (having a title of senior vice president (or its equivalent) or higher) duly authorized to settle the Dispute during the thirty (30) day period following the delivery of the Dispute Notice.

- (b) The Recipient Party shall, within five (5) Business Days following receipt of the Dispute Notice, provide to the Notifying Party a brief summary of the Recipient Party's position on the Dispute and a parallel schedule of availability of the Recipient Party's senior officers (having a title of senior vice president (or its equivalent) or higher) duly authorized to settle the Dispute. Following delivery of the respective senior officers' schedules of availability, the senior officers of the Parties shall meet and confer as often as they deem reasonably necessary during the remainder of the thirty (30) day period in good faith negotiations to resolve the Dispute to the satisfaction of each Party.
- (c) In the event a Dispute is not resolved pursuant to the procedures set forth in Sections 17.10(a) and (b) by the expiration of the thirty (30) day period set forth in Section 17.10(b), then a Party may pursue any legal remedy available to it in accordance with this Agreement.

17.11 Further Assurances.

For the duration of the Delivery Term, each Party shall take all commercially reasonable actions, including complying with all applicable registration and reporting requirements, and execute all documents or instruments necessary to perform the transactions contemplated by this Agreement, including to enable Buyer to use all of the RA Capacity and RAR Attributes committed by Seller to Buyer pursuant to this Agreement.

17.12 Execution.

A signature received via facsimile or email shall have the same legal effect as an original.

17.13 Joint Powers Authority.

Seller acknowledges and agrees that Buyer is organized as a Joint Powers Authority in accordance with the Joint Powers Act of the State of California (Government Code Section 6500 et seq.) pursuant to a Joint Powers Agreement and is a public entity separate from its members. Buyer shall solely be responsible for all debts, obligations and liabilities accruing and arising out of this Agreement and Seller agrees that it shall have no rights and shall not make any claim, take any actions or assert any remedies against any of Buyer's members in connection with this Agreement.

17.14 Dodd-Frank Act

The Parties intend this Agreement to be a "customary commercial arrangement" as described in Section II.A.1 of Commodity Futures Trading Commission, *Proposed Guidance, Certain Natural Gas and Electric Power Contracts*, 81 Fed. Reg. 20583 at 20586 (Apr. 8, 2016) and a "Forward Capacity Transaction" within the meaning of Commodity Futures Trading Commission, *Final Order in Response to a Petition From Certain Independent System Operators and Regional Transmission Organizations To Exempt Specified Transactions Authorized by a Tariff or Protocol Approved by the Federal Energy Regulatory Commission, 78 Fed. Reg. 19,880 (Apr. 2, 2013).*

17.15 Market-Based Rate Authority.

In addition to the covenant in Section 10.3(m), Seller shall, in accordance with Federal Energy Regulatory Commission (FERC) Order No. 697, upon request of Buyer, submit a letter of concurrence in support of any affirmative statement by Buyer that this Agreement does not transfer

"ownership or control of generation capacity" from Seller to Buyer as the term "ownership or control of generation capacity" is used in 18 CFR Section 35.42. Seller also shall not, in filings, if any, made subject to Order Nos. 652 and 697, claim that this Agreement conveys ownership or control of generation capacity from Seller to Buyer.

17.16 Rules of Interpretation.

In this Agreement, except as expressly stated otherwise or unless the context otherwise requires:

- (a) headings and the rendering of text in bold and italics are for convenience and reference purposes only and do not affect the meaning or interpretation of this Agreement;
- (b) words importing the singular include the plural and vice versa and the masculine, feminine and neuter genders include all genders;
- (c) the words "hereof", "herein", and "hereunder" and words of similar import shall refer to this Agreement as a whole and not to any particular provision of this Agreement;
- (d) a reference to an Article, Section, paragraph, clause, Party, or Exhibit is a reference to that Article, Section, paragraph, clause of, or that Party or Exhibit to, this Agreement unless otherwise specified;
- (e) a reference to a document or agreement, including this Agreement shall mean such document, agreement or this Agreement including any amendment or supplement to, or replacement, novation or modification of this Agreement, but disregarding any amendment, supplement, replacement, novation or modification made in breach of such document, agreement or this Agreement;
 - (f) a reference to a Person includes that Person's successors and permitted assigns;
- (g) the terms "include" and "including" mean "include or including (as applicable) without limitation" and any list of examples following such term shall in no way restrict or limit the generality of the word or provision in respect of which such examples are provided;
- (h) references to any statute, code or statutory provision are to be construed as a reference to the same as it may have been, or may from time to time be, amended, modified or reenacted, and include references to all bylaws, instruments, orders and regulations for the time being made thereunder or deriving validity therefrom unless the context otherwise requires;
- (i) in the event of a conflict, a mathematical formula or other precise description of a concept or a term shall prevail over words providing a more general description of a concept or a term;
- (j) references to any amount of money shall mean a reference to the amount in United States Dollars;
 - (k) the expression "and/or" when used as a conjunction shall connote "any or all of";

- (l) words, phrases or expressions not otherwise defined herein that (i) have a generally accepted meaning shall have such meaning in this Agreement or (ii) do not have well known and generally accepted meaning 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.

[Remainder of Page Intentionally Left Blank]

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

ENERSMART IMPERIAL BEACH BESS LLC, a California limited liability company By: By: Name: Name: Title: Title:

EXHIBIT A: 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:

APPLICANT DETAILS TO BE PROVIDED

Beneficiary:
[Buyer], a California joint powers authority
[Address]

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] (the "Letter of Credit") in favor of [Buyer], a California joint powers authority ("Beneficiary"), [Address], for an amount not to exceed the aggregate sum of U.S. \$[XXXXXX] (United States Dollars [XXXXX] and 00/100), pursuant to that certain Agreement dated as of _____ and as amended (the "Agreement") between [Applicant] and Beneficiary. This Letter of Credit shall become effective immediately and shall expire on [XXXXXX] 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 "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 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 documents presented under and in compliance with the terms of this Letter of Credit 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 registered mail or 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 is subject to the Uniform Customs and Practice for Documentary Credits (2007 Revision) International Chamber of Commerce Publication No. 600 (the "UCP"), except to the extent that the terms hereof are inconsistent with the provisions of the UCP, including but not limited to Articles 14(b) and 36 of the UCP, in which case the terms of this Letter of Credit shall govern. In the event of an act of God, riot, civil commotion, insurrection, war or any other cause beyond Issuer's control (as defined in Article 36 of the UCP) that interrupts Issuer's business and causes the place for presentation of the Letter of Credit to be closed for business on the last day for presentation, the Expiration Date of the Letter of Credit will be automatically extended without amendment to a date thirty (30) calendar days after the place for presentation reopens for business.

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.

All notices to Beneficiary shall be in writing and are required to be sent by certified letter, overnight courier, or delivered in person to: [Buyer], Chief Operating Officer, [Address]. Only notices to Beneficiary meeting the requirements of this paragraph shall be considered valid. Any notice to Beneficiary which is not in accordance with this paragraph shall be void and of no force or effect.

[Bank Name]	
[Insert officer name]	

[Insert officer title]

Exhibit A: (DRAW REQUEST SHOULD BE ON BENEFICIARY'S LETTERHEAD) **Drawing Certificate** [Insert Bank Name and Address] Ladies and Gentlemen: The undersigned, a duly authorized representative of [Buyer], a California joint powers authority, [Buyer address], as beneficiary (the "Beneficiary") of the Irrevocable Letter of Credit No. [XXXXXXX] (the "Letter of Credit") issued by [insert bank name] (the "Bank") by order of (the "Applicant"), hereby certifies to the Bank as follows: Applicant and Beneficiary are party to that certain Agreement dated as of 1. (the "Agreement"). 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) or \$ other occasion provided for in the Agreement where Beneficiary is authorized to draw on the letter of credit has occurred. OR Beneficiary is making a drawing under this Letter of Credit in the amount of U.S. \$ which equals the full available amount under the Letter of Credit, because we have received notice from the Bank that you have elected not to extend the Expiration Date of the Letter of Credit beyond its current Expiration Date and Applicant is required to maintain the Letter of Credit in force and effect beyond the expiration date of the Letter of Credit but has failed to provide Beneficiary with a replacement Letter of Credit or other acceptable instrument within thirty (30) days prior to such expiration date. The undersigned is a duly authorized representative of [Buyer], a California joint powers authority and is authorized to execute and deliver this Drawing Certificate on behalf of Beneficiary. You are hereby directed to make payment of the requested amount to [Buyer], a California joint powers authority by wire transfer in immediately available funds to the following account: [Specify account information] [Buyer] Name and Title of Authorized Representative Date

EXHIBIT B: FORM OF CONSTRUCTION START DATE CERTIFICATE

This certification of Construction Start Date ("Certification") is delivered by [Seller] ("Seller") to San Diego Community Power, a California joint powers authority ("Buyer") in accordance with the terms of that certain Agreement dated [date] ("Agreement") by and between Seller and Buyer. All capitalized terms used in this Certification but not otherwise defined herein shall have the respective meanings assigned to such terms in the Agreement.

Seller hereby certifies and represents to Buyer that the Construction Start (as defined in 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.

IN WITNESS WHEREOF, the undersigned has executed this Certification on behalf of Seller as of the day of
[Seller]
By:
Its:
Date

EXHIBIT C: FORM OF INITIAL DELIVERY DATE CERTIFICATE

This certification ("Certification") of Initial Delivery is delivered by [Seller] ("Seller") to San Diego Community Power, a California joint powers authority ("Buyer") in accordance with the terms of that Agreement dated [date] ("Agreement") by and between Seller and Buyer. All capitalized terms used in this Certification but not otherwise defined herein shall have the respective meanings assigned to such terms in the Agreement.

As of [DATE] , Seller hereby certifies and represents to Buyer the following:

a)	The Unit is fully operational, reliable and interconnected, fully integrated and synchronized with
	the Transmission System.
b)	Seller has installed equipment for the Unit with a nameplate capacity of no less than 3 MW.
c)	The Unit is fully capable of charging, storing and discharging energy up to no less than 3 MW and receiving instructions to charge, store and discharge energy.
d)	Seller's Interconnection Agreement provides for a maximum instantaneous discharge capability of
	no less than 3 MW.
e)	Authorization to parallel the Unit was obtained by the Participating Transmission Owner, SDG&E
	on [DATE].
SELL	ER:
Signat	ure:
Name:	<u></u>
Daic	
ENGI	NEER
Signat	ure:
Date:	

EXHIBIT D: DESCRIPTION OF UNIT

The following describes the Unit to be constructed, operated and maintained by Seller through the Term in accordance with the Agreement.

Unit name: EnerSmart Imperial Beach

Resource type: Battery Energy Storage

Nameplate capacity: 3 MW / 19.784 MWh

Location: San Diego, CA

Unit physical address: 1705 Palm Ave. San Diego, CA

Unit elevation: 15'

Unit latitude: 32 35' 00" N

Unit longitude: -117 05' 49" W

Interconnection: SDG&E

CAISO transmission access charge area (e.g. SDG&E): SDG&E

Point of interconnection: adjacent to site

Point of interconnection address: same as site address

Existing zone (e.g. SP-15): SP-15

PNode: IMPRLBCH 6 N001

CAISO Resource ID: 23NGR25823

Substation: Imperial Beach

EXHIBIT E: [RESERVED]

EXHIBIT F: PROGRESS REPORTING FORM

Each Progress Report must include the following items:

- 1. Executive summary.
- 2. Unit description.
- 3. Site plan of the Unit.
- 4. Description of any material planned changes to the Unit or the Site.
- 5. Schedule showing progress on Unit construction generally and achieving each of the Milestones and the Initial Delivery Date.
- 6. Summary of activities during the previous month, including any OSHA labor hour reports.
- 7. Forecast of activities scheduled for the current calendar quarter.
- 8. Written description about the progress relative to the Milestones and the Initial Delivery Date, including whether Seller is on schedule with respect to the same.
- 9. List of issues that are likely to potentially affect achievement of the Milestones and the Initial Delivery Date.
- 10. Progress and schedule of the EPC Contract, all major equipment supply agreements, Governmental Approvals, technical studies, and financing arrangements.
- 11. Pictures, in sufficient quantity and of appropriate detail, in order to document construction and interconnection progress.
- 12. Any other documentation reasonably requested by Buyer.

CONFIDENTIAL EXECUTION VERSION

EXHIBIT G: NOTICES

ENERSMART IMPERIAL BEACH BESS LLC, a California limited liability company ("Seller")	SAN DIEGO COMMUNITY POWER, a California joint powers authority ("Buyer")
All Notices:	All Notices:
Street: 400 S. Sierra Ave. Suite 100	P.O. Box 12716
City: Solana Beach, CA. 92075	San Diego, CA 92112
Attn: Skyler Tennis	Attn: Byron Vosburg, Chief Commercial
Phone: 951-317-4757	Officer
Email: skyler@enersmartstorage.com	Phone: (619) 880-6545
	Email: bvosburg@sdcommunitypower.org
Reference Numbers:	Reference Numbers:
Duns: n/a	Duns:
Federal Tax ID Number:	Federal Tax ID Number:
Invoices:	Invoices:
Attn: Eric Wheatley, VP Finance	Attn: SDCP Settlements
Phone: 704-763-8642	Phone: (619) 880-6545
E-mail: eric.wheatley@enersmartstorage.com	Email: settlements@sdcommunitypower.org
Scheduling:	Scheduling:
	Tenaska Power Services Co.
	Attn: Kara Whillock
	Phone: (972) 333-6122
	Email: kwhillock@tnsk.com
	Day Ahead: (817) 303-1115
	Real Time: (817) 303-1852
	Facsimile: (817) 303-1104
Payments:	Payments:
Attn: Eric Wheatley, VP Finance	Attn: Michael Maher
Phone: 704-763-8642	Phone: (415) 526-3020
E-mail:eric.wheatley@enersmartstorage.com	Email: mmaher@mahercpa.com
Wire Transfer:	Wire Transfer:
_	

ENERSMART IMPERIAL BEACH BESS LLC, a California limited liability company ("Seller")	SAN DIEGO COMMUNITY POWER, a California joint powers authority ("Buyer")
With additional Notices of an Event of	With additional Notices of an Event of
Default to:	Default to:
	Attn: SDCP General Counsel PO Box 12716 San Diego, CA 92112
	Email: legal@sdcommunitypower.org
Emergency Contact:	Emergency Contact:
	Attn: Byron Vosburg, Chief Commercial Officer Phone: (619) 880-6545 Email: bvosburg@sdcommunitypower.org

EXHIBIT H: FORM OF CONSENT TO COLLATERAL ASSIGNMENT

This Consent to Collateral Assignment (this "Consent") is entered into among (i) San Diego Community Power, a California joint powers authority ("SDCP"), (ii) [Name of Seller], a [Legal Status of Seller] (the "Project Company"), and (iii) [Name of Collateral Agent], a [Legal Status of Collateral Agent], as Collateral Agent for the secured parties under the Financing Documents referred to below (such secured parties together with their successors permitted under this Consent in such capacity, the "Secured Parties", and, such agent, together with its successors in such capacity, the "Collateral Agent"). SDCP, Project Company and Collateral Agent are hereinafter sometimes referred to individually as a "Party" and jointly as the "Parties". Capitalized terms used but not otherwise defined in this Consent shall have the meanings ascribed to them in the ESSA (as defined below).

RECITALS

The Parties enter into this Consent with reference to the following facts:

- A. Project Company and SDCP have entered into that certain Energy Storage Service Agreement, dated as of [Date] [List all amendments as contemplated by Section 3.4] ("ESSA"), pursuant to which Project Company will develop, construct, commission, test and operate the Facility (the "Project") and sell the Product to SDCP, and SDCP will purchase the Product from Project Company;
- B. As collateral for Project Company's obligations under the ESSA, Project Company has agreed to provide to SDCP certain collateral, which may include Performance Security and Development Security and other collateral described in the ESSA (collectively, the "ESSA Collateral");
- C. Project Company has entered into that certain [Insert description of financing arrangements with Lender], dated as of [Date], among Project Company, the Lenders party thereto and the Collateral Agent (the "Financing Agreement"), pursuant to which, among other things, the Lenders have extended commitments to make loans to Project Company;
- D. As collateral security for Project Company's obligations under the Financing Agreement and related agreements (collectively, the "Financing Documents"), Project Company has, among other things, assigned all of its right, title and interest in, to and under the ESSA and Project's Company's owners have pledged their ownership interest in Project Company (collectively, the "Assigned Interest") to the Collateral Agent pursuant to the Financing Documents; and
- E. It is a requirement under the Financing Agreement and the ESSA that SDCP and the other Parties hereto shall have executed and delivered this Consent.

AGREEMENT

In consideration of the foregoing, and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, and intending to be legally bound, the Parties hereto hereby agree as follows:

SECTION 1. CONSENT TO ASSIGNMENT, ETC.

1.1 Consent and Agreement.

SDCP hereby acknowledges:

- (a) Notice of and consents to the assignment as collateral security to Collateral Agent, for the benefit of the Secured Parties, of the Assigned Interest; and
- (b) The right (but not the obligation) of Collateral Agent in the exercise of its rights and remedies under the Financing Documents, to make all demands, give all notices, take all actions and exercise all rights of Project Company permitted under the ESSA (subject to SDCP's rights and defenses under the ESSA and the terms of this Consent) and accepts any such exercise; provided, insofar as the Collateral Agent exercises any such rights under the ESSA or makes any claims with respect to payments or other obligations under the ESSA, the terms and conditions of the ESSA applicable to such exercise of rights or claims shall apply to Collateral Agent to the same extent as to Project Company.

1.2 Project Company's Acknowledgement.

Each of Project Company and Collateral Agent hereby acknowledges and agrees that SDCP is authorized to act in accordance with Collateral Agent's instructions, and that SDCP shall bear no liability to Project Company or Collateral Agent in connection therewith, including any liability for failing to act in accordance with Project Company's instructions.

1.3 Right to Cure.

If Project Company defaults in the performance of any of its obligations under the ESSA, or upon the occurrence or non-occurrence of any event or condition under the ESSA which would immediately or with the passage of any applicable grace period or the giving of notice, or both, enable SDCP to terminate or suspend its performance under the ESSA (a "ESSA Default"), SDCP will not terminate or suspend its performance under the ESSA until it first gives written notice of such ESSA Default to Collateral Agent and affords Collateral Agent the right to cure such ESSA Default within the applicable cure period under the ESSA, which cure period shall run concurrently with that afforded Project Company under the ESSA. In addition, if Collateral Agent gives SDCP written notice prior to the expiration of the applicable cure period under the ESSA of Collateral Agent's intention to cure such ESSA Default (which notice shall include a reasonable description of the time during which it anticipates to cure such ESSA Default) and is diligently proceeding to cure such ESSA Default, notwithstanding the applicable cure period under the ESSA, Collateral Agent shall have a period of sixty (60) days (or, if such ESSA Default is for failure by the Project Company to pay an amount to SDCP which is due and payable under the ESSA other than to

provide ESSA Collateral, thirty (30) days, or, if such ESSA Default is for failure by Project Company to provide ESSA Collateral, ten (10) Business Days) from the Collateral Agent's receipt of the notice of such ESSA Default from SDCP to cure such ESSA Default; *provided*, (a) if possession of the Project is necessary to cure any such non-monetary ESSA Default and Collateral Agent has commenced foreclosure proceedings within sixty (60) days after notice of the ESSA Default and is diligently pursuing such foreclosure proceedings, Collateral Agent will be allowed a reasonable time, not to exceed one hundred eighty (180) days after the notice of the ESSA Default, to complete such proceedings and cure such ESSA Default, and (b) if Collateral Agent is prohibited from curing any such ESSA Default by any process, stay or injunction issued by any Governmental Authority or pursuant to any bankruptcy or insolvency proceeding or other similar proceeding involving Project Company, then the time periods specified herein for curing a ESSA Default shall be extended for the period of such prohibition, so long as Collateral Agent has diligently pursued removal of such process, stay or injunction. Collateral Agent shall provide SDCP with reports concerning the status of efforts to cure a ESSA Default upon SDCP's reasonable request.

1.4 Substitute Owner.

Subject to Section 1.7, the Parties agree that if Collateral Agent notifies (such notice, a "Financing Document Default Notice") SDCP that an event of default has occurred and is continuing under the Financing Documents (a "Financing Document Event of Default") then, upon a judicial foreclosure sale, non-judicial foreclosure sale, deed in lieu of foreclosure or other transfer following a Financing Document Event of Default, Collateral Agent (or its designee) shall be substituted for Project Company (the "Substitute Owner") under the ESSA, and, subject to Sections 1.7(b) and 1.7(c) below, SDCP and Substitute Owner will recognize each other as counterparties under the ESSA and will continue to perform their respective obligations (including those obligations accruing to SDCP and the Project Company prior to the existence of the Substitute Owner) under the ESSA in favor of each other in accordance with the terms thereof; provided, before SDCP is required to recognize the Substitute Owner, the Substitute Owner must (i) be a permitted assignee under the ESSA or (ii) have demonstrated to SDCP's reasonable satisfaction that the Substitute Owner has financial qualifications and operating experience [TBD] (a "Permitted Transferee"). For purposes of the foregoing, SDCP shall be entitled to assume that any such purported exercise of rights by Collateral Agent that results in substitution of a Substitute Owner under the ESSA is in accordance with the Financing Documents without independent investigation thereof but shall have the right to require that the Collateral Agent and its designee (if applicable) provide reasonable evidence demonstrating the same.

1.5 Replacement Agreements.

Subject to Section 1.7, if the ESSA is terminated, rejected or otherwise invalidated as a result of any bankruptcy, insolvency, reorganization or similar proceeding affecting Project Company, its owner(s) or guarantor(s), and if Collateral Agent or its designee directly or indirectly takes possession of, or title to, the Project (including possession by a receiver or title by foreclosure or deed in lieu of foreclosure) ("Replacement Owner"), SDCP shall, and Collateral Agent shall cause Replacement Owner to, enter into a new agreement with one another for the balance of the obligations under the ESSA remaining to be performed having terms substantially the same as the terms of the ESSA with respect to the remaining Term ("Replacement ESSA"); provided, before

SDCP is required to enter into a Replacement ESSA, the Replacement Owner must have demonstrated to SDCP's reasonable satisfaction that the Replacement Owner satisfies the requirements of a Permitted Transferee. For purposes of the foregoing, SDCP is entitled to assume that any such purported exercise of rights by Collateral Agent that results in a Replacement Owner is in accordance with the Financing Documents without independent investigation thereof but shall have the right to require that the Collateral Agent and its designee (if applicable) provide reasonable evidence demonstrating the same. Notwithstanding the execution and delivery of a Replacement ESSA, to the extent SDCP is, or was otherwise prior to its termination as described in this Section 1.5, entitled under the ESSA, SDCP may suspend performance of its obligations under such Replacement ESSA, unless and until all ESSA Defaults of Project Company under the ESSA or Replacement ESSA have been cured.

1.6 Transfer.

Subject to Section 1.7, a Substitute Owner or a Replacement Owner may assign all of its interest in the Project and the ESSA and a Replacement ESSA to a natural person, corporation, trust, business trust, joint venture, joint stock company, association, company, limited liability company, partnership, Governmental Authority or other entity (a "Person") to which the Project is transferred; *provided*, the proposed transferee shall have demonstrated to SDCP's reasonable satisfaction that such proposed transferee satisfies the requirements of a Permitted Transferee.

1.7 <u>Assumption of Obligations</u>.

(a) <u>Transferee</u>.

Any transferee under Section 1.6 shall expressly assume in a writing reasonably satisfactory to SDCP all of the obligations of Project Company, Substitute Owner or Replacement Owner under the ESSA or Replacement ESSA, as applicable, including posting and collateral assignment of the ESSA Collateral. Upon such assignment and the cure of any outstanding ESSA Default, and payment of all other amounts due and payable to SDCP in respect of the ESSA or such Replacement ESSA, the transferor shall be released from any further liability under the ESSA or Replacement ESSA, as applicable.

(b) Substitute Owner.

Subject to Section 1.7(c), any Substitute Owner pursuant to Section 1.4 shall be required to perform Project Company's obligations under the ESSA, including posting and collateral assignment of the ESSA Collateral; *provided*, the obligations of such Substitute Owner shall be no more than those of Project Company under the ESSA.

(c) No Liability.

SDCP acknowledges and agrees that neither Collateral Agent nor any Secured Party shall have any liability or obligation under the ESSA as a result of this Consent (except to the extent Collateral Agent or a Secured Party is a Substitute Owner or Replacement Owner) nor shall Collateral Agent or any other Secured Party be obligated or required to (i) perform any of Project Company's obligations under the ESSA, except as provided in Sections 1.7(a) and 1.7(b) and to

the extent Collateral Agent or a Secured Party is a Substitute Owner or Replacement Owner, or (ii) take any action to collect or enforce any claim for payment assigned under the Financing Documents. If Collateral Agent becomes a Substitute Owner pursuant to Section 1.4 or enters into a Replacement ESSA, Collateral Agent shall not have any personal liability to SDCP under the ESSA or Replacement ESSA and the sole recourse of SDCP in seeking enforcement of such obligations against Collateral Agent shall be to the aggregate interest of the Secured Parties in the Project; *provided*, such limited recourse shall not limit SDCP's right to seek equitable or injunctive relief against Collateral Agent, or SDCP's rights with respect to any offset rights expressly allowed under the ESSA, a Replacement ESSA or the ESSA Collateral.

1.8 Delivery of Notices.

SDCP shall deliver to Collateral Agent, concurrently with the delivery thereof to Project Company, a copy of each notice, request or demand given by SDCP to Project Company pursuant to the ESSA relating to (a) a ESSA Default by Project Company under the ESSA, (b) any claim regarding Force Majeure by SDCP under the ESSA, (c) any notice of dispute under the ESSA, (d) any notice of intent to terminate or any termination notice, and (e) any matter that would require the consent of Collateral Agent pursuant to Section 1.11 or any other provision of this Consent. Collateral Agent acknowledges that delivery of such notice, request and demand shall satisfy SDCP's obligation to give Collateral Agent a notice of ESSA Default under Section 1.3. Collateral Agent shall deliver to SDCP, concurrently with delivery thereof to Project Company, a copy of each notice, request or demand given by Collateral Agent to Project Company pursuant to the Financing Documents relating to a default by Project Company under the Financing Documents.

1.9 Confirmations.

SDCP will, as and when reasonably requested by Collateral Agent from time to time, confirm in writing matters relating to the ESSA (including the performance of same by Project Company); provided, such confirmation may be limited to matters of which SDCP is aware as of the time the confirmation is given and such confirmations shall be without prejudice to any rights of SDCP under the ESSA as between SDCP and Project Company.

1.10 Exclusivity of Dealings.

Except as provided in Sections 1.3, 1.4, 1.8, 1.9 and 2.1, unless and until SDCP receives a Financing Document Default Notice, SDCP shall deal exclusively with Project Company in connection with the performance of SDCP's obligations under the ESSA. From and after such time as SDCP receives a Financing Document Default Notice and until a Substitute Owner is substituted for Project Company pursuant to Section 1.4, a Replacement ESSA is entered into or the ESSA is transferred to a Person to whom the Project is transferred pursuant to Section 1.6, SDCP shall, until Collateral Agent confirms to SDCP in writing that all obligations under the Financing Documents are no longer outstanding, deal exclusively with Collateral Agent in connection with the performance of SDCP's obligations under the ESSA, and SDCP may irrevocably rely on instructions provided by Collateral Agent in accordance therewith to the exclusion of those provided by any other Person.

1.11 No Amendments.

To the extent permitted by Laws, SDCP agrees that it will not, without the Project Company obtaining prior written consent of Collateral Agent (not to be unreasonably withheld, delayed or conditioned) (a) enter into any material supplement, restatement, novation, extension, amendment or modification of the ESSA (b) terminate or suspend its performance under the ESSA (except in accordance with Section 1.3) or (c) consent to or accept any termination or cancellation of the ESSA by Project Company.

SECTION 2. PAYMENTS UNDER THE ESSA

2.1 <u>Payments</u>.

Unless and until SDCP receives written notice to the contrary from Collateral Agent, SDCP will make all payments to be made by it to Project Company under or by reason of the ESSA directly to Project Company. SDCP, Project Company, and Collateral Agent acknowledge that SDCP will be deemed to be in compliance with the payment terms of the ESSA to the extent that SDCP makes payments in accordance with Collateral Agent's instructions.

2.2 No Offset, Etc.

All payments required to be made by SDCP under the ESSA shall be made without any offset, recoupment, abatement, withholding, reduction or defense whatsoever, other than that expressly allowed by the terms of the ESSA.

SECTION 3. REPRESENTATIONS AND WARRANTIES OF SDCP

SDCP makes the following representations and warranties as of the date hereof in favor of Collateral Agent:

3.1 Organization.

SDCP is a joint powers authority and community choice aggregator duly organized and validly existing 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 its jurisdiction. SDCP has all requisite power and authority, corporate and otherwise, to enter into and to perform its obligations hereunder and under the ESSA, and to carry out the terms hereof and thereof and the transactions contemplated hereby and thereby.

3.2 <u>Authorization</u>.

The execution, delivery and performance by SDCP of this Consent and the ESSA have been duly authorized by all necessary corporate or other action on the part of SDCP and do not require any approval or consent of any holder (or any trustee for any holder) of any indebtedness or other obligation of SDCP which, if not obtained, will prevent SDCP from performing its obligations hereunder or under the ESSA except approvals or consents which have previously been obtained and which are in full force and effect.

3.3 Execution and Delivery; Binding Agreements.

Each of this Consent and the ESSA is in full force and effect, have been duly executed and delivered on behalf of SDCP by the appropriate officers of SDCP, and constitute the legal, valid and binding obligation of SDCP, enforceable against SDCP in accordance with its terms, except as the enforceability thereof may be limited by (a) bankruptcy, insolvency, reorganization, moratorium or other similar laws of general application affecting the enforcement of creditors' rights generally and (b) general equitable principles (whether considered in a proceeding in equity or at law).

3.4 No Default or Amendment.

Except as set forth in Schedule A attached hereto: (a) Neither SDCP nor, to SDCP's actual knowledge, Project Company, is in default of any of its obligations under the ESSA; (b) SDCP and, to SDCP's actual knowledge, Project Company, has complied with all conditions precedent to the effectiveness of its obligations under the ESSA; (c) to SDCP's actual knowledge, no event or condition exists which would either immediately or with the passage of any applicable grace period or giving of notice, or both, enable either SDCP or Project Company to terminate or suspend its obligations under the ESSA; and (d) the ESSA has not been amended, modified or supplemented in any manner except as set forth herein and in the recitals hereto.

3.5 <u>No Previous Assignments.</u>

SDCP has no notice of, and has not consented to, any previous assignment by Project Company of all or any part of its rights under the ESSA, except as previously disclosed in writing and consented to by SDCP.

SECTION 4. REPRESENTATIONS AND WARRANTIES OF PROJECT COMPANY

Project Company makes the following representations and warranties as of the date hereof in favor of the Collateral Agent and SDCP:

4.1 Organization.

Project Company is a [Legal Status of Seller] duly organized and validly existing under the laws of the state of its organization, and is duly qualified, authorized to do business and in good standing in every jurisdiction in which it owns or leases real property or in which the nature of its business requires it to be so qualified, except where the failure to so qualify would not have a material adverse effect on its financial condition, its ability to own its properties or its ability to transact its business. Project Company has all requisite power and authority, corporate and otherwise, to enter into and to perform its obligations hereunder and under the ESSA, and to carry out the terms hereof and thereof and the transactions contemplated hereby and thereby.

4.2 Authorization.

The execution, delivery and performance of this Consent by Project Company, and Project Company's assignment of its right, title and interest in, to and under the ESSA to the Collateral Agent pursuant to the Financing Documents, have been duly authorized by all necessary corporate or other action on the part of Project Company.

4.3 Execution and Delivery; Binding Agreement.

This Consent is in full force and effect, has been duly executed and delivered on behalf of Project Company by the appropriate officers of Project Company, and constitutes the legal, valid and binding obligation of Project Company, enforceable against Project Company in accordance with its terms, except as the enforceability thereof may be limited by (a) bankruptcy, insolvency, reorganization, moratorium or other similar laws of general application affecting the enforcement of creditors' rights generally and (b) general equitable principles (whether considered in a proceeding in equity or at law).

4.4 No Default or Amendment.

Except as set forth in Schedule B attached hereto: (a) neither Project Company nor, to Project Company's actual knowledge, SDCP, is in default of any of its obligations thereunder; (b) Project Company and, to Project Company's actual knowledge, SDCP, has complied with all conditions precedent to the effectiveness of its obligations under the ESSA; (c) to Project Company's actual knowledge, no event or condition exists which would either immediately or with the passage of any applicable grace period or giving of notice, or both, enable either SDCP or Project Company to terminate or suspend its obligations under the ESSA; and (d) the ESSA has not been amended, modified or supplemented in any manner except as set forth herein and in the recitals hereto.

4.5 <u>No Previous Assignments</u>.

Project Company has not previously assigned all or any part of its rights under the ESSA.

SECTION 5. REPRESENTATIONS AND WARRANTIES OF COLLATERAL AGENT

Collateral Agent makes the following representations and warranties as of the date hereof in favor of SDCP and Project Company:

5.1 <u>Authorization</u>.

The execution, delivery and performance of this Consent by Collateral Agent have been duly authorized by all necessary corporate or other action on the part of Collateral Agent and Secured Parties.

5.2 Execution and Delivery; Binding Agreement.

This Consent is in full force and effect, has been duly executed and delivered on behalf of Collateral Agent by the appropriate officers of Collateral Agent, and constitutes the legal, valid and binding obligation of Collateral Agent as Collateral Agent for the Secured Parties, enforceable against Collateral Agent (and the Secured Parties to the extent applicable) in accordance with its terms, except as the enforceability thereof may be limited by (a) bankruptcy, insolvency, reorganization, moratorium or other similar laws of general application affecting the enforcement of creditors' rights generally and (b) general equitable principles (whether considered in a proceeding in equity or at law).

SECTION 6. MISCELLANEOUS

6.1 Notices.

All notices and other communications hereunder shall be in writing, shall be deemed given upon receipt thereof by the Party or Parties to whom such notice is addressed, shall refer on their face to the ESSA (although failure to so refer shall not render any such notice or communication ineffective), shall be sent by first class mail, by personal delivery or by a nationally recognized courier service, and shall be directed (a) if to SDCP or Project Company, in accordance with [Notice Section of the ESSA] of the ESSA, (b) if to Collateral Agent, to [Collateral Agent Name], [Collateral Agent Address], Attn: [Collateral Agent Contact Information], Telephone: [___], Fax: [__], and (c) to such other address or addressee as any such Party may designate by notice given pursuant hereto.

6.2 Governing Law; Submission to Jurisdiction.

- (a) THIS CONSENT SHALL BE CONSTRUED IN ACCORDANCE WITH, AND THIS CONSENT AND ALL MATTERS ARISING OUT OF THIS CONSENT AND THE TRANSACTIONS CONTEMPLATED HEREBY SHALL BE GOVERNED BY, THE LAW OF THE STATE OF CALIFORNIA WITHOUT REGARD TO ANY CONFLICTS OF LAWS PROVISIONS THEREOF THAT WOULD RESULT IN THE APPLICATION OF THE LAW OF ANOTHER JURISDICTION.
- All disputes, claims or controversies arising out of, relating to, concerning or pertaining to the terms of this Consent shall be governed by the dispute resolution provisions of the ESSA. Subject to the foregoing, any legal action or proceeding with respect to this Consent and any action for enforcement of any judgment in respect thereof may be brought in the courts of the State of California or of the United States of America for the Central District of California, and, by execution and delivery of this Consent, each Party hereby accepts for itself and in respect of its property, generally and unconditionally, the non-exclusive jurisdiction of the aforesaid courts and appellate courts from any appeal thereof. Each Party further irrevocably consents to the service of process out of any of the aforementioned courts in any such action or proceeding by the mailing of copies thereof by registered or certified mail, postage prepaid, to its notice address provided pursuant to Section 6.1 hereof. Each Party hereby irrevocably waives any objection which it may now or hereafter have to the laying of venue of any of the aforesaid actions or proceedings arising out of or in connection with this Consent brought in the courts referred to above and hereby further irrevocably waives and agrees not to plead or claim in any such court that any such action or proceeding brought in any such court has been brought in an inconvenient forum. Nothing herein shall affect the right of any Party to serve process in any other manner permitted by law.

6.3 <u>Headings Descriptive</u>.

The headings of the several sections and subsections of this Consent are inserted for convenience only and shall not in any way affect the meaning or construction of any provision of this Consent.

6.4 <u>Severability</u>.

In case any provision in or obligation under this Consent shall be invalid, illegal or unenforceable in any jurisdiction, the validity, legality and enforceability of the remaining provisions or obligations, or of such provision or obligation in any other jurisdiction, shall not in any way be affected or impaired thereby.

6.5 Amendment, Waiver.

Neither this Consent nor any of the terms hereof may (a) be terminated, amended, supplemented or modified, except by an instrument in writing signed by SDCP, Project Company and Collateral Agent or (b) waived, except by an instrument in writing signed by the waiving Party.

6.6 Termination.

Each Party's obligations hereunder are absolute and unconditional, and no Party has any right, and shall have no right, to terminate this Consent or to be released, relieved or discharged from any obligation or liability hereunder until SDCP has been notified by Collateral Agent that all of the obligations under the Financing Documents shall have been satisfied in full (other than contingent indemnification obligations) or, with respect to the ESSA or any Replacement ESSA, its obligations under such ESSA or Replacement ESSA have been fully performed.

6.7 Successors and Assigns.

This Consent shall be binding upon each Party and its successors and assigns permitted under and in accordance with this Consent, and shall inure to the benefit of the other Parties and their respective successors and assignee permitted under and in accordance with this Consent. Each reference to a Person herein shall include such Person's successors and assigns permitted under and in accordance with this Consent.

6.8 Further Assurances.

SDCP hereby agrees to execute and deliver all such instruments and take all such action as may be necessary to effectuate fully the purposes of this Consent.

6.9 Waiver of Trial by Jury.

TO THE EXTENT PERMITTED BY APPLICABLE LAWS, THE PARTIES HEREBY IRREVOCABLY WAIVE ALL RIGHT OF TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM ARISING OUT OF OR IN CONNECTION WITH THIS CONSENT OR ANY MATTER ARISING HEREUNDER. EACH PARTY FURTHER WARRANTS AND REPRESENTS THAT IT HAS REVIEWED THIS WAIVER WITH ITS LEGAL COUNSEL, AND THAT IT KNOWINGLY AND VOLUNTARILY WAIVES ITS JURY TRIAL RIGHTS FOLLOWING CONSULTATION WITH LEGAL COUNSEL.

6.10 Entire Agreement.

This Consent and any agreement, document or instrument attached hereto or referred to herein integrate all the terms and conditions mentioned herein or incidental hereto and supersede all oral negotiations and prior writings in respect to the subject matter hereof. In the event of any conflict

between the terms, conditions and provisions of this Consent and any such agreement, document or instrument, the terms, conditions and provisions of this Consent shall prevail.

6.11 Effective Date.

This Consent shall be deemed effective as of the date upon which the last Party executes this Consent.

6.12 Counterparts; Electronic Signatures.

This Consent may be executed in one or more counterparts, each of which will be deemed to be an original of this Consent and all of which, when taken together, will be deemed to constitute one and the same agreement. The exchange of copies of this Consent and of signature pages by facsimile transmission, Portable Document Format (i.e., PDF), or by other electronic means shall constitute effective execution and delivery of this Consent as to the Parties and may be used in lieu of the original Consent for all purposes.

[Remainder of Page Left Intentionally Blank.]

IN WITNESS WHEREOF, the Parties hereto have caused this Consent to be duly executed and delivered by their duly authorized officers on the dates indicated below their respective signatures.

[NAME OF PROJECT COMPANY],	SAN DIEGO COMMUNITY POWER,
[Legal Status of Project Company].	a California joint powers authority.
By:	By:
[Name] [Title]	[Name] [Title]
Date:	Date:
[NAME OF COLLATERAL AGENT], [Legal Status of Collateral Agent].	
By:	
[Name] [Title]	
Date:	

SCHEDULE A

[Describe any disclosures relevant to representati	ions and warranties made in Section 3.4]
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SCHEDULE B

ſD	escribe any	disclosures	relevant to	representation	ns and	warranties	made in	Section 4.4
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ITEM 15 ATTACHMENT C

AMENDED AND RESTATED RESOURCE ADEQUACY AGREEMENT COVER SHEET

A. Parties

Seller: EnerSmart Mesa Heights BESS LLC, a California limited liability company

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

B. Unit Information

Unit Name:	EnerSmart Mesa Heights
Location:	7986 Dagget Street San Diego, CA 92111
CAISO Resource ID:	23NGR25822
Unit SCID:	AESM
Unit NQC:	3 MW
Unit EFC:	3 MW
Resource Type:	Battery Energy Storage System
Resource Category (1, 2, 3 or 4):	4
FCR Category (1, 2 or 3):	2
Path 26 (North or South):	SP26
Local Capacity Area (if any, as of Effective Date):	SDGE
Deliverability restrictions, if any, as described in most recent CAISO deliverability assessment:	TBD
Run Hour Restrictions	N/A

C. Resource Duration

Contract Year	Resource Duration		
1			
2			
3			
4			
5			
6			

CONFIDENTIAL EXECUTION VERSION

7		
8		
9		
10		
11		
12		
13		
14		
15		

D. RA Product and Attributes

Throughout the Delivery Term, Seller shall provide Buyer with the Designated RA Capacity of Product having the following attributes:

☑ RAR Attributes
☐ RAR Attributes with FCR Attributes
☐ LAR Attributes
☑ LAR Attributes with FCR Attributes
☐ FCR Attributes

E. Delivery Term

The Delivery Term is fifteen (15) Contract Years, subject to adjustment as set forth in Section 2.1(b).

F. Contract Quantities

The Contract Quantities for	each Showing Month of the	Delivery Term shall be:
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RAR Attributes:

LAR Attributes:

FCR Attributes:

G. Contract Price

The Contract Price shall be:

H. Seller's Security Amounts

Performance Security: \$20/kW multiplied by the Contract Quantity of RAR Attributes.

I. Milestones

Milestone	Date for Completion
Site Control obtained	October 2020
Interconnection Agreement executed	July 2022
Expected Construction Start Date	January 2025
Full Capacity Deliverability Status obtained	
Guaranteed Initial Delivery Date	

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PREAMBLE

This Amended and Restated Resource Adequacy Agreement ("<u>Agreement</u>") is entered into between EnerSmart Mesa Heights BESS LLC, a California limited liability company ("<u>Seller</u>") and **San Diego Community Power**, a California joint powers authority ("<u>Buyer</u>"), each individually a "<u>Party</u>" and together the "<u>Parties</u>," as of March ___, 2025 (the "<u>Effective Date</u>"). All capitalized terms used in this Agreement are used with the meanings ascribed to them in Article 1 to this Agreement.

RECITALS

WHEREAS, the Parties entered into that certain Resource Adequacy Agreement dated October 5, 2023 for the purchase and sale of Product from the Unit ("Original Agreement");

WHEREAS, the Parties hereby agree to amend, restate, replace and supersede the terms of the Original Agreement as set forth herein;

WHEREAS, Seller intends to develop, design, construct, own, and operate the Unit; 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 "Affiliate" means, with respect to any person, any other person (other than an individual) that, directly or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control with, such person. For this purpose, "control" means the direct or indirect ownership of fifty percent (50%) or more of the outstanding capital stock or other equity interests having ordinary voting power.
- 1.2 "Agreement" has the meaning set forth in the Preamble.
- 1.3 "Alternate Capacity" means any replacement RA Capacity having at least equivalent RAR Attributes, LAR Attributes and/or FCR Attributes as the Product provided by the Unit, including the same Slice-of-Day (as defined in the Resource Adequacy Rulings) and related characteristics, and any successor criteria applicable to the Unit; provided, if any portion of the Designated RA Capacity that Seller is seeking to replace is Designated RA Capacity having RAR Attributes and no LAR Attributes, and no such RAR capacity is available (such capacity shall also include FCR Attributes if this is a Flexible RA Product), then Seller may replace such portion of the Designated RA Capacity with capacity having RAR Attributes and LAR Attributes (as well as FCR Attributes if this is a Flexible RA Product).

