**ENERGY STORAGE SERVICE AGREEMENT**

**COVER SHEET**

**Seller**:[Entity name, state of formation, type of entity] (“**Seller**”)

**Buyer**:[Ava Community Energy Authority, a California joint powers authority (“Ava”)][City of San José, a California municipal corporation, doing business as San José Clean Energy (“SJCE”)] (“**Buyer**”)

**Description of Facility**: A [XX] MWAC / [XX] MWh-AC battery energy storage facility as further described below (the “**Facility**”), located in \_\_\_\_\_\_\_\_\_\_\_ County, in the State of California, as further described in Exhibit A.

**Milestones**:

| **Milestone** | **Date for Completion** |
| --- | --- |
| **Evidence of Site Control** |  |
| **Executed Interconnection Agreement** |  |
| **Obtain Federal and State Discretionary Permits** |  |
| **Network Upgrades Completed** |  |
| **Procure Major Equipment** |  |
| **Expected Construction Start Date** |  |
| **Initial Synchronization** |  |
| **Expected Commercial Operation Date** |  |
| **Full Capacity Deliverability Status Obtained**  |  |

**Delivery Term**: The period for Product delivery will be for \_\_\_\_\_ (\_\_) Contract Years[[1]](#footnote-2).

**Storage Contract Capacity**:\_\_ MWAC for [four (4)] [eight (8)] hours

**Storage Contract Output**: \_\_ MWh-AC

**Guaranteed Efficiency Rate**:

|  |  |
| --- | --- |
| **Contract Year** | **Guaranteed Efficiency Rate** |
| 1 | 88.0% |
| [2 -XX] | [*Seller to fill out rest of table*] |

**Contract Price**:

The Storage Rate shall be:

|  |  |
| --- | --- |
| **Contract Year** | **Storage Rate** |
| 1 – [XX] | $[XX.XX]/kW-mo. (flat) with no escalation |

**Metering Arrangement**: [CAISO Metered Entity] [SC Metered Entity]

**Delivery Point**: Facility PNode

**Product**:

☑ Discharging Energy

☑ Storage Capacity

☑ Capacity Attributes (select options below as applicable)

☐ Energy Only Status

☑ Full Capacity Deliverability Status

☑ Ancillary Services

**Scheduling Coordinator**: Buyer or Buyer’s agent

**Development Security and Performance Security**

Development Security: $125/kW of Storage Contract Capacity

Performance Security: $105/kW of Storage Contract Capacity

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**ENERGY STORAGE SERVICE AGREEMENT**

This Energy Storage Service Agreement (“**Agreement**”) is entered into as of the last dated signature on the signature page hereto (the “**Effective Date**”), between Buyer and Seller. Buyer and Seller are sometimes referred to herein individually as a “**Party**” and jointly as the “**Parties**.” All capitalized terms used in this Agreement are used with the meanings ascribed to them in Article 1 to this Agreement.

**RECITALS**

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

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

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

# DEFINITIONS

## **Contract Definitions**

. 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.

“**Actual Monthly NQC**” means the amount of Net Qualifying Capacity from the Facility that is eligible to count toward meeting Resource Adequacy Requirements by both the CPUC and CAISO.

“**Administrative NQC Reduction**” means a reduction in the maximum achievable Net Qualifying Capacity of the Facility due to a reduction that has been generally applied to resources materially similar to the Facility in terms of generating technology and operational characteristics (including those characteristics specified in the CPUC Master Resource Database), including any methodology that incorporates fleet averages or other average outage rates.

“**Affiliate**” means, with respect to any Person, each Person that directly or indirectly controls, is controlled by, or is under common control with such designated Person. For purposes of this definition and the definition of “Permitted Transferee” and “control” (including, with correlative meanings, the terms “controlled by” and “under common control with”), as used with respect to any Person, shall mean (a) the direct or indirect right to cast at least fifty percent (50%) of the votes exercisable at an annual general meeting (or its equivalent) of such Person or, if there are no such rights, ownership of at least fifty percent (50%) of the equity or other ownership interest in such Person, or (b) the right to direct the policies or operations of such Person.

“**Agreement**” has the meaning set forth in the Preamble and includes any Exhibits, schedules and any written supplements hereto, the Cover Sheet, and any designated collateral, credit support or similar arrangement between the Parties.

“**Ancillary Services**” means all ancillary services, products and other attributes, if any, associated with the Facility.

“**Availability Adjustment**” has the meaning set forth in Exhibit P.

“**Availability Notice**” means Seller’s availability forecasts issued pursuant to Section 4.3 with respect to the available Storage Capacity, which shall include any updates from Seller with respect to Facility outages or availability as reported to CAISO (including as reported in OMS).

“**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. local time for the Party sending a Notice, or payment, or performing a specified action.

“**Buyer**” means [Ava Community Energy Authority, a California joint powers authority][City of San José, a California municipal corporation, doing business as San José Clean Energy].

“**Buyer Default**” means an Event of Default of Buyer.

“**Buyer Dispatched Test**” has the meaning set forth in Section 4.9(a).

“**CAISO**” 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 Charging Energy and Discharging Energy.

“**CAISO Certification**” means the certification and testing requirements for a storage unit set forth in the CAISO Tariff that are applicable to the Facility, including certification and testing for all applicable Ancillary Services, PMAX, and PMIN.

“**CAISO Grid**” has the same meaning as “CAISO Controlled Grid” as defined in the CAISO Tariff.

“**CAISO Metered Entity**” has the meaning set forth in the CAISO Tariff.

“**CAISO Operating Order**” 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 (as such term in defined in Appendix A to the CAISO Tariff), 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; provided that if there is a conflict between the BPMs, the CAISO Operating Agreement or the Operating Procedures (as such term in defined in Appendix A to the CAISO Tariff), on the one hand, and the CAISO Tariff, on the other hand, the CAISO Tariff will control.

“**Capacity Attribute**” means any current or future defined characteristic, certificate, tag, credit, or accounting construct associated with the amount of power that the Facility can generate and deliver to the Delivery Point at a particular moment and that can be purchased and sold under CAISO market rules, including Resource Adequacy Benefits.

“**Capacity Damages**” has the meaning set forth in Exhibit B.

“**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:

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

1. ownership interests in Seller owned directly or indirectly by any Lender (including any cash equity or tax equity provider) or assignee or transferee thereof shall be excluded from the total outstanding equity interests in Seller.

“**Charging Energy**” means the energy delivered to the Facility pursuant to a Charging Notice as measured by the 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.

“**Charging Notice**” means the operating instruction, and any subsequent updates, given by Buyer to Seller, directing the Facility to charge with Charging Energy at a specific MW rate to a specified Stored Energy Level, provided that any such operating instruction shall be in accordance with the Operating Restrictions. For the avoidance of doubt, any Buyer request to initiate a Storage Capacity Test consistent with Section 4.9 shall not be considered a Charging Notice.

“**Claim**” has the meaning set forth in Section 17.2(a).

“**COD Certificate**” has the meaning set forth in Exhibit B.

“**COD Delay Damages**” means an amount equal to [XXXXXXXX Dollars ($XXXXXXX)][[2]](#footnote-3) per day.

“**Commercial Operation**” has the meaning set forth in Exhibit B.

“**Commercial Operation Date**” or “**COD**” has the meaning set forth in Exhibit B.

“**Compliance Actions**” has the meaning set forth in Section 3.12.

“**Compliance Expenditure Cap**” has the meaning set forth in Section 3.12.

“**Confidential Information**” has the meaning set forth in Section 19.1.

“**Collateral Assignment Agreement**” has the meaning set forth in Section 14.2.

“**Construction Delay Damages**” means an amount equal to [XXXXXXXX Dollars ($XXXXXXX)][[3]](#footnote-4) per day.

“**Construction Start**” has the meaning set forth in Exhibit B.

“**Construction Start Date**” has the meaning set forth in Exhibit B.

“**Contract Price**” has the meaning set forth on the Cover Sheet. For clarity, the Contract Price is the Storage Rate.

“**Contract Term**” has the meaning set forth in Section 2.1.

“**Contract Year**” means a period of twelve (12) consecutive months beginning on January 1st and continuing through December 31st of each calendar year, except that the first Contract Year shall commence on the Commercial Operation Date and the last Contract Year shall end at midnight at the end of the day prior to the anniversary of the Commercial Operation Date.

“**Costs**” means, with respect to the Non-Defaulting Party, brokerage fees, commissions and other similar third-party transaction costs and expenses reasonably incurred by such 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.

“**CPM Soft Offer Cap**” has the meaning set forth in the CAISO Tariff.

“**CPUC**” means the California Public Utilities Commission or any successor agency performing similar statutory functions.

“**CPUC System RA Penalty**” means the Tier 1 System RA Penalties assessed against LSEs by the CPUC for RA deficiencies that are not replaced or cured, as established in the Resource Adequacy Rulings and subsequently incorporated into the annual “Filing Guide for System, Local and Flexible Resource Adequacy Compliance Filings” that is issued by the CPUC Energy Division, which is expected to be updated annually, 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 LSEs for RA deficiencies.

“**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, Fitch or Moody’s.

“**Curtailment Order**” means any of the following:

1. CAISO orders, directs, alerts, or provides notice to a Party, including a CAISO Operating Order, to curtail deliveries of Charging Energy or Discharging Energy for the following reasons: (i) any System Emergency, or (ii) any warning of an anticipated System Emergency, or warning of an imminent condition or situation, which jeopardizes CAISO’s electric system integrity or the integrity of other systems to which CAISO is connected;
2. 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;
3. a curtailment ordered by CAISO or the Participating Transmission Owner due to scheduled or unscheduled maintenance on the Participating Transmission Owner’s transmission;
4. facilities that prevent (i) Buyer from receiving or (ii) Seller from delivering Charging Energy to the Facility and/or Discharging Energy to the Delivery Point; or
5. a curtailment in accordance with the obligations applicable to the Facility under the Interconnection Agreement with the Participating Transmission Owner or distribution operator.

“**Curtailment Period**” means the period of time, as measured using current Settlement Intervals, during which Seller reduces generation from the Facility pursuant to a Curtailment Order.

“**Cycle**” means a quantity of Discharging Energy (in MWh) equal to the Storage Contract Output.

“**Damage Payment**” means the dollar amount equal to the amount of the Development Security set forth on the Cover Sheet.

“**Day-Ahead Forecast**” has the meaning set forth in Section 4.3(c).

“**Day-Ahead Market**” has the meaning set forth in the CAISO Tariff.

“**Day-Ahead Schedule**” has the meaning set forth in the CAISO Tariff.

“**Deemed Delivered RA**” means for each hour of the Relevant Day in the applicable Showing Month the amount of Net Qualifying Capacity expressed in MW that the Facility would have delivered to the Delivery Point, but for (i) a Force Majeure Event, and (ii) Planned Outages permitted by the terms of this Agreement to the extent such Planned Outages reduce the maximum achievable Net Qualifying Capacity of the Facility.

“**Defaulting Party**” has the meaning set forth in Section 11.1(a).

“**Delivered RA**” means for each hour of the Relevant Day in the applicable Showing Month the sum of (a) the Net Qualifying Capacity of the Facility for such month able to be shown on Buyer’s monthly or annual Resource Adequacy Plan to the CAISO and CPUC and counted as Resource Adequacy Capacity by both the CAISO and CPUC, and (b) Deemed Delivered RA and (c) Replacement RA.

“**Delivery Point**” has the meaning set forth in Exhibit A.

“**Delivery Term**” has the meaning set forth on the Cover Sheet.

“**Designated Fund**” has the meaning set forth in Section 20.10(a).

“**Development Cure Period**” has the meaning set forth in Exhibit B.

“**Development Security**” means (a) cash or (b) a Letter of Credit in the amount set forth on the Cover Sheet.

“**Discharging Energy**” means all energy delivered to the Delivery Point from the Facility, net of Station Use, as measured by the Facility Meter in accordance with CAISO metering requirements and Prudent Operating Practices, adjusted pursuant to CAISO requirements for any applicable Electrical Losses. For the avoidance of doubt, all Discharging Energy will have originally been delivered to the Facility as Charging Energy.

“**Discharging Notice**” means the operating instruction, and any subsequent updates, given by Buyer to Seller, directing the Facility to discharge Discharging Energy at a specific MW rate to a specified Stored Energy Level, provided that any such operating instruction or updates shall be in accordance with the Operating Restrictions. For the avoidance of doubt, any Discharging Notice shall not constitute a Curtailment Order.

“**Early Termination Date**” has the meaning set forth in Section 11.2(a).

“**Effective Date**”has the meaning set forth on the Preamble.

“**Efficiency Rate**” means the measured round-trip efficiency rate of the Facility, expressed as a percentage, calculated pursuant to a Storage Capacity Test in accordance with Exhibit O.