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- 1.4 "Applicable Laws" means any law, rule, regulation, order, decision, judgment, or other legal or regulatory determination by any Governmental Body having jurisdiction over one or both Parties or this Agreement, including without limitation, the Tariff.
- 1.5 "Availability Incentive Payments" means Availability Incentive Payments as defined in the Tariff.
- 1.6 "Availability Standards" means Availability Standards as defined in the Tariff.
- 1.7 "Bankrupt" means with respect to any entity, such entity (a) files a petition or otherwise commences, authorizes or acquiesces in the commencement of a proceeding or cause of action under any bankruptcy, insolvency, reorganization or similar law, or has any such petition filed or commenced against it and such petition filed or commenced against it is not stayed or dismissed within ninety (90) days thereafter, (b) makes an assignment or any general arrangement for the benefit of creditors, (c) otherwise becomes bankrupt or insolvent (however evidenced), (d) has a liquidator, administrator, receiver, trustee, conservator or similar official appointed with respect to it or any substantial portion of its property or assets, or (e) is generally unable to pay its debts as they fall due.
- **1.8** "Business Day" means any day except a Saturday, Sunday, or a Federal Reserve Bank holiday in California.
- 1.9 "Buyer" has the meaning set forth in the Preamble.
- 1.10 "CAISO" means the California Independent System Operator or its successor.
- **1.11** "<u>CAISO Control Area</u>" means the Control Area (as defined in the Tariff) that is operated by the CAISO.
- 1.12 "CAISO Controlled Grid" has the meaning set forth in the Tariff.
- 1.13 "CAISO Offer Requirements" has the meaning set forth in Article 4.



- 1.15 "CIRA Tool" means the CAISO Customer Interface for Resource Adequacy.
- 1.16 "Claiming Party" has the meaning set forth in Section 3.12.
- 1.17 "Claims" means all third party claims or actions, threatened or filed and, whether groundless, false, fraudulent or otherwise, that directly or indirectly relate to the subject

matter of an indemnity, and the resulting losses, damages, expenses, attorneys' fees and court costs, whether incurred by settlement or otherwise, and whether such claims or actions are threatened or filed prior to or after the termination of this Agreement.

- 1.18 "Compliance Issue" has the meaning set forth in Article 13.
- 1.19 "Compliance Obligation" means the RAR, Local RAR, FCR, and any other resource adequacy or capacity procurement requirements imposed on LSEs by the CPUC pursuant to the Resource Adequacy Rulings, by the CAISO, by the WECC, or by any other Governmental Body having jurisdiction.
- 1.20 "Confidential Information" has the meaning set forth in Article 11.
- 1.21 "Construction Start" has the meaning set forth in Section 16.1(a).
- 1.22 "Construction Start Date" has the meaning set forth in Section 16.1(a).
- 1.23 "Contract Price" has the meaning set forth in Section G of the Cover Sheet.
- "Contract Quantity" means, with respect to any particular Showing Month of the Delivery Term, the amount of Product (in MWs) set forth in Section F of the Cover Sheet, which Seller has agreed to provide to Buyer from the Unit for such Showing Month, which amount may be amended in accordance with Section 16.2(b).
- 1.25 "Contract Year" means a period of twelve (12) consecutive months; the first Contract Year shall commence on the Initial Delivery Date; and each subsequent Contract Year shall commence on the anniversary of the Initial Delivery Date.
- 1.26 "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 a Terminated Transaction; and all reasonable attorneys' fees and expenses incurred by the Non-Defaulting Party in connection with the Terminated Transaction.
- 1.27 "CPUC" means the California Public Utilities Commission or its successor.
- 1.28 "<u>CPUC Filing Guide</u>" means the annual document issued by the CPUC which sets forth the guidelines, requirements and instructions for LSE's to demonstrate compliance with the CPUC's resource adequacy program.
- 1.29 "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.
- 1.30 "Defaulting Party" has the meaning set forth in Section 5.1.

- 1.31 "Delivery Point" has the meaning set forth in Section 3.4.
- 1.32 "<u>Delivery Term</u>" means the period of Contract Years set forth on the Cover Sheet beginning on the Initial Delivery Date as such period may be amended pursuant to Section 2.1(b), unless terminated earlier in accordance with the terms and conditions of this Agreement.
- 1.33 "<u>Designated RA Capacity</u>" shall be equal to, with respect to each Showing Month of the Delivery Term, the Contract Quantity of Product for each hour of the Resource Duration in such Showing Month able to be shown on Buyer's monthly or annual Supply Plan, including the amount of Contract Quantity that Seller has elected to provide as Alternate Capacity from one or more Replacement Units in accordance with Section 3.6.
- 1.34 "Development Cure Period" has the meaning set forth in Section 16.2(c).
- 1.35 "Dispute" has the meaning set forth in Section 17.10(a).
- 1.36 "Dispute Notice" has the meaning set forth in Section 17.10(a).
- 1.37 "Early Termination Date" has the meaning set forth in Section 5.2.
- **1.38** "Effective Date" is the date set forth in the Preamble.
- 1.39 "<u>Effective Flexible Capacity</u>" or "<u>EFC</u>" means the capacity of a resource that can be counted towards an LSE's Flexible Capacity Requirements, as identified from time to time by the Tariff, the Resource Adequacy Rulings, LRA, or other Governmental Body having jurisdiction.
- **1.40** "EPC Contract" means the Seller's engineering, procurement and construction contract with the EPC Contractor.
- **1.41** "EPC Contractor" means Seller's engineering, procurement and construction contractor or such Person performing those functions.
- 1.42 "Equitable Defenses" means any bankruptcy, insolvency, reorganization and other laws affecting creditors' rights generally, and with regard to equitable remedies, the discretion of the court before which proceedings to obtain same may be pending.
- 1.43 "Event of Default" has the meaning set forth in Section 5.1.
- 1.44 "FCR Attributes" means, with respect to a Resource Adequacy Resource, any and all flexible resource adequacy attributes that can be counted toward an LSE's FCR, as they are identified from time to time by the Resource Adequacy Rulings, the Tariff, an LRA, or other Governmental Body having jurisdiction including any Resource Duration attributes, exclusive of any LAR Attributes and any RAR Attributes.
- 1.45 "FCR Showings" means the FCR compliance showings (or similar or successor showings) an LSE is required to make to the CPUC (and, to the extent authorized by the CPUC, to

- the CAISO) pursuant to the Resource Adequacy Rulings and the Tariff, or to an LRA having jurisdiction over the LSE.
- **1.46** "FERC" means the Federal Energy Regulatory Commission or any successor government agency.
- 1.47 "<u>Final Deliverability</u>" means the condition existing when all network upgrades (which may include certain transmission plan upgrades) are completed and all transmission contingencies are resolved such that the Unit no longer requires annual Interim Deliverability Status allocations in order to deliver the Contract Quantity of RAR Attributes to Buyer from the Unit.
- **1.48** "Final Deliverability Date" means the date on which Final Deliverability occurs as evidenced in the Notice provided by Seller to Buyer pursuant to Section 3.3(c).
- 1.49 "<u>Financing Parties</u>" means the person(s) or entity(ies), if any, from time to time issuing or providing any construction, term, back leverage, working capital, bond or other financing, credit support, credit enhancements, interest rate hedging or other permanent debt, lease financing, cash equity, mezzanine or tax equity funding for the Unit, Seller, or any Affiliate of Seller, including any applicable trustee, collateral agent or similar person or entity.
- **1.50** "Flexible Capacity Category" has the meaning set forth in the Resource Adequacy Resource.
- 1.51 "Flexible Capacity Requirements" or "FCR" means the flexible capacity requirements established for LSEs by the CPUC pursuant to the Resource Adequacy Rulings, or by an LRA or other Governmental Body having jurisdiction.
- **1.52** "Flexible RA Product" means that the Product includes FCR Attributes, if applicable, as specified in Sections D and F of the Cover Sheet.
- 1.53 "Force Majeure" means an event or circumstance which prevents one Party from performing its obligations under the Agreement, which event or circumstance was not anticipated as of the Effective Date, which is not within the reasonable control of, or the result of the negligence of, the Claiming Party, and which, by the exercise of due diligence, the Claiming Party is unable to overcome or avoid or cause to be avoided. Force Majeure shall not be based on (i) the loss of Buyer's markets; (ii) Buyer's inability economically to use or resell the Product purchased hereunder; (iii) the loss or failure of Seller's supply (except to the extent due to a Force Majeure); or (iv) Seller's ability to sell the Product at a price greater than the Contract Price. Neither Party may raise a claim of Force Majeure based in whole or in part on curtailment by a Transmission Provider (i) unless such Party has contracted for firm transmission with a Transmission Provider for the Product to be delivered to or received at the Delivery Point and (ii) except to the extent such curtailment is due to Transmission Provider; provided, however, that existence of the foregoing factors shall not be sufficient to conclusively or presumptively prove the existence of a Force Majeure absent a showing of other facts and circumstances which in the aggregate with such factors establish that a Force Majeure as defined in the first sentence hereof has occurred.

- 1.54 "Full Capacity Deliverability Status" or "FCDS" has the meaning set forth in the Tariff.
- 1.55 "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 a Terminated Transaction, determined in a commercially reasonable manner.
- 1.56 "Governmental Approvals" means all authorizations, consents, approvals, waivers, exceptions, variances, filings, permits, orders, licenses, exemptions, notices to and declarations of or with any Governmental Body and shall include those siting and operating permits and licenses, and any of the foregoing under any applicable environmental law, that are required for the use and operation of the Unit.
- 1.57 "Governmental Body" means (a) any federal, state, local, municipal or other government; (b) any governmental, regulatory or administrative agency, commission or other authority lawfully exercising or entitled to exercise any administrative, executive, judicial, legislative, police, regulatory or taxing authority or power; (c) any court or governmental tribunal, but in all cases, excludes both Parties; and (d) CAISO.
- 1.58 "Governmental Charges" has the meaning set forth in Section 8.2.
- 1.59 "Guaranteed Initial Delivery Date" is the date set forth in Section I of the Cover Sheet, subject to extension pursuant to Section 16.2(c), but as limited by Section 16.2(d).
- 1.61
- 1.62 "<u>Initial Delivery</u>" has the meaning set forth in Section 16.2(a).

with the Transmission System during the Delivery Term.

1.64

- 1.63 "<u>Initial Delivery Date</u>" means the date on which Initial Delivery is achieved.
- 1.65 "Interconnection Agreement" means the interconnection agreement entered into by Seller pursuant to which the Unit and Seller's Interconnection Facilities will be interconnected
- 1.66 "<u>Interconnection Facilities</u>" means the interconnection facilities, control and protective devices and metering facilities required to connect the Unit with the Transmission System in accordance with the Interconnection Agreement.
- 1.67 "Interest Rate" means, for any date, the lesser of (a) the per annum rate of interest equal to the prime lending rate as may from time to time be published in *The Wall Street Journal* under "Money Rates" on such day (or if not published on such day on the most recent preceding day on which published), plus two percent (2%) and (b) the maximum rate permitted by applicable law.
- **1.68** "Interim Deliverability Notice" has the meaning set forth in Section 3.3(b).

- 1.69 "Interim Deliverability Period" has the meaning set forth in Section 3.3.
- 1.70 "Interim Deliverability Status" or "IDS" has the meaning set forth in the CAISO Tariff.
- 1.71 "Investment Grade" means a Credit Rating of at least

 (or, if such entities cease to provide Credit Ratings, from another comparable rating agency that is reasonably acceptable to the Parties).
- 1.72 "Joint Powers Act" means the Joint Exercise of Powers Act of the State of California (Government Code Section 6500 et seq.).
- 1.73 "Joint Powers Agreement" means that certain Joint Powers Agreement dated October 1, 2019, as amended from time to time, under which Buyer is organized as a Joint Powers Authority in accordance with the Joint Powers Act.
- 1.74 "LAR" means local area reliability, which is any program of localized resource adequacy requirements established for jurisdictional LSEs by the CPUC pursuant to the Resource Adequacy Rulings, or by another LRA having jurisdiction over the LSE, as implemented in the Tariff. LAR may also be known as local resource adequacy, local RAR, or local capacity requirement in other regulatory proceedings or legislative actions.
- 1.75 "LAR Attributes" means, with respect to a Unit, any and all resource adequacy attributes (or other locational attributes related to system reliability), as they are identified from time to time by the Resource Adequacy Rulings, CAISO, LRA, or other Governmental Body having jurisdiction, associated with the physical location or point of electrical interconnection of the Unit within the CAISO Control Area, that can be counted toward LAR, including any Resource Duration attributes, but exclusive of any RAR Attributes which are not associated with where in the CAISO Control Area the Unit is physically located or electrically interconnected. For clarity, it should be understood that if the CAISO, LRA, or other Governmental Body, defines new or re-defines existing local areas, then such change will not result in a change in payments made pursuant to this Agreement.
- 1.76 "LAR Showings" means the LAR compliance showings (or similar or successor showings) an LSE is required to make to the CPUC (and, to the extent authorized by the CPUC, to the CAISO) pursuant to the Resource Adequacy Rulings and the Tariff, or to an LRA having jurisdiction over the LSE.
- 1.77 "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 having a Credit Rating of at least with an outlook designation of outlook designation of from Moody's, in a form as set forth in Exhibit A or as otherwise acceptable to Buyer.
- **1.78** "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 a Terminated Transaction, determined in a commercially reasonable manner.
- 1.79 "LRA" has the meaning set forth in the Tariff.

- **1.80** "<u>LSE</u>" means load-serving entity. LSEs may be an investor-owned utility, an electric service provider, a community aggregator or community choice aggregator, or a municipality serving load in the CAISO Control Area (excluding exports).
- 1.81 "Milestones" has the meaning set forth in Section I of the Cover Sheet.
- 1.82 "Monthly RA Capacity Payment" has the meaning specified in Section 3.10(a).
- 1.83 "Moody's" means Moody's Investor Services, Inc. or its successor.
- 1.84 "NERC" means the North American Electric Reliability Corporation, or its successor.
- 1.85 "Net Qualifying Capacity" or "NQC" has the meaning set forth in the Tariff.
- 1.86 "Non-Availability Charges" has the meaning set forth in the Tariff.
- 1.87 "Non-Defaulting Party" has the meaning set forth in Section 5.2.
- 1.88 "Notification Deadline" has the meaning set forth in Section 3.6(a).
- 1.89 "Notifying Party" has the meaning set forth in Section 17.10(a).
- 1.90 "Outage" means any CAISO approved disconnection, separation, or reduction in the capacity of any Unit that relieves all or part of the obligations of the Unit under the CAISO Offer Requirements consistent with the Tariff. For the avoidance of doubt, Outage shall be deemed to include Planned Outage.
- 1.91 "Participating Transmission Owner" means an entity that (a) owns, operates and maintains transmission lines and associated facilities and/or has entitlements to use certain transmission lines and associated facilities and (b) has transferred to the CAISO operational control of such facilities and/or entitlements to be made part of the CAISO Grid. The Participating Transmission Owner for purposes of this Agreement is San Diego Gas & Electric.
- **1.92** "Performance Security" means collateral in the form of cash or a Letter of Credit in an amount set forth in Section G of the Cover Sheet.
- 1.93 "Planned Outage" means, subject to and as further described in the Tariff, a CAISO-approved planned or scheduled disconnection, separation or reduction in capacity of the Unit that is conducted for the purposes of carrying out routine repair or maintenance of such Unit, or for the purposes of new construction work for such Unit.
- 1.94 "Product" has the meaning set forth in Section 3.1.
- 1.95 "Progress Report" means a report substantially in the form set forth in Exhibit F, the requirements for which are further set forth in Section 16.1(b).
- 1.96 "RA Capacity" means the qualifying and deliverable capacity of the Unit for the number of hours corresponding to the applicable Resource Duration for RAR, LAR, and FCR

- purposes, as applicable, for the Delivery Term, as determined by the CPUC, CAISO, or other Governmental Body authorized to make such determination under Applicable Laws, including the Resource Adequacy Rulings. RA Capacity encompasses the applicable RAR Attributes, LAR Attributes and FCR Attributes of the capacity provided by a Unit.
- 1.97 "RAR" means the resource adequacy requirements, exclusive of LAR and FCR, established for LSEs by the CPUC pursuant to the Resource Adequacy Rulings, or by an LRA or other Governmental Body having jurisdiction.
- 1.98 "RAR Attributes" means, with respect to a Resource Adequacy Resource, any and all resource adequacy attributes, as they are identified from time to time by the Tariff, Resource Adequacy Rulings, LRA, or any Governmental Body having jurisdiction that can be counted toward RAR, including any Resource Duration attributes, exclusive of any LAR Attributes and FCR Attributes.
- 1.99 "RAR Showings" means the RAR compliance showings (or similar or successor showings) an LSE is required to make to the CPUC (and/or, to the extent authorized by the CPUC, to the CAISO), pursuant to the Tariff or Resource Adequacy Rulings, or to an LRA having jurisdiction.
- 1.100 "Recipient Party" has the meaning set forth in Section 17.10(a).
- 1.101 "Regulatory Event" has the meaning set forth in Section 17.7.
- 1.102 "Reliability Compensation Services Tariff" has the meaning set forth in the Tariff.
- 1.103 "Replacement Capacity" has the meaning specified in Section 3.8(a).
- 1.104 "Replacement Unit" means a unit that (i) has the same operational and locational characteristics set forth in Section B of the Cover Sheet, (ii) provides equivalent RAR Attributes, LAR Attributes and FCR Attributes, as applicable, as the Unit under the RAR counting rules established by the CPUC, CAISO, or other Governmental Body with jurisdiction; *provided however*, Seller may provide Replacement RA from a unit that does not have equivalent RAR Attributes, LAR Attributes and FCR Attributes, as applicable, with the prior consent of Buyer, and (iii) is capable of providing Alternate Capacity. A Replacement Unit may not be a coal-fired or nuclear generating resource.
- 1.105 "Required TPD Allocation" means an allocation of TP Deliverability from the CAISO that is sufficient for the Unit to obtain Full Capacity Deliverability Status for at least the Contract Quantity.
- 1.106 "Residual Unit Commitment" has the meaning set forth in the Tariff.
- 1.107 "Resold Product" has the meaning set forth in Article 12.
- 1.108 "Resource Adequacy Plan" has the meaning specified in the Tariff.

- 1.109 "Resource Adequacy Rulings" means any applicable CPUC ruling or decision relating to resource adequacy, and any other existing or subsequent 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 Term.
- 1.110 "Resource Adequacy Resource" has the meaning set forth in the Tariff.
- **1.111** "Resource Category" shall be as described in the CPUC Filing Guide, as such may be modified, amended, supplemented or updated from time to time.
- **1.112** "Resource Duration" means, for each Contract Year, the number of continuous hours of discharge as set forth on the Cover Sheet.
- **1.113** "RMR Contracts" has the meaning set forth in the Tariff.
- **1.114** "<u>S&P</u>" means the Standard & Poor's Rating Group (a division of McGraw-Hill, Inc.) or its successor.
- 1.115 "Schedule" or "Scheduling" means the actions of Seller, Buyer and/or their designated representatives, including each Party's Transmission Providers, if applicable, of notifying, requesting and confirming to each other the quantity and type of Product to be delivered on any given day or days during the Delivery Term at a specified Delivery Point.
- **1.116** "Scheduling Coordinator" has the same meaning as in the Tariff.
- 1.117 "Security Interest" has the meaning set forth in Section 14.3(a).
- 1.118 "Seller" has the meaning set forth in the Preamble.
- **1.119** "Settlement Amount" means, with respect to the Non-Defaulting Party, the aggregate Losses or Gains, and Costs, expressed in U.S. Dollars, which such party incurs as a result of a Terminated Transaction pursuant to Section 5.2.
- 1.120 "Showing Month" shall be the calendar month during the Delivery Term that is the subject of the RAR Showing, LAR Showing, and/or FCR Showing, as applicable, as set forth in the Resource Adequacy Rulings or Tariff. For illustrative purposes only, pursuant to the Resource Adequacy Rulings in effect as of the Effective Date, the monthly RAR Showing made in June is for the Showing Month of August.
- **1.121** "Shown Unit" means the Unit and any Replacement Units, from which Product is provided by Seller to Buyer.
- 1.122 "Site" means the real property on which the Unit is located as identified in Appendix D.
- 1.123 "Site Control" means that, for the Term, 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.

- **1.124** "Substitution Rules" has the meaning specified in the Tariff.
- 1.125 "Supply Plan" means the supply plans, or similar or successor filings, that each Scheduling Coordinator representing RA Capacity submits to the CAISO, LRA, or other Governmental Body, pursuant to Applicable Laws, in order for that RA Capacity to count, as applicable, for RAR Attributes, LAR Attributes, and/or FCR Attributes.
- **1.126** "Tariff" means the tariff and protocol provisions of the CAISO, including associated rules, procedures and business practice manuals, as amended or supplemented from time to time.
- 1.127 "Term" has the meaning set forth in Section 2.1.
- **1.128** "Terminated Transaction" has the meaning set forth in Section 5.2.
- 1.129 "Termination Payment" has the meaning set forth in Section 5.3.
- 1.130 "TP Deliverability" has the meaning set forth in the CAISO Tariff.
- 1.131 "Transmission Provider" means the CAISO.
- **1.132** "<u>Transmission System</u>" means the transmission facilities operated by the CAISO, which provide energy transmission service within the CAISO grid from the Delivery Point.
- 1.133 "<u>Unit</u>" shall mean the storage asset described in Section B of the Cover Sheet and Exhibit D.
- 1.134 "Work" means (a) work or operations performed by a Party or on a Party's behalf; and (b) materials, parts or equipment furnished in connection with such work or operations; including (i) warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "a Party's work"; and (ii) the providing of or failure to provide warnings or instructions.

ARTICLE 2: TERM; DELIVERY TERM; CONDITIONS PRECEDENT

2.1 Term.

- (a) The term of this Agreement shall commence upon the Effective Date and shall continue until the expiration of the Delivery Term, provided that this Agreement shall thereafter remain in effect until the Parties have fulfilled all obligations arising under this Agreement, including any compensation for the Product, Termination Payment, then-owing indemnification payments or other damages, are paid in full (whether directly or indirectly, such as through set-off or netting) and the Performance Security is released and/or returned (the "Term"). Upon Seller's request, Buyer will promptly confirm in writing the Initial Delivery Date following Seller's completion of all conditions precedent hereto.
- (b) If (i) the Initial IDS Year occurs after 2030, or (ii) the Unit experiences an IDS Gap Year during the period 2030 through the Final Deliverability Date, the Delivery Term shall be automatically reduced by five (5) years, for a maximum Delivery Term of ten (10) years.

(c) All provisions relating to invoicing, payment, delivery, settlement of other liabilities incurred pursuant to this Agreement and dispute resolution survive for the period necessary to effectuate the rights of the Party benefited by such provision except as otherwise specified herein. Notwithstanding anything to the contrary in this Agreement, (i) all rights under Sections 17.2 (Indemnities) and any other indemnity rights survive the end of the Delivery Term for an additional twelve (12) months; (ii) all rights and obligations under Article 11 (Confidentiality) survive the end of the Delivery Term for an additional two (2) years; (iii) all rights and obligations under Section 16.2(f) (Limitation on Seller's Ability to Make or Agree to Third-Party Sales from the Unit after Early Termination Date) survive early termination of this Agreement for an additional two (2) years; and (iv) all provisions relating to limitations of liability survive without limit.

2.2 Conditions Precedent to Initial Delivery Date.

Seller shall provide notice of expected Initial Delivery Date to Buyer no less than sixty (60) days in advance of such date. The Delivery Term shall not commence until Seller completes to Buyer's reasonable satisfaction each of the following conditions:

- (a) Seller shall have secured all CAISO and Governmental Approvals as are necessary for the safe and lawful operation and maintenance of the Unit and to enable Seller to deliver the Product to Buyer.
- (d) Seller shall have provided to Buyer a certification of Seller and a licensed professional engineer, substantially in the form attached hereto as Exhibit C, demonstrating that the Initial Delivery Date has occurred.
- (e) Seller shall have provided Performance Security to Buyer as required by Section 14.2.
- (f) As of the Initial Delivery Date, no Event of Default on the part of Seller shall have occurred and be continuing.
 - (g) Seller shall have obtained Interim Deliverability Status.
- (h) Subject to Section 16.2(b), Seller shall have obtained an NQC for the Unit of at least ...
- (i) In accordance with Section 3.7(a), Seller shall have (i) submitted, or caused the Unit's SC to submit, a notice to Buyer including Seller's proposed Supply Plan for the first Showing Month of the Delivery Term and (ii) submitted, or caused the Unit's SC to submit, a Supply Plan to CAISO for the first Showing Month of the Delivery Term.
- (j) Seller shall have delivered to Buyer all insurance documents required under Article 15.
- (k) As of the Initial Delivery Date, Seller shall have paid Buyer for all amounts owing under this Agreement, if any.

ARTICLE 3: TRANSACTION, DELIVERY AND PAYMENT

3.1 Resource Adequacy Capacity Product.

During the Delivery Term, Seller shall provide Buyer with RA Capacity from the Unit in the amount of the Contract Quantity of RAR Attributes, LAR Attributes, and FCR Attributes, with respect to each Showing Month (the "<u>Product</u>"). Seller's obligation to deliver the Contract Quantity of Product for each day of the Delivery Term is firm and will not be excused for any reason other than Force Majeure.

If the Unit is not available to provide the full amount of the Contract Quantity with respect to an applicable Showing Month for any reason other than Force Majeure, including, without limitation, any Outage or any adjustment of the RA Capacity of any Unit, then, Seller shall provide Buyer with Designated RA Capacity in amounts up to the Contract Quantity from one or more Replacement Units pursuant to Section 3.6. If Seller fails to provide Buyer with replacement Designated RA Capacity from Replacement Units pursuant to Section 3.6, then Seller shall be liable for damages and/or be required to indemnify Buyer for costs, penalties or fines pursuant to the terms of Sections 3.8 and 3.9.

Notwithstanding anything to the contrary herein, no energy or ancillary services associated with the Unit is required to be made available to Buyer as part of this Agreement and Buyer shall not be responsible for compensating Seller for Seller's commitments to the CAISO required by this Agreement.

3.2 Seller's and Buyer's Obligations.

Seller shall sell and deliver, or cause to be delivered, and Buyer shall purchase and receive, or cause to be received, the Designated RA Capacity of the Product as set forth in Section 3.7, and Buyer shall pay Seller the Monthly Capacity Payment for the Designated RA Capacity. Seller shall be responsible for any costs or charges imposed on or associated with the Product or its delivery of the Product up to the receipt of Product by Buyer pursuant to Section 3.7(b). Buyer shall be responsible for any costs or charges imposed on or associated with the Product or its receipt at and from Buyer's receipt of Product. For the duration of the Delivery Term, Seller shall take all commercially reasonable actions, including complying with all applicable registration and reporting requirements, and executing all documents or instruments necessary to enable Buyer to use all of the Designated RA Capacity and RAR Attributes committed by Seller to Buyer pursuant to this Agreement.

3.3 Deliverability.

The Parties acknowledge and agree that prior to the Final Deliverability Date for the Unit, Seller must obtain Interim Deliverability Status from the CAISO on a yearly basis in order to deliver Product to Buyer under this Agreement (such time period, the "Interim Deliverability Period").

(a) Beginning in the year prior to the first year of expected Commercial Operation and continuing throughout the Interim Deliverability Period, Seller shall take all commercially

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reasonable actions to obtain Interim Deliverability Status for the Unit in the amount of the Contract Quantity for each year of the Interim Deliverability Period.

- (b) Seller shall provide Buyer with Notice no later than August 1 of each year as to whether it has obtained Interim Deliverability Status for all or any portion of the Contract Quantity for the following calendar year ("Interim Deliverability Notice"); provided however, if CAISO has not provided notice to Seller by August 1, Seller shall provide the Interim Deliverability Notice to Buyer within two (2) Business Days of receipt of notice from CAISO of the deliverability status of the Unit. If the Unit receives partial Interim Deliverability Status in any year, the Monthly Capacity Payment shall be based on the amount of partial Interim Deliverability Status allocated to the Unit for the applicable year.
- (c) Seller shall provide Notice to Buyer of the Final Deliverability Date along with documentation from CAISO (or other evidence reasonably acceptable to Buyer) within three (3) Business Days of receipt of notice from CAISO; provided, if notice of the Final Deliverability Date is provided in a calendar year during which the Unit does not have Interim Deliverability Status, Seller shall provide Notice at least ninety (90) days prior to the first Showing Month after the Final Deliverability Date.

(d)

(e) If this Agreement is terminated by Buyer under Section 3.3(d), neither Seller nor Seller's Affiliates may sell, market or deliver any Product associated with or attributable to the Unit to a party other than Buyer for a period of two (2) years following the date of such termination 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 to Buyer on terms and conditions materially similar to the terms and conditions contained in this Agreement (including price) and Buyer fails to accept such offer within forty-five (45) days of Buyer's receipt thereof. Neither Seller nor Seller's Affiliates may sell or transfer the Unit, or any part thereof, or land rights or interests in the Site (including the interconnection queue position of the Unit) so long as the limitations contained in this Section 3.3(e) apply, unless the transferee agrees to be bound by the terms set forth in this Section 3.3(e) pursuant to a written agreement approved by Buyer in its reasonable discretion. Seller shall indemnify and hold Buyer harmless from all benefits lost and other damages sustained by Buyer as a result of any breach by Seller of its covenants contained within this Section 3.3(e).

3.4 Delivery Point.

The "<u>Delivery Point</u>" for the Unit shall be the CAISO Control Area, and if applicable, the LAR region in which the Unit is electrically interconnected.

3.5 Planned Outages.

Seller shall schedule all Planned Outages within the time period determined by the CAISO for the Unit as a Resource Adequacy Resource that is subject to the Availability Standards to qualify for

an "Approved Maintenance Outage" under the CAISO Tariff. Seller shall reimburse Buyer for any cost Buyer incurs to provide Replacement RA, as required by the CAISO, during any Planned Outages (including the cost of procuring Replacement RA for a full calendar month during any month in which a Planned Outage is planned or scheduled). Notwithstanding anything in this Agreement to the contrary, no Planned Outages of the Unit 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.

3.6 Alternate Capacity and Replacement Units.

- (a) The "Notification Deadline" for a given Showing Month shall be fifteen (15) Business Days before the earlier of the relevant deadlines for (a) the corresponding CPUC RAR Showings, LAR Showings and/or FCR Showings, as applicable for that Showing Month, or (b) submission of the CAISO Supply Plan filings applicable to that Showing Month.
- (b) If Seller is unable to provide the full Contract Quantity for any Showing Month for any reason, or if Seller desires to provide the Contract Quantity for any Showing Month from a Replacement Unit, then Seller may, at no additional cost to Buyer, provide Buyer with Alternate Capacity from one or more Replacement Units, with the total amount of Product provided to Buyer from the Unit and any Replacement Unit(s) up to an amount equal to the Contract Quantity for the applicable Showing Month; *provided*, in each case, Seller shall notify Buyer of the amount of Product that Seller will not be able to deliver from the Unit and the portion of the Contract Quantity for which Seller intends to provide Buyer with Alternate Capacity from identified Replacement Unit(s) no later than the Notification Deadline.
- (c) If Seller fails to provide Buyer the Contract Quantity of Product from the Unit or a Replacement Unit for a given Showing Month during the Delivery Term, then Buyer may, but shall not be required to, purchase replacement Product from a third party.
- (d) In the event Seller desired to provide Buyer with the Contract Quantity from a Replacement Unit owned and/or operated by a third party, Buyer shall be permitted to disclose to any such third party Confidential Information to the extent such disclosure is necessary to affect such transaction; *provided*, such other party agrees to keep such Confidential Information confidential.

3.7 Delivery of Product.

Seller shall provide Buyer with the Designated RA Capacity of Product for each Showing Month consistent with the following:

(a) No later than the Notification Deadline corresponding to each Showing Month of the Delivery Term, Seller shall submit, or cause the Shown Unit's Scheduling Coordinator to submit, Supply Plans to identify and confirm the Designated RA Capacity provided to Buyer for each Showing Month so that the total amount of Designated RA Capacity identified and confirmed for such Showing Month equals the Designated RA Capacity, unless specifically requested not to do so by the Buyer.

- (b) The Designated RA Capacity is delivered and received when the CIRA Tool shows that the Supply Plan submitted in compliance with Buyer's instructions, including Buyer's instructions to withhold all or part of the Designated RA Capacity from Seller's Supply Plan for any Showing Month during the Delivery Term, has been accepted by the CAISO. If CAISO rejects either the Supply Plan or Buyer's Resource Adequacy Plan with respect to any part of the Designated RA Capacity in any Showing Month, the Parties will confer, make such corrections as are necessary for acceptance, and resubmit the corrected Supply Plan or Resource Adequacy Plan for validation before the applicable Notification Deadline for the relevant Showing Month.
- (c) Consistent with the Substitution Rules, take all action, or cause each Unit's Scheduling Coordinator to take all action, to allow Buyer or a subsequent purchaser under Article 12 to utilize the Contract Quantity during each Showing Month under the Substitution Rules, including, but not limited to, ensuring that the Designated RA Capacity being provided in the pertinent Showing Month will qualify for substitution under the Substitution Rules and providing Buyer or subsequent purchaser under Article 12 with all information needed to utilize the Substitution Rules.

3.8 Damages for Failure to Provide Designated RA Capacity.

If Seller fails to provide Buyer with the Designated RA Capacity of Product for any Showing Month, and such failure is not excused under the terms of this Agreement, then the following shall apply:

- Capacity not provided by Seller with capacity having equivalent RAR Attributes, LAR Attributes and/or FCR Attributes as the Designated RA Capacity not provided by Seller; *provided*, if any portion of the Designated RA Capacity that Buyer is seeking to replace is Designated RA Capacity having RAR Attributes and no LAR Attributes, and no such RAR capacity is available (such capacity shall also include FCR Attributes if this is a Flexible RA Product), then Buyer may replace such portion of the Designated RA Capacity with capacity having RAR Attributes and LAR Attributes (as well as FCR Attributes if this is a Flexible RA Product) ("Replacement Capacity"), in either case, by entering into purchase transactions with one or more third parties, including, without limitation, third parties who have purchased capacity from Buyer, so long as such transactions are done at prevailing market prices. Buyer shall use commercially reasonable efforts to minimize damages when procuring any Replacement Capacity.
- (b) Seller shall pay to Buyer, on the date payment would otherwise be due in respect of the Showing Month for which the failure occurred, an amount equal to the positive difference, if any, between (A) the product of the Capacity Replacement Price times the amount of the Designated RA Capacity not provided by Seller and (B) the product of the Contract Price times the amount of the Designated RA Capacity not provided by Seller. If Seller fails to pay these damages, then Buyer may offset those damages owed it against any future amounts it may owe to Seller pursuant to Article 6.

3.9 Indemnities for Failure to Deliver Contract Quantity.

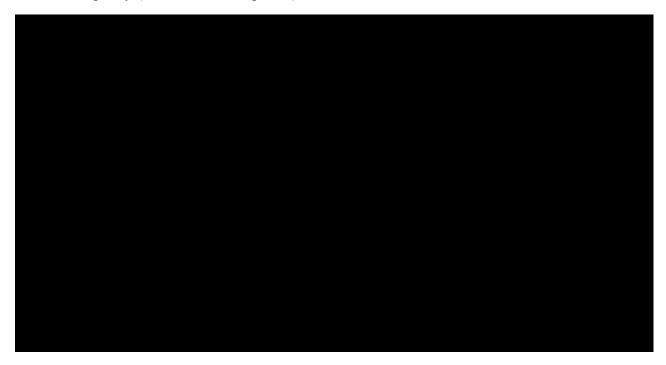
Seller agrees to indemnify, defend and hold harmless Buyer from any penalties, fines or costs assessed against Buyer by the CPUC or the CAISO, resulting from any of the following:

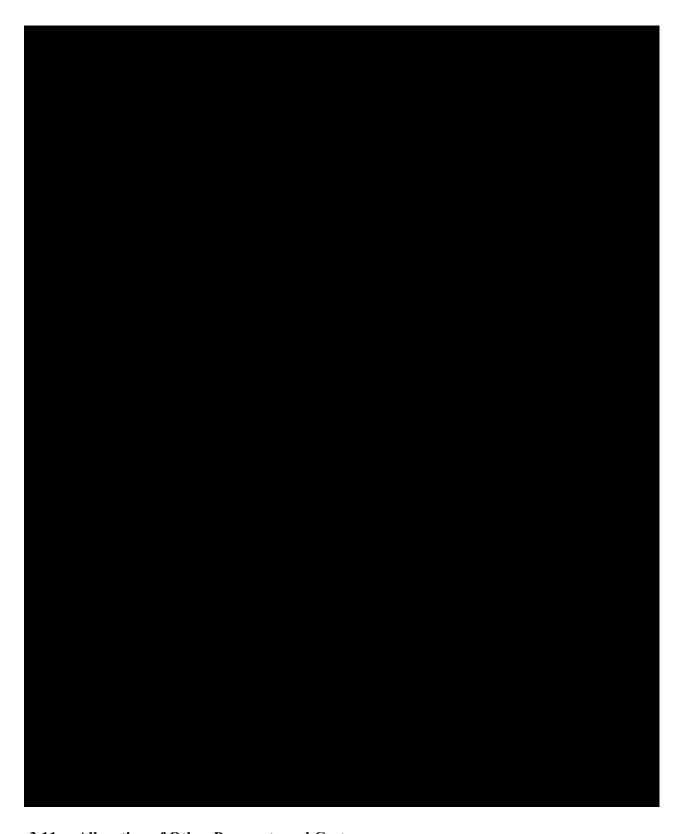
- (a) Seller's failure to provide any portion of the Designated RA Capacity for the respective Showing Month for the Delivery Term; or
- (b) A Unit Scheduling Coordinator's failure to submit accurate Supply Plans that identify Buyer's right, or a subsequent purchaser's right, to the Designated RA Capacity purchased hereunder.

With respect to the foregoing, the Parties shall use commercially reasonable efforts to minimize such penalties, fines and costs; *provided*, in no event shall Buyer be required to use or change its utilization of its owned or controlled assets or market positions to minimize these costs, penalties and fines. If Seller fails to pay the foregoing penalties, fines or costs, or fails to reimburse Buyer for those penalties, fines or costs, then Buyer may offset those penalties, fines or costs against any future amounts it may owe to Seller under this Agreement.

3.10 Monthly RA Capacity Payment.

(a) Buyer shall make a Monthly RA Capacity Payment to Seller for the Unit, in arrears, after the applicable Showing Month. The Parties agree that all invoices under this Agreement shall be due and payable on the twentieth (20th) day of the month after the Showing Month; *provided*, if such day is not a Business Day, then such invoice will be due and payable on the next Business Day. The Unit's "Monthly RA Capacity Payment" shall be equal to the product of (i) the applicable Contract Price for that Showing Month, (ii) the Contract Quantity of the Product actually delivered by Seller to Buyer for the Showing Month as set forth in Section 3.7 and (iii) 1,000. The final product of this Monthly RA Capacity Payment calculation shall be rounded to the nearest penny (i.e., two decimal places).





3.11 Allocation of Other Payments and Costs.

- (a) Seller may retain any revenues it may receive from, and shall pay all costs charged by, the CAISO or any other third party with respect to any Unit for (i) start-up, shut-down, and minimum load costs, (ii) capacity revenue for ancillary services, (iii) energy sales, (iv) any revenues for black start or reactive power services, or (v) the sale of the unit-contingent call rights on the storage capacity of the Unit to provide energy to a third party, so long as such rights do not confer on such third party the right to claim any portion of the RA Capacity sold hereunder in order to make an RAR Showing, LAR Showing, FCR Showing, or any similar capacity or resource adequacy showing with the CAISO or CPUC.
- (b) Buyer shall be entitled to receive and retain all revenues associated with the Designated RA Capacity of the Unit during the Delivery Term (including any capacity or availability revenues from RMR Contracts for any Unit, Reliability Compensation Services Tariff, and Residual Unit Commitment capacity payments, but excluding payments described in Section 3.11(a)).

(c) In accordance with Section 3.10:

- (i) all such Buyer revenues described in Section 3.11(b) received by Seller, or a Unit's Scheduling Coordinator, owner, or operator shall be remitted to Buyer, and Seller shall pay such revenues to Buyer if the Unit's Scheduling Coordinator, owner, or operator fails to remit those revenues to Buyer (and upon any such payment by Seller, Seller shall be subrogated to all rights of Buyer against such Unit's Scheduling Coordinator, owner, or operator for the amount of such revenues paid). If Seller fails to pay such revenues to Buyer, Buyer may offset any amounts owing to it for such revenues against any future amounts it may owe to Seller under this Agreement.
- (ii) all such Seller, or a Unit's Scheduling Coordinator, owner, or operator revenues described in Section 3.11(a)(i)-(v), but received by Buyer shall be remitted to Seller, and Buyer shall pay such revenues to Seller if the Unit's Scheduling Coordinator, owner, or operator fails to remit those revenues to Seller (and upon any such payment by Buyer, Buyer shall be subrogated to all rights of Seller against such Unit's Scheduling Coordinator, owner, or operator for the amount of such revenues paid). If Buyer fails to pay such revenues to Seller, Seller may offset any amounts owing to it for such revenues against any future amounts it may owe to Buyer under this Agreement.
- (d) If a centralized capacity market develops within the CAISO or WECC region, Buyer will have exclusive rights to offer, bid, or otherwise submit Designated RA Capacity provided to Buyer pursuant to this Agreement for re-sale in such market, and retain and receive any and all related revenues. Buyer shall be responsible for any material, incremental costs of offering, bidding, submitting, or re-selling Designated RA Capacity in such centralized capacity market.
- (e) Buyer acknowledges and agrees that all Availability Incentive Payments are for the benefit of Seller and for Seller's account, and that Seller shall receive, retain, or be entitled to receive all credits, payments, and revenues, if any, resulting from Seller achieving or exceeding Availability Standards. The Parties acknowledge and agree that any Non-Availability Charges are

the responsibility of Seller, and for Seller's account and Seller shall be responsible for all fees, charges, or penalties, if any, resulting from Seller failing to achieve Availability Standards.

3.12 Force Majeure.

To the extent either Party is prevented by Force Majeure from carrying out, in whole or part, its obligations under this Agreement and such Party (the "Claiming Party") gives notice and details of the Force Majeure to the other Party as soon as practicable, then, unless the terms of the Product specify otherwise, the Claiming Party shall be excused from the performance of its obligations with respect to this Agreement (other than the obligation to make payments then due or becoming due with respect to performance prior to the Force Majeure). The Claiming Party shall resume performance of its obligations under this Agreement as soon as reasonably practicable. The non-Claiming Party shall not be required to perform or resume performance of its obligations to the Claiming Party corresponding to the obligations of the Claiming Party excused by Force Majeure.