“**Electrical Losses**” means all transmission or transformation losses between the Facility Meter and the Delivery Point for the receipt of Charging Energy and delivery of Discharging Energy, calculated in accordance with CAISO approved methodologies applicable to revenue metering.

“**Energy In**” has the meaning set forth in Exhibit O.

“**Energy Out**” has the meaning set forth in Exhibit O.

“**Event of Default**” has the meaning set forth in Section 11.1.

“**Executed Interconnection Agreement Milestone**” 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 Commercial Operation Date**” is the date set forth on the Cover Sheet by which Seller reasonably expects to achieve Commercial Operation.

“**Expected Construction Start Date**” is the date set forth on the Cover Sheet by which Seller reasonably expects to achieve Construction Start.

“**Facility**” means the energy storage facility described on the Cover Sheet and in Exhibit A (including the operational requirements of the energy storage facility), located at the Site and including mechanical equipment and associated facilities and equipment required to deliver Storage Product (but excluding any Shared Facilities), and as such storage facility may be expanded or otherwise modified from time to time in accordance with the terms of this Agreement.

“**Facility Meter**” means the bi-directional revenue quality meter or meters (with a 0.3 accuracy class) as shown in Exhibit R, along with a compatible data processing gateway or remote intelligence gateway, telemetering equipment and data acquisition services sufficient for monitoring, recording and reporting, in real time, the amount of Charging Energy and Discharging Energy.

“**FERC**” 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 receiving Charging Energy or making Discharging Energy available at the Delivery Point and that is not the result of a Force Majeure Event.

“**Full Capacity Deliverability Status**” has the meaning as such term is defined in the CAISO Tariff.

“**Full Capacity Deliverability Status Finding**” means a written confirmation from the CAISO that the Facility is eligible for Full Capacity Deliverability Status.

“**Gains**” means, with respect to 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 Capacity Attributes.

“**Governmental Authority**” means any federal, state, provincial, local or municipal government, any political subdivision thereof or any other governmental, congressional or parliamentary, regulatory, or judicial instrumentality, authority, body, agency, department, bureau, or entity with authority to bind a Party at law, including CAISO; *provided*, *however*, that “Governmental Authority” for purposes of this Agreement shall not in any event include Buyer acting solely in its capacity as the administrator of San José Clean Energy[[4]](#footnote-5).

“**Guaranteed Efficiency Rate**” means the guaranteed Efficiency Rate of the Facility throughout the Delivery Term, as set forth on the Cover Sheet.

“**Guaranteed Commercial Operation Date**” or “**Guaranteed COD**” has the meaning set forth in Exhibit B.

“**Guaranteed Construction Start Date**” has the meaning set forth in Exhibit B.

“**Guaranteed RA Amount**” means the Qualifying Capacity minus Administrative NQC Reductions for each hour of the Relevant Day in the applicable Showing Month.

“**Guaranteed Storage Availability**” has the meaning set forth in Section 4.8.

“**Guarantor**” means, with respect to Seller, (a) an Affiliate of Seller with an Investment Grade Credit Rating, or (b) any Person reasonably acceptable to Buyer, that (i) has an Investment Grade Credit Rating, (ii) has a tangible net worth of at least One Hundred Fifty Million Dollars ($150,000,000), (iii) is incorporated or organized in a jurisdiction of the United States and is in good standing in such jurisdiction, and (iv) 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.

“**Imbalance Energy**” means the amount of energy in MWh, in any given Settlement Period or Settlement Interval, by which the amounts of Charging Energy or Discharging Energy deviates from the amount of Scheduled Energy.

“**Indemnifiable Loss(es)**” has the meaning set forth in Section 17.1.

“**Initial Synchronization**” means the initial delivery of Discharging Energy to the Delivery Point.

“**Installed Battery Capacity**” means the maximum dependable operating capability of the Facility to discharge electric energy, not to exceed the Storage Contract Capacity, as measured in MWAC at the Delivery Point, that achieves Commercial Operation, adjusted for ambient conditions on the date of the performance test, and as evidenced by a certificate substantially in the form attached as Exhibit I hereto.

“**Interconnection Agreement**” means that certain Large Generator Interconnection Agreement dated as of [\_\_\_\_\_\_\_\_\_\_\_\_\_] associated with CAISO Queue position [\_\_\_\_\_\_\_\_\_\_\_\_\_] among Seller’s Affiliate, the CAISO, and the Participating Transmission Owner, pursuant to which the Facility will be interconnected with the Transmission System, and pursuant to which the Interconnection Facilities will be constructed, operated and maintained during the Contract Term.

“**Interconnection Facilities**” means the interconnection facilities, control and protective devices and metering facilities required to connect the Facility with the Transmission System in accordance with the Interconnection Agreement.

“**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.

“**Inter-SC Trade**” or “**IST**” has the meaning set forth in the CAISO Tariff.

“**Investment Grade Credit Rating**” means a Credit Rating of BBB- or higher by S&P or Fitch or Baa3 or higher by Moody’s.

“**ITC**” means the investment tax credit established pursuant to Section 48 of the United States Internal Revenue Code of 1986.

[“**Joint Powers Act**”[[5]](#footnote-6) means the Joint Exercise of Powers Act of the State of California (Government Code Section 6500 et seq.).]

[“**Joint Powers Agreement**”[[6]](#footnote-7) means that certain Joint Powers Agreement dated December 1, 2016, as amended from time to time, under which Buyer is organized as a Joint Powers Authority in accordance with the Joint Powers Act.]

“**Law**” means any applicable law, statute, rule, regulation, decision, writ, order, decree or judgment, permit or any interpretation thereof, promulgated or issued by a Governmental Authority.

“**Lender**” means, collectively, any Person (i) providing senior or subordinated construction, interim, back leverage or long-term debt, 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), public debt or any other form (including financing or refinancing provided to a member or other direct or indirect owner of Seller), including any Person providing financing or refinancing for the Facility, and any trustee or agent or similar representative acting on their behalf, (ii) providing Interest Rate or commodity protection under an agreement hedging or otherwise mitigating the cost of any of the foregoing obligations 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, having assets of at least $10 Billion, and with such bank having a Credit Rating of at least A- from S&P or A3 from Moody’s, in a form substantially similar to the letter of credit set forth in Exhibit K.

“**Licensed Professional Engineer**” means an independent, professional engineer selected by Seller and reasonably acceptable to Buyer, licensed in the State of California.

“**Limited Assignee**” has the meaning set forth in Section 14.5.

“**Local Capacity Area Resources**” has the meaning set forth in the CAISO Tariff.

“**Locational Marginal Price**” or “**LMP**” has the meaning set forth in the CAISO Tariff.

“**Losses**” means, with respect to any 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 Capacity Attributes.

“**Master File**” has the meaning set forth in the CAISO Tariff.

“**Maximum Charging Capacity**” has the meaning set forth in in Exhibit A.

“**Maximum Discharging Capacity**” has the meaning set forth in in Exhibit A.

“**Meter Service Agreement**” means “Meter Service Agreement for CAISO Metered Entities” or “Meter Service Agreement for Scheduling Coordinators”, as applicable, as each are defined in the CAISO Tariff.

“**Milestones**” means the development activities for significant permitting, interconnection, financing and construction milestones set forth on the Cover Sheet.

“**Minimum Round-Trip Efficiency**” means seventy percent (70%).

“**Monthly Forecast**” has the meaning set forth in Section 4.3(b).

“**Monthly Storage Availability**”has the meaning set forth in Exhibit P.

“**Moody’s**” means Moody’s Investors Service, Inc., or its successors.

“**MW**” means megawatts in alternating current, unless expressly stated in terms of direct current.

“**MWh**” means megawatt-hour measured in alternating current, unless expressly stated in terms of direct current.

“**Negative LMP**” 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).

“**NEPA**” means the National Environmental Policy Act.

“**NERC**” 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, overnight courier service, or electronic messaging (email).

“**Notice of Claim**” has the meaning set forth in Section 17.2.

 “**Operating Restrictions**” means those rules, requirements, and procedures set forth on Exhibit Q.

“**Outage Management System**” or “**OMS**” has the meaning set forth in the CAISO Tariff.

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

“**Permitted Transferee**” means an entity that has, or is controlled by another Person that satisfies the following requirements:

1. A tangible net worth of not less than One Hundred Fifty Million Dollars ($150,000,000) or a Credit Rating of at least BBB- from S&P, BBB- from Fitch, or Baa3 from Moody’s; and
2. Has at least two (2) years of experience in the ownership and operations of storage facilities similar to the Facility, or has retained a third-party with such operations experience to operate the Facility.

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

“**Planned Outage**” has the meaning set forth in Section 4.6(a).

“**PMAX**” means the applicable CAISO-certified maximum operating level of the Facility.

“**PMIN**” means the applicable CAISO-certified minimum operating level of the Facility.

“**PNode**” has the meaning set forth in the CAISO Tariff.

“**Prevailing Wage Requirement**” has the meaning set forth in Section 13.4.

“**Product**” has the meaning set forth on the Cover Sheet.

“**Progress Report**” means a progress report including the items set forth in Exhibit E.

“**Prudent Operating Practice**” means (a) the applicable practices, methods and acts required by or consistent with applicable Laws and reliability criteria, and otherwise engaged in or approved by a significant portion of the electric utility industry during the relevant time period with respect to grid-interconnected, utility-scale 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 industry with respect to grid-interconnected, utility-scale generating facilities with integrated storage in the Western United States. Prudent Operating Practice includes compliance with applicable Laws, applicable reliability criteria, and the criteria, rules and standards promulgated in the National Electric Safety Code and the National Electrical Code, as they may be amended or superseded from time to time, including the criteria, rules and standards of any successor organizations.

“**Qualifying Capacity**” has the meaning set forth in the CAISO Tariff.

“**RA Deficiency Amount**” means the liquidated damages payment that Seller shall pay to Buyer for an applicable RA Shortfall Month equal to the product of (i) the RA Shortfall Amount, and (ii) the sum of (A) the CPUC System RA Penalty and (B) the CPM Soft Offer Cap.

“**RA Shortfall Amount**” shall be determined by first, calculating the difference of the Guaranteed RA Amount *minus* the Delivered RA for each hour of the Relevant Day in the applicable Showing Month and, second, selecting the highest hourly difference for any hour of the Relevant Day in the applicable Showing Month as determined pursuant to step one of this calculation, which such highest hourly value shall be the “RA Shortfall Amount” for purposes of calculating an RA Deficiency Amount for such Showing Month; provided, if the CPUC adopts another methodology for calculating a load serving entity’s procurement deficiencies in Resource Adequacy Benefits for purposes of the Resource Adequacy Requirements, the Parties shall cooperate in good faith to amend this definition to conform to such new methodology in order to preserve to the maximum extent possible the benefits, burdens, and obligations set forth in this definition as of the Effective Date. If the result of the calculation is a negative number, the RA Shortfall Amount shall be deemed to be zero MW for such Showing Month.

“**RA Shortfall Month**” means, for purposes of calculating an RA Deficiency Amount under Section 3.8(b), any month commencing after the Commercial Operation Date during which there is an RA Shortfall Amount.

“**Real-Time Forecast**” means any Notice of any change to the Storage Capacity delivered by or on behalf of Seller pursuant to Section 4.3(d).

“**Real-Time Market**” has the meaning set forth in the CAISO Tariff.

“**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.

“**Relevant Day**” means the peak day(s) of the month, or such other time period, as established by the CPUC for purposes of determining compliance with Resource Adequacy Requirements.

“**Remedial Action Plan**” has the meaning in Section 2.4.

“**Replacement RA**” means Resource Adequacy Benefits, if any, equivalent to those that would have been provided by the Facility with respect to the applicable Showing Month in all respects, including, as applicable, Resource Category and Flexible Capacity Category, and any successor criteria applicable to the Facility, unless Buyer consents to accept Replacement RA from another facility that provides non-equivalent Resource Adequacy Benefits; provided that any Replacement RA capacity must be communicated by Seller to Buyer with Replacement RA product information in a Notice to Buyer no later than the Notification Deadline.

“**Resource Adequacy Benefits**” means the rights and privileges attached to the Facility that satisfy any entity’s resource adequacy obligations, as those obligations are set forth in any Resource Adequacy Rulings and includes any local, zonal or otherwise locational attributes associated with the Facility, in addition to flex attributes.

“**Resource Adequacy Rulings**” means CPUC Decisions 04‑01‑050, 04‑10‑035, 05‑10‑042, 06‑04‑040, 06‑06‑064, 06‑07‑031 06‑07‑031, 07‑06‑029, 08‑06‑031, 09‑06‑028, 10‑06‑036, 11‑06‑022, 12‑06‑025, 13‑06‑024 and any other existing or subsequent ruling or decision, or any other resource adequacy Law, however described, as such decisions, rulings or Laws may be amended or modified from time-to-time throughout the Delivery Term.