ARTICLE 4: CAISO OFFER REQUIREMENTS

During the Delivery Term, except to the extent the Unit is in an Outage, or is affected by an event of Force Majeure that results in a partial or full Outage of the Unit, Seller shall either schedule or cause the Unit's Scheduling Coordinator to schedule with, or make available to, the CAISO the Unit's Designated RA Capacity in compliance with the Tariff, including compliance with Minimum State of Charge, Day-Ahead Availability, Real-Time Availability, Must Offer Obligation, and Default Energy Bid requirements established in Article 40 of the Tariff and Seller shall perform all, or cause the Unit's Scheduling Coordinator, owner, or operator, as applicable, to perform all obligations under the Tariff that are associated with the sale of Product hereunder (the "CAISO Offer Requirements"). Buyer shall have no liability for the failure of Seller or the failure of any Unit's Scheduling Coordinator, owner, or operator to comply with such Tariff provisions, including any penalties or fines imposed on Seller or the Unit's Scheduling Coordinator, owner, or operator for such noncompliance.

ARTICLE 5: EVENTS OF DEFAULT; REMEDIES

5.1 Events of Default.

An "Event of Default" shall mean, with respect to a Party (a "Defaulting Party"), the occurrence of any of the following:

- (a) the failure to make, when due, any payment required pursuant to this Agreement if such failure is not remedied within ten (10) Business Days after written notice;
- (b) 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 Party does not fully mitigate the adverse consequences as reasonably determined by the other Party of such incorrect representation or warranty to the other Party within thirty (30) days after written notice thereof;
- (c) the failure to perform any material covenant or obligation set forth in this Agreement (except to the extent constituting a separate Event of Default, and except for such Party's obligations to deliver or receive the Product, the exclusive remedy for which is provided

in Section 3.8 and 3.9) if such failure is not remedied within thirty (30) Business Days after written notice; provided, however, that if such failure cannot be reasonably cured within such thirty (30) Business Day period, the Defaulting Party shall have such additional time as is reasonably practical to cure such failure, not to exceed an additional one hundred fifty (150) days, if the Defaulting Party has begun curative action within the aforesaid thirty (30) Business Day period and is proceeding diligently, using commercially reasonable efforts, to complete such curative action;

- (d) Seller fails to take all commercially reasonable actions in a timely manner to achieve Final Deliverability for the Unit;
- (e) Seller fails to obtain by the Initial Delivery Date market rate sales authority pursuant to Section 10.3(m);
- (f) if at any time, Seller delivers or attempts to deliver Product to the Delivery Point for sale under this Agreement that was not generated by the Unit, except for Alternate Capacity;
- (g) Seller sells, assigns, or otherwise transfers, or commits to sell, assign, or otherwise transfer, the Product, or any portion thereof, during the Term to any party other than Buyer except as expressly permitted under this Agreement;
 - (h) such Party becomes Bankrupt;
- (i) such Party assigns this Agreement or any of its rights hereunder other than in compliance with Section 17.3, if applicable;
- (j) the failure of such Party to satisfy the creditworthiness/collateral requirements agreed to pursuant to Article 14 if such failure is not remedied within ten (10) Business Days after written notice;
- (k) 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 transfere 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; or
- (l) 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:
 - (i) the issuer of the outstanding Letter of Credit shall fail to maintain a Credit Rating of at least ;
 - (ii) the issuer of such Letter of Credit becomes Bankrupt;

- (iii) 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;
- (iv) the issuer of the outstanding Letter of Credit shall fail to honor a properly documented request to draw on such Letter of Credit;
- (v) 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;
- (vi) such Letter of Credit fails or ceases to be in full force and effect at any time; or
- (vii) 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.

5.2 Declaration of an Early Termination Date and Calculation of Settlement Amounts.

If an Event of Default with respect to a Defaulting Party shall have occurred and be continuing, the other Party (the "Non-Defaulting Party") shall have the right to (i) designate a day, no earlier than the day such notice is effective and no later than twenty (20) days after such notice is effective, as an early termination date ("Early Termination Date") to accelerate all amounts owing between the Parties and to liquidate and terminate this Agreement (referred to herein as a "Terminated Transaction") between the Parties, (ii) withhold any payments due to the Defaulting Party under this Agreement; and (iii) suspend performance. If the Early Termination Date occurs before the Initial Delivery Date, then no Settlement Amount shall be owed by either Party. If the Early Termination Date occurs after the Initial Delivery Date, then as soon as reasonably practicable, the Non-Defaulting Party shall calculate, in a commercially reasonable manner, a Settlement Amount for such Terminated Transaction as of the Early Termination Date (or, to the extent that in the reasonable opinion of the Non-Defaulting Party certain of such Terminated Transaction are commercially impracticable to liquidate and terminate or may not be liquidated and terminated under applicable law on the Early Termination Date, as soon thereafter as is reasonably practicable). The Gains and Losses for a Terminated Transaction shall be determined by calculating the amount that would be incurred or realized to replace or to provide the economic equivalent of the remaining payments or deliveries in respect of the Terminated Transaction. The Non-Defaulting Party (or its agent) may determine its Gains and Losses by reference to information either available to it internally or supplied by one or more third parties 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. Third parties supplying such information may include, without limitation, dealers in the relevant markets, endusers of the relevant product, information vendors and other sources of market information. 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). Notwithstanding the foregoing, in the event of termination under Section 5.1(d), the applicable Termination Payment shall be the full amount of the Development Security.

5.3 Net Out of Settlement Amounts.

The Non-Defaulting Party shall net out (a) any Settlement Amount that is due to the Non-Defaulting Party, plus, (b) at the option of the Non-Defaulting Party, any cash or other form of security then available to the Non-Defaulting Party pursuant to Article 14, plus (c) any or all other amounts due to the Non-Defaulting Party under this Agreement against (d) all amounts that are due to the Defaulting Party, so that all such amounts shall be netted out to a single liquidated amount (the "Termination Payment") payable by one Party to the other. The Termination Payment shall be due to or due from the Non-Defaulting Party as appropriate.

5.4 Notice of Payment of Termination Payment.

As soon as practicable after a liquidation, notice shall be given by the Non-Defaulting Party to the Defaulting Party of the amount of the Termination Payment and whether the Termination Payment is due to or due from the Non-Defaulting Party. The notice shall include a written statement explaining in reasonable detail the calculation of such amount. The Termination Payment shall be made by the Party that owes it within ten (10) days after such notice is effective.

5.5 Disputes with Respect to Termination Payment.

If the Defaulting Party disputes the Non-Defaulting Party's calculation of the Termination Payment, in whole or in part, the Defaulting Party shall, within ten (10) days of receipt of Non-Defaulting Party's calculation of the Termination Payment, provide to the Non-Defaulting Party a detailed written explanation of the basis for such dispute; *provided*, *however*, that if the Termination Payment is due from Seller as the Defaulting Party, Seller (as the Defaulting Party) shall first transfer Performance Security to Buyer (as the Non-Defaulting Party) in an amount equal to the Termination Payment.

5.6 Closeout Setoffs.

After calculation of a Termination Payment in accordance with Section 5.3, if the Defaulting Party would be owed the Termination Payment, the Non-Defaulting Party shall be entitled, at its option and in its discretion, to (i) set off against such Termination Payment any amounts due and owing by the Defaulting Party to the Non-Defaulting Party under any other agreements, instruments or undertakings between the Defaulting Party and the Non-Defaulting Party and/or (ii) to the extent the Agreement is not yet liquidated in accordance with Section 5.2, withhold payment of the Termination Payment to the Defaulting Party. The remedy provided for in this Section 5.6 shall be without prejudice and in addition to any right of setoff, combination of accounts, lien or other right to which any Party is at any time otherwise entitled (whether by operation of law, contract or otherwise).

ARTICLE 6: PAYMENT AND NETTING

6.1 Billing Period.

The calendar month shall be the standard period for all payments under this Agreement (other than Termination Payments). As soon as practicable after the end of each month, each Party will render

to the other Party an invoice for the payment obligations, if any, incurred hereunder during the preceding month.

6.2 Timeliness of Payment.

Unless otherwise agreed by the Parties, all invoices under this Agreement shall be due and payable in accordance with each Party's invoice instructions on or before the later of the twentieth (20th) day of each month, or tenth (10th) day after receipt of the invoice or, if such day is not a Business Day, then on the next Business Day. Each Party will make payments by electronic funds transfer, or by other mutually agreeable method(s), to the account designated by the other Party. Any amounts not paid by the due date will be deemed delinquent and will accrue interest at the Interest Rate, such interest to be calculated from and including the due date to but excluding the date the delinquent amount is paid in full.

6.3 Disputes and Adjustments of Invoices.

A Party may, in good faith, dispute the correctness of any invoice or any adjustment to an invoice, rendered under this Agreement or adjust any invoice for any arithmetic or computational error within twelve (12) months of the date the invoice, or adjustment to an invoice, was rendered. In the event an invoice or portion thereof, or any other claim or adjustment arising hereunder, is disputed, payment of the undisputed portion of the invoice shall be required to be made when due, with notice of the objection given to the other Party. Any invoice dispute or invoice adjustment shall be in writing and shall state the basis for the dispute or adjustment. Payment of the disputed amount shall not be required until the dispute is resolved. Upon resolution of the dispute, any required payment shall be made within five (5) Business Days of such resolution along with interest accrued at the Interest Rate from and including the due date to but excluding the date paid. Inadvertent overpayments shall be returned upon request or deducted by the Party receiving such overpayment from subsequent payments, with interest accrued at the Interest Rate from and including the date of such overpayment to but excluding the date repaid or deducted by the Party receiving such overpayment. Any dispute with respect to an invoice is waived unless the other Party is notified in accordance with this Section 6.3 within twelve (12) months after the invoice is rendered or any specific adjustment to the invoice is made. If an invoice is not rendered within twelve (12) months after the close of the month during which performance occurred, the right to payment for such performance is waived.

6.4 Netting of Payments.

The Parties hereby agree that they shall discharge mutual debts and payment obligations due and owing to each other under this Agreement 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, including any related damages calculated pursuant to Sections 3.8 or 3.9, 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.

6.5 Payment Obligation Absent Netting.

If no mutual debts or payment obligations exist and only one Party owes a debt or obligation to the other during the monthly billing period, including, but not limited to, any related damage amounts calculated pursuant to Sections 3.8 or 3.9, interest, and payments or credits, that Party shall pay such sum in full when due.

6.6 Security.

Unless the Party benefiting from Performance Security notifies the other Party in writing, and except in connection with a liquidation and termination in accordance with Article 5, all amounts netted pursuant to this Article 6 shall not take into account or include any Performance Security which may be in effect to secure a Party's performance under this Agreement.

ARTICLE 7: LIMITATIONS

7.1 Limitation of Remedies, Liability and Damages.

EXCEPT AS 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. FOR BREACH OF ANY PROVISION FOR WHICH AN EXPRESS REMEDY OR MEASURE OF DAMAGES IS PROVIDED, SUCH EXPRESS REMEDY OR MEASURE OF DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY, THE OBLIGOR'S LIABILITY SHALL BE LIMITED AS SET FORTH IN SUCH PROVISION AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED. IF NO REMEDY OR MEASURE OF DAMAGES IS EXPRESSLY PROVIDED HEREIN, THE OBLIGOR'S LIABILITY SHALL BE LIMITED TO DIRECT ACTUAL DAMAGES ONLY, SUCH DIRECT ACTUAL DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED. UNLESS EXPRESSLY HEREIN PROVIDED, NEITHER PARTY SHALL BE LIABLE FOR CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY OR INDIRECT DAMAGES, LOST PROFITS OR OTHER BUSINESS INTERRUPTION DAMAGES, BY STATUTE, IN TORT OR CONTRACT, UNDER ANY INDEMNITY PROVISION OR OTHERWISE. IT IS THE INTENT OF THE PARTIES THAT THE LIMITATIONS HEREIN IMPOSED ON REMEDIES AND THE MEASURE OF DAMAGES BE WITHOUT REGARD TO THE CAUSE OR CAUSES RELATED THERETO, INCLUDING THE NEGLIGENCE OF ANY PARTY, WHETHER SUCH NEGLIGENCE BE SOLE, JOINT OR CONCURRENT, OR ACTIVE OR PASSIVE. TO THE EXTENT ANY DAMAGES REOUIRED TO BE PAID HEREUNDER ARE LIQUIDATED, THE ACKNOWLEDGE THAT THE DAMAGES ARE DIFFICULT OR IMPOSSIBLE TO DETERMINE, OR OTHERWISE OBTAINING AN **ADEQUATE** REMEDY INCONVENIENT AND THE DAMAGES CALCULATED HEREUNDER CONSTITUTE A REASONABLE APPROXIMATION OF THE HARM OR LOSS.

ARTICLE 8: GOVERNMENTAL CHARGES

8.1 Cooperation.

Each Party shall use reasonable efforts to implement the provisions of and to administer this Agreement in accordance with the intent of the parties to minimize all taxes, so long as neither Party is materially adversely affected by such efforts.

8.2 Governmental Charges.

Seller shall pay or cause to be paid all taxes imposed by any government authority ("Governmental Charges") on or with respect to the Product or a transaction arising prior to the Delivery Point. Buyer shall pay or cause to be paid all Governmental Charges on or with respect to the Product or a transaction at and from the Delivery Point (other than ad valorem, franchise or income taxes which are related to the sale of the Product and are, therefore, the responsibility of the Seller). In the event Seller is required by law or regulation to remit or pay Governmental Charges which are Buyer's responsibility hereunder, Buyer shall promptly reimburse Seller for such Governmental Charges. If Buyer is required by law or regulation to remit or pay Governmental Charges which are Seller's responsibility hereunder, Buyer may deduct the amount of any such Governmental Charges from the sums due to Seller under Article 6. Nothing shall obligate or cause a Party to pay or be liable to pay any Governmental Charges for which it is exempt under the law.

ARTICLE 9: [RESERVED]

ARTICLE 10: REPRESENTATIONS; WARRANTIES; COVENANTS

10.1 Mutual Representations and Warranties.

On the Effective Date, each Party represents and warrants to the other Party that:

- (a) it is duly organized, validly existing and in good standing under the laws of the jurisdiction of its formation;
- (b) it has all regulatory authorizations necessary for it to legally perform its obligations under this Agreement, except all permits necessary to construct, operate and maintain the Unit and sell the Product therefrom in the case of Seller;
- (c) the execution, delivery and performance of this Agreement are within its powers, have been duly authorized by all necessary action and do not violate any of the terms and conditions in its governing documents, any contracts to which it is a party or any law, rule, regulation, order or the like applicable to it;
- (d) this Agreement and each other document executed and delivered in accordance with this Agreement constitutes its legally valid and binding obligation enforceable against it in accordance with its terms; subject to any Equitable Defenses.
- (e) it is not Bankrupt and there are no proceedings pending or being contemplated by it or, to its knowledge, threatened against it which would result in it being or becoming Bankrupt;
- (f) there is not pending or, to its knowledge, threatened against it or any of its Affiliates any legal proceedings that could materially adversely affect its ability to perform its obligations under this Agreement;

- (g) it is a "forward contract merchant" within the meaning of the United States Bankruptcy Code; and
- (h) it has entered into this Agreement in connection with the conduct of its business and it has the capacity or ability to make or take delivery of Product; provided that Seller does not yet have market rate sales authority to participate in CAISO and to effectuate the transaction contemplated by this Agreement.

10.2 Buyer and Seller Covenants.

Buyer and Seller shall, throughout the Delivery Term, take all commercially reasonable actions and execute any and all documents or instruments reasonably necessary to ensure Buyer's right to the use of the Contract Quantity for the sole benefit of Buyer or any subsequent purchaser under Article 12. Such commercially reasonable actions shall include, without limitation:

- (a) Cooperating with and providing, and in the case of Seller causing the Unit's Scheduling Coordinator, owner, or operator to cooperate with and provide requested supporting documentation to the CAISO, the CPUC, or any other Governmental Body responsible for administering RAR, LAR, and/or FCR under Applicable Laws, to certify or qualify the Contract Quantity as RA Capacity and Designated RA Capacity. Such actions shall include, without limitation, providing information requested by the CAISO, CPUC, or by an LRA having jurisdiction, to demonstrate for each month of the Delivery Term the ability to deliver the Contract Quantity from the Unit to the CAISO Controlled Grid for the minimum hours required to qualify as RA Capacity, and providing information requested by the CPUC, CAISO or other Governmental Body having jurisdiction to administer RAR, LAR, or FCR to demonstrate that the Contract Quantity can be delivered to the CAISO Controlled Grid, pursuant to "deliverability" standards established by the CAISO, or other Governmental Body having jurisdiction to administer RAR, LAR and/or FCR; and
- (b) Negotiating in good faith to make necessary amendments, if any, to this Agreement to conform it to subsequent clarifications, revisions, or decisions rendered by the CAISO, CPUC, FERC, or other Governmental Body having jurisdiction to administer RAR, LAR, or FCR so as to maintain the benefits of the bargain struck by the Parties on the Effective Date; *provided*, *however*, that such commercially reasonable actions shall not include any obligation that the owner or operator of the Unit undertake capital improvements, Unit enhancements, or the construction of new facilities nor in any way limit the Parties with respect to advocacy for any regulatory policies or market changes before any entity.

10.3 Seller Representations, Warranties and Covenants.

Seller represents, warrants and covenants to Buyer that:

- (a) Throughout the Delivery Term, the Unit qualifies as a Resource Adequacy Resource that is eligible to provide the Product pursuant to the Tariff and the Resource Adequacy Rulings;
- (b) Throughout the Delivery Term, Seller owns or has the exclusive right to the RA Capacity sold under this Agreement, and shall furnish Buyer, CAISO, CPUC or other jurisdictional

LRA, or other Governmental Body with such evidence as may reasonably be requested to demonstrate such ownership or exclusive right;

- (c) Throughout the Delivery Term, no portion of the Contract Quantity has been committed by Seller to any third party in order to satisfy RAR, LAR, FCR or analogous obligations in CAISO markets, other than pursuant to an RMR Contract between the CAISO and either Seller or the Unit's owner or operator;
- (d) Throughout the Delivery Term, no portion of the Contract Quantity has been committed by Seller in order to satisfy RAR, LAR, FCR, or analogous obligations in any non-CAISO market;
- (e) The Unit is within the CAISO Control Area and Seller shall maintain Site Control throughout the Delivery Term;
- (f) Throughout the Delivery Term, the owner or operator of the Unit is obligated to comply with Applicable Laws, including the Tariff, relating to RA Capacity, RAR, LAR, and FCR;
- (g) Throughout the Delivery Term, Seller shall maintain any Governmental Approvals required to perform Seller's obligations;
- (h) Throughout the Delivery Term, the respective cumulative amounts of LAR Attributes, RAR Attributes, and FCR Attributes that Seller has sold, assigned or transferred from the Unit does not exceed that Unit's RA Capacity;
- (i) Throughout the Delivery Term, with respect to the RA Capacity provided under this Agreement, Seller shall, and the Unit's Scheduling Coordinator is obligated to, comply with Applicable Laws, including the Tariff, relating to RAR, LAR, and FCR;
- (j) Prior to the start of the Delivery Term, Seller will notify the Scheduling Coordinator of the Unit that, throughout the Delivery Term, has transferred the Designated RA Capacity to Buyer, and the Scheduling Coordinator is obligated to deliver the Supply Plans in accordance with this Agreement and the Tariff;
- (k) Prior to the start of the Delivery Term, Seller will notify the Scheduling Coordinator of the Unit that Seller is obligated, throughout the Delivery Term, to cause the Unit's Scheduling Coordinator to provide to the Buyer, at least fifteen (15) Business Days before the Notification Deadline, the Designated RA Capacity of the Unit that is to be submitted in the Supply Plan associated with this Agreement for the applicable period; and
- (l) Prior to the start of the Delivery Term, Seller will notify the Unit's Scheduling Coordinator that, throughout the Delivery Term, Buyer is entitled to the revenues set forth in Section 3.11 and that such Scheduling Coordinator is obligated to promptly deliver those revenues to Buyer, along with appropriate documentation supporting the amount of those revenues.

(m) Promptly following the Effective Date, Seller will apply to FERC for market rate sales authority to participate in CAISO and to effectuate the transaction contemplated by this Agreement and Seller will maintain such authority throughout the Delivery Term.

10.4 Buyer Representations, Warranties and Covenants.

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.).

ARTICLE 11: CONFIDENTIALITY

- (a) Neither Party shall disclose the terms or conditions of this Agreement or information exchanged between the Parties pursuant to this Agreement ("Confidential Information") to a third party (other than the Party's or its Affiliates' employees, lenders or potential lenders, investors or potential investors, counsel, accountants or advisors who have a need to know such information and have agreed to keep such terms confidential) except in order to fulfill such Party's obligations under this Agreement or to comply with any applicable law, regulation, or any exchange, control area or independent system operator rule or in connection with any court or regulatory proceeding; *provided*, *however*, each Party shall, to the extent practicable, use reasonable efforts to prevent or limit the disclosure. The Parties shall be entitled to all remedies available at law or in equity to enforce, or seek relief in connection with, this confidentiality obligation.
- (b) Notwithstanding the foregoing, the Parties agree that Buyer may disclose the information pertaining to this Agreement to any Governmental Body, the CPUC, the CAISO or any LRA having jurisdiction in order to support its LAR Showings, RAR Showings and/or FCR Showings, as applicable, and Seller may disclose the transfer of the Designated RA Capacity under this Agreement to the Scheduling Coordinator of the Unit in order for such Scheduling Coordinator to timely submit accurate Supply Plans; *provided*, each disclosing Party shall use reasonable efforts to limit, to the extent possible, the ability of any such applicable Governmental Body, CAISO, or Scheduling Coordinator to further disclose such information. In addition, in the event Buyer resells all or any portion of the Designated RA Capacity to another party, Buyer shall be permitted to disclose to the other party to such resale transaction all such information to the extent such disclosure is necessary to affect such resale transaction; *provided*, such other party agrees to keep such information confidential.
- (c) Seller acknowledges that Buyer is subject to the California Constitution Article 1, Section 3, and the California Public Records Act, Cal. Gov. Code § 6250 et seq. ("Public Records Act") in regard to the documents comprising this Agreement, which items may constitute public records subject to inspection and copying by the public under the authority of the California Constitution and the Public Records Act. Buyer shall, consistent with those laws, use reasonable

efforts to provide Seller with notice of any third-party request to inspect or copy any of the documents that comprise this Agreement, which Seller might deem confidential and exempt from disclosure, in order that Seller may timely seek to protect those documents from disclosure to the third party. Seller acknowledges and agrees that Buyer shall not be liable to Seller if Buyer makes disclosure in accordance with the California Constitution and/or the Public Records Act before Seller has timely obtained an order to prevent Buyer from making the requested disclosure to the third party.

ARTICLE 12: BUYER'S RE-SALE OF PRODUCT

No less than fifteen (15) days prior to the Notification Deadline for any Showing Month of the Delivery Term, Buyer may provide written notice to Seller of Buyer's intent to re-sell all or a portion of the Product and any associated rights, in each case, acquired under this Agreement. If Buyer re-sells all or a portion of the Product and any associated rights acquired under this Agreement in accordance with this Article 12 ("Resold Product"), Seller agrees, and agrees to cause the Unit's Scheduling Coordinator, to follow Buyer's reasonable instructions with respect to providing such Resold Product to subsequent purchasers of such Resold Product to the extent such instructions are consistent with Seller's obligations under this Agreement. Seller further agrees, and agrees to cause the Unit's Scheduling Coordinator, to take all commercially reasonable actions and execute any and all documents or instruments reasonably necessary to allow such subsequent purchasers to use such Resold Product in a manner consistent with Buyer's rights under this Agreement. If Buyer incurs any liability to any purchaser of such Resold Product directly due to the failure of Seller or the Unit's Scheduling Coordinator to comply with the terms of this Agreement, then Seller shall be liable to Buyer for any liabilities Seller would have incurred under this Agreement if Buyer had not resold the Product, including without limitation, pursuant to Sections 3.8 and 3.9.

In the event there is any Resold Product, Buyer agrees to notify Seller that such a sale has occurred and agrees to provide Seller with the information specified below promptly following such sale (and any other information reasonably requested by Seller so that Seller may perform its obligations in this Article 12) and promptly notify Seller of any subsequent changes to such information with respect to any particular sale: (i) benefitting load serving entity SC identification number (SCID), (ii) volume (in MW) of Resold Product, and (iii) subsequent sale delivery period for Resold Product.

ARTICLE 13: COMPLIANCE OBLIGATION

The Parties acknowledge and agree that a material purpose of this Agreement is to enable Buyer to satisfy its Compliance Obligation. If, at any time during the Term, the Unit is not qualified to produce Product, including RAR Attributes, LAR Attributes, and FCR Attributes, as applicable, including due to any action by the CPUC, CAISO or any Governmental Body having jurisdiction that results in any change in Applicable Law occurring after the Effective Date that changes the Resource Adequacy Requirements such that the Product can no longer be counted towards Buyer's Compliance Obligation (a "Compliance Issue"), the Parties shall work in good faith to revise this Agreement so that the Parties can perform their obligations regarding the purchase and sale of Product sold hereunder in order to maintain the original intent; provided, however, in no event shall Seller be obligated to undertake capital improvements, Unit enhancements, or the construction of

new facilities. If a Compliance Issue results in the Product not being able to be counted towards Buyer's Compliance Obligation, and the Parties have not reached agreement on amendments within thirty (30) days after the initiation of discussions regarding the Compliance Issue that would allow the Product to be able to be counted towards Buyer's Compliance Obligation, Buyer may terminate this Agreement upon written notice to Seller, which shall be effective the next Business Day after such notice is received, and any such termination shall be without liability to either Party, subject to payment of any amounts owing as of the effective date of such termination.

ARTICLE 14: COLLATERAL REQUIREMENTS

14.1 [Reserved].

14.2 Performance Security.

Seller shall deliver Performance Security to Buyer on or before the Initial Delivery Date. Seller shall maintain the Performance Security in full force and effect, and shall within ten (10) Business Days after any draws made by Buyer in accordance with this Agreement replenish the Performance Security, until the following have occurred: (a) the Delivery Term has expired or terminated early; and (b) all payment obligations of Seller then due and payable under this Agreement, including compensation for penalties, termination damages, indemnification payments orother 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 end of the Delivery Term, or (iii) fails to honor Buyer's properly documented request todraw 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.

14.3 First Priority Security Interest in Cash or Cash Equivalent Collateral.

- (a) 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 the Performance Security, any other cash collateral and cash equivalent collateral posted under this Agreement, 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.
- (b) Upon or any time after the occurrence 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 Performance Security, Buyer may do any one or more of the following:

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- (i) Exercise any of its rights and remedies with respect to the Performance Security, as applicable, including any such rights and remedies under Applicable Law then in effect:
- (ii) Draw on any outstanding Letter of Credit issued for its benefit and retain any cash held by Buyer as Performance Security; and
- (iii) Liquidate Performance Security 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.

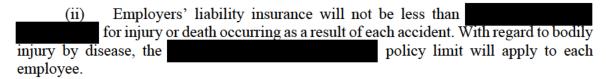
ARTICLE 15: INSURANCE

15.1 Insurance.

Throughout the Term, Seller shall procure and maintain the following insurance coverage and require and cause its contractors to maintain the same levels of coverage. For the avoidance of doubt, the obligations of the Seller in this Section 15.1 constitute a material obligation of this Agreement.

(a) Workers' Compensation and Employers' Liability.

(i) If it has employees, workers' compensation insurance indicating compliance with any applicable labor codes, acts, Applicable Laws or statutes, California state or federal, where Seller performs Work.



(b) <u>Commercial General Liability.</u>

(i) Commercial general liability insurance, including products and completed operations and personal injury insurance, in a minimum amount of per occurrence, and an annual aggregate of not less than , endorsed to provide contractual liability in said amount (subject to policy terms and conditions), specifically covering Seller's insurable indemnity obligations under this Agreement and including Buyer as an additional insured but only to the extent of Seller's insurable indemnity obligations under this Agreement. Limits may be satisfied through a combination of primary and excess policies.

- (ii) An umbrella insurance policy in a minimum limit of liability of
- (iii) Defense costs shall be provided as an additional benefit and not included within the limits of liability. Such insurance shall contain standard cross-liability and severability of interest provisions.

(c) Business Auto.

- (i) Business auto insurance for bodily injury and property damage with limits of per occurrence.
- (ii) 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.

(d) <u>Construction All-Risk Insurance.</u>

(i) During the construction of the Unit prior to the Initial Delivery Date, construction all-risk form property insurance covering the Unit during such construction periods, and naming Seller (and Lender if any) as the loss payee.

(e) Contractor's Pollution Liability.

- (i) If the scope of Work involves areas of known pollutants or contaminants, Seller shall maintain or require to be maintained, pollution liability coverage for bodily injury, property damage, including clean-up costs and defense costs resulting from sudden, and accidental conditions, including the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, hydrocarbons, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water shall be maintained.
- (ii) The limit will be at least each occurrence for bodily injury and property damage.
- (iii) The policy will endorse Buyer as additional insured but only to the extent of Seller's insurable indemnity obligations under this Agreement.

15.2 Evidence of Insurance.

Within ten (10) days after the Effective Date and upon annual renewal thereafter, Seller shall deliver to Buyer certificates of insurance evidencing the coverage required under this Agreement. These certificates shall specify that Buyer shall be given at least thirty (30) days prior notice by Seller in the event of any cancellation or termination of coverage, except ten (10) days for nonpayment of premium. With the exception of Workers Compensation/Employers Liability, such insurance shall be primary coverage without right of contribution from any insurance of Buyer.

ARTICLE 16: UNIT CONSTRUCTION AND INITIAL DELIVERY DATE

16.1 Construction of the Unit.

- (a) <u>Construction Start</u>. "<u>Construction Start</u>" will occur upon satisfaction of the following: (i) Seller has acquired the applicable regulatory authorizations, approvals and permits required for the commencement of construction of the Unit, (ii) Seller has engaged all contractors and ordered all essential equipment and supplies as, in each case, can reasonably be considered necessary so that physical construction of the Unit may begin and proceed to completion without foreseeable interruption of material duration, and (iii) Seller has executed an engineering, procurement, and construction contract (or equivalent agreements) and issued thereunder a notice to proceed or its equivalent that authorizes the contractor to mobilize to Site and begin physical construction of the Unit 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 Exhibit B hereto, and the date certified therein shall be the "Construction Start Date."
- (b) <u>Progress Reports.</u> The Parties agree time is of the essence in regard to the Agreement. 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 Initial Delivery Date, Seller shall provide to Buyer a Progress Report and agree to 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 Exhibit F. 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. Seller shall also provide Buyer with any information in Seller's possession that is reasonably requested by Buyer for Buyer to demonstrate to the CPUC, CAISO, or other Governmental Bodies that Buyer has met its applicable resource adequacy requirements, including providing status reports to the CPUC with respect to the Unit.

16.2 Initial Delivery Date.

- (a) <u>Initial Delivery</u>. "<u>Initial Delivery</u>" means the condition existing when Seller has fulfilled all of the conditions precedent in Section 2.2 of the Agreement and provided notice to Buyer substantially in the form of Exhibit C. Seller shall cause Initial Delivery for the Unit to occur by the Guaranteed Initial Delivery Date, as such date may be extended by a Development Cure Period pursuant to Section 16.2(c), subject to the limitations in Section 16.2(d).
- (b) Reduction to Contract Quantity. If, on the Initial Delivery Date, Seller shall have obtained an NQC and/or EFC, as applicable, for the Unit from the CPUC that is less than the Contract Quantity of RAR Attributes and/or FCR Attributes set forth on the Cover Sheet as of the Effective Date, as applicable, then the following sections of this Agreement shall be automatically amended: (i) the Unit NQC and/or Unit EFC in Section B of the Cover Sheet shall be revised to equal the maximum amount of NQC and/or EFC, as applicable, established for the Unit by the CPUC; (ii) the Contract Quantities in Section F of the Cover Sheet shall be revised to equal the maximum amount of NQC and/or EFC, as applicable, established for the Unit by the CPUC; (iii) the Contract Quantity of LAR Attributes, if applicable, shall equal the revised Contract Quantity

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of RAR Attributes; and (iv) the quantity of NQC set forth in Section 2.2(h) shall be revised to equal the maximum amount of NQC established for the Unit by the CPUC, if such amount is less than the amount set forth in Section 2.2(h) as of the Effective Date.



- (e) <u>Termination for Failure to Achieve Initial Delivery Date</u>. If the Unit has not achieved Initial Delivery on or before the Guaranteed Initial Delivery Date, as such date may be extended by a Development Cure Period pursuant to pursuant to Section 16.2(c) subject to the limitations in Section 16.2(d), then Buyer may terminate this Agreement upon written notice to Seller, which termination shall be effective the next Business Day after such notice is received, and any such termination shall be without liability to Seller, subject to payment of any amounts owing as of the effective date of such termination and provided that Seller shall be subject to Section 16.2(f).
- (f) <u>Limitation on Seller's Ability to Make or Agree to Third-Party Sales from the Unit after Early Termination Date</u>. If this Agreement is terminated by either Party prior to the Initial Delivery Date for any reason other than a Buyer Event of Default, neither Seller nor Seller's Affiliates may sell, market or deliver any Product associated with or attributable to the Unit to a party other than Buyer for a period of two (2) years following such termination, 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 on terms and conditions materially similar to the terms and conditions contained in this Agreement (including price) and Buyer fails to accept such offer within forty-five (45) days of Buyer's receipt thereof. Neither Seller nor Seller's Affiliates may sell or transfer the Unit, or any part thereof, or land rights or interests in the Site (including the interconnection queue position of the Unit) so long as the limitations contained in this Section 16.2(f) apply, unless the transferee agrees to be bound by the terms set forth in this Section 16.2(f)

pursuant to a written agreement approved by Buyer in its reasonable discretion. Seller shall indemnify and hold Buyer harmless from all benefits lost and other damages sustained by Buyer as a result of any breach by Seller of its covenants contained within this Section 16.2(f).

ARTICLE 17: MISCELLANEOUS

17.1 Title and Risk of Loss.

Title to and risk of loss related to the Product shall transfer from Seller to Buyer at the Delivery Point. Seller warrants that it will deliver to Buyer the Designated RA Capacity free and clear of all liens, security interests, claims and encumbrances or any interest therein or thereto by any person arising prior to the Delivery Point.

17.2 Indemnity.

- (a) <u>Indemnity by Seller</u>. Seller shall release, indemnify and hold harmless Buyer or Buyers' respective directors, officers, agents, and representatives against and from any and all loss, Claims, actions or suits, including costs and attorney's fees associated with damage to third parties resulting from, or arising out of or in any way connected with Seller's operation and/or maintenance of the Unit, including without limitation any loss, Claim, action or suit, for or on account of injury to, bodily or otherwise, or death of persons, or for damage to or destruction of property belonging to such third parties, excepting only such loss, Claim, action or suit as may be caused solely by the willful misconduct or gross negligence of Buyer, its Affiliates, or Buyers' and Affiliates' respective agents, employees, directors, or officers.
- (b) <u>Indemnity by Buyer</u>. Buyer shall release, indemnify and hold harmless Seller, its directors, officers, agents, and representatives against and from any and all loss, Claims, actions or suits, including costs and attorney's fees associated with damage to third parties resulting from, or arising out of or in any way connected with Buyer's access to the Unit site, including any loss, Claim, action or suit, for or on account of injury to, bodily or otherwise, or death of persons, or for damage to or destruction of property belonging to such third parties, excepting only such loss, Claim, action or suit as may be caused solely by the willful misconduct or gross negligence of Seller, its Affiliates, or Seller's and Affiliates' respective agents, employees, directors or officers.
- (c) <u>No Dedication</u>. Without limitation of each Party's obligations under Sections 17.2(a) and 17.2(b), nothing in this Agreement shall be construed to create any duty to, any standard of care with reference to, or any liability to any person or entity not a Party to this Agreement. No undertaking by one Party to the other under any provision of this Agreement shall constitute the dedication of that Party's system or any portion thereof to the other Party or the public, nor affect the status of Buyer as an independent public utility corporation or Seller as an independent individual or entity.

17.3 Assignment.

(a) Neither Party shall assign this Agreement or its rights hereunder without the prior written consent of the other Party, which consent shall not be unreasonably withheld, conditioned, or delayed; *provided*, *however*, Seller may, without the consent of Buyer (and without relieving

itself from liability hereunder), (i) transfer, sell, pledge, encumber or assign this Agreement or the accounts, revenues or proceeds hereof in connection with any financing or other financial arrangements, (ii) transfer or assign this Agreement to an affiliate of such Party which affiliate's creditworthiness is equal to or higher than that of such Party, or (iii) transfer or assign this Agreement to any person or entity succeeding to all or substantially all of the assets whose creditworthiness is equal to or higher than that of such Party; provided, however, that in the case of any such assignment pursuant to clause (ii) or clause (iii), any such assignee shall agree in writing to be bound by the terms and conditions hereof and so long as the transferring Party delivers such tax and enforceability assurance as the non-transferring Party may reasonably request. In connection with any financing or refinancing of the Unit by Seller, Buyer shall in good faith negotiate and agree upon a consent to collateral assignment of this Agreement substantially in the form of Exhibit H..

(b) In addition, Buyer shall work in good faith to: (i) agree upon and enter into such amendments to this Agreement as are reasonably requested by the Financing Parties in connection with the financing provided by such Financing Parties, provided that any such amendments: (A) do not materially reduce the benefits or materially increase the risk of Buyer hereunder; and (B) are reasonably acceptable to Buyer; (ii) agree upon and deliver a duly executed estoppel certificate and dating acknowledgement related to this Agreement, in form and substance satisfactory to Buyer, Seller and Seller's Financing Parties, in conjunction with the financing provided by such Financing Parties; and (iii) provide such other documents and technical assistance as Seller may reasonably request in connection with obtaining financing for the Unit. Seller shall pay Buyer's reasonable expenses, including attorneys' fees, incurred to provide consents, estoppels, or other required documentation in connection with Seller's financing of the Facility. Buyer shall have no obligation to provide any consent or estoppel, or enter into any agreement related to the financing of the Unit that materially and adversely affects any of Buyer's rights, benefits, risks or obligations under this Agreement, or to materially modify this Agreement.

17.4 Governing Law and Venue.

This Agreement and the rights and duties of the Parties hereunder shall be governed by and construed, enforced and performed in accordance with the laws of the state of California, without regard to principles of conflicts of Law. 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. Each of the Parties irrevocably and unconditionally agrees that any suit, action or other proceeding arising out of or relating to this Agreement, the transactions contemplated hereby, any provision hereof or the breach, performance, enforcement or validity or invalidity of this Agreement or any provision hereof shall be filed in either the United States District Court for the Southern District of California or the Superior Court of California, County of San Diego, as appropriate (and agrees not to commence any suit, action or proceeding relating thereto except in such courts). Each of the Parties irrevocably and unconditionally waives any objection to the laying of venue of any suit, action or proceeding arising out of or relating to this Agreement, the transactions contemplated hereby, any provision hereof or the breach, performance, enforcement or validity or invalidity of this Agreement or any provision hereof in the United States District Court for the Southern District of California or the Superior Court of California, County of San Diego, as appropriate, and hereby further irrevocably and unconditionally waives and agrees not to plead or claim in any such court that any such suit, action or proceeding brought in any such court has been brought in an inconvenient forum.

Notwithstanding the foregoing, each Party agrees that a final judgment (i.e., judgment after any appeals that may be duly made) in any suit, action or proceeding so brought shall be conclusive and may be enforced by suit on the judgment in any jurisdiction or in any other manner provided in law or in equity.

17.5 Notices.

All notices, requests, statements or payments shall be made as specified in Exhibit G. Notices (other than scheduling requests) shall, unless otherwise specified herein, be in writing and may be delivered by hand delivery, United States mail, overnight courier service or facsimile. Notice by facsimile or hand delivery shall be effective at the close of business on the day actually received, if received during business hours on a Business Day, and otherwise shall be effective at the close of business on the next Business Day. Notice by overnight United States mail or courier shall be effective on the next Business Day after it was sent. A Party may change its addresses by providing notice of same in accordance herewith.

17.6 Mobile-Sierra.

Absent the agreement of all Parties to the proposed change, the standard of review for changes to any rate, charge, classification, term or condition of this Agreement, whether proposed by a Party (to the extent that any waiver below is unenforceable or ineffective as to such Party), a non-party or FERC acting *sua sponte*, shall be the 'public interest' standard of review set forth in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956), and clarified by *Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1 of Snohomish*, 554 U.S. 527 (2008); *NRG Power Marketing LLC v. Maine Public Utility Commission*, 558 U.S. 527 (2010.

Notwithstanding any provision of this Agreement, and absent the prior written agreement of the Parties, each Party, to the fullest extent permitted by Applicable Laws, for itself and its respective successors and assigns, hereby also expressly and irrevocably waives any rights it can or may have, now or in the future, whether under Sections 205, 206, or 306 of the Federal Power Act or otherwise, to seek to obtain from FERC by any means, directly or indirectly (through complaint, investigation, supporting a third party seeking to obtain or otherwise), and each hereby covenants and agrees not at any time to seek to so obtain, an order from FERC changing any section of this Agreement specifying any rate or other material economic terms and conditions agreed to by the Parties.

17.7 General.

This Agreement (including the exhibits, schedules and any written supplements hereto, if any) constitutes the entire agreement between the Parties relating to the subject matter. Notwithstanding the foregoing, any collateral, credit support or margin agreement or similar arrangement between the Parties shall, upon designation by the Parties, be deemed part of this Agreement and shall be incorporated herein by reference. This Agreement shall be considered for all purposes as prepared through the joint efforts of the parties and shall not be construed against one party or the other as a result of the preparation, substitution, submission or other event of negotiation, drafting or execution hereof. Except to the extent herein provided for, no amendment or modification to this Agreement shall be enforceable unless reduced to writing and executed by

both Parties. Each Party agrees if it seeks to amend any applicable wholesale power sales tariff during the term of this Agreement, such amendment will not in any way affect outstanding transactions under this Agreement without the prior written consent of the other Party. Each Party further agrees that it will not assert, or defend itself, on the basis that any applicable tariff is inconsistent with this Agreement. This Agreement shall not impart any rights enforceable by any third party (other than a permitted successor or assignee bound to this Agreement). Waiver by a Party of any default by the other Party shall not be construed as a waiver of any other default. Any provision declared or rendered unlawful by any applicable court of law or regulatory agency or deemed unlawful because of a statutory change (individually or collectively, such events referred to as "Regulatory Event") will not otherwise affect the remaining lawful obligations that arise under this Agreement; provided, further, that if a Regulatory Event occurs, the Parties shall use commercially reasonable efforts to reform this Agreement in order to give effect to the original intention of the Parties. The term "including" when used in this Agreement shall be by way of example only and shall not be considered in any way to be in limitation. The headings used herein are for convenience and reference purposes only. All indemnity and audit rights shall survive the termination of this Agreement for twelve (12) months. This Agreement shall be binding on each Party's successors and permitted assigns.

17.8 Audit.

Each Party has the right, at its sole expense and during normal working hours, to examine the records of the other Party to the extent reasonably necessary to verify the accuracy of any statement, charge or computation made pursuant to this Agreement. If requested, a Party shall provide to the other Party statements evidencing the Designated RA Capacity delivered hereunder. If any such examination reveals any inaccuracy in any statement, the necessary adjustments in such statement and the payments thereof will be made promptly and shall bear interest calculated at the Interest Rate from the date the overpayment or underpayment was made until paid; *provided*, *however*, that no adjustment for any statement or payment will be made unless objection to the accuracy thereof was made prior to the lapse of twelve (12) months from the rendition thereof, and thereafter any objection shall be deemed waived.

17.9 Forward Contract.

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

17.10 Dispute Resolution.

(a) In the event of any claim, controversy or dispute between the Parties arising out of or relating to or in connection with this Agreement (including any dispute concerning the validity of this Agreement or the scope and interpretation of this Section 17.10) (a "<u>Dispute</u>"), any Party (the "<u>Notifying Party</u>") may deliver to the other Parties (the "<u>Recipient Party</u>") notice of the Dispute with a detailed description of the underlying circumstances of such Dispute (a "<u>Dispute Notice</u>"). The Dispute Notice shall include a schedule of the availability of the Notifying Party's senior officers (having a title of senior vice president (or its equivalent) or higher) duly authorized to settle the Dispute during the thirty (30) day period following the delivery of the Dispute Notice.