“**Round-Trip Efficiency Factor**” means (a) if the Efficiency Rate is greater than or equal to the Minimum Efficiency Rate, one hundred percent (100%), or (b) if the Efficiency Rate is less than the Minimum Efficiency Rate, zero percent (0%).

[“**San José Clean Energy**”[[7]](#footnote-8) is the City of San José’s community choice aggregation program. The San José Energy Department administers and manages San José Clean Energy.]

“**S&P**” 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 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.

“**SC Metered Entity**” has the meaning of a “Scheduling Coordinator Metered Entity” as defined in the CAISO Tariff.

“**Security Interest**” has the meaning set forth in Section 8.8.

“**Seller**” has the meaning set forth on the Cover Sheet.

“**Seller Initiated Test**” has the meaning set forth in Section 4.9(a).

“**Seller Termination Payment**” has the meaning set forth in Section 11.8(b).

“**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 Capacity Attributes 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.

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

“**Showing Month**” means the calendar month of the Delivery Term that is the subject of the 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 Compliance Showing made in June is for the Showing Month of August.

“**Site**” means the real property on which the Facility is or will be located, as further described in Exhibit A.

“**Site Control**” means that Seller: (a) owns or has the option to purchase the Site, including through an ownership interest in an Affiliate that owns the Site; (b) is the lessee or has the option to lease the Site; (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; or (d) has rights through ownership, lease, right-of-way grant or similar instrument, as the managing partner or other entity authorized to act in all manners relating to the control and operation of the Site.

“**SP-15**” means the Existing Zone Generation Trading Hub for Existing Zone region SP-15 as set forth in the CAISO Tariff.

“**Station Use**” means energy (including produced or discharged by the Facility) that is used within the Facility to power the lights, motors, cooling equipment, control systems and other electrical loads that are necessary for operation of the Facility except during periods in which the Facility is charging or discharging pursuant to a Charging Notice or Discharging Notice.

“**Storage Capacity**” means (a) the maximum dependable operating capability of the Facility to discharge electric energy that can be sustained for four (4) consecutive hours and (b) any other products that may be developed or evolve from time to time during the Term that the Facility is able to provide as the Facility is configured on the Commercial Operation Date and that relate to the maximum dependable operating capability of the Facility to discharge electric energy.

“**Storage Capacity Test**” means any test or retest of the Storage Contract Capacity of the Facility and/or Efficiency Rate conducted in accordance with the testing procedures, requirements and protocols set forth in Section 4.9 and Exhibit O.

“**Storage Contract Capacity**” means the total capacity (in MWAC) of the 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 5(a) of Exhibit B or Section 4.9 and Exhibit O to reflect the results of the most recently performed Storage Capacity Test.

“**Storage Contract Output**” means the total output (in MWh-AC) of the 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 5(a) of Exhibit B or Section 4.9 and Exhibit O to reflect the results of the most recently performed Storage Capacity Test.

“**Storage Product**” means (a) Discharging Energy, (b) Capacity Attributes, if any, (c) Storage Capacity, and (d) Ancillary Services (as defined in the CAISO Tariff), if any, in each case arising from or relating to the Facility.

“**Storage Rate**” has the meaning set forth on the Cover Sheet.

“**Stored Energy Level**” means, at a particular time, the amount of electric energy in the Facility available to be discharged as Discharging Energy, expressed in MWh-AC.

“**Subject Event**” has the meaning set forth in Exhibit B.

“**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.

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

“**Tax Credits**” means ITCs and any other state, local or federal tax credit, depreciation benefit, tax deduction or investment tax credit specific to the storage of energy from, or the operation or the ownership of, the Facility or any part thereof.

“**Terminated Transaction**” has the meaning set forth in Section 11.2(a).

“**Termination Payment**” has the meaning set forth in Section 11.3.

**“Third-Party Independent Evaluator”** means a qualified professional experienced in the appraisal of facilities similar to the Facility, with selection mutually agreed by the Parties or absent such agreement, a qualified professional experienced in the appraisal of facilities similar to the Facility with selection mutually agreed by two independent evaluators, with each independent evaluator selected by each of the Parties.

“**Transmission Provider**” means any entity or entities transmitting or transporting the Charging Energy and Discharging Energy on behalf of Seller or Buyer to or from the Delivery Point.

“**Transmission System**” means the transmission facilities operated by the CAISO, now or hereafter in existence, which provide energy transmission service within the CAISO grid from the Delivery Point.

“**Ultimate Parent**” means [Entity name, state of formation, type of entity].

## **Rules of Interpretation**

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

* + 1. 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;
		2. words importing the singular include the plural and vice versa and the masculine, feminine and neuter genders include all genders;
		3. 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;
		4. 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;
		5. 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 such document, agreement or this Agreement, but disregarding any amendment, supplement, replacement, novation or modification made in breach of such document, agreement or this Agreement;
		6. a reference to a Person includes that Person’s successors and permitted assigns;
		7. the term “including” means “including without limitation” and any list of examples following such term shall in no way restrict or limit the generality of the word or provision in respect of which such examples are provided;
		8. 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;
		9. 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;
		10. references to any amount of money shall mean a reference to the amount in United States Dollars;
		11. 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
		12. 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.

# TERM; CONDITIONS PRECEDENT

## **Contract Term**.

* + 1. 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 (“**Contract Term**”); *provided*, *however*, Buyer’s obligations to pay for or accept any Product are subject to Seller’s completion of the conditions precedent pursuant to Section 2.2.
		2. 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 19 and all indemnity and audit rights shall remain in full force and effect for two (2) years following the termination of this Agreement.