- (b) The Recipient Party shall, within five (5) Business Days following receipt of the Dispute Notice, provide to the Notifying Party a brief summary of the Recipient Party's position on the Dispute and a parallel schedule of availability of the Recipient Party's senior officers (having a title of senior vice president (or its equivalent) or higher) duly authorized to settle the Dispute. Following delivery of the respective senior officers' schedules of availability, the senior officers of the Parties shall meet and confer as often as they deem reasonably necessary during the remainder of the thirty (30) day period in good faith negotiations to resolve the Dispute to the satisfaction of each Party.
- (c) In the event a Dispute is not resolved pursuant to the procedures set forth in Sections 17.10(a) and (b) by the expiration of the thirty (30) day period set forth in Section 17.10(b), then a Party may pursue any legal remedy available to it in accordance with this Agreement.

17.11 Further Assurances.

For the duration of the Delivery Term, each Party shall take all commercially reasonable actions, including complying with all applicable registration and reporting requirements, and execute all documents or instruments necessary to perform the transactions contemplated by this Agreement, including to enable Buyer to use all of the RA Capacity and RAR Attributes committed by Seller to Buyer pursuant to this Agreement.

17.12 Execution.

A signature received via facsimile or email shall have the same legal effect as an original.

17.13 Joint Powers Authority.

Seller acknowledges and agrees that Buyer is organized as a Joint Powers Authority in accordance with the Joint Powers Act of the State of California (Government Code Section 6500 *et seq.*) pursuant to a Joint Powers Agreement and is a public entity separate from its members. Buyer shall solely be responsible for all debts, obligations and liabilities accruing and arising out of this Agreement and Seller agrees that it shall have no rights and shall not make any claim, take any actions or assert any remedies against any of Buyer's members in connection with this Agreement.

17.14 Dodd-Frank Act

The Parties intend this Agreement to be a "customary commercial arrangement" as described in Section II.A.1 of Commodity Futures Trading Commission, *Proposed Guidance, Certain Natural Gas and Electric Power Contracts*, 81 Fed. Reg. 20583 at 20586 (Apr. 8, 2016) and a "Forward Capacity Transaction" within the meaning of Commodity Futures Trading Commission, *Final Order in Response to a Petition From Certain Independent System Operators and Regional Transmission Organizations To Exempt Specified Transactions Authorized by a Tariff or Protocol Approved by the Federal Energy Regulatory Commission, 78 Fed. Reg. 19,880 (Apr. 2, 2013).*

17.15 Market-Based Rate Authority.

In addition to the covenant in Section 10.3(m), Seller shall, in accordance with Federal Energy Regulatory Commission (FERC) Order No. 697, upon request of Buyer, submit a letter of concurrence in support of any affirmative statement by Buyer that this Agreement does not transfer

"ownership or control of generation capacity" from Seller to Buyer as the term "ownership or control of generation capacity" is used in 18 CFR Section 35.42. Seller also shall not, in filings, if any, made subject to Order Nos. 652 and 697, claim that this Agreement conveys ownership or control of generation capacity from Seller to Buyer.

17.16 Rules of Interpretation.

In this Agreement, except as expressly stated otherwise or unless the context otherwise requires:

- (a) headings and the rendering of text in bold and italics are for convenience and reference purposes only and do not affect the meaning or interpretation of this Agreement;
- (b) words importing the singular include the plural and vice versa and the masculine, feminine and neuter genders include all genders;
- (c) the words "hereof", "herein", and "hereunder" and words of similar import shall refer to this Agreement as a whole and not to any particular provision of this Agreement;
- (d) a reference to an Article, Section, paragraph, clause, Party, or Exhibit is a reference to that Article, Section, paragraph, clause of, or that Party or Exhibit to, this Agreement unless otherwise specified;
- (e) a reference to a document or agreement, including this Agreement shall mean such document, agreement or this Agreement including any amendment or supplement to, or replacement, novation or modification of this Agreement, but disregarding any amendment, supplement, replacement, novation or modification made in breach of such document, agreement or this Agreement;
 - (f) a reference to a Person includes that Person's successors and permitted assigns;
- (g) the terms "include" and "including" mean "include or including (as applicable) without limitation" and any list of examples following such term shall in no way restrict or limit the generality of the word or provision in respect of which such examples are provided;
- (h) references to any statute, code or statutory provision are to be construed as a reference to the same as it may have been, or may from time to time be, amended, modified or reenacted, and include references to all bylaws, instruments, orders and regulations for the time being made thereunder or deriving validity therefrom unless the context otherwise requires;
- (i) in the event of a conflict, a mathematical formula or other precise description of a concept or a term shall prevail over words providing a more general description of a concept or a term;
- (j) references to any amount of money shall mean a reference to the amount in United States Dollars;
 - (k) the expression "and/or" when used as a conjunction shall connote "any or all of";

- (l) words, phrases or expressions not otherwise defined herein that (i) have a generally accepted meaning shall have such meaning in this Agreement or (ii) do not have well known and generally accepted meaning 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.

[Remainder of Page Intentionally Left Blank]

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

ENERSMART MESA HEIGHTS BESS LLC, a California limited liability company	SAN DIEGO COMMUNITY POWER, a California joint powers authority
By:	By:
Name:	Name:
Title:	Title:

EXHIBIT A: 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:

APPLICANT DETAILS TO BE PROVIDED

Beneficiary:

[Buyer], a California joint powers authority [Address]

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] (the "Letter of Credit") in favor of [Buyer], a California joint powers authority ("Beneficiary"), [Address], for an amount not to exceed the aggregate sum of U.S. \$[XXXXXX] (United States Dollars [XXXXX] and 00/100), pursuant to that certain Agreement dated as of ______ and as amended (the "Agreement") between [Applicant] and Beneficiary. This Letter of Credit shall become effective immediately and shall expire on [XXXXXX] 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 "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, or (b) facsimile to [bank fax number [XXX-XXXXX]] confirmed by [e-mail to [bank email address]] (if presented by fax it must be followed up by a phone call to us at [XXXXXXX] or [XXXXXX] to confirm receipt) with the originals to follow via courier. The drawing will be effective upon our receipt of the original documents at the above noted address.

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 documents presented under and in compliance with the terms of this Letter of Credit 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 registered mail or 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 is subject to the Uniform Customs and Practice for Documentary Credits (2007 Revision) International Chamber of Commerce Publication No. 600 (the "UCP"), except to the extent that the terms hereof are inconsistent with the provisions of the UCP, including but not limited to Articles 14(b) and 36 of the UCP, in which case the terms of this Letter of Credit shall govern. In the event of an act of God, riot, civil commotion, insurrection, war or any other cause beyond Issuer's control (as defined in Article 36 of the UCP) that interrupts Issuer's business and causes the place for presentation of the Letter of Credit to be closed for business on the last day for presentation, the Expiration Date of the Letter of Credit will be automatically extended without amendment to a date thirty (30) calendar days after the place for presentation reopens for business.

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.

All notices to Beneficiary shall be in writing and are required to be sent by certified letter, overnight courier, or delivered in person to: [Buyer], Chief Operating Officer, [Address]. Only notices to Beneficiary meeting the requirements of this paragraph shall be considered valid. Any notice to Beneficiary which is not in accordance with this paragraph shall be void and of no force or effect.

[Bank Name]	
[Insert officer name]	

[Insert officer title]

Exhibit A: (DRAW REQUEST SHOULD BE ON BENEFICIARY'S LETTERHEAD) **Drawing Certificate** [Insert Bank Name and Address] Ladies and Gentlemen: The undersigned, a duly authorized representative of [Buyer], a California joint powers authority, [Buyer address], as beneficiary (the "Beneficiary") of the Irrevocable Letter of Credit No. [XXXXXXX] (the "Letter of Credit") issued by [insert bank name] (the "Bank") by order of (the "Applicant"), hereby certifies to the Bank as follows: Applicant and Beneficiary are party to that certain Agreement dated as of 1. (the "Agreement"). 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) or \$ other occasion provided for in the Agreement where Beneficiary is authorized to draw on the letter of credit has occurred. OR Beneficiary is making a drawing under this Letter of Credit in the amount of U.S. \$ which equals the full available amount under the Letter of Credit, because we have received notice from the Bank that you have elected not to extend the Expiration Date of the Letter of Credit beyond its current Expiration Date and Applicant is required to maintain the Letter of Credit in force and effect beyond the expiration date of the Letter of Credit but has failed to provide Beneficiary with a replacement Letter of Credit or other acceptable instrument within thirty (30) days prior to such expiration date. The undersigned is a duly authorized representative of [Buyer], a California joint powers authority and is authorized to execute and deliver this Drawing Certificate on behalf of Beneficiary. You are hereby directed to make payment of the requested amount to [Buyer], a California joint powers authority by wire transfer in immediately available funds to the following account: [Specify account information] [Buyer] Name and Title of Authorized Representative Date

EXHIBIT B: FORM OF CONSTRUCTION START DATE CERTIFICATE

This certification of Construction Start Date ("Certification") is delivered by [Seller] ("Seller") to San Diego Community Power, a California joint powers authority ("Buyer") in accordance with the terms of that certain Agreement dated [date] ("Agreement") by and between Seller and Buyer. All capitalized terms used in this Certification but not otherwise defined herein shall have the respective meanings assigned to such terms in the Agreement.

Seller hereby certifies and represents to Buyer that the Construction Start (as defined in 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.

IN WITNESS WHEREOF, the undersigned has executed this Certification on behalf of Seller as of the day of
[Seller]
By:
Its:
Date

EXHIBIT C: FORM OF INITIAL DELIVERY DATE CERTIFICATE

This certification ("Certification") of Initial Delivery is delivered by [Seller] ("Seller") to San Diego Community Power, a California joint powers authority ("Buyer") in accordance with the terms of that Agreement dated [date] ("Agreement") by and between Seller and Buyer. All capitalized terms used in this Certification but not otherwise defined herein shall have the respective meanings assigned to such terms in the Agreement.

As of [DATE] , Seller hereby certifies and represents to Buyer the following:

a)	The Unit is fully operational, reliable and interconnected, fully integrated and synchronized with
	the Transmission System.
b)	Seller has installed equipment for the Unit with a nameplate capacity of no less than 3 MW.
c)	The Unit is fully capable of charging, storing and discharging energy up to no less than 3 MW and receiving instructions to charge, store and discharge energy.
d)	Seller's Interconnection Agreement provides for a maximum instantaneous discharge capability of
	no less than 3 MW.
e)	Authorization to parallel the Unit was obtained by the Participating Transmission Owner, SDG&E
	on <u>[DATE]</u> .
SELL	ER:
Signat	ure:
Name:	
Daic	
ENGI	NEER
Signat	ure:
Date:	

EXHIBIT D: DESCRIPTION OF UNIT

The following describes the Unit to be constructed, operated and maintained by Seller through the Term in accordance with the Agreement.

Unit name: EnerSmart Mesa Heights

Resource type: Battery Energy Storage

Nameplate capacity: 3 MW / 14.838 MWh

Location: San Diego, CA

Unit physical address: 7986 Dagget Street San Diego, CA

Unit elevation: 450'

Unit latitude: 32 49 26 N

Unit longitude: -117 09'06.1" W

Interconnection: SDG&E

CAISO transmission access charge area (e.g. SDG&E): SDG&E

Point of interconnection: adjacent to site

Point of interconnection address: same as site address

Existing zone (e.g. SP-15): SP-15

PNode: MESAHGTS 6 N001

CAISO Resource ID: 23NGR25822

Substation: Mesa Heights

EXHIBIT E: [RESERVED]

EXHIBIT F: PROGRESS REPORTING FORM

Each Progress Report must include the following items:

- 1. Executive summary.
- 2. Unit description.
- 3. Site plan of the Unit.
- 4. Description of any material planned changes to the Unit or the Site.
- 5. Schedule showing progress on Unit construction generally and achieving each of the Milestones and the Initial Delivery Date.
- 6. Summary of activities during the previous month, including any OSHA labor hour reports.
- 7. Forecast of activities scheduled for the current calendar quarter.
- 8. Written description about the progress relative to the Milestones and the Initial Delivery Date, including whether Seller is on schedule with respect to the same.
- 9. List of issues that are likely to potentially affect achievement of the Milestones and the Initial Delivery Date.
- 10. Progress and schedule of the EPC Contract, all major equipment supply agreements, Governmental Approvals, technical studies, and financing arrangements.
- 11. Pictures, in sufficient quantity and of appropriate detail, in order to document construction and interconnection progress.
- 12. Any other documentation reasonably requested by Buyer.

CONFIDENTIAL EXECUTION VERSION

EXHIBIT G: NOTICES

ENERSMART MESA HEIGHTS BESS LLC, a California limited liability company ("Seller")	SAN DIEGO COMMUNITY POWER, a California joint powers authority ("Buyer")
All Notices: Street: 400 S. Sierra Ave. Suite 100	All Notices: P.O. Box 12716
City: Solana Beach, CA. 92075 Attn: Skyler Tennis Phone: 951-317-4757 Email: skyler@enersmartstorage.com	San Diego, CA 92112 Attn: Byron Vosburg, Chief Commercial Officer Phone: (619) 880-6545 Email: bvosburg@sdcommunitypower.org
Reference Numbers:	Reference Numbers:
Duns: n/a	Duns:
Federal Tax ID Number:	Federal Tax ID Number:
Eric Wheatley, VP Finance Phone: 704-763-8642	Invoices: Attn: SDCP Settlements Phone: (619) 880-6545
E-mail: eric.wheatley@enersmartstorage.com	Email: settlements@sdcommunitypower.org
Scheduling:	Scheduling: Tenaska Power Services Co. Attn: Kara Whillock Phone: (972) 333-6122 Email: kwhillock@tnsk.com Day Ahead: (817) 303-1115 Real Time: (817) 303-1852 Facsimile: (817) 303-1104
Payments:	Payments:
Attn: Eric Wheatley, VP Finance	Attn: Michael Maher
Phone: 704-763-8642	Phone: (415) 526-3020
E-mail:eric.wheatley@enersmartstorage.com Wire Transfer:	Email: mmaher@mahercpa.com Wire Transfer:
wire transfer:	wire Transfer:

ENERSMART MESA HEIGHTS BESS LLC, a California limited liability company ("Seller")	SAN DIEGO COMMUNITY POWER, a California joint powers authority ("Buyer")
With additional Notices of an Event of	With additional Notices of an Event of
Default to:	Default to:
	Attn: SDCP General Counsel
	PO Box 12716
	San Diego, CA 92112
	Email: legal@sdcommunitypower.org
Emergency Contact:	Emergency Contact:
	Attn: Byron Vosburg, Chief Commercial
	Officer
	Phone: (619) 880-6545
	Email: bvosburg@sdcommunitypower.org

EXHIBIT H: FORM OF CONSENT TO COLLATERAL ASSIGNMENT

This Consent to Collateral Assignment (this "Consent") is entered into among (i) San Diego Community Power, a California joint powers authority ("SDCP"), (ii) [Name of Seller], a [Legal Status of Seller] (the "Project Company"), and (iii) [Name of Collateral Agent], a [Legal Status of Collateral Agent], as Collateral Agent for the secured parties under the Financing Documents referred to below (such secured parties together with their successors permitted under this Consent in such capacity, the "Secured Parties", and, such agent, together with its successors in such capacity, the "Collateral Agent"). SDCP, Project Company and Collateral Agent are hereinafter sometimes referred to individually as a "Party" and jointly as the "Parties". Capitalized terms used but not otherwise defined in this Consent shall have the meanings ascribed to them in the ESSA (as defined below).

RECITALS

The Parties enter into this Consent with reference to the following facts:

- A. Project Company and SDCP have entered into that certain Energy Storage Service Agreement, dated as of [Date] [List all amendments as contemplated by Section 3.4] ("ESSA"), pursuant to which Project Company will develop, construct, commission, test and operate the Facility (the "Project") and sell the Product to SDCP, and SDCP will purchase the Product from Project Company;
- B. As collateral for Project Company's obligations under the ESSA, Project Company has agreed to provide to SDCP certain collateral, which may include Performance Security and Development Security and other collateral described in the ESSA (collectively, the "ESSA Collateral");
- C. Project Company has entered into that certain [Insert description of financing arrangements with Lender], dated as of [Date], among Project Company, the Lenders party thereto and the Collateral Agent (the "Financing Agreement"), pursuant to which, among other things, the Lenders have extended commitments to make loans to Project Company;
- D. As collateral security for Project Company's obligations under the Financing Agreement and related agreements (collectively, the "Financing Documents"), Project Company has, among other things, assigned all of its right, title and interest in, to and under the ESSA and Project's Company's owners have pledged their ownership interest in Project Company (collectively, the "Assigned Interest") to the Collateral Agent pursuant to the Financing Documents; and
- E. It is a requirement under the Financing Agreement and the ESSA that SDCP and the other Parties hereto shall have executed and delivered this Consent.

AGREEMENT

In consideration of the foregoing, and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, and intending to be legally bound, the Parties hereto hereby agree as follows:

SECTION 1. CONSENT TO ASSIGNMENT, ETC.

1.1 Consent and Agreement.

SDCP hereby acknowledges:

- (a) Notice of and consents to the assignment as collateral security to Collateral Agent, for the benefit of the Secured Parties, of the Assigned Interest; and
- (b) The right (but not the obligation) of Collateral Agent in the exercise of its rights and remedies under the Financing Documents, to make all demands, give all notices, take all actions and exercise all rights of Project Company permitted under the ESSA (subject to SDCP's rights and defenses under the ESSA and the terms of this Consent) and accepts any such exercise; provided, insofar as the Collateral Agent exercises any such rights under the ESSA or makes any claims with respect to payments or other obligations under the ESSA, the terms and conditions of the ESSA applicable to such exercise of rights or claims shall apply to Collateral Agent to the same extent as to Project Company.

1.2 Project Company's Acknowledgement.

Each of Project Company and Collateral Agent hereby acknowledges and agrees that SDCP is authorized to act in accordance with Collateral Agent's instructions, and that SDCP shall bear no liability to Project Company or Collateral Agent in connection therewith, including any liability for failing to act in accordance with Project Company's instructions.

1.3 Right to Cure.

If Project Company defaults in the performance of any of its obligations under the ESSA, or upon the occurrence or non-occurrence of any event or condition under the ESSA which would immediately or with the passage of any applicable grace period or the giving of notice, or both, enable SDCP to terminate or suspend its performance under the ESSA (a "ESSA Default"), SDCP will not terminate or suspend its performance under the ESSA until it first gives written notice of such ESSA Default to Collateral Agent and affords Collateral Agent the right to cure such ESSA Default within the applicable cure period under the ESSA, which cure period shall run concurrently with that afforded Project Company under the ESSA. In addition, if Collateral Agent gives SDCP written notice prior to the expiration of the applicable cure period under the ESSA of Collateral Agent's intention to cure such ESSA Default (which notice shall include a reasonable description of the time during which it anticipates to cure such ESSA Default) and is diligently proceeding to cure such ESSA Default, notwithstanding the applicable cure period under the ESSA, Collateral Agent shall have a period of sixty (60) days (or, if such ESSA Default is for failure by the Project Company to pay an amount to SDCP which is due and payable under the ESSA other than to

provide ESSA Collateral, thirty (30) days, or, if such ESSA Default is for failure by Project Company to provide ESSA Collateral, ten (10) Business Days) from the Collateral Agent's receipt of the notice of such ESSA Default from SDCP to cure such ESSA Default; *provided*, (a) if possession of the Project is necessary to cure any such non-monetary ESSA Default and Collateral Agent has commenced foreclosure proceedings within sixty (60) days after notice of the ESSA Default and is diligently pursuing such foreclosure proceedings, Collateral Agent will be allowed a reasonable time, not to exceed one hundred eighty (180) days after the notice of the ESSA Default, to complete such proceedings and cure such ESSA Default, and (b) if Collateral Agent is prohibited from curing any such ESSA Default by any process, stay or injunction issued by any Governmental Authority or pursuant to any bankruptcy or insolvency proceeding or other similar proceeding involving Project Company, then the time periods specified herein for curing a ESSA Default shall be extended for the period of such prohibition, so long as Collateral Agent has diligently pursued removal of such process, stay or injunction. Collateral Agent shall provide SDCP with reports concerning the status of efforts to cure a ESSA Default upon SDCP's reasonable request.

1.4 Substitute Owner.

Subject to Section 1.7, the Parties agree that if Collateral Agent notifies (such notice, a "Financing Document Default Notice") SDCP that an event of default has occurred and is continuing under the Financing Documents (a "Financing Document Event of Default") then, upon a judicial foreclosure sale, non-judicial foreclosure sale, deed in lieu of foreclosure or other transfer following a Financing Document Event of Default, Collateral Agent (or its designee) shall be substituted for Project Company (the "Substitute Owner") under the ESSA, and, subject to Sections 1.7(b) and 1.7(c) below, SDCP and Substitute Owner will recognize each other as counterparties under the ESSA and will continue to perform their respective obligations (including those obligations accruing to SDCP and the Project Company prior to the existence of the Substitute Owner) under the ESSA in favor of each other in accordance with the terms thereof; provided, before SDCP is required to recognize the Substitute Owner, the Substitute Owner must (i) be a permitted assignee under the ESSA or (ii) have demonstrated to SDCP's reasonable satisfaction that the Substitute Owner has financial qualifications and operating experience [TBD] (a "Permitted Transferee"). For purposes of the foregoing, SDCP shall be entitled to assume that any such purported exercise of rights by Collateral Agent that results in substitution of a Substitute Owner under the ESSA is in accordance with the Financing Documents without independent investigation thereof but shall have the right to require that the Collateral Agent and its designee (if applicable) provide reasonable evidence demonstrating the same.

1.5 Replacement Agreements.

Subject to Section 1.7, if the ESSA is terminated, rejected or otherwise invalidated as a result of any bankruptcy, insolvency, reorganization or similar proceeding affecting Project Company, its owner(s) or guarantor(s), and if Collateral Agent or its designee directly or indirectly takes possession of, or title to, the Project (including possession by a receiver or title by foreclosure or deed in lieu of foreclosure) ("Replacement Owner"), SDCP shall, and Collateral Agent shall cause Replacement Owner to, enter into a new agreement with one another for the balance of the obligations under the ESSA remaining to be performed having terms substantially the same as the terms of the ESSA with respect to the remaining Term ("Replacement ESSA"); provided, before

SDCP is required to enter into a Replacement ESSA, the Replacement Owner must have demonstrated to SDCP's reasonable satisfaction that the Replacement Owner satisfies the requirements of a Permitted Transferee. For purposes of the foregoing, SDCP is entitled to assume that any such purported exercise of rights by Collateral Agent that results in a Replacement Owner is in accordance with the Financing Documents without independent investigation thereof but shall have the right to require that the Collateral Agent and its designee (if applicable) provide reasonable evidence demonstrating the same. Notwithstanding the execution and delivery of a Replacement ESSA, to the extent SDCP is, or was otherwise prior to its termination as described in this Section 1.5, entitled under the ESSA, SDCP may suspend performance of its obligations under such Replacement ESSA, unless and until all ESSA Defaults of Project Company under the ESSA or Replacement ESSA have been cured.

1.6 Transfer.

Subject to Section 1.7, a Substitute Owner or a Replacement Owner may assign all of its interest in the Project and the ESSA and a Replacement ESSA to a natural person, corporation, trust, business trust, joint venture, joint stock company, association, company, limited liability company, partnership, Governmental Authority or other entity (a "Person") to which the Project is transferred; *provided*, the proposed transferee shall have demonstrated to SDCP's reasonable satisfaction that such proposed transferee satisfies the requirements of a Permitted Transferee.

1.7 <u>Assumption of Obligations</u>.

(a) <u>Transferee</u>.

Any transferee under Section 1.6 shall expressly assume in a writing reasonably satisfactory to SDCP all of the obligations of Project Company, Substitute Owner or Replacement Owner under the ESSA or Replacement ESSA, as applicable, including posting and collateral assignment of the ESSA Collateral. Upon such assignment and the cure of any outstanding ESSA Default, and payment of all other amounts due and payable to SDCP in respect of the ESSA or such Replacement ESSA, the transferor shall be released from any further liability under the ESSA or Replacement ESSA, as applicable.

(b) Substitute Owner.

Subject to Section 1.7(c), any Substitute Owner pursuant to Section 1.4 shall be required to perform Project Company's obligations under the ESSA, including posting and collateral assignment of the ESSA Collateral; *provided*, the obligations of such Substitute Owner shall be no more than those of Project Company under the ESSA.

(c) No Liability.

SDCP acknowledges and agrees that neither Collateral Agent nor any Secured Party shall have any liability or obligation under the ESSA as a result of this Consent (except to the extent Collateral Agent or a Secured Party is a Substitute Owner or Replacement Owner) nor shall Collateral Agent or any other Secured Party be obligated or required to (i) perform any of Project Company's obligations under the ESSA, except as provided in Sections 1.7(a) and 1.7(b) and to

the extent Collateral Agent or a Secured Party is a Substitute Owner or Replacement Owner, or (ii) take any action to collect or enforce any claim for payment assigned under the Financing Documents. If Collateral Agent becomes a Substitute Owner pursuant to Section 1.4 or enters into a Replacement ESSA, Collateral Agent shall not have any personal liability to SDCP under the ESSA or Replacement ESSA and the sole recourse of SDCP in seeking enforcement of such obligations against Collateral Agent shall be to the aggregate interest of the Secured Parties in the Project; *provided*, such limited recourse shall not limit SDCP's right to seek equitable or injunctive relief against Collateral Agent, or SDCP's rights with respect to any offset rights expressly allowed under the ESSA, a Replacement ESSA or the ESSA Collateral.

1.8 Delivery of Notices.

SDCP shall deliver to Collateral Agent, concurrently with the delivery thereof to Project Company, a copy of each notice, request or demand given by SDCP to Project Company pursuant to the ESSA relating to (a) a ESSA Default by Project Company under the ESSA, (b) any claim regarding Force Majeure by SDCP under the ESSA, (c) any notice of dispute under the ESSA, (d) any notice of intent to terminate or any termination notice, and (e) any matter that would require the consent of Collateral Agent pursuant to Section 1.11 or any other provision of this Consent. Collateral Agent acknowledges that delivery of such notice, request and demand shall satisfy SDCP's obligation to give Collateral Agent a notice of ESSA Default under Section 1.3. Collateral Agent shall deliver to SDCP, concurrently with delivery thereof to Project Company, a copy of each notice, request or demand given by Collateral Agent to Project Company pursuant to the Financing Documents relating to a default by Project Company under the Financing Documents.

1.9 Confirmations.

SDCP will, as and when reasonably requested by Collateral Agent from time to time, confirm in writing matters relating to the ESSA (including the performance of same by Project Company); provided, such confirmation may be limited to matters of which SDCP is aware as of the time the confirmation is given and such confirmations shall be without prejudice to any rights of SDCP under the ESSA as between SDCP and Project Company.

1.10 Exclusivity of Dealings.

Except as provided in Sections 1.3, 1.4, 1.8, 1.9 and 2.1, unless and until SDCP receives a Financing Document Default Notice, SDCP shall deal exclusively with Project Company in connection with the performance of SDCP's obligations under the ESSA. From and after such time as SDCP receives a Financing Document Default Notice and until a Substitute Owner is substituted for Project Company pursuant to Section 1.4, a Replacement ESSA is entered into or the ESSA is transferred to a Person to whom the Project is transferred pursuant to Section 1.6, SDCP shall, until Collateral Agent confirms to SDCP in writing that all obligations under the Financing Documents are no longer outstanding, deal exclusively with Collateral Agent in connection with the performance of SDCP's obligations under the ESSA, and SDCP may irrevocably rely on instructions provided by Collateral Agent in accordance therewith to the exclusion of those provided by any other Person.

1.11 No Amendments.

To the extent permitted by Laws, SDCP agrees that it will not, without the Project Company obtaining prior written consent of Collateral Agent (not to be unreasonably withheld, delayed or conditioned) (a) enter into any material supplement, restatement, novation, extension, amendment or modification of the ESSA (b) terminate or suspend its performance under the ESSA (except in accordance with Section 1.3) or (c) consent to or accept any termination or cancellation of the ESSA by Project Company.

SECTION 2. PAYMENTS UNDER THE ESSA

2.1 <u>Payments</u>.

Unless and until SDCP receives written notice to the contrary from Collateral Agent, SDCP will make all payments to be made by it to Project Company under or by reason of the ESSA directly to Project Company. SDCP, Project Company, and Collateral Agent acknowledge that SDCP will be deemed to be in compliance with the payment terms of the ESSA to the extent that SDCP makes payments in accordance with Collateral Agent's instructions.

2.2 No Offset, Etc.

All payments required to be made by SDCP under the ESSA shall be made without any offset, recoupment, abatement, withholding, reduction or defense whatsoever, other than that expressly allowed by the terms of the ESSA.

SECTION 3. REPRESENTATIONS AND WARRANTIES OF SDCP

SDCP makes the following representations and warranties as of the date hereof in favor of Collateral Agent:

3.1 Organization.

SDCP is a joint powers authority and community choice aggregator duly organized and validly existing 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 its jurisdiction. SDCP has all requisite power and authority, corporate and otherwise, to enter into and to perform its obligations hereunder and under the ESSA, and to carry out the terms hereof and thereof and the transactions contemplated hereby and thereby.

3.2 <u>Authorization</u>.

The execution, delivery and performance by SDCP of this Consent and the ESSA have been duly authorized by all necessary corporate or other action on the part of SDCP and do not require any approval or consent of any holder (or any trustee for any holder) of any indebtedness or other obligation of SDCP which, if not obtained, will prevent SDCP from performing its obligations hereunder or under the ESSA except approvals or consents which have previously been obtained and which are in full force and effect.

3.3 Execution and Delivery; Binding Agreements.

Each of this Consent and the ESSA is in full force and effect, have been duly executed and delivered on behalf of SDCP by the appropriate officers of SDCP, and constitute the legal, valid and binding obligation of SDCP, enforceable against SDCP in accordance with its terms, except as the enforceability thereof may be limited by (a) bankruptcy, insolvency, reorganization, moratorium or other similar laws of general application affecting the enforcement of creditors' rights generally and (b) general equitable principles (whether considered in a proceeding in equity or at law).

3.4 No Default or Amendment.

Except as set forth in Schedule A attached hereto: (a) Neither SDCP nor, to SDCP's actual knowledge, Project Company, is in default of any of its obligations under the ESSA; (b) SDCP and, to SDCP's actual knowledge, Project Company, has complied with all conditions precedent to the effectiveness of its obligations under the ESSA; (c) to SDCP's actual knowledge, no event or condition exists which would either immediately or with the passage of any applicable grace period or giving of notice, or both, enable either SDCP or Project Company to terminate or suspend its obligations under the ESSA; and (d) the ESSA has not been amended, modified or supplemented in any manner except as set forth herein and in the recitals hereto.

3.5 <u>No Previous Assignments.</u>

SDCP has no notice of, and has not consented to, any previous assignment by Project Company of all or any part of its rights under the ESSA, except as previously disclosed in writing and consented to by SDCP.

SECTION 4. REPRESENTATIONS AND WARRANTIES OF PROJECT COMPANY

Project Company makes the following representations and warranties as of the date hereof in favor of the Collateral Agent and SDCP:

4.1 Organization.

Project Company is a [Legal Status of Seller] duly organized and validly existing under the laws of the state of its organization, and is duly qualified, authorized to do business and in good standing in every jurisdiction in which it owns or leases real property or in which the nature of its business requires it to be so qualified, except where the failure to so qualify would not have a material adverse effect on its financial condition, its ability to own its properties or its ability to transact its business. Project Company has all requisite power and authority, corporate and otherwise, to enter into and to perform its obligations hereunder and under the ESSA, and to carry out the terms hereof and thereof and the transactions contemplated hereby and thereby.

4.2 Authorization.

The execution, delivery and performance of this Consent by Project Company, and Project Company's assignment of its right, title and interest in, to and under the ESSA to the Collateral Agent pursuant to the Financing Documents, have been duly authorized by all necessary corporate or other action on the part of Project Company.

4.3 Execution and Delivery; Binding Agreement.

This Consent is in full force and effect, has been duly executed and delivered on behalf of Project Company by the appropriate officers of Project Company, and constitutes the legal, valid and binding obligation of Project Company, enforceable against Project Company in accordance with its terms, except as the enforceability thereof may be limited by (a) bankruptcy, insolvency, reorganization, moratorium or other similar laws of general application affecting the enforcement of creditors' rights generally and (b) general equitable principles (whether considered in a proceeding in equity or at law).

4.4 No Default or Amendment.

Except as set forth in Schedule B attached hereto: (a) neither Project Company nor, to Project Company's actual knowledge, SDCP, is in default of any of its obligations thereunder; (b) Project Company and, to Project Company's actual knowledge, SDCP, has complied with all conditions precedent to the effectiveness of its obligations under the ESSA; (c) to Project Company's actual knowledge, no event or condition exists which would either immediately or with the passage of any applicable grace period or giving of notice, or both, enable either SDCP or Project Company to terminate or suspend its obligations under the ESSA; and (d) the ESSA has not been amended, modified or supplemented in any manner except as set forth herein and in the recitals hereto.

4.5 <u>No Previous Assignments</u>.

Project Company has not previously assigned all or any part of its rights under the ESSA.

SECTION 5. REPRESENTATIONS AND WARRANTIES OF COLLATERAL AGENT

Collateral Agent makes the following representations and warranties as of the date hereof in favor of SDCP and Project Company:

5.1 <u>Authorization</u>.

The execution, delivery and performance of this Consent by Collateral Agent have been duly authorized by all necessary corporate or other action on the part of Collateral Agent and Secured Parties.

5.2 Execution and Delivery; Binding Agreement.

This Consent is in full force and effect, has been duly executed and delivered on behalf of Collateral Agent by the appropriate officers of Collateral Agent, and constitutes the legal, valid and binding obligation of Collateral Agent as Collateral Agent for the Secured Parties, enforceable against Collateral Agent (and the Secured Parties to the extent applicable) in accordance with its terms, except as the enforceability thereof may be limited by (a) bankruptcy, insolvency, reorganization, moratorium or other similar laws of general application affecting the enforcement of creditors' rights generally and (b) general equitable principles (whether considered in a proceeding in equity or at law).

SECTION 6. MISCELLANEOUS

6.1 Notices.

All notices and other communications hereunder shall be in writing, shall be deemed given upon receipt thereof by the Party or Parties to whom such notice is addressed, shall refer on their face to the ESSA (although failure to so refer shall not render any such notice or communication ineffective), shall be sent by first class mail, by personal delivery or by a nationally recognized courier service, and shall be directed (a) if to SDCP or Project Company, in accordance with [Notice Section of the ESSA] of the ESSA, (b) if to Collateral Agent, to [Collateral Agent Name], [Collateral Agent Address], Attn: [Collateral Agent Contact Information], Telephone: [___], Fax: [__], and (c) to such other address or addressee as any such Party may designate by notice given pursuant hereto.

6.2 Governing Law; Submission to Jurisdiction.

- (a) THIS CONSENT SHALL BE CONSTRUED IN ACCORDANCE WITH, AND THIS CONSENT AND ALL MATTERS ARISING OUT OF THIS CONSENT AND THE TRANSACTIONS CONTEMPLATED HEREBY SHALL BE GOVERNED BY, THE LAW OF THE STATE OF CALIFORNIA WITHOUT REGARD TO ANY CONFLICTS OF LAWS PROVISIONS THEREOF THAT WOULD RESULT IN THE APPLICATION OF THE LAW OF ANOTHER JURISDICTION.
- All disputes, claims or controversies arising out of, relating to, concerning or pertaining to the terms of this Consent shall be governed by the dispute resolution provisions of the ESSA. Subject to the foregoing, any legal action or proceeding with respect to this Consent and any action for enforcement of any judgment in respect thereof may be brought in the courts of the State of California or of the United States of America for the Central District of California, and, by execution and delivery of this Consent, each Party hereby accepts for itself and in respect of its property, generally and unconditionally, the non-exclusive jurisdiction of the aforesaid courts and appellate courts from any appeal thereof. Each Party further irrevocably consents to the service of process out of any of the aforementioned courts in any such action or proceeding by the mailing of copies thereof by registered or certified mail, postage prepaid, to its notice address provided pursuant to Section 6.1 hereof. Each Party hereby irrevocably waives any objection which it may now or hereafter have to the laying of venue of any of the aforesaid actions or proceedings arising out of or in connection with this Consent brought in the courts referred to above and hereby further irrevocably waives and agrees not to plead or claim in any such court that any such action or proceeding brought in any such court has been brought in an inconvenient forum. Nothing herein shall affect the right of any Party to serve process in any other manner permitted by law.

6.3 <u>Headings Descriptive</u>.

The headings of the several sections and subsections of this Consent are inserted for convenience only and shall not in any way affect the meaning or construction of any provision of this Consent.

6.4 <u>Severability</u>.

In case any provision in or obligation under this Consent shall be invalid, illegal or unenforceable in any jurisdiction, the validity, legality and enforceability of the remaining provisions or obligations, or of such provision or obligation in any other jurisdiction, shall not in any way be affected or impaired thereby.

6.5 Amendment, Waiver.

Neither this Consent nor any of the terms hereof may (a) be terminated, amended, supplemented or modified, except by an instrument in writing signed by SDCP, Project Company and Collateral Agent or (b) waived, except by an instrument in writing signed by the waiving Party.

6.6 Termination.

Each Party's obligations hereunder are absolute and unconditional, and no Party has any right, and shall have no right, to terminate this Consent or to be released, relieved or discharged from any obligation or liability hereunder until SDCP has been notified by Collateral Agent that all of the obligations under the Financing Documents shall have been satisfied in full (other than contingent indemnification obligations) or, with respect to the ESSA or any Replacement ESSA, its obligations under such ESSA or Replacement ESSA have been fully performed.

6.7 <u>Successors and Assigns.</u>

This Consent shall be binding upon each Party and its successors and assigns permitted under and in accordance with this Consent, and shall inure to the benefit of the other Parties and their respective successors and assignee permitted under and in accordance with this Consent. Each reference to a Person herein shall include such Person's successors and assigns permitted under and in accordance with this Consent.

6.8 Further Assurances.

SDCP hereby agrees to execute and deliver all such instruments and take all such action as may be necessary to effectuate fully the purposes of this Consent.

6.9 Waiver of Trial by Jury.

TO THE EXTENT PERMITTED BY APPLICABLE LAWS, THE PARTIES HEREBY IRREVOCABLY WAIVE ALL RIGHT OF TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM ARISING OUT OF OR IN CONNECTION WITH THIS CONSENT OR ANY MATTER ARISING HEREUNDER. EACH PARTY FURTHER WARRANTS AND REPRESENTS THAT IT HAS REVIEWED THIS WAIVER WITH ITS LEGAL COUNSEL, AND THAT IT KNOWINGLY AND VOLUNTARILY WAIVES ITS JURY TRIAL RIGHTS FOLLOWING CONSULTATION WITH LEGAL COUNSEL.

6.10 Entire Agreement.

This Consent and any agreement, document or instrument attached hereto or referred to herein integrate all the terms and conditions mentioned herein or incidental hereto and supersede all oral negotiations and prior writings in respect to the subject matter hereof. In the event of any conflict

between the terms, conditions and provisions of this Consent and any such agreement, document or instrument, the terms, conditions and provisions of this Consent shall prevail.

6.11 Effective Date.

This Consent shall be deemed effective as of the date upon which the last Party executes this Consent.

6.12 <u>Counterparts; Electronic Signatures.</u>

This Consent may be executed in one or more counterparts, each of which will be deemed to be an original of this Consent and all of which, when taken together, will be deemed to constitute one and the same agreement. The exchange of copies of this Consent and of signature pages by facsimile transmission, Portable Document Format (i.e., PDF), or by other electronic means shall constitute effective execution and delivery of this Consent as to the Parties and may be used in lieu of the original Consent for all purposes.

[Remainder of Page Left Intentionally Blank.]

IN WITNESS WHEREOF, the Parties hereto have caused this Consent to be duly executed and delivered by their duly authorized officers on the dates indicated below their respective signatures.

[NAME OF PROJECT COMPANY], [Legal Status of Project Company].	SAN DIEGO COMMUNITY POWER, a California joint powers authority.
By:	By:
[Name] [Title]	[Name] [Title]
Date:	Date:
[NAME OF COLLATERAL AGENT], [Legal Status of Collateral Agent].	
By:	
[Name] [Title]	
Date:	

SCHEDULE A

[Describe any disclosures relevant to representations and warranties made in Section 3	presentations and warranties made in Section	nt to repre	losures releva	ıy discl	Describe ar	
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SCHEDULE B

[Describe any disclosures relevant to representations and warranties made in Section 4.4]

ITEM 15 ATTACHMENT D

AMENDED AND RESTATED RESOURCE ADEQUACY AGREEMENT **COVER SHEET**

A. Parties

Seller: EnerSmart Chula Vista BESS LLC, a California limited liability company

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

B. Unit Information

Unit Name:	EnerSmart Chula Vista
Location:	Chula Vista, CA
CAISO Resource ID:	OTAY_6_ECVBT1 OTAY_6_ECVBT2
Unit SCID:	AESM
Unit NQC:	3 MW
Unit EFC:	3 MW
Resource Type:	Battery Energy Storage System
Resource Category (1, 2, 3 or 4):	4
FCR Category (1, 2 or 3):	2
Path 26 (North or South):	SP26
Local Capacity Area (if any, as of Effective Date):	SDGE
Deliverability restrictions, if any, as described in most recent CAISO deliverability assessment:	TBD
Run Hour Restrictions	N/A

C. Resource Duration

Contract Year	Resource Duration	
1		
2		
3		
4		
5		
6		

CONFIDENTIAL **EXECUTION VERSION**

7		
8		
9		
10		

D. RA Product and Attributes

I. Milestones

	Throughout the Delivery Term, Seller shall provide Buyer with the Designated RA Capa of Product having the following attributes:	acity
	☑ RAR Attributes	
	☐ RAR Attributes with FCR Attributes	
	☐ LAR Attributes	
	□ LAR Attributes with FCR Attributes	
	☐ FCR Attributes	
E.	Delivery Term	
	The Delivery Term is ten (10) Contract Years, subject to adjustment as set forth in Sec 2.1(b).	etior
F.	Contract Quantities	
	The Contract Quantities for each Showing Month of the Delivery Term shall be:	
	RAR Attributes:	
	LAR Attributes:	
	FCR Attributes:	
G.	Contract Price	
Th	e Contract Price shall be:	
Η.	Seller's Security Amounts	
	Performance Security:	

Milestone	Date for Completion
Site Control obtained	June 16, 2020
Interconnection Agreement executed	May 27, 2021
Expected Construction Start Date	Completed
Full Capacity Deliverability Status obtained	
Guaranteed Initial Delivery Date	

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PREAMBLE

This Amended and Restated Resource Adequacy Agreement ("<u>Agreement</u>") is entered into between EnerSmart Chula Vista BESS LLC, a California limited liability company ("<u>Seller</u>") and **San Diego Community Power**, a California joint powers authority ("<u>Buyer</u>"), each individually a "<u>Party</u>" and together the "<u>Parties</u>," as of March ___, 2025 (the "<u>Effective Date</u>"). All capitalized terms used in this Agreement are used with the meanings ascribed to them in Article 1 to this Agreement.

RECITALS

WHEREAS, the Parties entered into that certain Resource Adequacy Agreement dated October 5, 2023 for the purchase and sale of Product from the Unit ("Original Agreement");

WHEREAS, the Parties hereby agree to amend, restate, replace and supersede the terms of the Original Agreement as set forth herein;

WHEREAS, Seller intends to develop, design, construct, own, and operate the Unit; 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 "Affiliate" means, with respect to any person, any other person (other than an individual) that, directly or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control with, such person. For this purpose, "control" means the direct or indirect ownership of fifty percent (50%) or more of the outstanding capital stock or other equity interests having ordinary voting power.
- 1.2 "Agreement" has the meaning set forth in the Preamble.
- 1.3 "Alternate Capacity" means any replacement RA Capacity having at least equivalent RAR Attributes, LAR Attributes and/or FCR Attributes as the Product provided by the Unit, including the same Slice-of-Day (as defined in the Resource Adequacy Rulings) and related characteristics, and any successor criteria applicable to the Unit; provided, if any portion of the Designated RA Capacity that Seller is seeking to replace is Designated RA Capacity having RAR Attributes and no LAR Attributes, and no such RAR capacity is available (such capacity shall also include FCR Attributes if this is a Flexible RA Product), then Seller may replace such portion of the Designated RA Capacity with capacity having RAR Attributes and LAR Attributes (as well as FCR Attributes if this is a Flexible RA Product).

CONFIDENTIAL EXECUTION VERSION

- 1.4 "Applicable Laws" means any law, rule, regulation, order, decision, judgment, or other legal or regulatory determination by any Governmental Body having jurisdiction over one or both Parties or this Agreement, including without limitation, the Tariff.
- 1.5 "Availability Incentive Payments" means Availability Incentive Payments as defined in the Tariff.
- 1.6 "Availability Standards" means Availability Standards as defined in the Tariff.
- 1.7 "Bankrupt" means with respect to any entity, such entity (a) files a petition or otherwise commences, authorizes or acquiesces in the commencement of a proceeding or cause of action under any bankruptcy, insolvency, reorganization or similar law, or has any such petition filed or commenced against it and such petition filed or commenced against it is not stayed or dismissed within ninety (90) days thereafter, (b) makes an assignment or any general arrangement for the benefit of creditors, (c) otherwise becomes bankrupt or insolvent (however evidenced), (d) has a liquidator, administrator, receiver, trustee, conservator or similar official appointed with respect to it or any substantial portion of its property or assets, or (e) is generally unable to pay its debts as they fall due.
- 1.8 "Business Day" means any day except a Saturday, Sunday, or a Federal Reserve Bank holiday in California.
- 1.9 "Buyer" has the meaning set forth in the Preamble.
- 1.10 "CAISO" means the California Independent System Operator or its successor.
- **1.11** "CAISO Control Area" means the Control Area (as defined in the Tariff) that is operated by the CAISO.
- 1.12 "CAISO Controlled Grid" has the meaning set forth in the Tariff.
- 1.13 "CAISO Offer Requirements" has the meaning set forth in Article 4.



- 1.15 "CIRA Tool" means the CAISO Customer Interface for Resource Adequacy.
- 1.16 "Claiming Party" has the meaning set forth in Section 3.12.
- 1.17 "Claims" means all third party claims or actions, threatened or filed and, whether groundless, false, fraudulent or otherwise, that directly or indirectly relate to the subject

matter of an indemnity, and the resulting losses, damages, expenses, attorneys' fees and court costs, whether incurred by settlement or otherwise, and whether such claims or actions are threatened or filed prior to or after the termination of this Agreement.

- 1.18 "Compliance Issue" has the meaning set forth in Article 13.
- 1.19 "Compliance Obligation" means the RAR, Local RAR, FCR, and any other resource adequacy or capacity procurement requirements imposed on LSEs by the CPUC pursuant to the Resource Adequacy Rulings, by the CAISO, by the WECC, or by any other Governmental Body having jurisdiction.
- 1.20 "Confidential Information" has the meaning set forth in Article 11.
- 1.21 "Construction Start" has the meaning set forth in Section 16.1(a).
- 1.22 "Construction Start Date" has the meaning set forth in Section 16.1(a).
- 1.23 "Contract Price" has the meaning set forth in Section G of the Cover Sheet.
- 1.24 "Contract Quantity" means, with respect to any particular Showing Month of the Delivery Term, the amount of Product (in MWs) set forth in Section F of the Cover Sheet, which Seller has agreed to provide to Buyer from the Unit for such Showing Month, which amount may be amended in accordance with Section 16.2(b).
- 1.25 "Contract Year" means a period of twelve (12) consecutive months; the first Contract Year shall commence on the Initial Delivery Date; and each subsequent Contract Year shall commence on the anniversary of the Initial Delivery Date.
- 1.26 "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 a Terminated Transaction; and all reasonable attorneys' fees and expenses incurred by the Non-Defaulting Party in connection with the Terminated Transaction.
- 1.27 "CPUC" means the California Public Utilities Commission or its successor.
- 1.28 "<u>CPUC Filing Guide</u>" means the annual document issued by the CPUC which sets forth the guidelines, requirements and instructions for LSE's to demonstrate compliance with the CPUC's resource adequacy program.
- 1.29 "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.
- 1.30 "Defaulting Party" has the meaning set forth in Section 5.1.

- 1.31 "Delivery Point" has the meaning set forth in Section 3.4.
- **1.32** "<u>Delivery Term</u>" means the period of Contract Years set forth on the Cover Sheet beginning on the Initial Delivery Date, unless terminated earlier in accordance with the terms and conditions of this Agreement.
- 1.33 "<u>Designated RA Capacity</u>" shall be equal to, with respect to each Showing Month of the Delivery Term, the Contract Quantity of Product for each hour of the Resource Duration in such Showing Month able to be shown on Buyer's monthly or annual Supply Plan, including the amount of Contract Quantity that Seller has elected to provide as Alternate Capacity from one or more Replacement Units in accordance with Section 3.6.
- 1.34 "Development Cure Period" has the meaning set forth in Section 16.2(c).
- 1.35 "Dispute" has the meaning set forth in Section 17.10(a).
- 1.36 "Dispute Notice" has the meaning set forth in Section 17.10(a).
- 1.37 "Early Termination Date" has the meaning set forth in Section 5.2.
- **1.38** "Effective Date" is the date set forth in the Preamble.
- **1.39** "<u>Effective Flexible Capacity</u>" or "<u>EFC</u>" means the capacity of a resource that can be counted towards an LSE's Flexible Capacity Requirements, as identified from time to time by the Tariff, the Resource Adequacy Rulings, LRA, or other Governmental Body having jurisdiction.
- **1.40** "EPC Contract" means the Seller's engineering, procurement and construction contract with the EPC Contractor.
- **1.41** "<u>EPC Contractor</u>" means Seller's engineering, procurement and construction contractor or such Person performing those functions.
- 1.42 "Equitable Defenses" means any bankruptcy, insolvency, reorganization and other laws affecting creditors' rights generally, and with regard to equitable remedies, the discretion of the court before which proceedings to obtain same may be pending.
- 1.43 "Event of Default" has the meaning set forth in Section 5.1.
- 1.44 "FCR Attributes" means, with respect to a Resource Adequacy Resource, any and all flexible resource adequacy attributes that can be counted toward an LSE's FCR, as they are identified from time to time by the Resource Adequacy Rulings, the Tariff, an LRA, or other Governmental Body having jurisdiction including any Resource Duration attributes, exclusive of any LAR Attributes and any RAR Attributes.
- 1.45 "FCR Showings" means the FCR compliance showings (or similar or successor showings) an LSE is required to make to the CPUC (and, to the extent authorized by the CPUC, to

- the CAISO) pursuant to the Resource Adequacy Rulings and the Tariff, or to an LRA having jurisdiction over the LSE.
- **1.46** "FERC" means the Federal Energy Regulatory Commission or any successor government agency.
- 1.47 "<u>Final Deliverability</u>" means the condition existing when all network upgrades (which may include certain transmission plan upgrades) are completed and all transmission contingencies are resolved such that the Unit no longer requires annual Interim Deliverability Status allocations in order to deliver the Contract Quantity of RAR Attributes to Buyer from the Unit.
- **1.48** "Final Deliverability Date" means the date on which Final Deliverability occurs as evidenced in the Notice provided by Seller to Buyer pursuant to Section 3.3(c).
- 1.49 "<u>Financing Parties</u>" means the person(s) or entity(ies), if any, from time to time issuing or providing any construction, term, back leverage, working capital, bond or other financing, credit support, credit enhancements, interest rate hedging or other permanent debt, lease financing, cash equity, mezzanine or tax equity funding for the Unit, Seller, or any Affiliate of Seller, including any applicable trustee, collateral agent or similar person or entity.
- **1.50** "Flexible Capacity Category" has the meaning set forth in the Resource Adequacy Resource.
- 1.51 "Flexible Capacity Requirements" or "FCR" means the flexible capacity requirements established for LSEs by the CPUC pursuant to the Resource Adequacy Rulings, or by an LRA or other Governmental Body having jurisdiction.
- **1.52** "Flexible RA Product" means that the Product includes FCR Attributes, if applicable, as specified in Sections D and F of the Cover Sheet.
- 1.53 "Force Majeure" means an event or circumstance which prevents one Party from performing its obligations under the Agreement, which event or circumstance was not anticipated as of the Effective Date, which is not within the reasonable control of, or the result of the negligence of, the Claiming Party, and which, by the exercise of due diligence, the Claiming Party is unable to overcome or avoid or cause to be avoided. Force Majeure shall not be based on (i) the loss of Buyer's markets; (ii) Buyer's inability economically to use or resell the Product purchased hereunder; (iii) the loss or failure of Seller's supply (except to the extent due to a Force Majeure); or (iv) Seller's ability to sell the Product at a price greater than the Contract Price. Neither Party may raise a claim of Force Majeure based in whole or in part on curtailment by a Transmission Provider (i) unless such Party has contracted for firm transmission with a Transmission Provider for the Product to be delivered to or received at the Delivery Point and (ii) except to the extent such curtailment is due to Transmission Provider; provided, however, that existence of the foregoing factors shall not be sufficient to conclusively or presumptively prove the existence of a Force Majeure absent a showing of other facts and circumstances which in the aggregate with such factors establish that a Force Majeure as defined in the first sentence hereof has occurred.

- 1.54 "Full Capacity Deliverability Status" or "FCDS" has the meaning set forth in the Tariff.
- 1.55 "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 a Terminated Transaction, determined in a commercially reasonable manner.
- 1.56 "Governmental Approvals" means all authorizations, consents, approvals, waivers, exceptions, variances, filings, permits, orders, licenses, exemptions, notices to and declarations of or with any Governmental Body and shall include those siting and operating permits and licenses, and any of the foregoing under any applicable environmental law, that are required for the use and operation of the Unit.
- 1.57 "Governmental Body" means (a) any federal, state, local, municipal or other government; (b) any governmental, regulatory or administrative agency, commission or other authority lawfully exercising or entitled to exercise any administrative, executive, judicial, legislative, police, regulatory or taxing authority or power; (c) any court or governmental tribunal, but in all cases, excludes both Parties; and (d) CAISO.
- 1.58 "Governmental Charges" has the meaning set forth in Section 8.2.
- 1.59 "Guaranteed Initial Delivery Date" is the date set forth in Section I of the Cover Sheet, subject to extension pursuant to Section 16.2(c), but as limited by Section 16.2(d).
- 1.61
- 1.62 "Initial Delivery" has the meaning set forth in Section 16.2(a).

with the Transmission System during the Delivery Term.

1.64

- 1.63 "<u>Initial Delivery Date</u>" means the date on which Initial Delivery is achieved.
- 1.65 "Interconnection Agreement" means the interconnection agreement entered into by Seller pursuant to which the Unit and Seller's Interconnection Facilities will be interconnected
- 1.66 "<u>Interconnection Facilities</u>" means the interconnection facilities, control and protective devices and metering facilities required to connect the Unit with the Transmission System in accordance with the Interconnection Agreement.
- 1.67 "Interest Rate" means, for any date, the lesser of (a) the per annum rate of interest equal to the prime lending rate as may from time to time be published in *The Wall Street Journal* under "Money Rates" on such day (or if not published on such day on the most recent preceding day on which published), plus two percent (2%) and (b) the maximum rate permitted by applicable law.
- **1.68** "<u>Interim Deliverability Notice</u>" has the meaning set forth in Section 3.3(b).

- 1.69 "Interim Deliverability Period" has the meaning set forth in Section 3.3.
- 1.70 "Interim Deliverability Status" or "IDS" has the meaning set forth in the CAISO Tariff.
- 1.71 "Investment Grade" means a Credit Rating of at least (or, if such entities cease to provide Credit Ratings, from another comparable rating agency that is reasonably acceptable to the Parties).
- 1.72 "Joint Powers Act" means the Joint Exercise of Powers Act of the State of California (Government Code Section 6500 et seq.).
- 1.73 "Joint Powers Agreement" means that certain Joint Powers Agreement dated October 1, 2019, as amended from time to time, under which Buyer is organized as a Joint Powers Authority in accordance with the Joint Powers Act.
- 1.74 "<u>LAR</u>" means local area reliability, which is any program of localized resource adequacy requirements established for jurisdictional LSEs by the CPUC pursuant to the Resource Adequacy Rulings, or by another LRA having jurisdiction over the LSE, as implemented in the Tariff. LAR may also be known as local resource adequacy, local RAR, or local capacity requirement in other regulatory proceedings or legislative actions.
- 1.75 "LAR Attributes" means, with respect to a Unit, any and all resource adequacy attributes (or other locational attributes related to system reliability), as they are identified from time to time by the Resource Adequacy Rulings, CAISO, LRA, or other Governmental Body having jurisdiction, associated with the physical location or point of electrical interconnection of the Unit within the CAISO Control Area, that can be counted toward LAR, including any Resource Duration attributes, but exclusive of any RAR Attributes which are not associated with where in the CAISO Control Area the Unit is physically located or electrically interconnected. For clarity, it should be understood that if the CAISO, LRA, or other Governmental Body, defines new or re-defines existing local areas, then such change will not result in a change in payments made pursuant to this Agreement.
- 1.76 "LAR Showings" means the LAR compliance showings (or similar or successor showings) an LSE is required to make to the CPUC (and, to the extent authorized by the CPUC, to the CAISO) pursuant to the Resource Adequacy Rulings and the Tariff, or to an LRA having jurisdiction over the LSE.
- 1.77 "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 having a Credit Rating of at least with an outlook designation of with an outlook designation of from Moody's, in a form as set forth in Exhibit A or as otherwise acceptable to Buyer.
- **1.78** "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 a Terminated Transaction, determined in a commercially reasonable manner.
- 1.79 "LRA" has the meaning set forth in the Tariff.

- **1.80** "<u>LSE</u>" means load-serving entity. LSEs may be an investor-owned utility, an electric service provider, a community aggregator or community choice aggregator, or a municipality serving load in the CAISO Control Area (excluding exports).
- 1.81 "<u>Milestones</u>" has the meaning set forth in Section I of the Cover Sheet.
- 1.82 "Monthly RA Capacity Payment" has the meaning specified in Section 3.10(a).
- 1.83 "Moody's" means Moody's Investor Services, Inc. or its successor.
- 1.84 "NERC" means the North American Electric Reliability Corporation, or its successor.
- 1.85 "Net Qualifying Capacity" or "NQC" has the meaning set forth in the Tariff.
- 1.86 "Non-Availability Charges" has the meaning set forth in the Tariff.
- 1.87 "Non-Defaulting Party" has the meaning set forth in Section 5.2.
- 1.88 "Notification Deadline" has the meaning set forth in Section 3.6(a).
- 1.89 "Notifying Party" has the meaning set forth in Section 17.10(a).
- 1.90 "Outage" means any CAISO approved disconnection, separation, or reduction in the capacity of any Unit that relieves all or part of the obligations of the Unit under the CAISO Offer Requirements consistent with the Tariff. For the avoidance of doubt, Outage shall be deemed to include Planned Outage.
- 1.91 "Participating Transmission Owner" means an entity that (a) owns, operates and maintains transmission lines and associated facilities and/or has entitlements to use certain transmission lines and associated facilities and (b) has transferred to the CAISO operational control of such facilities and/or entitlements to be made part of the CAISO Grid. The Participating Transmission Owner for purposes of this Agreement is San Diego Gas & Electric.
- **1.92** "Performance Security" means collateral in the form of cash or a Letter of Credit in an amount set forth in Section G of the Cover Sheet.
- 1.93 "Planned Outage" means, subject to and as further described in the Tariff, a CAISO-approved planned or scheduled disconnection, separation or reduction in capacity of the Unit that is conducted for the purposes of carrying out routine repair or maintenance of such Unit, or for the purposes of new construction work for such Unit.
- 1.94 "Product" has the meaning set forth in Section 3.1.
- 1.95 "Progress Report" means a report substantially in the form set forth in Exhibit F, the requirements for which are further set forth in Section 16.1(b).
- 1.96 "RA Capacity" means the qualifying and deliverable capacity of the Unit for the number of hours corresponding to the applicable Resource Duration for RAR, LAR, and FCR

- purposes, as applicable, for the Delivery Term, as determined by the CPUC, CAISO, or other Governmental Body authorized to make such determination under Applicable Laws, including the Resource Adequacy Rulings. RA Capacity encompasses the applicable RAR Attributes, LAR Attributes and FCR Attributes of the capacity provided by a Unit.
- 1.97 "<u>RAR</u>" means the resource adequacy requirements, exclusive of LAR and FCR, established for LSEs by the CPUC pursuant to the Resource Adequacy Rulings, or by an LRA or other Governmental Body having jurisdiction.
- 1.98 "RAR Attributes" means, with respect to a Resource Adequacy Resource, any and all resource adequacy attributes, as they are identified from time to time by the Tariff, Resource Adequacy Rulings, LRA, or any Governmental Body having jurisdiction that can be counted toward RAR, including any Resource Duration attributes, exclusive of any LAR Attributes and FCR Attributes.
- 1.99 "RAR Showings" means the RAR compliance showings (or similar or successor showings) an LSE is required to make to the CPUC (and/or, to the extent authorized by the CPUC, to the CAISO), pursuant to the Tariff or Resource Adequacy Rulings, or to an LRA having jurisdiction.
- 1.100 "Recipient Party" has the meaning set forth in Section 17.10(a).
- 1.101 "Regulatory Event" has the meaning set forth in Section 17.7.
- 1.102 "Reliability Compensation Services Tariff" has the meaning set forth in the Tariff.
- 1.103 "Replacement Capacity" has the meaning specified in Section 3.8(a).
- 1.104 "Replacement Unit" means a unit that (i) has the same operational and locational characteristics set forth in Section B of the Cover Sheet, (ii) provides equivalent RAR Attributes, LAR Attributes and FCR Attributes, as applicable, as the Unit under the RAR counting rules established by the CPUC, CAISO, or other Governmental Body with jurisdiction; *provided however*, Seller may provide Replacement RA from a unit that does not have equivalent RAR Attributes, LAR Attributes and FCR Attributes, as applicable, with the prior consent of Buyer, and (iii) is capable of providing Alternate Capacity. A Replacement Unit may not be a coal-fired or nuclear generating resource.
- 1.105 "Required TPD Allocation" means an allocation of TP Deliverability from the CAISO that is sufficient for the Unit to obtain Full Capacity Deliverability Status for at least the Contract Quantity.
- 1.106 "Residual Unit Commitment" has the meaning set forth in the Tariff.
- 1.107 "Resold Product" has the meaning set forth in Article 12.
- 1.108 "Resource Adequacy Plan" has the meaning specified in the Tariff.

- 1.109 "Resource Adequacy Rulings" means any applicable CPUC ruling or decision relating to resource adequacy, and any other existing or subsequent 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 Term.
- 1.110 "Resource Adequacy Resource" has the meaning set forth in the Tariff.
- **1.111** "Resource Category" shall be as described in the CPUC Filing Guide, as such may be modified, amended, supplemented or updated from time to time.
- **1.112** "Resource Duration" means, for each Contract Year, the number of continuous hours of discharge as set forth on the Cover Sheet.
- **1.113** "RMR Contracts" has the meaning set forth in the Tariff.
- **1.114** "<u>S&P</u>" means the Standard & Poor's Rating Group (a division of McGraw-Hill, Inc.) or its successor.
- 1.115 "Schedule" or "Scheduling" means the actions of Seller, Buyer and/or their designated representatives, including each Party's Transmission Providers, if applicable, of notifying, requesting and confirming to each other the quantity and type of Product to be delivered on any given day or days during the Delivery Term at a specified Delivery Point.
- **1.116** "Scheduling Coordinator" has the same meaning as in the Tariff.
- 1.117 "Security Interest" has the meaning set forth in Section 14.3(a).
- 1.118 "Seller" has the meaning set forth in the Preamble.
- 1.119 "Settlement Amount" means, with respect to the Non-Defaulting Party, the aggregate Losses or Gains, and Costs, expressed in U.S. Dollars, which such party incurs as a result of a Terminated Transaction pursuant to Section 5.2.
- 1.120 "Showing Month" shall be the calendar month during the Delivery Term that is the subject of the RAR Showing, LAR Showing, and/or FCR Showing, as applicable, as set forth in the Resource Adequacy Rulings or Tariff. For illustrative purposes only, pursuant to the Resource Adequacy Rulings in effect as of the Effective Date, the monthly RAR Showing made in June is for the Showing Month of August.
- **1.121** "Shown Unit" means the Unit and any Replacement Units, from which Product is provided by Seller to Buyer.
- 1.122 "Site" means the real property on which the Unit is located as identified in Appendix D.
- 1.123 "Site Control" means that, for the Term, 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.

- **1.124** "Substitution Rules" has the meaning specified in the Tariff.
- 1.125 "Supply Plan" means the supply plans, or similar or successor filings, that each Scheduling Coordinator representing RA Capacity submits to the CAISO, LRA, or other Governmental Body, pursuant to Applicable Laws, in order for that RA Capacity to count, as applicable, for RAR Attributes, LAR Attributes, and/or FCR Attributes.
- **1.126** "Tariff" means the tariff and protocol provisions of the CAISO, including associated rules, procedures and business practice manuals, as amended or supplemented from time to time.
- 1.127 "Term" has the meaning set forth in Section 2.1.
- **1.128** "Terminated Transaction" has the meaning set forth in Section 5.2.
- 1.129 "Termination Payment" has the meaning set forth in Section 5.3.
- 1.130 "TP Deliverability" has the meaning set forth in the CAISO Tariff.
- 1.131 "Transmission Provider" means the CAISO.
- **1.132** "<u>Transmission System</u>" means the transmission facilities operated by the CAISO, which provide energy transmission service within the CAISO grid from the Delivery Point.
- 1.133 "<u>Unit</u>" shall mean the storage asset described in Section B of the Cover Sheet and Exhibit D.
- 1.134 "Work" means (a) work or operations performed by a Party or on a Party's behalf; and (b) materials, parts or equipment furnished in connection with such work or operations; including (i) warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "a Party's work"; and (ii) the providing of or failure to provide warnings or instructions.

ARTICLE 2: TERM; DELIVERY TERM; CONDITIONS PRECEDENT

2.1 Term.

- (a) The term of this Agreement shall commence upon the Effective Date and shall continue until the expiration of the Delivery Term, provided that this Agreement shall thereafter remain in effect until the Parties have fulfilled all obligations arising under this Agreement, including any compensation for the Product, Termination Payment, then-owing indemnification payments or other damages, are paid in full (whether directly or indirectly, such as through set-off or netting) and the Performance Security is released and/or returned (the "Term"). Upon Seller's request, Buyer will promptly confirm in writing the Initial Delivery Date following Seller's completion of all conditions precedent hereto.
 - (b) Reserved.

(c) All provisions relating to invoicing, payment, delivery, settlement of other liabilities incurred pursuant to this Agreement and dispute resolution survive for the period necessary to effectuate the rights of the Party benefited by such provision except as otherwise specified herein. Notwithstanding anything to the contrary in this Agreement, (i) all rights under Sections 17.2 (Indemnities) and any other indemnity rights survive the end of the Delivery Term for an additional twelve (12) months; (ii) all rights and obligations under Article 11 (Confidentiality) survive the end of the Delivery Term for an additional two (2) years; (iii) all rights and obligations under Section 16.2(f) (Limitation on Seller's Ability to Make or Agree to Third-Party Sales from the Unit after Early Termination Date) survive early termination of this Agreement for an additional two (2) years; and (iv) all provisions relating to limitations of liability survive without limit.

2.2 Conditions Precedent to Initial Delivery Date.

Seller shall provide notice of expected Initial Delivery Date to Buyer no less than sixty (60) days in advance of such date. The Delivery Term shall not commence until Seller completes to Buyer's reasonable satisfaction each of the following conditions:

- (a) Seller shall have secured all CAISO and Governmental Approvals as are necessary for the safe and lawful operation and maintenance of the Unit and to enable Seller to deliver the Product to Buyer.
- (d) Seller shall have provided to Buyer a certification of Seller and a licensed professional engineer, substantially in the form attached hereto as Exhibit C, demonstrating that the Initial Delivery Date has occurred.
- (e) Seller shall have provided Performance Security to Buyer as required by Section 14.2.
- (f) As of the Initial Delivery Date, no Event of Default on the part of Seller shall have occurred and be continuing.
 - (g) Seller shall have obtained Interim Deliverability Status.
- (h) Subject to Section 16.2(b), Seller shall have obtained an NQC for the Unit of at least
- (i) In accordance with Section 3.7(a), Seller shall have (i) submitted, or caused the Unit's SC to submit, a notice to Buyer including Seller's proposed Supply Plan for the first Showing Month of the Delivery Term and (ii) submitted, or caused the Unit's SC to submit, a Supply Plan to CAISO for the first Showing Month of the Delivery Term.
- (j) Seller shall have delivered to Buyer all insurance documents required under Article 15.
- (k) As of the Initial Delivery Date, Seller shall have paid Buyer for all amounts owing under this Agreement, if any.

ARTICLE 3: TRANSACTION, DELIVERY AND PAYMENT

3.1 Resource Adequacy Capacity Product.

During the Delivery Term, Seller shall provide Buyer with RA Capacity from the Unit in the amount of the Contract Quantity of RAR Attributes, LAR Attributes, and FCR Attributes, with respect to each Showing Month (the "<u>Product</u>"). Seller's obligation to deliver the Contract Quantity of Product for each day of the Delivery Term is firm and will not be excused for any reason other than Force Majeure.

If the Unit is not available to provide the full amount of the Contract Quantity with respect to an applicable Showing Month for any reason other than Force Majeure, including, without limitation, any Outage or any adjustment of the RA Capacity of any Unit, then, Seller shall provide Buyer with Designated RA Capacity in amounts up to the Contract Quantity from one or more Replacement Units pursuant to Section 3.6. If Seller fails to provide Buyer with replacement Designated RA Capacity from Replacement Units pursuant to Section 3.6, then Seller shall be liable for damages and/or be required to indemnify Buyer for costs, penalties or fines pursuant to the terms of Sections 3.8 and 3.9.

Notwithstanding anything to the contrary herein, no energy or ancillary services associated with the Unit is required to be made available to Buyer as part of this Agreement and Buyer shall not be responsible for compensating Seller for Seller's commitments to the CAISO required by this Agreement.

3.2 Seller's and Buyer's Obligations.

Seller shall sell and deliver, or cause to be delivered, and Buyer shall purchase and receive, or cause to be received, the Designated RA Capacity of the Product as set forth in Section 3.7, and Buyer shall pay Seller the Monthly Capacity Payment for the Designated RA Capacity. Seller shall be responsible for any costs or charges imposed on or associated with the Product or its delivery of the Product up to the receipt of Product by Buyer pursuant to Section 3.7(b). Buyer shall be responsible for any costs or charges imposed on or associated with the Product or its receipt at and from Buyer's receipt of Product. For the duration of the Delivery Term, Seller shall take all commercially reasonable actions, including complying with all applicable registration and reporting requirements, and executing all documents or instruments necessary to enable Buyer to use all of the Designated RA Capacity and RAR Attributes committed by Seller to Buyer pursuant to this Agreement.

3.3 Deliverability.

The Parties acknowledge and agree that prior to the Final Deliverability Date for the Unit, Seller must obtain Interim Deliverability Status from the CAISO on a yearly basis in order to deliver Product to Buyer under this Agreement (such time period, the "Interim Deliverability Period").

(a) Beginning in the year prior to the first year of expected Commercial Operation and continuing throughout the Interim Deliverability Period, Seller shall take all commercially

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reasonable actions to obtain Interim Deliverability Status for the Unit in the amount of the Contract Quantity for each year of the Interim Deliverability Period.

- (b) Seller shall provide Buyer with Notice no later than August 1 of each year as to whether it has obtained Interim Deliverability Status for all or any portion of the Contract Quantity for the following calendar year ("Interim Deliverability Notice"); provided however, if CAISO has not provided notice to Seller by August 1, Seller shall provide the Interim Deliverability Notice to Buyer within two (2) Business Days of receipt of notice from CAISO of the deliverability status of the Unit. If the Unit receives partial Interim Deliverability Status in any year, the Monthly Capacity Payment shall be based on the amount of partial Interim Deliverability Status allocated to the Unit for the applicable year.
- (c) Seller shall provide Notice to Buyer of the Final Deliverability Date along with documentation from CAISO (or other evidence reasonably acceptable to Buyer) within three (3) Business Days of receipt of notice from CAISO; provided, if notice of the Final Deliverability Date is provided in a calendar year during which the Unit does not have Interim Deliverability Status, Seller shall provide Notice at least ninety (90) days prior to the first Showing Month after the Final Deliverability Date.

(e) If this Agreement is terminated by Buyer under Section 3.3(d), neither Seller nor Seller's Affiliates may sell, market or deliver any Product associated with or attributable to the Unit to a party other than Buyer for a period of two (2) years following the date of such termination 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 to Buyer on terms and conditions materially similar to the terms and conditions contained in this Agreement (including price) and Buyer fails to accept such offer within forty-five (45) days of Buyer's receipt thereof. Neither Seller nor Seller's Affiliates may sell or transfer the Unit, or any part thereof, or land rights or interests in the Site (including the interconnection queue position of the Unit) so long as the limitations contained in

this Section 3.3(e) apply, unless the transferee agrees to be bound by the terms set forth in this Section 3.3(e) pursuant to a written agreement approved by Buyer in its reasonable discretion. Seller shall indemnify and hold Buyer harmless from all benefits lost and other damages sustained by Buyer as a result of any breach by Seller of its covenants contained within this Section 3.3(e).

3.4 Delivery Point.

The "<u>Delivery Point</u>" for the Unit shall be the CAISO Control Area, and if applicable, the LAR region in which the Unit is electrically interconnected.

3.5 Planned Outages.

Seller shall schedule all Planned Outages within the time period determined by the CAISO for the Unit as a Resource Adequacy Resource that is subject to the Availability Standards to qualify for

an "Approved Maintenance Outage" under the CAISO Tariff. Seller shall reimburse Buyer for any cost Buyer incurs to provide Replacement RA, as required by the CAISO, during any Planned Outages (including the cost of procuring Replacement RA for a full calendar month during any month in which a Planned Outage is planned or scheduled). Notwithstanding anything in this Agreement to the contrary, no Planned Outages of the Unit 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.

3.6 Alternate Capacity and Replacement Units.

- (a) The "Notification Deadline" for a given Showing Month shall be fifteen (15) Business Days before the earlier of the relevant deadlines for (a) the corresponding CPUC RAR Showings, LAR Showings and/or FCR Showings, as applicable for that Showing Month, or (b) submission of the CAISO Supply Plan filings applicable to that Showing Month.
- (b) If Seller is unable to provide the full Contract Quantity for any Showing Month for any reason, or if Seller desires to provide the Contract Quantity for any Showing Month from a Replacement Unit, then Seller may, at no additional cost to Buyer, provide Buyer with Alternate Capacity from one or more Replacement Units, with the total amount of Product provided to Buyer from the Unit and any Replacement Unit(s) up to an amount equal to the Contract Quantity for the applicable Showing Month; *provided*, in each case, Seller shall notify Buyer of the amount of Product that Seller will not be able to deliver from the Unit and the portion of the Contract Quantity for which Seller intends to provide Buyer with Alternate Capacity from identified Replacement Unit(s) no later than the Notification Deadline.
- (c) If Seller fails to provide Buyer the Contract Quantity of Product from the Unit or a Replacement Unit for a given Showing Month during the Delivery Term, then Buyer may, but shall not be required to, purchase replacement Product from a third party.
- (d) In the event Seller desired to provide Buyer with the Contract Quantity from a Replacement Unit owned and/or operated by a third party, Buyer shall be permitted to disclose to any such third party Confidential Information to the extent such disclosure is necessary to affect such transaction; *provided*, such other party agrees to keep such Confidential Information confidential.

3.7 Delivery of Product.

Seller shall provide Buyer with the Designated RA Capacity of Product for each Showing Month consistent with the following:

(a) No later than the Notification Deadline corresponding to each Showing Month of the Delivery Term, Seller shall submit, or cause the Shown Unit's Scheduling Coordinator to submit, Supply Plans to identify and confirm the Designated RA Capacity provided to Buyer for each Showing Month so that the total amount of Designated RA Capacity identified and confirmed for such Showing Month equals the Designated RA Capacity, unless specifically requested not to do so by the Buyer.

- (b) The Designated RA Capacity is delivered and received when the CIRA Tool shows that the Supply Plan submitted in compliance with Buyer's instructions, including Buyer's instructions to withhold all or part of the Designated RA Capacity from Seller's Supply Plan for any Showing Month during the Delivery Term, has been accepted by the CAISO. If CAISO rejects either the Supply Plan or Buyer's Resource Adequacy Plan with respect to any part of the Designated RA Capacity in any Showing Month, the Parties will confer, make such corrections as are necessary for acceptance, and resubmit the corrected Supply Plan or Resource Adequacy Plan for validation before the applicable Notification Deadline for the relevant Showing Month.
- (c) Consistent with the Substitution Rules, take all action, or cause each Unit's Scheduling Coordinator to take all action, to allow Buyer or a subsequent purchaser under Article 12 to utilize the Contract Quantity during each Showing Month under the Substitution Rules, including, but not limited to, ensuring that the Designated RA Capacity being provided in the pertinent Showing Month will qualify for substitution under the Substitution Rules and providing Buyer or subsequent purchaser under Article 12 with all information needed to utilize the Substitution Rules.

3.8 Damages for Failure to Provide Designated RA Capacity.

If Seller fails to provide Buyer with the Designated RA Capacity of Product for any Showing Month, and such failure is not excused under the terms of this Agreement, then the following shall apply:

- Capacity not provided by Seller with capacity having equivalent RAR Attributes, LAR Attributes and/or FCR Attributes as the Designated RA Capacity not provided by Seller; *provided*, if any portion of the Designated RA Capacity that Buyer is seeking to replace is Designated RA Capacity having RAR Attributes and no LAR Attributes, and no such RAR capacity is available (such capacity shall also include FCR Attributes if this is a Flexible RA Product), then Buyer may replace such portion of the Designated RA Capacity with capacity having RAR Attributes and LAR Attributes (as well as FCR Attributes if this is a Flexible RA Product) ("Replacement Capacity"), in either case, by entering into purchase transactions with one or more third parties, including, without limitation, third parties who have purchased capacity from Buyer, so long as such transactions are done at prevailing market prices. Buyer shall use commercially reasonable efforts to minimize damages when procuring any Replacement Capacity.
- (b) Seller shall pay to Buyer, on the date payment would otherwise be due in respect of the Showing Month for which the failure occurred, an amount equal to the positive difference, if any, between (A) the product of the Capacity Replacement Price times the amount of the Designated RA Capacity not provided by Seller and (B) the product of the Contract Price times the amount of the Designated RA Capacity not provided by Seller. If Seller fails to pay these damages, then Buyer may offset those damages owed it against any future amounts it may owe to Seller pursuant to Article 6.

3.9 Indemnities for Failure to Deliver Contract Quantity.

CONFIDENTIAL EXECUTION VERSION

Seller agrees to indemnify, defend and hold harmless Buyer from any penalties, fines or costs assessed against Buyer by the CPUC or the CAISO, resulting from any of the following:

- (a) Seller's failure to provide any portion of the Designated RA Capacity for the respective Showing Month for the Delivery Term; or
- (b) A Unit Scheduling Coordinator's failure to submit accurate Supply Plans that identify Buyer's right, or a subsequent purchaser's right, to the Designated RA Capacity purchased hereunder.

With respect to the foregoing, the Parties shall use commercially reasonable efforts to minimize such penalties, fines and costs; *provided*, in no event shall Buyer be required to use or change its utilization of its owned or controlled assets or market positions to minimize these costs, penalties and fines. If Seller fails to pay the foregoing penalties, fines or costs, or fails to reimburse Buyer for those penalties, fines or costs, then Buyer may offset those penalties, fines or costs against any future amounts it may owe to Seller under this Agreement.

3.10 Monthly RA Capacity Payment.

(a) Buyer shall make a Monthly RA Capacity Payment to Seller for the Unit, in arrears, after the applicable Showing Month. The Parties agree that all invoices under this Agreement shall be due and payable on the twentieth (20th) day of the month after the Showing Month; *provided*, if such day is not a Business Day, then such invoice will be due and payable on the next Business Day. The Unit's "Monthly RA Capacity Payment" shall be equal to the product of (i) the applicable Contract Price for that Showing Month, (ii) the Contract Quantity of the Product actually delivered by Seller to Buyer for the Showing Month as set forth in Section 3.7 and (iii) 1,000. The final product of this Monthly RA Capacity Payment calculation shall be rounded to the nearest penny (i.e., two decimal places).



CONFIDENTIAL EXECUTION VERSION



3.11 Allocation of Other Payments and Costs.

- (a) Seller may retain any revenues it may receive from, and shall pay all costs charged by, the CAISO or any other third party with respect to any Unit for (i) start-up, shut-down, and minimum load costs, (ii) capacity revenue for ancillary services, (iii) energy sales, (iv) any revenues for black start or reactive power services, or (v) the sale of the unit-contingent call rights on the storage capacity of the Unit to provide energy to a third party, so long as such rights do not confer on such third party the right to claim any portion of the RA Capacity sold hereunder in order to make an RAR Showing, LAR Showing, FCR Showing, or any similar capacity or resource adequacy showing with the CAISO or CPUC.
- (b) Buyer shall be entitled to receive and retain all revenues associated with the Designated RA Capacity of the Unit during the Delivery Term (including any capacity or availability revenues from RMR Contracts for any Unit, Reliability Compensation Services Tariff, and Residual Unit Commitment capacity payments, but excluding payments described in Section 3.11(a)).
 - (c) In accordance with Section 3.10:
 - (i) all such Buyer revenues described in Section 3.11(b) received by Seller, or a Unit's Scheduling Coordinator, owner, or operator shall be remitted to Buyer, and Seller shall pay such revenues to Buyer if the Unit's Scheduling Coordinator, owner, or operator

fails to remit those revenues to Buyer (and upon any such payment by Seller, Seller shall be subrogated to all rights of Buyer against such Unit's Scheduling Coordinator, owner, or operator for the amount of such revenues paid). If Seller fails to pay such revenues to Buyer, Buyer may offset any amounts owing to it for such revenues against any future amounts it may owe to Seller under this Agreement.

- (ii) all such Seller, or a Unit's Scheduling Coordinator, owner, or operator revenues described in Section 3.11(a)(i)-(v), but received by Buyer shall be remitted to Seller, and Buyer shall pay such revenues to Seller if the Unit's Scheduling Coordinator, owner, or operator fails to remit those revenues to Seller (and upon any such payment by Buyer, Buyer shall be subrogated to all rights of Seller against such Unit's Scheduling Coordinator, owner, or operator for the amount of such revenues paid). If Buyer fails to pay such revenues to Seller, Seller may offset any amounts owing to it for such revenues against any future amounts it may owe to Buyer under this Agreement.
- (d) If a centralized capacity market develops within the CAISO or WECC region, Buyer will have exclusive rights to offer, bid, or otherwise submit Designated RA Capacity provided to Buyer pursuant to this Agreement for re-sale in such market, and retain and receive any and all related revenues. Buyer shall be responsible for any material, incremental costs of offering, bidding, submitting, or re-selling Designated RA Capacity in such centralized capacity market.
- (e) Buyer acknowledges and agrees that all Availability Incentive Payments are for the benefit of Seller and for Seller's account, and that Seller shall receive, retain, or be entitled to receive all credits, payments, and revenues, if any, resulting from Seller achieving or exceeding Availability Standards. The Parties acknowledge and agree that any Non-Availability Charges are the responsibility of Seller, and for Seller's account and Seller shall be responsible for all fees, charges, or penalties, if any, resulting from Seller failing to achieve Availability Standards.

3.12 Force Majeure.

To the extent either Party is prevented by Force Majeure from carrying out, in whole or part, its obligations under this Agreement and such Party (the "Claiming Party") gives notice and details of the Force Majeure to the other Party as soon as practicable, then, unless the terms of the Product specify otherwise, the Claiming Party shall be excused from the performance of its obligations with respect to this Agreement (other than the obligation to make payments then due or becoming due with respect to performance prior to the Force Majeure). The Claiming Party shall resume performance of its obligations under this Agreement as soon as reasonably practicable. The non-Claiming Party shall not be required to perform or resume performance of its obligations to the Claiming Party corresponding to the obligations of the Claiming Party excused by Force Majeure.

ARTICLE 4: CAISO OFFER REQUIREMENTS

During the Delivery Term, except to the extent the Unit is in an Outage, or is affected by an event of Force Majeure that results in a partial or full Outage of the Unit, Seller shall either schedule or cause the Unit's Scheduling Coordinator to schedule with, or make available to, the CAISO the Unit's Designated RA Capacity in compliance with the Tariff, including compliance with Minimum State of Charge, Day-Ahead Availability, Real-Time Availability, Must Offer

Obligation, and Default Energy Bid requirements established in Article 40 of the Tariff and Seller shall perform all, or cause the Unit's Scheduling Coordinator, owner, or operator, as applicable, to perform all obligations under the Tariff that are associated with the sale of Product hereunder (the "CAISO Offer Requirements"). Buyer shall have no liability for the failure of Seller or the failure of any Unit's Scheduling Coordinator, owner, or operator to comply with such Tariff provisions, including any penalties or fines imposed on Seller or the Unit's Scheduling Coordinator, owner, or operator for such noncompliance.

ARTICLE 5: EVENTS OF DEFAULT; REMEDIES

5.1 Events of Default.

An "Event of Default" shall mean, with respect to a Party (a "Defaulting Party"), the occurrence of any of the following:

- (a) the failure to make, when due, any payment required pursuant to this Agreement if such failure is not remedied within ten (10) Business Days after written notice;
- (b) 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 Party does not fully mitigate the adverse consequences as reasonably determined by the other Party of such incorrect representation or warranty to the other Party within thirty (30) days after written notice thereof;
- (c) the failure to perform any material covenant or obligation set forth in this Agreement (except to the extent constituting a separate Event of Default, and except for such Party's obligations to deliver or receive the Product, the exclusive remedy for which is provided in Section 3.8 and 3.9) if such failure is not remedied within thirty (30) Business Days after written notice; provided, however, that if such failure cannot be reasonably cured within such thirty (30) Business Day period, the Defaulting Party shall have such additional time as is reasonably practical to cure such failure, not to exceed an additional one hundred fifty (150) days, if the Defaulting Party has begun curative action within the aforesaid thirty (30) Business Day period and is proceeding diligently, using commercially reasonable efforts, to complete such curative action;
- (d) Seller fails to take all commercially reasonable actions in a timely manner to achieve Final Deliverability for the Unit;
- (e) Seller fails to obtain by the Initial Delivery Date market rate sales authority pursuant to Section 10.3(m);
- (f) if at any time, Seller delivers or attempts to deliver Product to the Delivery Point for sale under this Agreement that was not generated by the Unit, except for Alternate Capacity;
- (g) Seller sells, assigns, or otherwise transfers, or commits to sell, assign, or otherwise transfer, the Product, or any portion thereof, during the Term to any party other than Buyer except as expressly permitted under this Agreement;
 - (h) such Party becomes Bankrupt;

- (i) such Party assigns this Agreement or any of its rights hereunder other than in compliance with Section 17.3, if applicable;
- (j) the failure of such Party to satisfy the creditworthiness/collateral requirements agreed to pursuant to Article 14 if such failure is not remedied within ten (10) Business Days after written notice;
- (k) 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 transfere 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; or
- (l) 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:
 - (i) the issuer of the outstanding Letter of Credit shall fail to maintain a Credit Rating of at least ;
 - (ii) the issuer of such Letter of Credit becomes Bankrupt;
 - (iii) 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;
 - (iv) the issuer of the outstanding Letter of Credit shall fail to honor a properly documented request to draw on such Letter of Credit;
 - (v) 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;
 - (vi) such Letter of Credit fails or ceases to be in full force and effect at any time; or
 - (vii) 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.