## **Conditions Precedent**

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* + 1. The Delivery Term shall not commence until Seller completes each of the following conditions:
			1. Seller has delivered to Buyer (i) a completion certificate from a Licensed Professional Engineer substantially in the form of Exhibit H and (ii) a certificate from a Licensed Professional Engineer substantially in the form of Exhibit I setting forth the Installed Battery Capacity on the Commercial Operation Date;
			2. 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;
			3. 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;
			4. Seller has provided Buyer with a copy of written notice from the CAISO that the Facility has achieved Full Capacity Deliverability Status;
			5. Copies of executed agreements demonstrating Site Control shall have been delivered to Buyer; provided Seller will be permitted to redact any confidential information contained therein;
			6. Insurance requirements for the Facility pursuant to Article 18 have been met, with evidence provided in writing to Buyer;
			7. All applicable regulatory authorizations, approvals and permits required for operation of the Facility have been obtained and all conditions thereof that are capable of being satisfied on the Commercial Operation Date have been satisfied and shall be in full force and effect, and Seller has delivered to Buyer an attestation certificate from an officer of Seller certifying to the satisfaction of this condition;
			8. Seller has completed CAISO Certification of the Facility, and a copy of the CAISO Certification has been delivered to Buyer;
			9. Seller has certified in writing to Buyer that Seller has complied with the Prevailing Wage Requirement set forth in Section 13.4, and provided reasonably requested documentation demonstrating such compliance;
			10. Seller has certified in writing to Buyer that Seller has satisfied the obligations related to workforce development set forth in Exhibit U, and provided reasonably requested documentation demonstrating such compliance;
			11. Seller has certified in writing to Buyer that Seller has satisfied the community benefit-related obligations set forth in Exhibit Q, and provided reasonably requested documentation demonstrating such compliance;
			12. Seller has delivered the Performance Security to Buyer in accordance with Section 8.8; and
			13. Seller has paid Buyer for all amounts owing under this Agreement, if any, including Construction Delay Damages and COD Delay Damages.

## **Development; Construction; Progress Reports**

. Within fifteen (15) days after the close of (a) each calendar quarter from the first calendar quarter following the Effective Date until the Expected Construction Start Date, and (b) each calendar month thereafter until the Commercial Operation Date, Seller shall provide to Buyer a Progress Report; provided, that if Seller misses the Guaranteed Construction Start Date or Guaranteed Commercial Operation Date, Seller shall provide updated Progress Reports to Buyer on a weekly basis, or as otherwise agreed. The Progress Report shall (i) describe the progress towards meeting the Milestones; (ii) identify any missed Milestones, including the cause of the delay; and (iii) provide a detailed description of Seller’s corrective actions to achieve the missed Milestones and all subsequent Milestones by the Guaranteed Commercial Operation Date. The form of the Progress Report is set forth in Exhibit E. Seller agrees to regularly scheduled telephonic or video-conferenced 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 reasonably 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 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, if known (e.g., governmental approvals, financing, property acquisition, design activities, equipment procurement, project construction, interconnection, or any other factor), Seller’s detailed description of its proposed course of action to achieve the missed Milestones and all subsequent Milestones by the date sixty (60) days after the Guaranteed Commercial Operation Date; *provided*, that delivery of any Remedial Action Plan shall not relieve Seller of its obligation to provide Remedial Action Plans with respect to any subsequent Milestones in accordance with the terms of this Agreement. Subject to the provisions of Exhibit B, so long as Seller complies with its obligations under this Section 2.4, Seller shall not be considered in default of its obligations under this Agreement solely as a result of missing any Milestone.

# PURCHASE AND SALE

## **Purchase and Sale of Product**

### . Subject to the terms and conditions of this Agreement, during the Delivery Term, Buyer will purchase all of the Product produced by or associated with the Facility at the Contract Price and in accordance with Exhibit C, and Seller shall supply and deliver to Buyer all of the Product produced by or associated with the Facility. At its sole discretion, Buyer may during the Delivery Term resell or use for another purpose all or a portion of the Product, provided that no such resale or use shall relieve Buyer of any obligations hereunder or modify any of Seller’s 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.

## **[Reserved]**.

## **Imbalance Energy**.

Buyer and Seller recognize that in any given Settlement Period there may be Imbalance Energy. To the extent there is any Imbalance Energy, except as set forth in Sections 4.3(f) and 4.10, any payments or charges related to such Imbalance Energy shall be for the account of Buyer.

## **[Reserved]**.

## **[Reserved]**.

## **[Reserved]**.

## **Capacity Attributes**.

Seller shall have achieved Full Capacity Deliverability Status for the Facility no later than the commencement of the Delivery Term. As between Buyer and Seller, Seller shall be responsible for the cost and installation of any Network Upgrades associated with obtaining such Full Capacity Deliverability Status.

1. Throughout the Delivery Term, Seller grants, pledges, assigns and otherwise commits to Buyer all the Capacity Attributes from the Facility.
2. Throughout the Delivery Term, Seller shall use commercially reasonable efforts to maintain eligibility for Full Capacity Deliverability Status or Interim Deliverability Status for the Facility from the CAISO and shall perform all actions necessary to ensure that the Facility qualifies to provide Resource Adequacy Benefits to Seller. Throughout the Delivery Term, Seller hereby covenants and agrees to transfer all Resource Adequacy Benefits to Buyer.
3. For the duration of the Delivery Term, Seller shall take all 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.

## **Resource Adequacy Failure**

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* + 1. RA Deficiency Determination. For each RA Shortfall Month, Seller shall pay to Buyer the RA Deficiency Amount as liquidated damages, as the sole and exclusive remedy for the Capacity Attributes Seller failed to convey to Buyer.
		2. RA Deficiency Amount Calculation. For each RA Shortfall Month, Seller shall pay to Buyer the RA Deficiency Amount; *provided* that Seller may, as an alternative to paying RA Deficiency Amounts, provide Replacement RA in the amount of the RA Shortfall Amount, provided that any Replacement RA capacity is communicated by Seller to Buyer with Replacement RA product information in a written notice substantially in the form of Exhibit M at least seventy-five (75) days before the applicable CPUC Showing Month.
		3. Replacement RA. Seller may provide Replacement RA, provided that any Replacement RA capacity is communicated by Seller to Buyer with Replacement RA product information in a written notice substantially in the form of Exhibit M at least seventy-five (75) days before the applicable CPUC Showing Month.

## **[Reserved]**.

## **CPUC Mid-Term Reliability Requirements**.[[8]](#footnote-9)

* + 1. The Parties acknowledge that Buyer is entering into this Agreement to satisfy a portion of its obligations to procure capacity to meet mid-term reliability requirements specified by the CPUC in CPUC Decision 21‑06‑035. Seller represents and warrants to Buyer that:
			1. The Product includes the exclusive right to claim the Capacity Attributes of the Facility as an incremental resource for purposes of CPUC Decision 21-06-035;
			2. Seller has not and will not sell, assign or transfer the right to claim procurement of the Capacity Attributes of the Facility as an incremental resource for purposes of CPUC Decision 21-06-035 to any other person or entity during the Delivery Term; and
			3. Seller will provide additional information and documentation to Buyer if necessary to enable Buyer to demonstrate that the Product meets the procurement mandates set forth in CPUC Decision 21-06-035.