5.2 Declaration of an Early Termination Date and Calculation of Settlement Amounts.

If an Event of Default with respect to a Defaulting Party shall have occurred and be continuing, the other Party (the "Non-Defaulting Party") shall have the right to (i) designate a day, no earlier than the day such notice is effective and no later than twenty (20) days after such notice is effective, as an early termination date ("Early Termination Date") to accelerate all amounts owing between

the Parties and to liquidate and terminate this Agreement (referred to herein as a "Terminated Transaction") between the Parties, (ii) withhold any payments due to the Defaulting Party under this Agreement; and (iii) suspend performance. If the Early Termination Date occurs before the Initial Delivery Date, then no Settlement Amount shall be owed by either Party. If the Early Termination Date occurs after the Initial Delivery Date, then as soon as reasonably practicable, the Non-Defaulting Party shall calculate, in a commercially reasonable manner, a Settlement Amount for such Terminated Transaction as of the Early Termination Date (or, to the extent that in the reasonable opinion of the Non-Defaulting Party certain of such Terminated Transaction are commercially impracticable to liquidate and terminate or may not be liquidated and terminated under applicable law on the Early Termination Date, as soon thereafter as is reasonably practicable). The Gains and Losses for a Terminated Transaction shall be determined by calculating the amount that would be incurred or realized to replace or to provide the economic equivalent of the remaining payments or deliveries in respect of the Terminated Transaction. The Non-Defaulting Party (or its agent) may determine its Gains and Losses by reference to information either available to it internally or supplied by one or more third parties 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. Third parties supplying such information may include, without limitation, dealers in the relevant markets, endusers of the relevant product, information vendors and other sources of market information. 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). Notwithstanding the foregoing, in the event of termination under Section 5.1(d), the applicable Termination Payment shall be the full amount of the Development Security.

5.3 Net Out of Settlement Amounts.

The Non-Defaulting Party shall net out (a) any Settlement Amount that is due to the Non-Defaulting Party, plus, (b) at the option of the Non-Defaulting Party, any cash or other form of security then available to the Non-Defaulting Party pursuant to Article 14, plus (c) any or all other amounts due to the Non-Defaulting Party under this Agreement against (d) all amounts that are due to the Defaulting Party, so that all such amounts shall be netted out to a single liquidated amount (the "Termination Payment") payable by one Party to the other. The Termination Payment shall be due to or due from the Non-Defaulting Party as appropriate.

5.4 Notice of Payment of Termination Payment.

As soon as practicable after a liquidation, notice shall be given by the Non-Defaulting Party to the Defaulting Party of the amount of the Termination Payment and whether the Termination Payment is due to or due from the Non-Defaulting Party. The notice shall include a written statement explaining in reasonable detail the calculation of such amount. The Termination Payment shall be made by the Party that owes it within ten (10) days after such notice is effective.

5.5 Disputes with Respect to Termination Payment.

If the Defaulting Party disputes the Non-Defaulting Party's calculation of the Termination Payment, in whole or in part, the Defaulting Party shall, within ten (10) days of receipt of Non-

Defaulting Party's calculation of the Termination Payment, provide to the Non-Defaulting Party a detailed written explanation of the basis for such dispute; *provided*, *however*, that if the Termination Payment is due from Seller as the Defaulting Party, Seller (as the Defaulting Party) shall first transfer Performance Security to Buyer (as the Non-Defaulting Party) in an amount equal to the Termination Payment.

5.6 Closeout Setoffs.

After calculation of a Termination Payment in accordance with Section 5.3, if the Defaulting Party would be owed the Termination Payment, the Non-Defaulting Party shall be entitled, at its option and in its discretion, to (i) set off against such Termination Payment any amounts due and owing by the Defaulting Party to the Non-Defaulting Party under any other agreements, instruments or undertakings between the Defaulting Party and the Non-Defaulting Party and/or (ii) to the extent the Agreement is not yet liquidated in accordance with Section 5.2, withhold payment of the Termination Payment to the Defaulting Party. The remedy provided for in this Section 5.6 shall be without prejudice and in addition to any right of setoff, combination of accounts, lien or other right to which any Party is at any time otherwise entitled (whether by operation of law, contract or otherwise).

ARTICLE 6: PAYMENT AND NETTING

6.1 Billing Period.

The calendar month shall be the standard period for all payments under this Agreement (other than Termination Payments). As soon as practicable after the end of each month, each Party will render to the other Party an invoice for the payment obligations, if any, incurred hereunder during the preceding month.

6.2 Timeliness of Payment.

Unless otherwise agreed by the Parties, all invoices under this Agreement shall be due and payable in accordance with each Party's invoice instructions on or before the later of the twentieth (20th) day of each month, or tenth (10th) day after receipt of the invoice or, if such day is not a Business Day, then on the next Business Day. Each Party will make payments by electronic funds transfer, or by other mutually agreeable method(s), to the account designated by the other Party. Any amounts not paid by the due date will be deemed delinquent and will accrue interest at the Interest Rate, such interest to be calculated from and including the due date to but excluding the date the delinquent amount is paid in full.

6.3 Disputes and Adjustments of Invoices.

A Party may, in good faith, dispute the correctness of any invoice or any adjustment to an invoice, rendered under this Agreement or adjust any invoice for any arithmetic or computational error within twelve (12) months of the date the invoice, or adjustment to an invoice, was rendered. In the event an invoice or portion thereof, or any other claim or adjustment arising hereunder, is disputed, payment of the undisputed portion of the invoice shall be required to be made when due, with notice of the objection given to the other Party. Any invoice dispute or invoice adjustment shall be in writing and shall state the basis for the dispute or adjustment. Payment of the disputed

amount shall not be required until the dispute is resolved. Upon resolution of the dispute, any required payment shall be made within five (5) Business Days of such resolution along with interest accrued at the Interest Rate from and including the due date to but excluding the date paid. Inadvertent overpayments shall be returned upon request or deducted by the Party receiving such overpayment from subsequent payments, with interest accrued at the Interest Rate from and including the date of such overpayment to but excluding the date repaid or deducted by the Party receiving such overpayment. Any dispute with respect to an invoice is waived unless the other Party is notified in accordance with this Section 6.3 within twelve (12) months after the invoice is rendered or any specific adjustment to the invoice is made. If an invoice is not rendered within twelve (12) months after the close of the month during which performance occurred, the right to payment for such performance is waived.

6.4 Netting of Payments.

The Parties hereby agree that they shall discharge mutual debts and payment obligations due and owing to each other under this Agreement 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, including any related damages calculated pursuant to Sections 3.8 or 3.9, 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.

6.5 Payment Obligation Absent Netting.

If no mutual debts or payment obligations exist and only one Party owes a debt or obligation to the other during the monthly billing period, including, but not limited to, any related damage amounts calculated pursuant to Sections 3.8 or 3.9, interest, and payments or credits, that Party shall pay such sum in full when due.

6.6 Security.

Unless the Party benefiting from Performance Security notifies the other Party in writing, and except in connection with a liquidation and termination in accordance with Article 5, all amounts netted pursuant to this Article 6 shall not take into account or include any Performance Security which may be in effect to secure a Party's performance under this Agreement.

ARTICLE 7: LIMITATIONS

7.1 Limitation of Remedies, Liability and Damages.

EXCEPT AS 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. FOR BREACH OF ANY PROVISION FOR WHICH AN EXPRESS REMEDY OR MEASURE OF DAMAGES IS PROVIDED, SUCH EXPRESS REMEDY OR MEASURE OF DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY, THE OBLIGOR'S LIABILITY SHALL BE LIMITED AS SET FORTH IN SUCH PROVISION AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE

WAIVED. IF NO REMEDY OR MEASURE OF DAMAGES IS EXPRESSLY PROVIDED HEREIN, THE OBLIGOR'S LIABILITY SHALL BE LIMITED TO DIRECT ACTUAL DAMAGES ONLY, SUCH DIRECT ACTUAL DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED. UNLESS EXPRESSLY HEREIN PROVIDED, NEITHER PARTY SHALL BE LIABLE FOR CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY OR INDIRECT DAMAGES, LOST PROFITS OR OTHER BUSINESS INTERRUPTION DAMAGES, BY STATUTE, IN TORT OR CONTRACT, UNDER ANY INDEMNITY IT IS THE INTENT OF THE PARTIES THAT THE PROVISION OR OTHERWISE. LIMITATIONS HEREIN IMPOSED ON REMEDIES AND THE MEASURE OF DAMAGES BE WITHOUT REGARD TO THE CAUSE OR CAUSES RELATED THERETO, INCLUDING THE NEGLIGENCE OF ANY PARTY, WHETHER SUCH NEGLIGENCE BE SOLE, JOINT OR CONCURRENT, OR ACTIVE OR PASSIVE. TO THE EXTENT ANY DAMAGES REQUIRED TO BE PAID HEREUNDER ARE LIQUIDATED, THE PARTIES ACKNOWLEDGE THAT THE DAMAGES ARE DIFFICULT OR IMPOSSIBLE TO OR OTHERWISE OBTAINING AN ADEQUATE DETERMINE, REMEDY INCONVENIENT AND THE DAMAGES CALCULATED HEREUNDER CONSTITUTE A REASONABLE APPROXIMATION OF THE HARM OR LOSS.

ARTICLE 8: GOVERNMENTAL CHARGES

8.1 Cooperation.

Each Party shall use reasonable efforts to implement the provisions of and to administer this Agreement in accordance with the intent of the parties to minimize all taxes, so long as neither Party is materially adversely affected by such efforts.

8.2 Governmental Charges.

Seller shall pay or cause to be paid all taxes imposed by any government authority ("Governmental Charges") on or with respect to the Product or a transaction arising prior to the Delivery Point. Buyer shall pay or cause to be paid all Governmental Charges on or with respect to the Product or a transaction at and from the Delivery Point (other than ad valorem, franchise or income taxes which are related to the sale of the Product and are, therefore, the responsibility of the Seller). In the event Seller is required by law or regulation to remit or pay Governmental Charges which are Buyer's responsibility hereunder, Buyer shall promptly reimburse Seller for such Governmental Charges. If Buyer is required by law or regulation to remit or pay Governmental Charges which are Seller's responsibility hereunder, Buyer may deduct the amount of any such Governmental Charges from the sums due to Seller under Article 6. Nothing shall obligate or cause a Party to pay or be liable to pay any Governmental Charges for which it is exempt under the law.

ARTICLE 9: [RESERVED]

ARTICLE 10: REPRESENTATIONS; WARRANTIES; COVENANTS

10.1 Mutual Representations and Warranties.

On the Effective Date, each Party represents and warrants to the other Party that:

- (a) it is duly organized, validly existing and in good standing under the laws of the jurisdiction of its formation;
- (b) it has all regulatory authorizations necessary for it to legally perform its obligations under this Agreement, except all permits necessary to construct, operate and maintain the Unit and sell the Product therefrom in the case of Seller;
- (c) the execution, delivery and performance of this Agreement are within its powers, have been duly authorized by all necessary action and do not violate any of the terms and conditions in its governing documents, any contracts to which it is a party or any law, rule, regulation, order or the like applicable to it;
- (d) this Agreement and each other document executed and delivered in accordance with this Agreement constitutes its legally valid and binding obligation enforceable against it in accordance with its terms; subject to any Equitable Defenses.
- (e) it is not Bankrupt and there are no proceedings pending or being contemplated by it or, to its knowledge, threatened against it which would result in it being or becoming Bankrupt;
- (f) there is not pending or, to its knowledge, threatened against it or any of its Affiliates any legal proceedings that could materially adversely affect its ability to perform its obligations under this Agreement;
- (g) it is a "forward contract merchant" within the meaning of the United States Bankruptcy Code; and
- (h) it has entered into this Agreement in connection with the conduct of its business and it has the capacity or ability to make or take delivery of Product; provided that Seller does not yet have market rate sales authority to participate in CAISO and to effectuate the transaction contemplated by this Agreement.

10.2 Buyer and Seller Covenants.

Buyer and Seller shall, throughout the Delivery Term, take all commercially reasonable actions and execute any and all documents or instruments reasonably necessary to ensure Buyer's right to the use of the Contract Quantity for the sole benefit of Buyer or any subsequent purchaser under Article 12. Such commercially reasonable actions shall include, without limitation:

(a) Cooperating with and providing, and in the case of Seller causing the Unit's Scheduling Coordinator, owner, or operator to cooperate with and provide requested supporting documentation to the CAISO, the CPUC, or any other Governmental Body responsible for administering RAR, LAR, and/or FCR under Applicable Laws, to certify or qualify the Contract Quantity as RA Capacity and Designated RA Capacity. Such actions shall include, without limitation, providing information requested by the CAISO, CPUC, or by an LRA having jurisdiction, to demonstrate for each month of the Delivery Term the ability to deliver the Contract Quantity from the Unit to the CAISO Controlled Grid for the minimum hours required to qualify as RA Capacity, and providing information requested by the CPUC, CAISO or other Governmental Body having jurisdiction to administer RAR, LAR, or FCR to demonstrate that the

Contract Quantity can be delivered to the CAISO Controlled Grid, pursuant to "deliverability" standards established by the CAISO, or other Governmental Body having jurisdiction to administer RAR, LAR and/or FCR; and

(b) Negotiating in good faith to make necessary amendments, if any, to this Agreement to conform it to subsequent clarifications, revisions, or decisions rendered by the CAISO, CPUC, FERC, or other Governmental Body having jurisdiction to administer RAR, LAR, or FCR so as to maintain the benefits of the bargain struck by the Parties on the Effective Date; *provided*, *however*, that such commercially reasonable actions shall not include any obligation that the owner or operator of the Unit undertake capital improvements, Unit enhancements, or the construction of new facilities nor in any way limit the Parties with respect to advocacy for any regulatory policies or market changes before any entity.

10.3 Seller Representations, Warranties and Covenants.

Seller represents, warrants and covenants to Buyer that:

- (a) Throughout the Delivery Term, the Unit qualifies as a Resource Adequacy Resource that is eligible to provide the Product pursuant to the Tariff and the Resource Adequacy Rulings;
- (b) Throughout the Delivery Term, Seller owns or has the exclusive right to the RA Capacity sold under this Agreement, and shall furnish Buyer, CAISO, CPUC or other jurisdictional LRA, or other Governmental Body with such evidence as may reasonably be requested to demonstrate such ownership or exclusive right;
- (c) Throughout the Delivery Term, no portion of the Contract Quantity has been committed by Seller to any third party in order to satisfy RAR, LAR, FCR or analogous obligations in CAISO markets, other than pursuant to an RMR Contract between the CAISO and either Seller or the Unit's owner or operator;
- (d) Throughout the Delivery Term, no portion of the Contract Quantity has been committed by Seller in order to satisfy RAR, LAR, FCR, or analogous obligations in any non-CAISO market;
- (e) The Unit is within the CAISO Control Area and Seller shall maintain Site Control throughout the Delivery Term;
- (f) Throughout the Delivery Term, the owner or operator of the Unit is obligated to comply with Applicable Laws, including the Tariff, relating to RA Capacity, RAR, LAR, and FCR;
- (g) Throughout the Delivery Term, Seller shall maintain any Governmental Approvals required to perform Seller's obligations;
- (h) Throughout the Delivery Term, the respective cumulative amounts of LAR Attributes, RAR Attributes, and FCR Attributes that Seller has sold, assigned or transferred from the Unit does not exceed that Unit's RA Capacity;

- (i) Throughout the Delivery Term, with respect to the RA Capacity provided under this Agreement, Seller shall, and the Unit's Scheduling Coordinator is obligated to, comply with Applicable Laws, including the Tariff, relating to RAR, LAR, and FCR;
- (j) Prior to the start of the Delivery Term, Seller will notify the Scheduling Coordinator of the Unit that, throughout the Delivery Term, has transferred the Designated RA Capacity to Buyer, and the Scheduling Coordinator is obligated to deliver the Supply Plans in accordance with this Agreement and the Tariff;
- (k) Prior to the start of the Delivery Term, Seller will notify the Scheduling Coordinator of the Unit that Seller is obligated, throughout the Delivery Term, to cause the Unit's Scheduling Coordinator to provide to the Buyer, at least fifteen (15) Business Days before the Notification Deadline, the Designated RA Capacity of the Unit that is to be submitted in the Supply Plan associated with this Agreement for the applicable period; and
- (l) Prior to the start of the Delivery Term, Seller will notify the Unit's Scheduling Coordinator that, throughout the Delivery Term, Buyer is entitled to the revenues set forth in Section 3.11 and that such Scheduling Coordinator is obligated to promptly deliver those revenues to Buyer, along with appropriate documentation supporting the amount of those revenues.
- (m) Promptly following the Effective Date, Seller will apply to FERC for market rate sales authority to participate in CAISO and to effectuate the transaction contemplated by this Agreement and Seller will maintain such authority throughout the Delivery Term.

10.4 Buyer Representations, Warranties and Covenants.

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.).

ARTICLE 11: CONFIDENTIALITY

(a) Neither Party shall disclose the terms or conditions of this Agreement or information exchanged between the Parties pursuant to this Agreement ("Confidential Information") to a third party (other than the Party's or its Affiliates' employees, lenders or potential lenders, investors or potential investors, counsel, accountants or advisors who have a need to know such information and have agreed to keep such terms confidential) except in order to fulfill such Party's obligations under this Agreement or to comply with any applicable law, regulation, or any exchange, control area or independent system operator rule or in connection with any court or regulatory proceeding; *provided*, *however*, each Party shall, to the extent practicable, use reasonable efforts to prevent or limit the disclosure. The Parties shall be entitled to all remedies available at law or in equity to enforce, or seek relief in connection with, this confidentiality obligation.

- (b) Notwithstanding the foregoing, the Parties agree that Buyer may disclose the information pertaining to this Agreement to any Governmental Body, the CPUC, the CAISO or any LRA having jurisdiction in order to support its LAR Showings, RAR Showings and/or FCR Showings, as applicable, and Seller may disclose the transfer of the Designated RA Capacity under this Agreement to the Scheduling Coordinator of the Unit in order for such Scheduling Coordinator to timely submit accurate Supply Plans; *provided*, each disclosing Party shall use reasonable efforts to limit, to the extent possible, the ability of any such applicable Governmental Body, CAISO, or Scheduling Coordinator to further disclose such information. In addition, in the event Buyer resells all or any portion of the Designated RA Capacity to another party, Buyer shall be permitted to disclose to the other party to such resale transaction all such information to the extent such disclosure is necessary to affect such resale transaction; *provided*, such other party agrees to keep such information confidential.
- (c) Seller acknowledges that Buyer is subject to the California Constitution Article 1, Section 3, and the California Public Records Act, Cal. Gov. Code § 6250 et seq. ("Public Records Act") in regard to the documents comprising this Agreement, which items may constitute public records subject to inspection and copying by the public under the authority of the California Constitution and the Public Records Act. Buyer shall, consistent with those laws, use reasonable efforts to provide Seller with notice of any third-party request to inspect or copy any of the documents that comprise this Agreement, which Seller might deem confidential and exempt from disclosure, in order that Seller may timely seek to protect those documents from disclosure to the third party. Seller acknowledges and agrees that Buyer shall not be liable to Seller if Buyer makes disclosure in accordance with the California Constitution and/or the Public Records Act before Seller has timely obtained an order to prevent Buyer from making the requested disclosure to the third party.

ARTICLE 12: BUYER'S RE-SALE OF PRODUCT

No less than fifteen (15) days prior to the Notification Deadline for any Showing Month of the Delivery Term, Buyer may provide written notice to Seller of Buyer's intent to re-sell all or a portion of the Product and any associated rights, in each case, acquired under this Agreement. If Buyer re-sells all or a portion of the Product and any associated rights acquired under this Agreement in accordance with this Article 12 ("Resold Product"), Seller agrees, and agrees to cause the Unit's Scheduling Coordinator, to follow Buyer's reasonable instructions with respect to providing such Resold Product to subsequent purchasers of such Resold Product to the extent such instructions are consistent with Seller's obligations under this Agreement. Seller further agrees, and agrees to cause the Unit's Scheduling Coordinator, to take all commercially reasonable actions and execute any and all documents or instruments reasonably necessary to allow such subsequent purchasers to use such Resold Product in a manner consistent with Buyer's rights under this Agreement. If Buyer incurs any liability to any purchaser of such Resold Product directly due to the failure of Seller or the Unit's Scheduling Coordinator to comply with the terms of this Agreement, then Seller shall be liable to Buyer for any liabilities Seller would have incurred under this Agreement if Buyer had not resold the Product, including without limitation, pursuant to Sections 3.8 and 3.9.

In the event there is any Resold Product, Buyer agrees to notify Seller that such a sale has occurred and agrees to provide Seller with the information specified below promptly following such sale

(and any other information reasonably requested by Seller so that Seller may perform its obligations in this Article 12) and promptly notify Seller of any subsequent changes to such information with respect to any particular sale: (i) benefitting load serving entity SC identification number (SCID), (ii) volume (in MW) of Resold Product, and (iii) subsequent sale delivery period for Resold Product.

ARTICLE 13: COMPLIANCE OBLIGATION

The Parties acknowledge and agree that a material purpose of this Agreement is to enable Buyer to satisfy its Compliance Obligation. If, at any time during the Term, the Unit is not qualified to produce Product, including RAR Attributes, LAR Attributes, and FCR Attributes, as applicable, including due to any action by the CPUC, CAISO or any Governmental Body having jurisdiction that results in any change in Applicable Law occurring after the Effective Date that changes the Resource Adequacy Requirements such that the Product can no longer be counted towards Buyer's Compliance Obligation (a "Compliance Issue"), the Parties shall work in good faith to revise this Agreement so that the Parties can perform their obligations regarding the purchase and sale of Product sold hereunder in order to maintain the original intent; provided, however, in no event shall Seller be obligated to undertake capital improvements, Unit enhancements, or the construction of new facilities. If a Compliance Issue results in the Product not being able to be counted towards Buyer's Compliance Obligation, and the Parties have not reached agreement on amendments within thirty (30) days after the initiation of discussions regarding the Compliance Issue that would allow the Product to be able to be counted towards Buyer's Compliance Obligation, Buyer may terminate this Agreement upon written notice to Seller, which shall be effective the next Business Day after such notice is received, and any such termination shall be without liability to either Party, subject to payment of any amounts owing as of the effective date of such termination.

ARTICLE 14: COLLATERAL REQUIREMENTS

14.1 [Reserved].

14.2 Performance Security.

Seller shall deliver Performance Security to Buyer on or before the Initial Delivery Date. Seller shall maintain the Performance Security in full force and effect, and shall within ten (10) Business Days after any draws made by Buyer in accordance with this Agreement replenish the Performance Security, until the following have occurred: (a) the Delivery Term has expired or terminated early; and (b) all payment obligations of Seller then due and payable under this Agreement, including compensation for penalties, termination damages, indemnification payments orother 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 end of the Delivery Term, or (iii) fails to honor Buyer's properly documented request todraw 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.

14.3 First Priority Security Interest in Cash or Cash Equivalent Collateral.

- (a) 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 the Performance Security, any other cash collateral and cash equivalent collateral posted under this Agreement, 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.
- (b) Upon or any time after the occurrence 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 Performance Security, Buyer may do any one or more of the following:
 - (i) Exercise any of its rights and remedies with respect to the Performance Security, as applicable, including any such rights and remedies under Applicable Law then in effect:
 - (ii) Draw on any outstanding Letter of Credit issued for its benefit and retain any cash held by Buyer as Performance Security; and
 - (iii) Liquidate Performance Security 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.

ARTICLE 15: INSURANCE

15.1 Insurance.

Throughout the Term, Seller shall procure and maintain the following insurance coverage and require and cause its contractors to maintain the same levels of coverage. For the avoidance of doubt, the obligations of the Seller in this Section 15.1 constitute a material obligation of this Agreement.

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(a) Workers' Compensation and Employers' Liability.

(i) If it has employees, workers' compensation insurance indicating compliance with any applicable labor codes, acts, Applicable Laws or statutes, California state or federal, where Seller performs Work.

	(ii)	Employers	' liability	insurance	will	not	he les	s th	an			
		or injury or								rogard to	ho	dily
			death occi	ning as a i	CSUIT					-		_
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employ	ee.											

(b) <u>Commercial General Liability.</u>

 Commercial general liability insurance, including products and completed
operations and personal injury insurance, in a minimum amount of
occurrence, and an annual aggregate of not less than
endorsed to provide contractual liability in said amount (subject to policy
terms and conditions), specifically covering Seller's insurable indemnity obligations under
this Agreement and including Buyer as an additional insured but only to the extent of
Seller's insurable indemnity obligations under this Agreement. Limits may be satisfied
through a combination of primary and excess policies.

- (ii) An umbrella insurance policy in a minimum limit of liability of
- (iii) Defense costs shall be provided as an additional benefit and not included within the limits of liability. Such insurance shall contain standard cross-liability and severability of interest provisions.

(c) <u>Business Auto.</u>

- (i) Business auto insurance for bodily injury and property damage with limits of per occurrence.
- (ii) 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.

(d) <u>Construction All-Risk Insurance.</u>

(i) During the construction of the Unit prior to the Initial Delivery Date, construction all-risk form property insurance covering the Unit during such construction periods, and naming Seller (and Lender if any) as the loss payee.

(e) Contractor's Pollution Liability.

(i) If the scope of Work involves areas of known pollutants or contaminants, Seller shall maintain or require to be maintained, pollution liability coverage for bodily injury, property damage, including clean-up costs and defense costs resulting from sudden, and accidental conditions, including the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, hydrocarbons, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water shall be maintained.

- (ii) The limit will be at least each occurrence for bodily injury and property damage.
- (iii) The policy will endorse Buyer as additional insured but only to the extent of Seller's insurable indemnity obligations under this Agreement.

15.2 Evidence of Insurance.

Within ten (10) days after the Effective Date and upon annual renewal thereafter, Seller shall deliver to Buyer certificates of insurance evidencing the coverage required under this Agreement. These certificates shall specify that Buyer shall be given at least thirty (30) days prior notice by Seller in the event of any cancellation or termination of coverage, except ten (10) days for nonpayment of premium. With the exception of Workers Compensation/Employers Liability, such insurance shall be primary coverage without right of contribution from any insurance of Buyer.

ARTICLE 16: UNIT CONSTRUCTION AND INITIAL DELIVERY DATE

16.1 Construction of the Unit.

- (a) <u>Construction Start.</u> "<u>Construction Start</u>" will occur upon satisfaction of the following: (i) Seller has acquired the applicable regulatory authorizations, approvals and permits required for the commencement of construction of the Unit, (ii) Seller has engaged all contractors and ordered all essential equipment and supplies as, in each case, can reasonably be considered necessary so that physical construction of the Unit may begin and proceed to completion without foreseeable interruption of material duration, and (iii) Seller has executed an engineering, procurement, and construction contract (or equivalent agreements) and issued thereunder a notice to proceed or its equivalent that authorizes the contractor to mobilize to Site and begin physical construction of the Unit 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 Exhibit B hereto, and the date certified therein shall be the "Construction Start Date."
- (b) Progress Reports. The Parties agree time is of the essence in regard to the Agreement. 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 Initial Delivery Date, Seller shall provide to Buyer a Progress Report and agree to 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 Exhibit F. 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. Seller shall also provide Buyer with any information in Seller's possession that is reasonably requested by Buyer for Buyer to demonstrate to the CPUC, CAISO,

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or other Governmental Bodies that Buyer has met its applicable resource adequacy requirements, including providing status reports to the CPUC with respect to the Unit.

16.2 Initial Delivery Date.

- (a) <u>Initial Delivery</u>. "<u>Initial Delivery</u>" means the condition existing when Seller has fulfilled all of the conditions precedent in Section 2.2 of the Agreement and provided notice to Buyer substantially in the form of Exhibit C. Seller shall cause Initial Delivery for the Unit to occur by the Guaranteed Initial Delivery Date, as such date may be extended by a Development Cure Period pursuant to Section 16.2(c), subject to the limitations in Section 16.2(d).
- (b) Reduction to Contract Quantity. If, on the Initial Delivery Date, Seller shall have obtained an NQC and/or EFC, as applicable, for the Unit from the CPUC that is less than the Contract Quantity of RAR Attributes and/or FCR Attributes set forth on the Cover Sheet as of the Effective Date, as applicable, then the following sections of this Agreement shall be automatically amended: (i) the Unit NQC and/or Unit EFC in Section B of the Cover Sheet shall be revised to equal the maximum amount of NQC and/or EFC, as applicable, established for the Unit by the CPUC; (ii) the Contract Quantities in Section F of the Cover Sheet shall be revised to equal the maximum amount of NQC and/or EFC, as applicable, established for the Unit by the CPUC; (iii) the Contract Quantity of LAR Attributes, if applicable, shall equal the revised Contract Quantity of RAR Attributes; and (iv) the quantity of NQC set forth in Section 2.2(h) shall be revised to equal the maximum amount of NQC established for the Unit by the CPUC, if such amount is less than the amount set forth in Section 2.2(h) as of the Effective Date.



(e) <u>Termination for Failure to Achieve Initial Delivery Date</u>. If the Unit has not achieved Initial Delivery on or before the Guaranteed Initial Delivery Date, as such date may be

extended by a Development Cure Period pursuant to pursuant to Section 16.2(c) subject to the limitations in Section 16.2(d), then Buyer may terminate this Agreement upon written notice to Seller, which termination shall be effective the next Business Day after such notice is received, and any such termination shall be without liability to Seller, subject to payment of any amounts owing as of the effective date of such termination and provided that Seller shall be subject to Section 16.2(f).

Limitation on Seller's Ability to Make or Agree to Third-Party Sales from the Unit after Early Termination Date. If this Agreement is terminated by either Party prior to the Initial Delivery Date for any reason other than a Buyer Event of Default, neither Seller nor Seller's Affiliates may sell, market or deliver any Product associated with or attributable to the Unit to a party other than Buyer for a period of two (2) years following such termination, 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 on terms and conditions materially similar to the terms and conditions contained in this Agreement (including price) and Buyer fails to accept such offer within forty-five (45) days of Buyer's receipt thereof. Neither Seller nor Seller's Affiliates may sell or transfer the Unit, or any part thereof, or land rights or interests in the Site (including the interconnection queue position of the Unit) so long as the limitations contained in this Section 16.2(f) apply, unless the transferee agrees to be bound by the terms set forth in this Section 16.2(f) pursuant to a written agreement approved by Buyer in its reasonable discretion. Seller shall indemnify and hold Buyer harmless from all benefits lost and other damages sustained by Buyer as a result of any breach by Seller of its covenants contained within this Section 16.2(f).

ARTICLE 17: MISCELLANEOUS

17.1 Title and Risk of Loss.

Title to and risk of loss related to the Product shall transfer from Seller to Buyer at the Delivery Point. Seller warrants that it will deliver to Buyer the Designated RA Capacity free and clear of all liens, security interests, claims and encumbrances or any interest therein or thereto by any person arising prior to the Delivery Point.

17.2 Indemnity.

- (a) <u>Indemnity by Seller</u>. Seller shall release, indemnify and hold harmless Buyer or Buyers' respective directors, officers, agents, and representatives against and from any and all loss, Claims, actions or suits, including costs and attorney's fees associated with damage to third parties resulting from, or arising out of or in any way connected with Seller's operation and/or maintenance of the Unit, including without limitation any loss, Claim, action or suit, for or on account of injury to, bodily or otherwise, or death of persons, or for damage to or destruction of property belonging to such third parties, excepting only such loss, Claim, action or suit as may be caused solely by the willful misconduct or gross negligence of Buyer, its Affiliates, or Buyers' and Affiliates' respective agents, employees, directors, or officers.
- (b) <u>Indemnity by Buyer</u>. Buyer shall release, indemnify and hold harmless Seller, its directors, officers, agents, and representatives against and from any and all loss, Claims, actions

or suits, including costs and attorney's fees associated with damage to third parties resulting from, or arising out of or in any way connected with Buyer's access to the Unit site, including any loss, Claim, action or suit, for or on account of injury to, bodily or otherwise, or death of persons, or for damage to or destruction of property belonging to such third parties, excepting only such loss, Claim, action or suit as may be caused solely by the willful misconduct or gross negligence of Seller, its Affiliates, or Seller's and Affiliates' respective agents, employees, directors or officers.

(c) <u>No Dedication</u>. Without limitation of each Party's obligations under Sections 17.2(a) and 17.2(b), nothing in this Agreement shall be construed to create any duty to, any standard of care with reference to, or any liability to any person or entity not a Party to this Agreement. No undertaking by one Party to the other under any provision of this Agreement shall constitute the dedication of that Party's system or any portion thereof to the other Party or the public, nor affect the status of Buyer as an independent public utility corporation or Seller as an independent individual or entity.

17.3 Assignment.

- (a) Neither Party shall assign this Agreement or its rights hereunder without the prior written consent of the other Party, which consent shall not be unreasonably withheld, conditioned, or delayed; *provided*, *however*, Seller may, without the consent of Buyer (and without relieving itself from liability hereunder), (i) transfer, sell, pledge, encumber or assign this Agreement or the accounts, revenues or proceeds hereof in connection with any financing or other financial arrangements, (ii) transfer or assign this Agreement to an affiliate of such Party which affiliate's creditworthiness is equal to or higher than that of such Party, or (iii) transfer or assign this Agreement to any person or entity succeeding to all or substantially all of the assets whose creditworthiness is equal to or higher than that of such Party; *provided*, *however*, that in the case of any such assignment pursuant to clause (ii) or clause (iii), any such assignee shall agree in writing to be bound by the terms and conditions hereof and so long as the transferring Party delivers such tax and enforceability assurance as the non-transferring Party may reasonably request. In connection with any financing or refinancing of the Unit by Seller, Buyer shall in good faith negotiate and agree upon a consent to collateral assignment of this Agreement substantially in the form of Exhibit H..
- (b) In addition, Buyer shall work in good faith to: (i) agree upon and enter into such amendments to this Agreement as are reasonably requested by the Financing Parties in connection with the financing provided by such Financing Parties, provided that any such amendments: (A) do not materially reduce the benefits or materially increase the risk of Buyer hereunder; and (B) are reasonably acceptable to Buyer; (ii) agree upon and deliver a duly executed estoppel certificate and dating acknowledgement related to this Agreement, in form and substance satisfactory to Buyer, Seller and Seller's Financing Parties, in conjunction with the financing provided by such Financing Parties; and (iii) provide such other documents and technical assistance as Seller may reasonably request in connection with obtaining financing for the Unit. Seller shall pay Buyer's reasonable expenses, including attorneys' fees, incurred to provide consents, estoppels, or other required documentation in connection with Seller's financing of the Facility. Buyer shall have no obligation to provide any consent or estoppel, or enter into any agreement related to the financing

of the Unit that materially and adversely affects any of Buyer's rights, benefits, risks or obligations under this Agreement, or to materially modify this Agreement.

17.4 Governing Law and Venue.

This Agreement and the rights and duties of the Parties hereunder shall be governed by and construed, enforced and performed in accordance with the laws of the state of California, without regard to principles of conflicts of Law. 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. Each of the Parties irrevocably and unconditionally agrees that any suit, action or other proceeding arising out of or relating to this Agreement, the transactions contemplated hereby, any provision hereof or the breach, performance, enforcement or validity or invalidity of this Agreement or any provision hereof shall be filed in either the United States District Court for the Southern District of California or the Superior Court of California, County of San Diego, as appropriate (and agrees not to commence any suit, action or proceeding relating thereto except in such courts). Each of the Parties irrevocably and unconditionally waives any objection to the laying of venue of any suit, action or proceeding arising out of or relating to this Agreement, the transactions contemplated hereby, any provision hereof or the breach, performance, enforcement or validity or invalidity of this Agreement or any provision hereof in the United States District Court for the Southern District of California or the Superior Court of California, County of San Diego, as appropriate, and hereby further irrevocably and unconditionally waives and agrees not to plead or claim in any such court that any such suit, action or proceeding brought in any such court has been brought in an inconvenient forum. Notwithstanding the foregoing, each Party agrees that a final judgment (i.e., judgment after any appeals that may be duly made) in any suit, action or proceeding so brought shall be conclusive and may be enforced by suit on the judgment in any jurisdiction or in any other manner provided in law or in equity.

17.5 Notices.

All notices, requests, statements or payments shall be made as specified in Exhibit G. Notices (other than scheduling requests) shall, unless otherwise specified herein, be in writing and may be delivered by hand delivery, United States mail, overnight courier service or facsimile. Notice by facsimile or hand delivery shall be effective at the close of business on the day actually received, if received during business hours on a Business Day, and otherwise shall be effective at the close of business on the next Business Day. Notice by overnight United States mail or courier shall be effective on the next Business Day after it was sent. A Party may change its addresses by providing notice of same in accordance herewith.

17.6 Mobile-Sierra.

Absent the agreement of all Parties to the proposed change, the standard of review for changes to any rate, charge, classification, term or condition of this Agreement, whether proposed by a Party (to the extent that any waiver below is unenforceable or ineffective as to such Party), a non-party or FERC acting *sua sponte*, shall be the 'public interest' standard of review set forth in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956), and clarified by *Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1 of Snohomish*, 554 U.S. 527 (2008); *NRG Power Marketing LLC v. Maine Public Utility Commission*, 558 U.S. 527 (2010.

Notwithstanding any provision of this Agreement, and absent the prior written agreement of the Parties, each Party, to the fullest extent permitted by Applicable Laws, for itself and its respective successors and assigns, hereby also expressly and irrevocably waives any rights it can or may have, now or in the future, whether under Sections 205, 206, or 306 of the Federal Power Act or otherwise, to seek to obtain from FERC by any means, directly or indirectly (through complaint, investigation, supporting a third party seeking to obtain or otherwise), and each hereby covenants and agrees not at any time to seek to so obtain, an order from FERC changing any section of this Agreement specifying any rate or other material economic terms and conditions agreed to by the Parties.

17.7 General.

This Agreement (including the exhibits, schedules and any written supplements hereto, if any) constitutes the entire agreement between the Parties relating to the subject matter. Notwithstanding the foregoing, any collateral, credit support or margin agreement or similar arrangement between the Parties shall, upon designation by the Parties, be deemed part of this Agreement and shall be incorporated herein by reference. This Agreement shall be considered for all purposes as prepared through the joint efforts of the parties and shall not be construed against one party or the other as a result of the preparation, substitution, submission or other event of negotiation, drafting or execution hereof. Except to the extent herein provided for, no amendment or modification to this Agreement shall be enforceable unless reduced to writing and executed by both Parties. Each Party agrees if it seeks to amend any applicable wholesale power sales tariff during the term of this Agreement, such amendment will not in any way affect outstanding transactions under this Agreement without the prior written consent of the other Party. Each Party further agrees that it will not assert, or defend itself, on the basis that any applicable tariff is inconsistent with this Agreement. This Agreement shall not impart any rights enforceable by any third party (other than a permitted successor or assignee bound to this Agreement). Waiver by a Party of any default by the other Party shall not be construed as a waiver of any other default. Any provision declared or rendered unlawful by any applicable court of law or regulatory agency or deemed unlawful because of a statutory change (individually or collectively, such events referred to as "Regulatory Event") will not otherwise affect the remaining lawful obligations that arise under this Agreement; provided, further, that if a Regulatory Event occurs, the Parties shall use commercially reasonable efforts to reform this Agreement in order to give effect to the original intention of the Parties. The term "including" when used in this Agreement shall be by way of example only and shall not be considered in any way to be in limitation. The headings used herein are for convenience and reference purposes only. All indemnity and audit rights shall survive the termination of this Agreement for twelve (12) months. This Agreement shall be binding on each Party's successors and permitted assigns.

17.8 **Audit.**

Each Party has the right, at its sole expense and during normal working hours, to examine the records of the other Party to the extent reasonably necessary to verify the accuracy of any statement, charge or computation made pursuant to this Agreement. If requested, a Party shall provide to the other Party statements evidencing the Designated RA Capacity delivered hereunder. If any such examination reveals any inaccuracy in any statement, the necessary adjustments in such statement and the payments thereof will be made promptly and shall bear interest calculated at the Interest Rate from the date the overpayment or underpayment was made until paid; *provided*,

however, that no adjustment for any statement or payment will be made unless objection to the accuracy thereof was made prior to the lapse of twelve (12) months from the rendition thereof, and thereafter any objection shall be deemed waived.

17.9 Forward Contract.

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

17.10 Dispute Resolution.

- (a) In the event of any claim, controversy or dispute between the Parties arising out of or relating to or in connection with this Agreement (including any dispute concerning the validity of this Agreement or the scope and interpretation of this Section 17.10) (a "<u>Dispute</u>"), any Party (the "<u>Notifying Party</u>") may deliver to the other Parties (the "<u>Recipient Party</u>") notice of the Dispute with a detailed description of the underlying circumstances of such Dispute (a "<u>Dispute Notice</u>"). The Dispute Notice shall include a schedule of the availability of the Notifying Party's senior officers (having a title of senior vice president (or its equivalent) or higher) duly authorized to settle the Dispute during the thirty (30) day period following the delivery of the Dispute Notice.
- (b) The Recipient Party shall, within five (5) Business Days following receipt of the Dispute Notice, provide to the Notifying Party a brief summary of the Recipient Party's position on the Dispute and a parallel schedule of availability of the Recipient Party's senior officers (having a title of senior vice president (or its equivalent) or higher) duly authorized to settle the Dispute. Following delivery of the respective senior officers' schedules of availability, the senior officers of the Parties shall meet and confer as often as they deem reasonably necessary during the remainder of the thirty (30) day period in good faith negotiations to resolve the Dispute to the satisfaction of each Party.
- (c) In the event a Dispute is not resolved pursuant to the procedures set forth in Sections 17.10(a) and (b) by the expiration of the thirty (30) day period set forth in Section 17.10(b), then a Party may pursue any legal remedy available to it in accordance with this Agreement.

17.11 Further Assurances.

For the duration of the Delivery Term, each Party shall take all commercially reasonable actions, including complying with all applicable registration and reporting requirements, and execute all documents or instruments necessary to perform the transactions contemplated by this Agreement, including to enable Buyer to use all of the RA Capacity and RAR Attributes committed by Seller to Buyer pursuant to this Agreement.

17.12 Execution.

A signature received via facsimile or email shall have the same legal effect as an original.

17.13 Joint Powers Authority.

Seller acknowledges and agrees that Buyer is organized as a Joint Powers Authority in accordance with the Joint Powers Act of the State of California (Government Code Section 6500 *et seq.*) pursuant to a Joint Powers Agreement and is a public entity separate from its members. Buyer shall solely be responsible for all debts, obligations and liabilities accruing and arising out of this Agreement and Seller agrees that it shall have no rights and shall not make any claim, take any actions or assert any remedies against any of Buyer's members in connection with this Agreement.