## **[Reserved]**.

## **Compliance Expenditure Cap**.

* + 1. If a change of law occurs after the Effective Date that affects the Product’s eligibility to qualify for or maintain Resource Adequacy, then Seller shall use commercially reasonable efforts to comply with such change of law as necessary to maintain the Product eligibility described above, subject to the following sentence. Notwithstanding anything to the contrary, the Parties agree that the maximum out-of-pocket costs and expenses (“**Compliance Costs**”) Seller shall be required to bear during the term of this Agreement to comply with all of such obligations shall be capped at Twenty-Five Thousand Dollars ($25,000) per MW of Storage Contract Capacity with respect to changes that impact the Product’s eligibility to qualify for or maintain Resource Adequacy (the “**Compliance Expenditure Cap**”). Seller’s internal administrative costs associated with obtaining, maintaining, conveying or effectuating, Buyer’s use of (as applicable) any Product are excluded from the Compliance Expenditure Cap.
		2. Any actions required for Seller to comply with its obligations set forth in the immediately preceding paragraph, the Compliance Costs of which will be included in the Compliance Expenditure Cap, shall be referred to collectively as the “**Compliance Actions**.”
		3. If Seller reasonably anticipates the need to incur Compliance Costs in excess of the Compliance Expenditure Cap in order to take any Compliance Action Seller shall provide Notice to Buyer of such anticipated Compliance Costs.
		4. 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 Compliance Costs 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 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.

* + 1. If Buyer does not pay the Compliance Costs in excess of the Compliance Expenditure Cap, or if it is not possible for Seller to achieve compliance with a change in law through the payment or incurrence of costs, then in each case (i) Seller shall be excused from the corresponding Compliance Actions under this Agreement, and (ii) Buyer shall continue to pay Seller under this Agreement without any reduction in revenues that otherwise would result from the change in law.

# OBLIGATIONS AND DELIVERIES

## **Delivery**

.  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 Discharging Energy to Buyer at the Delivery Point, and Buyer shall take delivery of Discharging Energy at the Delivery Point in accordance with the terms of this Agreement. Seller will be responsible for paying or satisfying when due any costs or charges imposed in connection with the delivery of Discharging Energy to the Delivery Point, including without limitation, Station Use, Electrical Losses, any costs associated with delivering the Charging Energy from the Delivery Point to the 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 Discharging Energy at and after the Delivery Point, including without limitation transmission costs and transmission line losses and imbalance charges. The Charging Energy and Discharging Energy will be scheduled to the CAISO by Buyer (or Buyer’s designated Scheduling Coordinator) in accordance with Exhibit D.

## **Title and Risk of Loss**

. Title to and risk of loss related to the 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.

## **Forecasting**

. Seller shall provide the forecasts described below at its sole expense and in a format reasonably acceptable to Buyer (or Buyer’s designee). Seller shall use 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.

* + 1. [Reserved].
		2. Monthly Forecast of Storage Capacity. No less than thirty (30) days before the Commercial Operation Date, and thereafter 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 expected Storage Capacity for each day of the following month in a form substantially similar to the table found in Exhibit F (“**Monthly Forecast**”).
		3. Day-Ahead Forecast. By 5:30 AM Pacific Prevailing Time on the Business Day immediately preceding the date of delivery, or as otherwise specified by Buyer consistent with Prudent Operating Practice, Seller shall provide Buyer and the SC (if applicable) with a non-binding forecast of Storage Capacity 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 the Storage Capacity for each hour of each applicable day. Except as otherwise agreed, Seller shall provide the Day-Ahead Forecast in the form of a CSV file or other mutually agreed file format delivered to Buyer’s SC and Buyer’s File Transfer Protocol (FTP) site as set forth in Exhibit N. If Seller fails to provide a Day-Ahead Forecast as required herein for any period, then for such unscheduled delivery period only Buyer and the SC (if applicable) shall rely on any Real-Time Forecast provided in accordance with Section 4.3(d) or the Monthly Forecast or Buyer’s best estimate based on information reasonably available to Buyer.
		4. Real-Time Forecasts. During the Delivery Term, Seller shall notify Buyer and the SC (if applicable) of any changes from the Day-Ahead Forecast of one (1) MW or more in Storage Capacity, whether due to Forced Facility Outage, Force Majeure Event 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 Storage 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 as soon as reasonably possible. Such Real-Time Forecasts shall contain information regarding the beginning date and time of the event resulting in the change in Storage Capacity, the expected end date and time of such event, and any other information required by the CAISO or reasonably requested by Buyer. These Real-Time Forecasts shall be communicated in a method reasonably acceptable to Buyer and the SC (if applicable); *provided* that Buyer or its SC 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 email to Buyer and the SC (if applicable).
		5. Forced Facility Outages. Notwithstanding anything to the contrary herein, Seller shall notify the SC of Forced Facility Outages promptly but no later than the time periods required by the CAISO Tariff and the CAISO’s outage management rules and Seller shall keep the SC 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.
		6. Forecasting Penalties. Unless excused by a Force Majeure Event, in the event Seller does not in a given hour provide the forecast required in Section 4.3(d) and Buyer incurs a loss or penalty resulting from Seller’s failure with respect to Charging Energy or Discharging Energy during such hour, Seller shall be responsible for any penalties, Imbalance Energy charges, or other costs from CAISO resulting from Seller’s failure to provide the forecast required in Section 4.3(d) (“**Forecasting Penalty**”). Settlement of Forecasting Penalties shall occur as set forth in Article 8 of this Agreement.
		7. CAISO Tariff Requirements. 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 charged and discharged by the Facility.

## **Dispatch Down/Curtailment**.

* + 1. General. Seller agrees to reduce the amount of Discharging Energy produced by the Facility, by the amount and for the period set forth in any Curtailment Order; *provided* that Seller is not required to reduce such amount to the extent such reduction or any such Curtailment Order is inconsistent with the limitations of the Facility set out in the Operating Restrictions.
		2. Reserved.
		3. Failure to Comply. If Seller fails to comply with a Curtailment Order, then, for each MWh of Discharging Energy that is delivered by the Facility to the Delivery Point in contradiction of the 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 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 Curtailment Order.
		4. 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, including an electronic signal conveying real time and intra-day instructions, to operate the Facility as reasonably directed by the Buyer in accordance with this Agreement or a Governmental Authority, including to implement a 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 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 Curtailment Order communication via such systems and facilities shall have the same force and effect on Seller as any other form of communication.