17.14 Dodd-Frank Act

The Parties intend this Agreement to be a "customary commercial arrangement" as described in Section II.A.1 of Commodity Futures Trading Commission, *Proposed Guidance, Certain Natural Gas and Electric Power Contracts*, 81 Fed. Reg. 20583 at 20586 (Apr. 8, 2016) and a "Forward Capacity Transaction" within the meaning of Commodity Futures Trading Commission, *Final Order in Response to a Petition From Certain Independent System Operators and Regional Transmission Organizations To Exempt Specified Transactions Authorized by a Tariff or Protocol Approved by the Federal Energy Regulatory Commission, 78 Fed. Reg. 19,880 (Apr. 2, 2013).*

17.15 Market-Based Rate Authority.

In addition to the covenant in Section 10.3(m), Seller shall, in accordance with Federal Energy Regulatory Commission (FERC) Order No. 697, upon request of Buyer, submit a letter of concurrence in support of any affirmative statement by Buyer that this Agreement does not transfer "ownership or control of generation capacity" from Seller to Buyer as the term "ownership or control of generation capacity" is used in 18 CFR Section 35.42. Seller also shall not, in filings, if any, made subject to Order Nos. 652 and 697, claim that this Agreement conveys ownership or control of generation capacity from Seller to Buyer.

17.16 Rules of Interpretation.

In this Agreement, except as expressly stated otherwise or unless the context otherwise requires:

- (a) headings and the rendering of text in bold and italics are for convenience and reference purposes only and do not affect the meaning or interpretation of this Agreement;
- (b) words importing the singular include the plural and vice versa and the masculine, feminine and neuter genders include all genders;
- (c) the words "hereof", "herein", and "hereunder" and words of similar import shall refer to this Agreement as a whole and not to any particular provision of this Agreement;
- (d) a reference to an Article, Section, paragraph, clause, Party, or Exhibit is a reference to that Article, Section, paragraph, clause of, or that Party or Exhibit to, this Agreement unless otherwise specified;
- (e) a reference to a document or agreement, including this Agreement shall mean such document, agreement or this Agreement including any amendment or supplement to, or replacement, novation or modification of this Agreement, but disregarding any amendment,

supplement, replacement, novation or modification made in breach of such document, agreement or this Agreement;

- (f) a reference to a Person includes that Person's successors and permitted assigns;
- (g) the terms "include" and "including" mean "include or including (as applicable) without limitation" and any list of examples following such term shall in no way restrict or limit the generality of the word or provision in respect of which such examples are provided;
- (h) references to any statute, code or statutory provision are to be construed as a reference to the same as it may have been, or may from time to time be, amended, modified or reenacted, and include references to all bylaws, instruments, orders and regulations for the time being made thereunder or deriving validity therefrom unless the context otherwise requires;
- (i) in the event of a conflict, a mathematical formula or other precise description of a concept or a term shall prevail over words providing a more general description of a concept or a term;
- (j) references to any amount of money shall mean a reference to the amount in United States Dollars;
 - (k) the expression "and/or" when used as a conjunction shall connote "any or all of";
- (l) words, phrases or expressions not otherwise defined herein that (i) have a generally accepted meaning shall have such meaning in this Agreement or (ii) do not have well known and generally accepted meaning 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.

[Remainder of Page Intentionally Left Blank]

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

ENERSMART CHULA VISTA BESS LLC, a California limited liability company	SAN DIEGO COMMUNITY POWE a California joint powers authority		
By:	By:		
Name:	Name:		
Title:	Title:		

EXHIBIT A: 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:

APPLICANT DETAILS TO BE PROVIDED

Beneficiary:

[Buyer], a California joint powers authority [Address]

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] (the "Letter of Credit") in favor of [Buyer], a California joint powers authority ("Beneficiary"), [Address], for an amount not to exceed the aggregate sum of U.S. \$[XXXXXX] (United States Dollars [XXXXX] and 00/100), pursuant to that certain Agreement dated as of ______ and as amended (the "Agreement") between [Applicant] and Beneficiary. This Letter of Credit shall become effective immediately and shall expire on [XXXXXX] 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 "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, or (b) facsimile to [bank fax number [XXX-XXXXX]] confirmed by [e-mail to [bank email address]] (if presented by fax it must be followed up by a phone call to us at [XXXXXXX] or [XXXXXX] to confirm receipt) with the originals to follow via courier. The drawing will be effective upon our receipt of the original documents at the above noted address.

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 documents presented under and in compliance with the terms of this Letter of Credit 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 registered mail or 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 is subject to the Uniform Customs and Practice for Documentary Credits (2007 Revision) International Chamber of Commerce Publication No. 600 (the "UCP"), except to the extent that the terms hereof are inconsistent with the provisions of the UCP, including but not limited to Articles 14(b) and 36 of the UCP, in which case the terms of this Letter of Credit shall govern. In the event of an act of God, riot, civil commotion, insurrection, war or any other cause beyond Issuer's control (as defined in Article 36 of the UCP) that interrupts Issuer's business and causes the place for presentation of the Letter of Credit to be closed for business on the last day for presentation, the Expiration Date of the Letter of Credit will be automatically extended without amendment to a date thirty (30) calendar days after the place for presentation reopens for business.

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. [XXXXXXXX]. For telephone assistance, please contact Issuer's Standby Letter of Credit Department at [XXX-XXX-XXXX] and have this Letter of Credit available.

All notices to Beneficiary shall be in writing and are required to be sent by certified letter, overnight courier, or delivered in person to: [Buyer], Chief Operating Officer, [Address]. Only notices to Beneficiary meeting the requirements of this paragraph shall be considered valid. Any notice to Beneficiary which is not in accordance with this paragraph shall be void and of no force or effect.

[Bank Name]		
Insert officer	name]	

[Insert officer title]

Exhibit A: (DRAW REQUEST SHOULD BE ON BENEFICIARY'S LETTERHEAD) **Drawing Certificate** [Insert Bank Name and Address] Ladies and Gentlemen: The undersigned, a duly authorized representative of [Buyer], a California joint powers authority, [Buyer address], as beneficiary (the "Beneficiary") of the Irrevocable Letter of Credit No. [XXXXXXX] (the "Letter of Credit") issued by [insert bank name] (the "Bank") by order of (the "Applicant"), hereby certifies to the Bank as follows: Applicant and Beneficiary are party to that certain Agreement dated as of 1. (the "Agreement"). 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) or \$ other occasion provided for in the Agreement where Beneficiary is authorized to draw on the letter of credit has occurred. OR Beneficiary is making a drawing under this Letter of Credit in the amount of U.S. \$ which equals the full available amount under the Letter of Credit, because we have received notice from the Bank that you have elected not to extend the Expiration Date of the Letter of Credit beyond its current Expiration Date and Applicant is required to maintain the Letter of Credit in force and effect beyond the expiration date of the Letter of Credit but has failed to provide Beneficiary with a replacement Letter of Credit or other acceptable instrument within thirty (30) days prior to such expiration date. The undersigned is a duly authorized representative of [Buyer], a California joint powers authority and is authorized to execute and deliver this Drawing Certificate on behalf of Beneficiary. You are hereby directed to make payment of the requested amount to [Buyer], a California joint powers authority by wire transfer in immediately available funds to the following account: [Specify account information] [Buyer] Name and Title of Authorized Representative Date

EXHIBIT B: FORM OF CONSTRUCTION START DATE CERTIFICATE

This certification of Construction Start Date ("Certification") is delivered by [Seller] ("Seller") to San Diego Community Power, a California joint powers authority ("Buyer") in accordance with the terms of that certain Agreement dated [date] ("Agreement") by and between Seller and Buyer. All capitalized terms used in this Certification but not otherwise defined herein shall have the respective meanings assigned to such terms in the Agreement.

Seller hereby certifies and represents to Buyer that the Construction Start (as defined in 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.

IN WITNESS WHEREOF, the undersigned lof the day of	has executed this Certification on behalf of Seller as
[Seller]	
By:	
Its:	
Date:	

EXHIBIT C: FORM OF INITIAL DELIVERY DATE CERTIFICATE

This certification ("Certification") of Initial Delivery is delivered by [Seller] ("Seller") to San Diego Community Power, a California joint powers authority ("Buyer") in accordance with the terms of that Agreement dated [date] ("Agreement") by and between Seller and Buyer. All capitalized terms used in this Certification but not otherwise defined herein shall have the respective meanings assigned to such terms in the Agreement.

As of [DATE] , Seller hereby certifies and represents to Buyer the following:

a)	The Unit is fully operational, reliable and interconnected, fully integrated and synchronized with
	the Transmission System.
b)	Seller has installed equipment for the Unit with a nameplate capacity of no less than 3 MW.
c)	The Unit is fully capable of charging, storing and discharging energy up to no less than 3 MW and receiving instructions to charge, store and discharge energy.
d)	Seller's Interconnection Agreement provides for a maximum instantaneous discharge capability of
ĺ	no less than 3 MW.
e)	Authorization to parallel the Unit was obtained by the Participating Transmission Owner, SDG&E
	on <u>[DATE]</u>
SELL	ER:
Signat	ure:
Name:	·
Date:	
_	
ENGI	NEER
Signat	ure:
Date:	

EXHIBIT D: DESCRIPTION OF UNIT

The following describes the Unit to be constructed, operated and maintained by Seller through the Term in accordance with the Agreement.

Unit name: EnerSmart Chula Vista

Resource type: Battery Energy Storage

Nameplate capacity: 6 MW / 11.989 MWh

Location: Chula Vista, CA

Unit physical address: 3821 Main St. Chula Vista, CA

Unit elevation: 100'

Unit latitude: 32 35' 40" N

Unit longitude: -116 03' 02" W

Interconnection: SDG&E

CAISO transmission access charge area (e.g. SDG&E): SDG&E

Point of interconnection: adjacent to site

Point of interconnection address: same as site address

Existing zone (e.g. SP-15): SP-15

PNode: OTAY 6 N001

CAISO Resource ID: OTAY 6 ECVBT1 and OTAY 6 ECVBT2

Substation: OTAY

EXHIBIT E: [RESERVED]

EXHIBIT F: PROGRESS REPORTING FORM

Each Progress Report must include the following items:

- 1. Executive summary.
- 2. Unit description.
- 3. Site plan of the Unit.
- 4. Description of any material planned changes to the Unit or the Site.
- 5. Schedule showing progress on Unit construction generally and achieving each of the Milestones and the Initial Delivery Date.
- 6. Summary of activities during the previous month, including any OSHA labor hour reports.
- 7. Forecast of activities scheduled for the current calendar quarter.
- 8. Written description about the progress relative to the Milestones and the Initial Delivery Date, including whether Seller is on schedule with respect to the same.
- 9. List of issues that are likely to potentially affect achievement of the Milestones and the Initial Delivery Date.
- 10. Progress and schedule of the EPC Contract, all major equipment supply agreements, Governmental Approvals, technical studies, and financing arrangements.
- 11. Pictures, in sufficient quantity and of appropriate detail, in order to document construction and interconnection progress.
- 12. Any other documentation reasonably requested by Buyer.

CONFIDENTIAL EXECUTION VERSION

EXHIBIT G: NOTICES

ENERSMART CHULA VISTA BESS LLC, a California limited liability company ("Seller")	SAN DIEGO COMMUNITY POWER, a California joint powers authority ("Buyer")
All Notices:	All Notices:
Street: 400 S. Sierra Ave. Suite 100	P.O. Box 12716
City: Solana Beach, CA. 92075	San Diego, CA 92112
Attn: Skyler Tennis	Attn: Byron Vosburg, Chief Commercial
Phone: 951-317-4757	Officer
Email: skyler@enersmartstorage.com	Phone: (619) 880-6545
	Email: bvosburg@sdcommunitypower.org
Reference Numbers:	Reference Numbers:
Duns: n/a	Duns:
Federal Tax ID Number:	Federal Tax ID Number:
Invoices:	Invoices:
Attn: Eric Wheatley, VP Finance	Attn: SDCP Settlements
Phone: 704-763-8642	Phone: (619) 880-6545
E-mail: eric.wheatley@enersmartstorage.com	Email: settlements@sdcommunitypower.org
Scheduling:	Scheduling:
300	Tenaska Power Services Co.
	Attn: Kara Whillock
	Phone: (972) 333-6122
	Email: kwhillock@tnsk.com
	Day Ahead: (817) 303-1115
	Real Time: (817) 303-1852
	Facsimile: (817) 303-1104
Payments:	Payments:
Attn: Eric Wheatley, VP Finance	Attn: Michael Maher
Phone: 704-763-8642	Phone: (415) 526-3020
E-mail:eric.wheatley@enersmartstorage.com	Email: mmaher@mahercpa.com
Wire Transfer:	Wire Transfer:
_	
7	100

ENERSMART CHULA VISTA BESS LLC, a California limited liability company ("Seller")	SAN DIEGO COMMUNITY POWER, a California joint powers authority ("Buyer")		
With additional Notices of an Event of	With additional Notices of an Event of		
Default to:	Default to: Attn: SDCP General Counsel PO Box 12716 San Diego, CA 92112 Email: legal@sdcommunitypower.org		
Emergency Contact:	Emergency Contact: Attn: Byron Vosburg, Chief Commercial Officer Phone: (619) 880-6545 Email: bvosburg@sdcommunitypower.org		

EXHIBIT H: FORM OF CONSENT TO COLLATERAL ASSIGNMENT

This Consent to Collateral Assignment (this "Consent") is entered into among (i) San Diego Community Power, a California joint powers authority ("SDCP"), (ii) [Name of Seller], a [Legal Status of Seller] (the "Project Company"), and (iii) [Name of Collateral Agent], a [Legal Status of Collateral Agent], as Collateral Agent for the secured parties under the Financing Documents referred to below (such secured parties together with their successors permitted under this Consent in such capacity, the "Secured Parties", and, such agent, together with its successors in such capacity, the "Collateral Agent"). SDCP, Project Company and Collateral Agent are hereinafter sometimes referred to individually as a "Party" and jointly as the "Parties". Capitalized terms used but not otherwise defined in this Consent shall have the meanings ascribed to them in the ESSA (as defined below).

RECITALS

The Parties enter into this Consent with reference to the following facts:

- A. Project Company and SDCP have entered into that certain Energy Storage Service Agreement, dated as of [Date] [List all amendments as contemplated by Section 3.4] ("ESSA"), pursuant to which Project Company will develop, construct, commission, test and operate the Facility (the "Project") and sell the Product to SDCP, and SDCP will purchase the Product from Project Company;
- B. As collateral for Project Company's obligations under the ESSA, Project Company has agreed to provide to SDCP certain collateral, which may include Performance Security and Development Security and other collateral described in the ESSA (collectively, the "ESSA Collateral");
- C. Project Company has entered into that certain [Insert description of financing arrangements with Lender], dated as of [Date], among Project Company, the Lenders party thereto and the Collateral Agent (the "Financing Agreement"), pursuant to which, among other things, the Lenders have extended commitments to make loans to Project Company;
- D. As collateral security for Project Company's obligations under the Financing Agreement and related agreements (collectively, the "Financing Documents"), Project Company has, among other things, assigned all of its right, title and interest in, to and under the ESSA and Project's Company's owners have pledged their ownership interest in Project Company (collectively, the "Assigned Interest") to the Collateral Agent pursuant to the Financing Documents; and
- E. It is a requirement under the Financing Agreement and the ESSA that SDCP and the other Parties hereto shall have executed and delivered this Consent.

AGREEMENT

In consideration of the foregoing, and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, and intending to be legally bound, the Parties hereto hereby agree as follows:

SECTION 1. CONSENT TO ASSIGNMENT, ETC.

1.1 Consent and Agreement.

SDCP hereby acknowledges:

- (a) Notice of and consents to the assignment as collateral security to Collateral Agent, for the benefit of the Secured Parties, of the Assigned Interest; and
- (b) The right (but not the obligation) of Collateral Agent in the exercise of its rights and remedies under the Financing Documents, to make all demands, give all notices, take all actions and exercise all rights of Project Company permitted under the ESSA (subject to SDCP's rights and defenses under the ESSA and the terms of this Consent) and accepts any such exercise; provided, insofar as the Collateral Agent exercises any such rights under the ESSA or makes any claims with respect to payments or other obligations under the ESSA, the terms and conditions of the ESSA applicable to such exercise of rights or claims shall apply to Collateral Agent to the same extent as to Project Company.

1.2 Project Company's Acknowledgement.

Each of Project Company and Collateral Agent hereby acknowledges and agrees that SDCP is authorized to act in accordance with Collateral Agent's instructions, and that SDCP shall bear no liability to Project Company or Collateral Agent in connection therewith, including any liability for failing to act in accordance with Project Company's instructions.

1.3 Right to Cure.

If Project Company defaults in the performance of any of its obligations under the ESSA, or upon the occurrence or non-occurrence of any event or condition under the ESSA which would immediately or with the passage of any applicable grace period or the giving of notice, or both, enable SDCP to terminate or suspend its performance under the ESSA (a "ESSA Default"), SDCP will not terminate or suspend its performance under the ESSA until it first gives written notice of such ESSA Default to Collateral Agent and affords Collateral Agent the right to cure such ESSA Default within the applicable cure period under the ESSA, which cure period shall run concurrently with that afforded Project Company under the ESSA. In addition, if Collateral Agent gives SDCP written notice prior to the expiration of the applicable cure period under the ESSA of Collateral Agent's intention to cure such ESSA Default (which notice shall include a reasonable description of the time during which it anticipates to cure such ESSA Default) and is diligently proceeding to cure such ESSA Default, notwithstanding the applicable cure period under the ESSA, Collateral Agent shall have a period of sixty (60) days (or, if such ESSA Default is for failure by the Project Company to pay an amount to SDCP which is due and payable under the ESSA other than to

provide ESSA Collateral, thirty (30) days, or, if such ESSA Default is for failure by Project Company to provide ESSA Collateral, ten (10) Business Days) from the Collateral Agent's receipt of the notice of such ESSA Default from SDCP to cure such ESSA Default; *provided*, (a) if possession of the Project is necessary to cure any such non-monetary ESSA Default and Collateral Agent has commenced foreclosure proceedings within sixty (60) days after notice of the ESSA Default and is diligently pursuing such foreclosure proceedings, Collateral Agent will be allowed a reasonable time, not to exceed one hundred eighty (180) days after the notice of the ESSA Default, to complete such proceedings and cure such ESSA Default, and (b) if Collateral Agent is prohibited from curing any such ESSA Default by any process, stay or injunction issued by any Governmental Authority or pursuant to any bankruptcy or insolvency proceeding or other similar proceeding involving Project Company, then the time periods specified herein for curing a ESSA Default shall be extended for the period of such prohibition, so long as Collateral Agent has diligently pursued removal of such process, stay or injunction. Collateral Agent shall provide SDCP with reports concerning the status of efforts to cure a ESSA Default upon SDCP's reasonable request.

1.4 Substitute Owner.

Subject to Section 1.7, the Parties agree that if Collateral Agent notifies (such notice, a "Financing Document Default Notice") SDCP that an event of default has occurred and is continuing under the Financing Documents (a "Financing Document Event of Default") then, upon a judicial foreclosure sale, non-judicial foreclosure sale, deed in lieu of foreclosure or other transfer following a Financing Document Event of Default, Collateral Agent (or its designee) shall be substituted for Project Company (the "Substitute Owner") under the ESSA, and, subject to Sections 1.7(b) and 1.7(c) below, SDCP and Substitute Owner will recognize each other as counterparties under the ESSA and will continue to perform their respective obligations (including those obligations accruing to SDCP and the Project Company prior to the existence of the Substitute Owner) under the ESSA in favor of each other in accordance with the terms thereof; provided, before SDCP is required to recognize the Substitute Owner, the Substitute Owner must (i) be a permitted assignee under the ESSA or (ii) have demonstrated to SDCP's reasonable satisfaction that the Substitute Owner has financial qualifications and operating experience [TBD] (a "Permitted Transferee"). For purposes of the foregoing, SDCP shall be entitled to assume that any such purported exercise of rights by Collateral Agent that results in substitution of a Substitute Owner under the ESSA is in accordance with the Financing Documents without independent investigation thereof but shall have the right to require that the Collateral Agent and its designee (if applicable) provide reasonable evidence demonstrating the same.

1.5 Replacement Agreements.

Subject to Section 1.7, if the ESSA is terminated, rejected or otherwise invalidated as a result of any bankruptcy, insolvency, reorganization or similar proceeding affecting Project Company, its owner(s) or guarantor(s), and if Collateral Agent or its designee directly or indirectly takes possession of, or title to, the Project (including possession by a receiver or title by foreclosure or deed in lieu of foreclosure) ("Replacement Owner"), SDCP shall, and Collateral Agent shall cause Replacement Owner to, enter into a new agreement with one another for the balance of the obligations under the ESSA remaining to be performed having terms substantially the same as the terms of the ESSA with respect to the remaining Term ("Replacement ESSA"); provided, before

SDCP is required to enter into a Replacement ESSA, the Replacement Owner must have demonstrated to SDCP's reasonable satisfaction that the Replacement Owner satisfies the requirements of a Permitted Transferee. For purposes of the foregoing, SDCP is entitled to assume that any such purported exercise of rights by Collateral Agent that results in a Replacement Owner is in accordance with the Financing Documents without independent investigation thereof but shall have the right to require that the Collateral Agent and its designee (if applicable) provide reasonable evidence demonstrating the same. Notwithstanding the execution and delivery of a Replacement ESSA, to the extent SDCP is, or was otherwise prior to its termination as described in this Section 1.5, entitled under the ESSA, SDCP may suspend performance of its obligations under such Replacement ESSA, unless and until all ESSA Defaults of Project Company under the ESSA or Replacement ESSA have been cured.

1.6 Transfer.

Subject to Section 1.7, a Substitute Owner or a Replacement Owner may assign all of its interest in the Project and the ESSA and a Replacement ESSA to a natural person, corporation, trust, business trust, joint venture, joint stock company, association, company, limited liability company, partnership, Governmental Authority or other entity (a "Person") to which the Project is transferred; *provided*, the proposed transferee shall have demonstrated to SDCP's reasonable satisfaction that such proposed transferee satisfies the requirements of a Permitted Transferee.

1.7 <u>Assumption of Obligations</u>.

(a) <u>Transferee</u>.

Any transferee under Section 1.6 shall expressly assume in a writing reasonably satisfactory to SDCP all of the obligations of Project Company, Substitute Owner or Replacement Owner under the ESSA or Replacement ESSA, as applicable, including posting and collateral assignment of the ESSA Collateral. Upon such assignment and the cure of any outstanding ESSA Default, and payment of all other amounts due and payable to SDCP in respect of the ESSA or such Replacement ESSA, the transferor shall be released from any further liability under the ESSA or Replacement ESSA, as applicable.

(b) Substitute Owner.

Subject to Section 1.7(c), any Substitute Owner pursuant to Section 1.4 shall be required to perform Project Company's obligations under the ESSA, including posting and collateral assignment of the ESSA Collateral; *provided*, the obligations of such Substitute Owner shall be no more than those of Project Company under the ESSA.

(c) No Liability.

SDCP acknowledges and agrees that neither Collateral Agent nor any Secured Party shall have any liability or obligation under the ESSA as a result of this Consent (except to the extent Collateral Agent or a Secured Party is a Substitute Owner or Replacement Owner) nor shall Collateral Agent or any other Secured Party be obligated or required to (i) perform any of Project Company's obligations under the ESSA, except as provided in Sections 1.7(a) and 1.7(b) and to

the extent Collateral Agent or a Secured Party is a Substitute Owner or Replacement Owner, or (ii) take any action to collect or enforce any claim for payment assigned under the Financing Documents. If Collateral Agent becomes a Substitute Owner pursuant to Section 1.4 or enters into a Replacement ESSA, Collateral Agent shall not have any personal liability to SDCP under the ESSA or Replacement ESSA and the sole recourse of SDCP in seeking enforcement of such obligations against Collateral Agent shall be to the aggregate interest of the Secured Parties in the Project; *provided*, such limited recourse shall not limit SDCP's right to seek equitable or injunctive relief against Collateral Agent, or SDCP's rights with respect to any offset rights expressly allowed under the ESSA, a Replacement ESSA or the ESSA Collateral.

1.8 Delivery of Notices.

SDCP shall deliver to Collateral Agent, concurrently with the delivery thereof to Project Company, a copy of each notice, request or demand given by SDCP to Project Company pursuant to the ESSA relating to (a) a ESSA Default by Project Company under the ESSA, (b) any claim regarding Force Majeure by SDCP under the ESSA, (c) any notice of dispute under the ESSA, (d) any notice of intent to terminate or any termination notice, and (e) any matter that would require the consent of Collateral Agent pursuant to Section 1.11 or any other provision of this Consent. Collateral Agent acknowledges that delivery of such notice, request and demand shall satisfy SDCP's obligation to give Collateral Agent a notice of ESSA Default under Section 1.3. Collateral Agent shall deliver to SDCP, concurrently with delivery thereof to Project Company, a copy of each notice, request or demand given by Collateral Agent to Project Company pursuant to the Financing Documents relating to a default by Project Company under the Financing Documents.

1.9 Confirmations.

SDCP will, as and when reasonably requested by Collateral Agent from time to time, confirm in writing matters relating to the ESSA (including the performance of same by Project Company); provided, such confirmation may be limited to matters of which SDCP is aware as of the time the confirmation is given and such confirmations shall be without prejudice to any rights of SDCP under the ESSA as between SDCP and Project Company.

1.10 Exclusivity of Dealings.

Except as provided in Sections 1.3, 1.4, 1.8, 1.9 and 2.1, unless and until SDCP receives a Financing Document Default Notice, SDCP shall deal exclusively with Project Company in connection with the performance of SDCP's obligations under the ESSA. From and after such time as SDCP receives a Financing Document Default Notice and until a Substitute Owner is substituted for Project Company pursuant to Section 1.4, a Replacement ESSA is entered into or the ESSA is transferred to a Person to whom the Project is transferred pursuant to Section 1.6, SDCP shall, until Collateral Agent confirms to SDCP in writing that all obligations under the Financing Documents are no longer outstanding, deal exclusively with Collateral Agent in connection with the performance of SDCP's obligations under the ESSA, and SDCP may irrevocably rely on instructions provided by Collateral Agent in accordance therewith to the exclusion of those provided by any other Person.

1.11 No Amendments.

To the extent permitted by Laws, SDCP agrees that it will not, without the Project Company obtaining prior written consent of Collateral Agent (not to be unreasonably withheld, delayed or conditioned) (a) enter into any material supplement, restatement, novation, extension, amendment or modification of the ESSA (b) terminate or suspend its performance under the ESSA (except in accordance with Section 1.3) or (c) consent to or accept any termination or cancellation of the ESSA by Project Company.

SECTION 2. PAYMENTS UNDER THE ESSA

2.1 <u>Payments</u>.

Unless and until SDCP receives written notice to the contrary from Collateral Agent, SDCP will make all payments to be made by it to Project Company under or by reason of the ESSA directly to Project Company. SDCP, Project Company, and Collateral Agent acknowledge that SDCP will be deemed to be in compliance with the payment terms of the ESSA to the extent that SDCP makes payments in accordance with Collateral Agent's instructions.

2.2 No Offset, Etc.

All payments required to be made by SDCP under the ESSA shall be made without any offset, recoupment, abatement, withholding, reduction or defense whatsoever, other than that expressly allowed by the terms of the ESSA.

SECTION 3. REPRESENTATIONS AND WARRANTIES OF SDCP

SDCP makes the following representations and warranties as of the date hereof in favor of Collateral Agent:

3.1 Organization.

SDCP is a joint powers authority and community choice aggregator duly organized and validly existing 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 its jurisdiction. SDCP has all requisite power and authority, corporate and otherwise, to enter into and to perform its obligations hereunder and under the ESSA, and to carry out the terms hereof and thereof and the transactions contemplated hereby and thereby.

3.2 <u>Authorization</u>.

The execution, delivery and performance by SDCP of this Consent and the ESSA have been duly authorized by all necessary corporate or other action on the part of SDCP and do not require any approval or consent of any holder (or any trustee for any holder) of any indebtedness or other obligation of SDCP which, if not obtained, will prevent SDCP from performing its obligations hereunder or under the ESSA except approvals or consents which have previously been obtained and which are in full force and effect.

3.3 Execution and Delivery; Binding Agreements.

Each of this Consent and the ESSA is in full force and effect, have been duly executed and delivered on behalf of SDCP by the appropriate officers of SDCP, and constitute the legal, valid and binding obligation of SDCP, enforceable against SDCP in accordance with its terms, except as the enforceability thereof may be limited by (a) bankruptcy, insolvency, reorganization, moratorium or other similar laws of general application affecting the enforcement of creditors' rights generally and (b) general equitable principles (whether considered in a proceeding in equity or at law).

3.4 No Default or Amendment.

Except as set forth in Schedule A attached hereto: (a) Neither SDCP nor, to SDCP's actual knowledge, Project Company, is in default of any of its obligations under the ESSA; (b) SDCP and, to SDCP's actual knowledge, Project Company, has complied with all conditions precedent to the effectiveness of its obligations under the ESSA; (c) to SDCP's actual knowledge, no event or condition exists which would either immediately or with the passage of any applicable grace period or giving of notice, or both, enable either SDCP or Project Company to terminate or suspend its obligations under the ESSA; and (d) the ESSA has not been amended, modified or supplemented in any manner except as set forth herein and in the recitals hereto.

3.5 <u>No Previous Assignments.</u>

SDCP has no notice of, and has not consented to, any previous assignment by Project Company of all or any part of its rights under the ESSA, except as previously disclosed in writing and consented to by SDCP.

SECTION 4. REPRESENTATIONS AND WARRANTIES OF PROJECT COMPANY

Project Company makes the following representations and warranties as of the date hereof in favor of the Collateral Agent and SDCP:

4.1 Organization.

Project Company is a [Legal Status of Seller] duly organized and validly existing under the laws of the state of its organization, and is duly qualified, authorized to do business and in good standing in every jurisdiction in which it owns or leases real property or in which the nature of its business requires it to be so qualified, except where the failure to so qualify would not have a material adverse effect on its financial condition, its ability to own its properties or its ability to transact its business. Project Company has all requisite power and authority, corporate and otherwise, to enter into and to perform its obligations hereunder and under the ESSA, and to carry out the terms hereof and thereof and the transactions contemplated hereby and thereby.

4.2 Authorization.

The execution, delivery and performance of this Consent by Project Company, and Project Company's assignment of its right, title and interest in, to and under the ESSA to the Collateral Agent pursuant to the Financing Documents, have been duly authorized by all necessary corporate or other action on the part of Project Company.

4.3 <u>Execution and Delivery; Binding Agreement.</u>

This Consent is in full force and effect, has been duly executed and delivered on behalf of Project Company by the appropriate officers of Project Company, and constitutes the legal, valid and binding obligation of Project Company, enforceable against Project Company in accordance with its terms, except as the enforceability thereof may be limited by (a) bankruptcy, insolvency, reorganization, moratorium or other similar laws of general application affecting the enforcement of creditors' rights generally and (b) general equitable principles (whether considered in a proceeding in equity or at law).

4.4 No Default or Amendment.

Except as set forth in Schedule B attached hereto: (a) neither Project Company nor, to Project Company's actual knowledge, SDCP, is in default of any of its obligations thereunder; (b) Project Company and, to Project Company's actual knowledge, SDCP, has complied with all conditions precedent to the effectiveness of its obligations under the ESSA; (c) to Project Company's actual knowledge, no event or condition exists which would either immediately or with the passage of any applicable grace period or giving of notice, or both, enable either SDCP or Project Company to terminate or suspend its obligations under the ESSA; and (d) the ESSA has not been amended, modified or supplemented in any manner except as set forth herein and in the recitals hereto.

4.5 No Previous Assignments.

Project Company has not previously assigned all or any part of its rights under the ESSA.

SECTION 5. REPRESENTATIONS AND WARRANTIES OF COLLATERAL AGENT

Collateral Agent makes the following representations and warranties as of the date hereof in favor of SDCP and Project Company:

5.1 <u>Authorization</u>.

The execution, delivery and performance of this Consent by Collateral Agent have been duly authorized by all necessary corporate or other action on the part of Collateral Agent and Secured Parties.

5.2 Execution and Delivery; Binding Agreement.

This Consent is in full force and effect, has been duly executed and delivered on behalf of Collateral Agent by the appropriate officers of Collateral Agent, and constitutes the legal, valid and binding obligation of Collateral Agent as Collateral Agent for the Secured Parties, enforceable against Collateral Agent (and the Secured Parties to the extent applicable) in accordance with its terms, except as the enforceability thereof may be limited by (a) bankruptcy, insolvency, reorganization, moratorium or other similar laws of general application affecting the enforcement of creditors' rights generally and (b) general equitable principles (whether considered in a proceeding in equity or at law).

SECTION 6. MISCELLANEOUS

6.1 Notices.

All notices and other communications hereunder shall be in writing, shall be deemed given upon receipt thereof by the Party or Parties to whom such notice is addressed, shall refer on their face to the ESSA (although failure to so refer shall not render any such notice or communication ineffective), shall be sent by first class mail, by personal delivery or by a nationally recognized courier service, and shall be directed (a) if to SDCP or Project Company, in accordance with [Notice Section of the ESSA] of the ESSA, (b) if to Collateral Agent, to [Collateral Agent Name], [Collateral Agent Address], Attn: [Collateral Agent Contact Information], Telephone: [___], Fax: [__], and (c) to such other address or addressee as any such Party may designate by notice given pursuant hereto.

6.2 Governing Law; Submission to Jurisdiction.

- (a) THIS CONSENT SHALL BE CONSTRUED IN ACCORDANCE WITH, AND THIS CONSENT AND ALL MATTERS ARISING OUT OF THIS CONSENT AND THE TRANSACTIONS CONTEMPLATED HEREBY SHALL BE GOVERNED BY, THE LAW OF THE STATE OF CALIFORNIA WITHOUT REGARD TO ANY CONFLICTS OF LAWS PROVISIONS THEREOF THAT WOULD RESULT IN THE APPLICATION OF THE LAW OF ANOTHER JURISDICTION.
- All disputes, claims or controversies arising out of, relating to, concerning or pertaining to the terms of this Consent shall be governed by the dispute resolution provisions of the ESSA. Subject to the foregoing, any legal action or proceeding with respect to this Consent and any action for enforcement of any judgment in respect thereof may be brought in the courts of the State of California or of the United States of America for the Central District of California, and, by execution and delivery of this Consent, each Party hereby accepts for itself and in respect of its property, generally and unconditionally, the non-exclusive jurisdiction of the aforesaid courts and appellate courts from any appeal thereof. Each Party further irrevocably consents to the service of process out of any of the aforementioned courts in any such action or proceeding by the mailing of copies thereof by registered or certified mail, postage prepaid, to its notice address provided pursuant to Section 6.1 hereof. Each Party hereby irrevocably waives any objection which it may now or hereafter have to the laying of venue of any of the aforesaid actions or proceedings arising out of or in connection with this Consent brought in the courts referred to above and hereby further irrevocably waives and agrees not to plead or claim in any such court that any such action or proceeding brought in any such court has been brought in an inconvenient forum. Nothing herein shall affect the right of any Party to serve process in any other manner permitted by law.

6.3 <u>Headings Descriptive</u>.

The headings of the several sections and subsections of this Consent are inserted for convenience only and shall not in any way affect the meaning or construction of any provision of this Consent.

6.4 <u>Severability</u>.

In case any provision in or obligation under this Consent shall be invalid, illegal or unenforceable in any jurisdiction, the validity, legality and enforceability of the remaining provisions or obligations, or of such provision or obligation in any other jurisdiction, shall not in any way be affected or impaired thereby.

6.5 Amendment, Waiver.

Neither this Consent nor any of the terms hereof may (a) be terminated, amended, supplemented or modified, except by an instrument in writing signed by SDCP, Project Company and Collateral Agent or (b) waived, except by an instrument in writing signed by the waiving Party.

6.6 Termination.

Each Party's obligations hereunder are absolute and unconditional, and no Party has any right, and shall have no right, to terminate this Consent or to be released, relieved or discharged from any obligation or liability hereunder until SDCP has been notified by Collateral Agent that all of the obligations under the Financing Documents shall have been satisfied in full (other than contingent indemnification obligations) or, with respect to the ESSA or any Replacement ESSA, its obligations under such ESSA or Replacement ESSA have been fully performed.

6.7 Successors and Assigns.

This Consent shall be binding upon each Party and its successors and assigns permitted under and in accordance with this Consent, and shall inure to the benefit of the other Parties and their respective successors and assignee permitted under and in accordance with this Consent. Each reference to a Person herein shall include such Person's successors and assigns permitted under and in accordance with this Consent.

6.8 Further Assurances.

SDCP hereby agrees to execute and deliver all such instruments and take all such action as may be necessary to effectuate fully the purposes of this Consent.

6.9 Waiver of Trial by Jury.

TO THE EXTENT PERMITTED BY APPLICABLE LAWS, THE PARTIES HEREBY IRREVOCABLY WAIVE ALL RIGHT OF TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM ARISING OUT OF OR IN CONNECTION WITH THIS CONSENT OR ANY MATTER ARISING HEREUNDER. EACH PARTY FURTHER WARRANTS AND REPRESENTS THAT IT HAS REVIEWED THIS WAIVER WITH ITS LEGAL COUNSEL, AND THAT IT KNOWINGLY AND VOLUNTARILY WAIVES ITS JURY TRIAL RIGHTS FOLLOWING CONSULTATION WITH LEGAL COUNSEL.

6.10 Entire Agreement.

This Consent and any agreement, document or instrument attached hereto or referred to herein integrate all the terms and conditions mentioned herein or incidental hereto and supersede all oral negotiations and prior writings in respect to the subject matter hereof. In the event of any conflict

between the terms, conditions and provisions of this Consent and any such agreement, document or instrument, the terms, conditions and provisions of this Consent shall prevail.

6.11 Effective Date.

This Consent shall be deemed effective as of the date upon which the last Party executes this Consent.

6.12 Counterparts; Electronic Signatures.

This Consent may be executed in one or more counterparts, each of which will be deemed to be an original of this Consent and all of which, when taken together, will be deemed to constitute one and the same agreement. The exchange of copies of this Consent and of signature pages by facsimile transmission, Portable Document Format (i.e., PDF), or by other electronic means shall constitute effective execution and delivery of this Consent as to the Parties and may be used in lieu of the original Consent for all purposes.

[Remainder of Page Left Intentionally Blank.]

IN WITNESS WHEREOF, the Parties hereto have caused this Consent to be duly executed and delivered by their duly authorized officers on the dates indicated below their respective signatures.

[NAME OF PROJECT COMPANY],	SAN DIEGO COMMUNITY POWER,	
[Legal Status of Project Company].	a California joint powers authority.	
By:	By:	
[Name] [Title]	[Name] [Title]	
Date:	Date:	
[NAME OF COLLATERAL AGENT], [Legal Status of Collateral Agent].		
By:		
[Name] [Title]		
Date:		

SCHEDULE A

[Describe any disclosures relevant to representations and v	warranties made in Section 3.4]
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SCHEDULE B

[Describe any	disclosures relevant	to representations and	l warranties made i	n Section 4.4]
		1		



SAN DIEGO COMMUNITY POWER Staff Report – Item 16

TO: Board of Directors

FROM: Byron Vosburg, Chief Commercial Officer

VIA: Karin Burns, Chief Executive Officer

SUBJECT: Approve Energy Consulting Services Agreement with Pacific Energy

Advisors, Inc.

DATE: March 27, 2025

RECOMMENDATION:

Approve the Energy Consulting Services Agreement with Pacific Energy Advisors, Inc. for up to \$775,000 for Energy Consulting Services through March 31, 2029 and subject to an annual autorenewal, until terminated, and authorize the Chief Executive Officer (CEO) to execute the Agreement in substantially the form attached hereto, with such changes as are approved by the CEO and reviewed and approved as to form by the General Counsel.

BACKGROUND:

In November 2019, Community Power issued Request for Proposal (RFP) 19-001 for wholesale power services to provide energy planning and procurement support, power contract negotiation, rate design assistance, risk management, schedule coordination, integrated resource planning and long-term renewables procurement.

Pacific Energy Advisors was selected for Task 1 (project planning, portfolio management, and advisory services) and Task 3 (Integrated Resource Plan, long-term renewable energy procurement, and distributed energy resource planning) services from five shortlisted and interviewed participants (of 13 total respondents). Accordingly, the Community Power Board approved an initial Energy Consulting Services Agreement PEA in February 2020, and it was executed in May of 2020.

Throughout pre-launch and early-stage procurement and planning efforts, PEA provided analysis, guidance, and support in a number of areas, namely load forecasting, rate-setting, resource planning, energy procurement, and financial modeling. Three years on, in March 2023, Community Power and PEA revisited the Energy Consulting Services Agreement and negotiated a new Services Agreement to align with the scope and services that Community Power, as a maturing organization, would continue to need.

Community Power and PEA continue to see mutual value in working together, but in light of the maturity of Community Power as an established CCA and the considerable growth of the Community Power team, it's appropriate to revisit the scope of consulting services again.

ANALYSIS AND DISCUSSION:

Staff and PEA have reviewed the scope of services included in the previous Energy Consulting Services to determine which services SDCP still requires, which are no longer relevant, and which Community Power expects to in-house over the coming year. Most notably, Community Power has grown significantly over the last two years, allowing Community Power to continue in-housing services previously and currently provided by PEA.

Staff and PEA have negotiated the attached two-year Services Agreement, with an initial two-year renewal, and then an annual renewal thereafter until terminated.

This Services Agreement will allow for in-housing (and associated parallel operations and transitioning) of the following services on or before September 30, 2025:

- Energy Trade Risk Management (ETRM)
- Financial Modeling
- Long-term Load Forecasting
- Resource Adequacy procurement and compliance support

Once these functions have been transitioned in-house, PEA will continue to provide Community Power with specialized support related to RPS compliance and as an overall trusted advisor with incredible knowledge and experience in the CCA space, but the monthly rate Community Power will pay PEA will be significantly reduced to reflect the new scope of services.

In order to ensure that Community Power and PEA navigate the transition period successfully, staff have negotiated an optional 3-month extension of ETRM services on the off chance that additional time is needed.

COMMITTEE REVIEW:

N/A

FISCAL IMPACT:

The costs associated with this Energy Consulting Services Agreement will be between \$335,000 and \$385,000 over the initial two-year term of this agreement. Inclusive of an optional 3-month extension of ETRM services and two potential auto-renewals through March 31, 2029, the total will not exceed \$775,000 between April 1, 2025, and March 31, 2029. The annual auto renewal thereafter will be subject to an annual 3% increase in costs. By revising the scope of services Community Power will save at least \$20,000 per month upon in-housing services per this agreement.

ATTACHMENTS:

A: Agreement Between San Diego Community Power and Pacific Energy Advisors, Inc. for Energy Consulting Services

ITEM 16 ATTACHMENT A

AGREEMENT BETWEEN SAN DIEGO COMMUNITY POWER AND PACIFIC ENERGY ADVISORS, INC. FOR ENERGY CONSULTING SERVICES

This Energy Consulting Services Agreement ("Agreement") is made and entered into on March __, 2025 ("Effective Date"), by and between SAN DIEGO COMMUNITY POWER, a California joint powers authority ("SDCP") and PACIFIC ENERGY ADVISORS, INC., a California corporation ("Consultant"). SDCP and Consultant are sometimes individually referred to as a "Party" and collectively as "Parties."

RECITALS

- A. Consultant desires to perform and assumes responsibility for the provision of certain professional services required by SDCP as part of its community choice aggregation program on the terms and conditions set forth in this Agreement. Consultant represents that it is experienced in providing wholesale energy services and is familiar with the plans of SDCP.
- B. SDCP desires to engage Consultant to render such professional services for SDCP's community choice aggregation program ("**Project**"), as set forth in this Agreement.

AGREEMENT

NOW, THEREFORE, in consideration of the premises and other good and valuable consideration, the sufficiency and receipt of which are hereby acknowledged, the parties hereto hereby agree as follows:

1. Scope of Services and Term.

- 1.1. <u>General Scope of Services</u>. Consultant promises and agrees to furnish to SDCP all services, and incidental and customary work necessary to fully and adequately provide the services described in <u>Exhibit A ("Services")</u>. All Services shall be subject to, and performed in accordance with, this Agreement, the schedules and/or exhibits attached hereto, and all applicable local, state and federal laws, rules and regulations.
- 1.2. <u>Term.</u> This Agreement shall be effective on the Effective Date. Unless earlier terminated as provided herein, this Agreement shall remain in effect through March 31, 2027 ("Initial Term"). At the end of the Initial Term, the Agreement shall renew on an annual basis for successive one (1) year terms (each, a "Renewal Term"), unless a Party provides three (3) months prior written notice of its intent not to extend the term of the Agreement. Consultant shall provide the Services within the term of this Agreement, and shall meet any other established schedules and deadlines, as mutually agreed by the Parties.

2. Responsibilities of Consultant.

2.2. <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 terms of <u>Exhibit A</u>. 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 timely performance under this Agreement, SDCP shall respond to Consultant's submittals in a timely manner.
- 2.3 <u>Conformance to Applicable Requirements</u>. All work prepared by Consultant shall be subject to the approval of SDCP.
- 2.4. <u>Sub-Consultants</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.

3. Conditions to Consultant's Performance.

- 3.1 <u>Information and Assistance</u>. Upon Consultant's reasonable request, SDCP shall provide such information and assistance as is reasonably required for Consultant to provide the Services. If SDCP fails to provide Consultant with such requested information or assistance, then Consultant shall continue to provide in a timely manner any such portion(s) of the affected Services that Consultant can reasonably provide to the extent possible in the absence of such information or assistance.
- 3.2 <u>Notification</u>. SDCP shall notify all other relevant parties, including, but not limited to, its data manager ("**Data Manager**"), the Utility Distribution Company ("**UDC**"), which is currently San Diego Gas & Electric, the California Independent System Operator ("**CAISO**") and SDCP's lender(s), as necessary, of the existence of this Agreement and Consultant's role as contemplated in this Agreement.
- 3.3. <u>SDCP's Representative</u>. SDCP hereby designates **the Chief Executive Officer**, 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.

- 3.4 <u>Consultant's Representatives</u>. Consultant hereby designates **Kirby Dusel** and John Dalessi, or their noted designee(s), to act as Consultant's Representatives for the performance of this Agreement ("Consultant's Representatives"). Consultant's Representatives shall have full authority to represent and act on behalf of the Consultant for all purposes under this Agreement. The Consultant's Representatives shall supervise and direct the Services, using their 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.
- 3.5 <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 mutually agreeable times.
- 3.6 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 subcontractors 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 sub-consultants 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.
- 3.7 <u>Laws and Regulations</u>. Consultant shall keep itself fully informed of and in compliance with pertinent local, state and federal laws, rules and regulations in any manner affecting the performance of the Services, and shall give all notices required by law. Consultant shall be liable for all violations of such laws and regulations in connection with the 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.

4. Insurance

- 4.1 <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.
- 4.2 <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*: \$2,000,000 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.
- (C) <u>Professional Liability</u>. Consultant shall procure and maintain, and require its sub-consultants to procure and maintain, for a period of two (2) years following completion of the Services, errors and omissions liability insurance appropriate to their profession. Such insurance shall be in an amount not less than \$2,000,000 per claim. This insurance shall be endorsed to include contractual liability applicable to this Agreement and shall be written on a policy form coverage specifically designed to protect against acts, errors or omissions of the Consultant. "Covered Professional Services" as designated in the policy must specifically include work performed under this Agreement. The policy must "pay on behalf of" the insured and must include a provision establishing the insurer's duty to defend.
- 4.3 <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) General Liability.

- (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) Products/Completed Operations Liability; (5) Aggregate Limits that Apply per Project; (6) Explosion, Collapse and Underground (UCX) exclusion deleted; (7) Contractual Liability with respect to this Agreement; (8) Broad Form Property Damage; and (9) 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>.

(i) 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 he/she 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 he/she 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) <u>All Coverages</u>.

- (i) Defense costs shall be payable in addition to the limits set forth hereunder.
- (ii) 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.
- (iii) 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).
- (iv) 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.
- (v) 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.
- (vi) 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.
- (vii) 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.

(viii) 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.

- 4.3. <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.
- 4.4. <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.
- 4.5. <u>Acceptability of Insurers</u>. Insurance is to be placed with insurers with a current A.M. Best's rating no less than A:VII, licensed to do business in California, and satisfactory to SDCP.
- 4.6. <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.
- 4.7. <u>Subconsultant Insurance Requirements</u>. Consultant shall not allow any subcontractors or subconsultants 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 or subconsultants 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 or subconsultants.

5. Fees and Payments.

5.1. <u>Compensation</u>. Consultant shall receive compensation, including authorized reimbursements, for all Services rendered under this Agreement as set forth in <u>Exhibit A</u>. Extra Work may be authorized, as described in Section 5.4 below; and if authorized, said Extra Work will be compensated at the rates and manner set forth in this Agreement.

- 5.2 <u>Payment of Compensation</u>. Consultant shall submit to SDCP a monthly itemized invoice which shall include all fees and authorized expenses related to Services during the previous month. SDCP shall, within 30 days of Consultant's invoice submittal, review the invoice and pay all approved charges thereon.
- 5.3. <u>Reimbursement for Expenses</u>. Consultant shall not be reimbursed for any expenses unless authorized in writing by SDCP. For all authorized expenses, Consultant shall reflect such items, on an itemized basis, in its monthly invoices as noted in Section 5.2.
- 5.4. Extra Work. 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, or be compensated for, Extra Work without written authorization from SDCP's Representative.

6. 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. No more than once per year, Consultant shall allow a representative of SDCP, at SDCP's sole cost and expense, 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. Any audit or inspection shall, at Consultant's exclusive option, take place off of Consultant's premises.

7. Termination and Expiration of Agreement: Meet and Confer.

- 7.1. Termination for Convenience. After July 1, 2025 (and only after such time), SDCP may, by providing three (3) months advance written notice to Consultant, terminate this Agreement without cause by giving written notice to Consultant of such termination, and specifying the effective date thereof, which shall not take effect until a minimum three (3) months following such notice. Upon termination, Consultant shall be compensated in accordance with this section. After July 1, 2025 (and only after such time), Consultant may also terminate this Agreement for cause or upon three (3) months advance written notice to SDCP; the written notice shall specify the effective date of such termination, which shall not take effect until a minimum three (3) months following such notice.
- 7.2. Termination for Cause. If any one of the following events (each an "Event of Default") occurs with respect to a Party, then the other Party may terminate this Agreement (inclusive of Schedules, Exhibits and Addenda) upon written notice to the defaulting Party: (i) with respect to SDCP, SDCP fails to pay amounts due hereunder, and such failure continues for fifteen (15) business days following written notice from Consultant; (ii) either Party defaults in the observance or performance of any of its material covenants or agreements in this Agreement and such default continues uncured for twenty (20) business days following written notice to the defaulting Party; (iii) either Party makes an assignment for the benefit of creditors (other than a collateral assignment to an entity providing financing to such Party), files a petition or otherwise

commences, authorizes or acquiesces in the commencement of a proceeding or cause under any bankruptcy or similar law for the protection of creditors or has such a petition filed against it or otherwise becomes bankrupt or insolvent (however evidenced), or is unable to pay its debts as they become due; or (iv) with respect to SDCP, SDCP fails to satisfy UDC's credit-worthiness requirements set forth in the UDC tariffs and such failure continues uncured for twenty (20) business days following written notice to SDCP from UDC.

- 7.3. Effect of Termination. Upon the date of expiration or notice of termination of this Agreement (whether terminated for convenience or for cause, or whether expiring at the end of a term): (i) Consultant shall cease providing Services and Extra Work hereunder except as required or authorized in Section 3.6.1.4 below; (ii) Consultant shall issue an invoice (the "Termination Invoice") to SDCP for (a) all outstanding fees for Services rendered by Consultant through and including the date of expiration or termination, (b) all authorized expenses outstanding and unpaid as of the date of expiration or termination,; and (iii) SDCP shall pay the Termination Invoice within thirty (30) days of Consultant's invoice submittal.
- 7.4. Transition of Services Upon Termination or Expiration. Upon such expiration or termination, and upon request of SDCP, Consultant shall reasonably cooperate with SDCP to ensure a prompt and efficient transfer of all SDCP data, documents and other materials to SDCP or a new services provider, in an industry standard format or formats, and in a manner such as to attempt to minimize the impact of expiration or termination on SDCP's customers. Consultant and SDCP shall mutually agree on transition activities requiring completion and a reasonable schedule of completion associated therewith. Consultant shall provide to SDCP data and documentation, and other Consultant non-proprietary information reasonably requested by SDCP in connection with the transition. Consultant shall (1) return all documents and other materials received from SDCP and all copies (if any) of such documents and tangible materials, and (ii) destroy all other documents or materials in Consultant's possession that contain SDCP customer data; provided, however, that Consultant may retain copies of information necessary for Consultant's tax, billing or other financial purposes, to be used solely for such purposes.
- 7.5. <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.
- 7.6. <u>Dispute Resolution</u>. The Parties shall meet and confer together in good faith regarding any dispute, controversy or claim (each, a "**Dispute**") arising out of or relating to this Agreement, or any breach or alleged breach hereof, prior to either Party declaring a breach of the Agreement. A meet and confer shall occur within ten (10) business days of any Dispute whereby the Parties agree to cooperate in good faith to resolve the Dispute, and may use a mutually agreeable third party to resolve such Dispute. In no event shall either Party be delayed or impeded from exercising any of its rights at law or equity, including, without limitation, petitioning a court for provisional relief, including injunctive relief, prior to invoking the meet and confer resolution process.

8. <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: Pacific Energy Advisors, Inc.

Attn: Kirby Dusel

1839 Iron Point Road, Suite 120

Folsom CA 95630

SDCP: San Diego Community Power

Attn: Byron Vosburg 815 E Street, Suite 12716 San Diego, CA 92112

Such notice shall be deemed made when personally delivered or delivered by nationally recognized courier that renders a receipt for delivery.

9. Intellectual Property and Confidentiality.

SDCP owns all right, title and interest in and to all SDCP Materials. Upon the expiration of this Agreement, or in the event of termination, SDCP Materials and all SDCP customer data, in whatever form and in any state of completion, shall remain the property of SDCP and shall be promptly returned to SDCP. Upon termination, Consultant may make and retain a copy of such contract materials if permitted by law. SDCP Materials shall mean any and all data created by Consultant specifically for SDCP in the performance of the Services and Extra Work pursuant to this Agreement ("SDCP Materials").

For the avoidance of doubt, Consultant's intellectual property, including, but not limited to, Consultant's trademarks, service marks, trade names and other designations, web site(s), web design(s), internal systems, computer systems, programs, software (including software code), ideas, know-how, work product, copyrights, patents, trade secrets and other proprietary and/or intellectual property shall remain the exclusive property of Consultant.

10. <u>Confidentiality.</u> All 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 specifically 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.

- 11. <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.
- 12. <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.
- 13. <u>Indemnification</u>. Consultant (including its officials, officers, employees, agents, subconsultants and contractors, collectively the "Indemnifying Party") shall, to the extent of its own willful, reckless or negligent misconduct, defend, indemnify and hold SDCP, its officials, officers, consultants, employees, and volunteers ("**Indemnified Party**") free and harmless from any and all claims, demands, causes of action, costs, expenses, liability, loss, damage or injury, in law or equity, to property or persons, including wrongful death, in any manner arising out of or incident, arising out of or in connection with the performance of the Services, the Project or this Agreement, including reasonable attorney's fees and other related costs and expenses. Consultant's obligation to indemnify shall not be restricted to insurance proceeds, if any, received by SDCP, its directors, officials, officers, consultants, employees, agents or volunteers. Consultant's indemnification obligations herein are conditioned upon the Indemnified Party: (i) promptly notifying the Consultant of any claim in writing; and (ii) cooperating with Consultant in the defense of the claim.
- 14. <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.
- 15. <u>Governing Law.</u> This Agreement shall be governed by the laws of the State of California. Venue shall be governed by a court of competent jurisdiction in San Diego County.
- 17. <u>SDCP's Right to Employ Other Consultants.</u> SDCP reserves right to employ other consultants in connection with this Project.
- 18. <u>Successors and Assigns.</u> This Agreement shall be binding on the successors and assigns of the Parties.
- 19. <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. Notwithstanding the foregoing, the Parties agree that in the absence of a merger, the sale or transfer of all or substantially all of the shares of the Consultant shall not constitute an assignment or transfer of this Agreement.
- 20. <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.

- 21. <u>Amendment; Modification</u>. No supplement, modification, or amendment of this Agreement shall be binding unless executed in writing and signed by both Parties.
- 22. <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.
- 23. <u>No Third Party Beneficiaries</u>. There are no intended third party beneficiaries of any right or obligation assumed by the Parties.
- 24. <u>Invalidity; 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.
- 25. 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.
- 26. <u>Equal Opportunity Employment</u>. Consultant represents that it is an equal opportunity employer and it shall not discriminate against any subcontractor, employee or applicant for employment because of race, religion, color, national origin, handicap, ancestry, sex or age. 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.
- 27. <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 require 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.
- 28. <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.

29. <u>Counterparts</u>. This Agreement may be signed in counterparts, each of which shall constitute an original.

[SIGNATURES ON FOLLOWING PAGE]

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

PACIFIC ENERGY ADVISORS, INC.[*]

SAN DIEGO COMMUNITY POWER

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.

^{*} A corporation requires the signatures of two corporate officers.

EXHIBIT A

SERVICES/TERMS AND CONDITIONS

Consultant and SDCP agree that the following services ("CCA Services") shall be provided by Consultant for the benefit of SDCP under the terms and conditions as described herein.

1) Power Resources Support (April 1, 2025 through September 30, 2025)

- (a) Maintain Annual and Long-Term Sales Forecast
 - Prepare and maintain SDCP customer and electric sales forecasts, including: 1) monthly enrolled accounts, megawatt hours (MWh) and megawatts (MW) by load profile group; 2) monthly coincident peak MW and hourly MW; and 3) clear delineation of all inputs and assumptions for 1) and 2).
 - Update long-term sales forecasts, as necessary, to maintain accuracy; monitor accuracy of load forecasts on a monthly basis; consider adjustments to such forecasts if observed variance exceeds threshold of 5% forecast error. Include sensitivity analysis which provide "high" and "low" bounds (e.g., p05 and p95) for each forecast based on historical weather and load fluctuations.
- (b) Energy Trading and Risk Management System
 - Maintain an energy trading and risk management system (ETRM) for purposes of tracking and reporting all energy and capacity transactions completed by SDCP.
 - Receive fully executed transaction documents from SDCP for purposes of entering such transactions in the ETRM system.
 - Within 3 business days of receipt, enter energy, renewable energy and capacity transactions within such ETRM system, including expected energy and capacity from generation and energy storage resources.
 - Produce periodic reports, as readily available within the deal capture system, to assist
 with SDCP's ongoing resource planning and position monitoring efforts. Such reports
 shall include:
 - Monthly Position Extract (monthly)
 - Monthly Realized Unrealized Detail (monthly)
 - o Contracts Entered Within Past 30-Days (monthly)
 - Deal Settlement Extract (monthly)
 - Monthly load and resource balance (monthly)

- o Market exposure and stochastic risk assessment, including projected load and generation volumetric and price risk (monthly)
- Mark-to-market valuation by counterparty (monthly)
- Hourly Inter-Scheduling Coordinator trades for n + 90 days (monthly and upon new trades)
- Hourly Position Extract (Monthly)

Consultant acknowledges that reports described above may occasionally be requested outside of the normal monthly cycle and will accommodate such requests subject to reasonable limits that may be established between SDCP and Consultant representatives.

- Provide data from ETRM system maintained by Consultant to support data request responses for the semi-annual PCIA RPS data request, the quarterly PCIA RA data request, and the CAISO's annual flexible capacity needs assessment.
- Subject to reasonable lead times, provide existing contract data from ETRM system
 maintained by Consultant to assist SDCP in preparing IRP and RPS Procurement Plan
 compliance filings and procurement data requests resulting from CPUC procurement
 orders.
- Assist in preparing demand forecast and resource plan submissions pursuant to the Integrated Energy Policy Report (IEPR) process.
- Assist in preparing compliance filings for the Resource Adequacy program, including submission of peak demand forecasts to the CPUC and CEC, compliance template preparation and submission to the CPUC and CEC, RA plan preparation and coordination with SDCP's Scheduling Coordinator for submission to CAISO, assistance with cross-validation trouble shooting and error correction, and submission of historical load data to the CPUC and CEC.

2) Financial Model Maintenance ("pro forma") (April 1, 2025 through September 30, 2025)

- Maintain pro forma financial model of monthly income/expense projections, cash flow and cash balances.
- Update pro forma model monthly and as necessary to incorporate current load, resource and market data; monitor accuracy of financial projections on a monthly basis; assist in reconciling budget variances.
- Prepare forecast of power supply and other expenses for annual budget.
- As necessary, coordinate with SDCP and its financial advisors with regard to matters that may impact SDCP's financial standing, debt levels, electric rates, annual budget, resource planning and other key concerns.

3) Regulatory Compliance Support (April 1, 2025 through March 31, 2027)

• Assist in preparing annual RPS compliance reports.

- Manage SDCP's WREGIS account and various subaccounts, including report preparation, certificate transfer review and retirement, as-needed generator registration (example: Feed-In Tariff projects under contract with SDCP) and other account management activities.
- Assist in preparing annual reports related to California's Power Source Disclosure Program, including technical elements of Power Content Label development.
- Prepare compliance filings pursuant to the CEC's Quarterly Fuels and Energy Report and the U.S. Energy Information Agency monthly EIA-826 and annual EIA-861 reports.

4) Other Procurement, Financial and Regulatory Support

On an as-requested basis, PEA will provide support to SDCP in completing certain regulatory compliance and reporting activities. All services under this Task 4 will be completed in consideration of mutually agreeable schedules for completion and shall be billed on a time-and-materials basis at the hourly rates noted below. Other Procurement, Financial and Regulatory Support may include the following non-exhaustive list of tasks:

- Assistance in preparation, administration, and evaluation of offers submitted in response to solicitations for energy-related projects and products.
- Assistance in preparing RPS Procurement plan data templates and relevant portions of narrative.
- Assistance in preparing Integrated Resource Plan data templates and relevant portions of narrative.
- Support for responding to data requests from regulatory bodies, trade associations, etc., not otherwise specified in Task 3 above.
- Consultation as trusted, experienced advisors with respect to CCA financial planning, rate-making, procurement planning, or regulatory compliance obligations and filings.
- Updates to SDCP load forecast
- Compliance template preparation and submission to the CPUC and CEC and assistance with cross-validation trouble shooting and error correction for month-ahead RA compliance

Fee for Performance of Services under Tasks 1, 2 and 3:

April 1, 2025 through September 30, 2025: \$ 32,000/month

October 1, 2025 through March 31, 2027, as follows:

For the months of January through March and September through December: \$5,000/month with such fee increased by three percent (3%) on January 1st of each year, beginning January 1, 2026

For the months of April through August: \$15,000/month

To the extent that SDCP requires Services under Task 1(b) beyond September 30, 2025, PEA agrees to provide Services under Tasks 1, 2 and 3 for an additional three (3) month period (October 1, 2025 through December 31, 2025); provided, that, (i) SDCP provides at least ninety (90) days' prior written notice, and (ii) the total monthly Fee for Tasks 1, 2 and 3 shall be increased to \$40,000/month for the three (3) month period between October 1, 2025 through December 31, 2025.

Inclusive of the optional 3-month extension of Task 1(b) services above, and assuming the Parties renew the Term of this Agreement two times through March 31, 2029, the total fees to be paid under this Agreement shall in no event exceed seven hundred seventy-five thousand dollars (\$775,000).

Fee for Performance of Task 4 Services:

PEA will provide the services described in Task 4 on a time-and-materials basis, billed monthly to SDCP. For all such work, the following hourly rates will apply:

Staff	Hourly Rate*
Senior Executive Staff	\$400
Managing Director	\$380
Director	\$360
Associate Director	\$340
Managing Consultant	\$320
Senior Consultant	\$300
Consultant	\$280
Analyst	\$260

^{*}The Hourly Rates noted above shall be subject to a three percent (3%) increase on January 1st of each year, beginning January 1, 2026.

Travel and related expenses will be billed monthly at cost with no markup. Examples of such expenses will likely include airfare, rental vehicles, airport parking and hotels (if meeting attendance is requested over a multi-day period). If desired, PEA will coordinate with SDCP in developing a mutually agreeable budget for such expenses – note that such budget would be additive to the monthly fees for services, as noted above, and may impact the frequency of travel by PEA to attend on-site meetings.

GLOSSARY OF TERMS

AB – Assembly Bill - An Assembly Bill is a piece of legislation that is introduced in the Assembly. In other words, the Assembly, rather than the Senate, is the house of origin in the legislature for the legislation. In California, it is common for legislation to be referred to by its house of origin number (such as, AB 32) even once it becomes law.

AL - Advice Letter - An Advice Letter is a request by a CPUC jurisdictional entity for Commission approval, authorization, or other relief.

ALJ – Administrative Law Judge - ALJs preside over CPUC cases to develop the evidentiary record and draft proposed decisions for Commission action.

ARB – **Air Resources Board** - The California Air Resources Board (CARB or ARB) is the "clean air agency" in the government of California. CARB is charged with protecting the public from the harmful effects of air pollution and developing programs and actions to fight climate change.

AREM – **Alliance for Retail Energy Markets** – a not for profit corporation that advocates for continued development of successful customer choice in retail energy markets and provides a focused voice for competitive energy retailers and their customers in selected public policy forums on the state level. AREM represented direct access providers such as Constellation NewEnergy and Direct Energy.

BayREN - Bay Area Regional Energy Network - BayREN offers region-wide energy programs, services and resources to members of the public by promoting energy efficient buildings, reducing carbon emissions and building government capacity.

CAISO – California Independent System Operator - a non-profit independent system operator that oversees the operation of the California bulk electric power system, transmission lines and electricity market generated and transmitted by its members (~80% of California's electric flow). Its stated mission is to "operate the grid reliably and efficiently, provide fair and open transmission access, promote environmental stewardship and facilitate effective markets and promote infrastructure development." CAISO is regulated by FERC and governed by a five-member governing board appointed by the governor.

CALCCA – California Community Choice Association – Association made up of Community Choice Aggregation (CCA) groups which represents the interests of California's community choice electricity providers.

CALSEIA – California Solar Energy Industries - CALSEIA represents more than 200 companies doing solar-related business in California, including manufacturers, distributors, installation contractors, consultants, and educators. Members' annual dues support professional staff and a lobbyist who represent the common interests of California's solar industry at the Legislature, Governor's Office, and state and local agencies.

CALSLA – California City County Street Light Association - statewide association representing cities, counties and towns before the CPUC that is committed to maintaining fair and equitable street light electric rates and facilities charges, and disseminating street light related information.

CAM – **Cost Allocation Mechanism** - the cost recovery mechanism to cover procurement costs incurred in serving the central procurement function.

CARB – California Air Resources Board – The CARB is charged with protecting the public from the harmful effects of air pollution and developing programs and actions to fight climate change in California.

CARE – California Alternative Rates for Energy – A State program for low-income households that provides a 30% discount on monthly energy bills and a 20% discount on natural gas bills. CARE is funded through a rate surcharge paid by all other utility customers.

CBE – **Communities for a Better Environment** - environmental justice organization that was founded in 1978. The mission of CBE is to build people's power in California's communities of color and low-income communities to achieve environmental health and justice by preventing and reducing pollution and building green, healthy and sustainable communities and environments.

CCA – Community Choice Aggregator - A community choice aggregator, sometimes referred to as community choice aggregation, allows local governments to procure power on behalf of their residents, businesses, and municipal accounts from an alternative supplier while still receiving transmission and distribution service from their existing utility provider. CCAs are an attractive option for communities that want more local control over their electricity sources, more green power than is offered by the default utility, and/or lower electricity prices. By aggregating demand, communities gain leverage to negotiate better rates with competitive suppliers and choose greener power sources.

CCSF – **City and County of San Francisco** - The City and County of San Francisco often engage in joint advocacy before the CPUC. San Francisco operates CleanPowerSF, a CCA.

CEC – **California Energy Commission** - the primary energy policy and planning agency for California, whose core responsibilities include advancing state energy policy, achieving energy efficiency, investing in energy innovation, developing renewable energy, transforming transportation, overseeing energy infrastructure and preparing for energy emergencies.

CEE – **Coalition for Energy Efficiency** – non-profit comprised of US and Canadian energy efficiency administrators working together to accelerate the development and availability of energy efficient products and services.

CLECA – California Large Energy Consumers Association - an organization of large, high load factor industrial customers located throughout the state; the members are in the cement, steel, industrial gas, pipeline, beverage, cold storage, food packaging, and mining industries, and share the fact that electricity costs comprise a significant portion of their costs of production. Some members are bundled customers, others are Direct Access (DA) customers, and some are served by Community Choice Aggregators (CCAs); a few members have onsite renewable generation.

CPUC – California Public Utility Commission - state agency that regulates privately owned electric, natural gas, telecommunications, water, railroad, rail transit, and passenger transportation companies, in addition to authorizing video franchises.

C&I – Commercial and Industrial – Business customers. C&I customers generally consume much higher volumes of electricity and gas. Many utilities segment their C&I customers by energy consumption (small, medium and large).

CP – Compliance Period – Time period to become RPS compliant, set by the CPUC (California Public Utilities Commission)

DA – **Direct Access** – An option that allows eligible customers to purchase their electricity directly from third party providers known as Electric Service Providers (ESP).

DA Cap – the maximum amount of electric usage that may be allocated to Direct Access customers in California, or more specifically, within an Investor-Owned Utility service territory.

DACC – **Direct Access Customer Coalition** a regulatory advocacy group comprised of educational, governmental, commercial and industrial customers that utilize direct access for all or a portion of their electrical energy requirements

DA Lottery – a random drawing by which DA waitlist customers become eligible to enroll in DA service under the currently-applicable Direct Access Cap.

DA Waitlist – customers that have officially registered their interest in becoming a DA customer but are not yet able to enroll in service because of DA cap limitations.

DAC – **Disadvantaged Community** - Disadvantaged communities refers to the areas throughout California which most suffer from a combination of economic, health, and environmental burdens. These burdens include poverty, high unemployment, air and water pollution, presence of hazardous wastes as well as high incidence of asthma and heart disease. One way that the state identifies these areas is by collecting and analyzing information from communities all over the state. CalEnviroScreen, an analytical tool created by the California Environmental Protection Agency (CalEPA), combines different types of census tract-specific information into a score to determine which communities are the most burdened or "disadvantaged."

DASR – Direct Access Service Request – Request submitted by C&I customers to become direct access eligible.

Demand - The rate at which electric energy is delivered to or by a system or part of a system, generally expressed in kilowatts (kW), megawatts (MW), or gigawatts (GW), at a given instant or averaged over any designated interval of time. Demand should not be confused with Load or Energy.

DER – Distributed Energy Resource – A small-scale physical or virtual asset (e.g. EV charger, smart thermostat, behind-the-meter solar/storage, energy efficiency) that operates locally and is connected to a larger power grid at the distribution level.

Distribution - The delivery of electricity to the retail customer's home or business through low voltage distribution lines.

DLAP – Default Load Aggregation Point – In the CAISO's electricity optimization model, DLAP is the node at which all bids for demand should be submitted and settled.

- **DR Demand Response -** An opportunity for consumers to play a significant role in the operation of the electric grid by reducing or shifting their electricity usage during peak periods in response to time-based rates or other forms of financial incentives.
- **DRP Distributed Resource Plans -** plans that are required by statute that are intended to identify optimal locations for the deployment of distributed resources.
- **DWR Department of Water Resources** DWR manages California's water resources, systems, and infrastructure in a responsible, sustainable way.
- **ECR Enhanced Community Renewable -** An IOU program that reflects the "Community Solar" model of renewable energy purchasing. Customers sign up to purchase a portion of a local solar project directly from a Developer at a level that meets at least 25% of their monthly electricity demand, but up to 100%. The customer will pay the Developer for the subscribed output, and receive a credit on their utility bill that reflects their enrollment level.
- **ED Energy Division -** The CPUC's Energy Division develops and administers energy policy and programs to serve the public interest, advise the Commission, and ensure compliance with the Commission decisions and statutory mandates.
- **EE Energy Efficiency-** the use of less energy to perform the same task or produce the same result. Energy-efficient homes and buildings use less energy to heat, cool, and run appliances and electronics, and energy-efficient manufacturing facilities use less energy.
- **ELCC Effective Load Carrying Capacity** The additional load met by an incremental generator while maintaining the same level of system reliability. For solar and wind resources the ELCC is the amount of capacity which can be counted for Resource Adequacy purposes.
- **EPIC Electric Program Investment Charge –** The EPIC program was created by the CPUC to support investments in clean energy technologies that provide benefits to the electricity ratepayers of PG&E, San Diego Gas & Electric Company (SDG&E), and Southern California Edison Company (SCE)
- **ERRA Energy Resource Recovery Account –** ERRA proceedings are used to determine fuel and purchased power costs which can be recovered in rates. The utilities do not earn a rate of return on these costs, and only recover actual costs. The costs are forecast for the year ahead. If the actual costs are lower than forecast, then the utility gives money back, and vice versa.
- **ES Energy Storage** the capture of energy produced at one time for use at a later time to reduce imbalances between energy demand and energy production.
- **ESA Energy Storage Agreement -** means a battery services contract, a capacity contract, demand response contract or similar agreement.
- **ESP Energy Service Provider -** An energy entity that provides service to a retail or end-use customer.
- **EV Electric Vehicle** a vehicle that uses one or more electric motors for propulsion.
- **FCR Flexible Capacity Requirements -** "Flexible capacity need" is defined as the quantity of resources needed by the CAISO to manage grid reliability during the greatest three-hour continuous ramp in each month. Resources will be considered as "flexible capacity" if they can sustain or increase output, or reduce ramping needs, during the hours of "flexible need." "FCR"

means the flexible capacity requirements established for LSEs by the CPUC pursuant to the CPUC Decisions.

GHG – **Greenhouse gas** - water vapor, carbon dioxide, tropospheric ozone, nitrous oxide, methane, and chlorofluorocarbons (CFCs). A gas that causes the atmosphere to trap heat radiating from the earth. The most common GHG is Carbon Dioxide, though Methane and others have this effect as well.

GRC – General Rate Case – Proceedings used to address the costs of operating and maintaining the utility system and the allocation of those costs among customer classes. For California's three large IOUs, the GRCs are parsed into two phases. Phase I of a GRC determines the total amount the utility is authorized to collect, while Phase II determines the share of the cost each customer class is responsible and the rate schedules for each class. Each large electric utility files a GRC application every three years for review by the Public Advocates Office and interested parties and approval by the CPUC.

GTSR – **Green Tariff Shared Renewables** – The GTSR program enables customers to receive 50 to 100 percent of their electricity demand from renewable sources. The GTSR program has two components: the Green Tariff (GT) component and the Enhanced Community Renewables (ECR) component. Through GT, a customer may pay the difference between their current generation charge and the cost of procuring 50 to 100 percent renewables. With ECR, a customer agrees to purchase a share of a community renewable (typically solar) project directly from a developer, and in exchange will receive a credit from their utility for the customer's avoided generation procurement.

GWh – Gigawatt-hour - The unit of energy equal to that expended in one hour at a rate of one billion watts. One GWh equals 1,000 megawatt-hours.

ICA – Integration Capacity Analysis - The enhanced integrated capacity and locational net benefit analysis quantifies the capability of the system to integrate Distributed Energy Resources (DERs) within the distribution system. Results are dependent on the most limiting element of the various power system criteria such as thermal ratings, power quality, system protection limits and safety standards of existing equipment.

IDER – Integrated Distributed Energy Resources – A CPUC proceeding that aims to more effectively coordinate the integration of demand-side resources in order to better meet customer and grid needs, while enabling California to attain its greenhouse gas reduction goals.

IDSM – Integrated Demand-Side Management - an approach that joins together all the resources utilities have at their disposal to plan, generate and supply electricity in the most efficient manner possible.

IEP – Independent Energy Producers – California's oldest and leading nonprofit trade association, representing the interest of developers and operators of independent energy facilities and independent power marketers.

IMD – Independent Marketing Division - Under state law, IOUs are prohibited from lobbying or marketing on community choice unless the IOU forms an independent marketing division funded by shareholders rather than ratepayers. SDG&E' and its parent company Sempra were permitted by the CPUC to create such an independent marketing division, which allowed SDG&E to lobby against plans to create a CCA program.

IOU – Investor-Owned Utility – A private electricity and natural gas provider, such as SDG&E, PG&E or SCE, which are the three largest IOUs in California.

IRP – Integrated Resource Plan – A plan which outlines an electric utility's resource needs in order to meet expected electricity demand long-term.

kW - **Kilowatt** - Measure of power where power (watts) = voltage (volts) x amperage (amps) and 1 kW = 1000 watts

kWh – **Kilowatt-hour** – This is a measure of consumption. It is the amount of electricity that is used over some period of time, typically a one-month period for billing purposes. Customers are charged a rate per kWh of electricity used.

LCE - Lancaster Choice Energy - the CCA that serves the City of Lancaster, California.

LCFS – Low Carbon Fuel Standard – A CARB program designed to encourage the use of cleaner low-carbon fuels in California, encourage the production of those fuels, and therefore, reduce greenhouse gas emissions.

LCR – Local (RA) Capacity Requirements – The amount of Resource Adequacy capacity required to be demonstrated in a specific location or zone.

LMP – Locational Marginal Price – Each generator unit and load pocket is assigned a node in the CAISO optimization model. The model will assign a LMP to the node in both the day- ahead and real time market as it balances the system using the least cost. The LMP is comprised of three components: the marginal cost of energy, congestion and losses. The LMP is used to financially settle transactions in the CAISO.

LNBA – Locational Net Benefits Analysis - a cost-benefit analysis of distributed resources that incorporates location-specific net benefits to the electric grid.

Load - An end use device or customer that receives power from an energy delivery system. Load should not be confused with Demand, which is the measure of power that a load receives or requires. See Demand.

LSE – Load-serving Entity – Entities that have been granted authority by state, local law or regulation to serve their own load directly through wholesale energy purchases and have chosen to exercise that authority.

LTPP – Long-Term Procurement Rulemaking - This is an "umbrella" proceeding to consider, in an integrated fashion, all of the Commission's electric procurement policies and programs.

MCE – Marin Clean Energy - the first CCA in California that began serving customers in 2010. They serve customers in Contra Costa, Marin, Napa and Solano counties in Northern California.

MEO – **Marketing Education and Outreach** - a term generally used to describe various strategies to inform customers, such as to motivate consumers to take action on energy efficiency or conservation measures and change their behavior.

MW - Megawatt - measure of power. A megawatt equals 1,000 kilowatts or 1 million watts.

MWH - Megawatt-hour - measure of energy

NAESCO – National Association of Energy Service Companies – – an advocacy and accreditation organization for energy service companies (ESCOs). Energy Service Companies

contract with private and public sector energy users to provide cost-effective energy efficiency retrofits across a wide spectrum of client facilities.

NBC – **Non-Bypassable Charge** - fees that are paid on every kilowatt-hour of electricity that is consumed from the grid. These charges can be used to fund things like energy assistance programs for low-income households and energy efficiency programs. These charges apply even if customers buy grid-supplied power from an outside power company such as a CCA.

NDA – Non-Disclosure Agreement - a contract by which one or more parties agree not to disclose confidential information that they have shared with each other.

NEM – Net Energy Metering – A program in which solar customers receive credit for excess electricity generated by solar panels.

NRDC – Natural Resources Defense Council - non-profit international environmental advocacy group.

NP-15 – **North Path 15** – NP-15 is a CAISO pricing zone usually used to approximate wholesale electricity prices in northern California in PG&E's service territory.

OIR – Order Instituting Rulemaking - A procedural document that is issued by the CPUC to start a formal proceeding. A draft OIR is issued for comment by interested parties and made final by vote of the five Commissioners of the CPUC.

OSC – Order to Show Cause - order requiring an individual or entity to explain, justify, or prove something.

ORA – Office of Ratepayer Advocates - the independent consumer advocate within the CPUC, now called Public Advocates office.

PA – Program Administrator (for EE Business Plans) IOUs and local government agencies authorized to implement CPUC-directed Energy Efficiency programs.

PCE – Peninsula Clean Energy Authority - CCA serving San Mateo County and all 20 of its cities and towns as well as the City of Los Banos.

PCC1 – RPS Portfolio Content Category 1 – Bundled renewables where the energy and REC are dynamically scheduled into a California Balancing Authority (CBA) such as the CAISO. Also known as "in-state" renewables.

PCC2 – RPS Portfolio Content Category 2 – Bundled renewables where the energy and REC are from out-of-state and not dynamically scheduled to a CBA.

PCC3 - RPS Portfolio Content Category 3 - Unbundled REC

PCIA or "exit fee" - Power Charge Indifference Adjustment (PCIA) is an "exit fee" based on stranded costs of utility generation set by the California Public Utilities Commission. It is calculated annually and assessed to customers of CCAs and paid to the IOU that lost those customers as a result of the formation of a CCA.

PCL – Power Content Label – A user-friendly way of displaying information to California consumers about the energy resources used to generate the electricity they sell, as required by AB 162 (Statue of 2009) and Senate Bill 1305 (Statutes of 1997).

PD – Proposed Decision – A procedural document in a CPUC Rulemaking that is formally commented on by parties to the proceeding. A PD is a precursor to a final Decision voted on by the five Commissioners of the CPUC.

PG&E – Pacific Gas & Electric - the IOU that serves 16 million people over a 70,000 square mile service area in Northern California.

PHC – Prehearing Conference - CPUC hearing to discuss the scope of a proceeding among other matters. Interested stakeholders can request party status during these.

Pnode – Pricing Node – In the CAISO optimization model, it is a point where a physical injection or withdrawal of energy is modeled and for which a LMP is calculated.

PPA – Power Purchase Agreement – A contract used to purchase the energy, capacity and attributes from a renewable resource project.

PRP – Priority Review Project - transportation electrification pilot projects approved by the CPUC pursuant to SB 350.

PRRR – **Progress on Residential Rate Reform** – Pursuant to a CPUC decision, the IOUs must submit to the CPUC and parties periodic updates on the progress of their efforts to assist customers with residential rate design changes related to rate reform, including tier collapse and transition to a default time of use rate.

PUC – Public Utilities Code - California statute that contains 33 Divisions, and the range of topics within this Code includes natural gas restructuring, private energy producers, telecommunication services, and specific municipal utility districts and transit authorities. Primary statute for governance of utilities as well as CCAs in California.

PURPA – Public Utilities Regulatory Policy Act - federal statute passed by Congress to encourage fuel diversity via alternative energy sources and to introduce competition into the electric sector. It was meant to promote energy conservation (reduce demand) and promote greater use of domestic energy and renewable energy (increase supply). The law was created in response to the 1973 energy crisis.

RA – Resource Adequacy - Under its Resource Adequacy (RA) program, the California Public Utilities Commission (CPUC) requires load-serving entities—both independently owned utilities and electric service providers—to demonstrate in both monthly and annual filings that they have purchased capacity commitments of no less than 115% of their peak loads.

RAM – Renewables Auction Mechanism - a procurement program the Investor-owned Utilities (IOUs) may use to procure RPS eligible generation. The IOUs may use RAM to satisfy authorized procurement needs, for example, system Resource Adequacy needs, local Resource Adequacy needs, RPS needs, reliability needs, Local Capacity Requirements, Green Tariff Shared Renewables needs, and any need arising from Commission or legislative mandates.

RE – Renewable Energy - Energy from a source that is not depleted when used, such as wind or solar power.

REC - Renewable Energy Certificate - A REC is the property right to the environmental benefits associated with generating renewable electricity. For instance, homeowners who generate solar

electricity are credited with 1 solar REC for every MWh of electricity they produce. Utilities obligated to fulfill an RPS requirement can purchase these RECs on the open market.

RES-BCT – Renewables Energy Self-Generation Bill Credit Transfer - This program enables local governments and universities to share generation credits from a system located on one government-owned property with billing accounts at other government-owned properties. The system size limit under RES-BCT is 5 MW, and bill credits are applied at the generation-only portion of a customer's retail rate.

RFO – **Request for Offers** a competitive procurement process used by organizations to solicit the submission of proposals from interested parties in response to a scope of services.

RPS - Renewable Portfolio Standard - Law that requires CA utilities and other load serving entities (including CCAs) to provide an escalating percentage of CA qualified renewable power (culminating at 33% by 2020) in their annual energy portfolio.

SB – **Senate Bill** - a piece of legislation that is introduced in the Senate. In other words, the Senate, rather than the Assembly, is the house of origin in the legislature for the legislation.

SCE – Southern California Edison - the large IOU that serves the Los Angeles and Orange County area.

SCP – Sonoma Clean Power Authority – CCA serving Sonoma County and surrounding areas in Northern California.

SDG&E – San Diego Gas & Electric - the IOU that serves San Diego county, they own the infrastructure that delivers SDCP energy to customers.

SGIP – Self-Generation Incentive Program – A program which provides incentives to support existing, new, and emerging distributed energy resources (storage, wind turbines, waste heat to power technologies, etc.)

SUE – Super User Electric - electric surcharge that's intended to penalize consumers for excessive energy use.

SVCE - Silicon Valley Clean Energy - CCA serving Silicon Valley Area.

TCR EPS Protocol – The Climate Registry Electric Power Sector Protocol – Online tools and resources provided by The Climate Registry to assist organizations to measure, report, and reduce carbon emissions.

TE – Transportation Electrification - For the transportation sector, electrification means replacing fossil fuels with electricity as the means of powering light-duty vehicles, medium- and heavy-duty trucks, and buses. The primary goal is to reduce greenhouse gas (GHG) emissions and, ultimately, contribute to mitigating the effects of climate change on the planet.

Time-of-Use (TOU) Rates — The pricing of delivered electricity based on the estimated cost of electricity during a particular time-block. Time-of-use rates are usually divided into three or four time-blocks per 24 hour period (on-peak, midpeak, off-peak and sometimes super off-peak) and by seasons of the year (summer and winter). Real time pricing differs from TOU rates in that it is based on actual (as opposed to forecasted) prices that may fluctuate many times a day and are weather sensitive, rather than varying with a fixed schedule.

TM – Tree Mortality - refers to the death of forest trees and provides a measure of forest health. In the context of energy, the CPUC is tasked with utilizing its authority to extend contracts and take actions to authorize new contracts on bioenergy facilities that receive feedstock from high hazard zones.

TURN – The Utility Reform Network - A ratepayer advocacy group charged with ensuring that California IOUs implement just and reasonable rates.

Unbundled RECs - Renewable energy certificates that verify a purchase of a MWH unit of renewable power where the actual power and the certificate are "unbundled" and sold to different buyers.

VPP – Virtual Power Plant – A cloud-based network that leverages an aggregation of distributed energy resources (DERs) to shift energy demand or provide services to the grid. For example, thousands of EV chargers could charge at a slower speed and hundreds of home batteries could discharge to the grid during a demand peak to significantly reduce the procurement of traditional supply resources.

VAMO – Voluntary Allocation, Market Offer - the process for SDG&E to allocate a proportional share of their renewable portfolio to SDCP and other LSEs within the service territory.