## **Charging Energy Management**

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1. Upon receipt of a valid Charging Notice, Seller shall take any and all action necessary to deliver the Charging Energy to the Facility in order to deliver the Storage Product in accordance with the terms of this Agreement (including the Operating Restrictions), including maintenance, repair or replacement of equipment in Seller’s possession or control used to deliver the Charging Energy to the Facility.
2. Buyer will have the right to charge the Facility seven (7) days per week and twenty-four (24) hours per day (including holidays), by providing Charging Notices to Seller electronically, provided, that Buyer’s right to issue Charging Notices is subject to Prudent Operating Practice and the requirements and limitations set forth in this Agreement, including the Operating Restrictions and the provisions of Section 4.5(a). Each Charging Notice issued in accordance with this Agreement will be effective unless and until Buyer modifies such Charging Notice by providing Seller with an updated Charging Notice.
3. Seller shall not charge the Facility during the Term other than pursuant to a valid Charging Notice, or in connection with 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 (a) charges the Facility to a Stored Energy Level greater than the Stored Energy Level provided for in the Charging Notice or (b) charges the 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 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.
4. Buyer will have the right to discharge the 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. 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.
5. Notwithstanding anything in this Agreement to the contrary, during any Settlement Interval, CAISO Operating Orders, and Curtailment Orders 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 CAISO Operating Order, Curtailment Order or other instruction or direction from a Governmental Authority or the PTO or the Transmission Provider. Buyer shall have the right, but not the obligation, to provide Seller with updated Charging Notices and Discharging Notices during any CAISO Operating Order, or Curtailment Order consistent with the Operational Procedures.
6. The Facility shall be capable of receiving Charging Energy from the CAISO Grid; *provided*, Buyer shall be responsible for all Charging Energy costs related to charging of the Facility.
7. The Facility will be able to provide the full suite of Ancillary Services in CAISO markets (to the extent any such services are available in the CAISO markets as of the Effective Date) and Seller will dispatch the Facility in response to signals from the Buyer or Buyer’s Scheduling Coordinator, subject to the Operating Restrictions. These Ancillary Services include Frequency Regulation, Spinning Reserve, Ramp Support, Frequency Response, Voltage Control, VAR Dispatch, and Power Factor Correction. Upon Buyer’s reasonable request, Seller shall submit the Facility for additional CAISO Certification so that the Facility may provide additional Ancillary Services that the Facility is, at the relevant time, actually physically capable of providing without modification of the Facility, provided that Buyer has agreed to reimburse Seller for any costs Seller incurs in connection with conducting such additional CAISO Certification.

## **Reduction in Delivery Obligation**

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* + 1. Facility Maintenance. Between June 1st and September 30th, Seller shall not schedule non-emergency maintenance that reduces the Storage Capacity of the Facility by more than ten percent (10%), unless (i) such outage is required to avoid damage to the Facility, (ii) such maintenance is necessary to maintain equipment warranties and cannot be scheduled outside the period of June 1st to September 30th, (iii) such outage is required in accordance with Prudent Operating Practices, or (iv) the Parties agree otherwise in writing (each scheduled maintenance permitted under this clause (a) and each of the foregoing outages described in foregoing clauses (a)(i) – (a)(iv), a “**Planned Outage**”). To the extent notice is not already required under the terms hereof, Seller shall notify Buyer as soon as practicable of any extensions to scheduled maintenance and expected end dates thereof.
			1. Seller shall not replace existing batteries unless for critical maintenance purposes or increase the capacity of the Facility without the prior consent of Buyer; *provided*, *however*, that Seller may also add or replace batteries in order to maintain the Storage Contract Capacity available to Buyer at the Interconnection Point.
		2. Forced Facility Outage. Seller shall be permitted to reduce deliveries of Product except Capacity Attributes during any Forced Facility Outage. Seller shall provide Buyer with Notice and expected duration (if known) of any Forced Facility Outage.
		3. System Emergencies and other Interconnection Events. Seller shall be permitted to reduce deliveries of Product except Capacity Attributes during any period of System Emergency, or upon Notice of a Curtailment Order pursuant to the terms of this Agreement, the Interconnection Agreement or applicable tariff.
		4. Force Majeure Event. Seller shall be permitted to reduce deliveries of Product during any Force Majeure Event.
		5. Health and Safety. Seller shall be permitted to reduce deliveries of Product except Capacity Attributes as necessary to maintain health and safety pursuant to Section 6.2.

## **[Reserved]**

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## **Storage Availability**

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* + 1. During the Delivery Term, the Facility shall maintain a Monthly Storage Availability of no less than ninety-eight percent (98%) (the “**Guaranteed Storage Availability**”), which Monthly Storage Availability shall be calculated in accordance with Exhibit P.
		2. If, the Monthly Storage Availability during any month is less than the Guaranteed Storage Availability, then Buyer’s payment for the Storage Product shall be calculated by reference to the Availability Adjustment (as determined in accordance with Exhibit P).

## **Storage Capacity Tests**

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1. Prior to the Commercial Operation Date, Seller shall schedule and complete a Storage Capacity Test in accordance with Exhibit O. Thereafter, Seller and Buyer shall have the right to run additional Storage Capacity Tests in accordance with Exhibit O. Any testing of the Facility requested by Buyer after the Commercial Operation Date shall be deemed Buyer-instructed dispatches of the Facility (“**Buyer Dispatched Test**”). Any test of the Facility that is not a Buyer Dispatched Test, including all tests conducted prior to Commercial Operation, all required annual tests pursuant to Section B (“Subsequent Storage Capacity Tests”) in Exhibit O, any Storage Capacity Test conducted if the Storage Contract Capacity immediately prior to such Storage Capacity Test is below seventy-five percent (75%) of the Storage Contract Capacity set forth on the Cover Sheet, any test required by CAISO (including any test required to maintain CAISO Certification), and other Seller-requested discretionary tests or dispatches, at times and for durations reasonably agreed to by Buyer, that Seller deems necessary for purposes of reliably operating or maintaining the Facility or for re-performing a required test within a reasonable number of days of the initial required test (considering the circumstances that led to the need for a retest) shall be deemed a “**Seller Initiated Test**”. For all Seller Initiated Tests, 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 Buyer Dispatched Test, Buyer shall (x) pay for all CAISO costs and charges for associated Charging Energy, and (y) be entitled to any CAISO revenues associated with associated Discharging Energy. Any Buyer Dispatched Test and all required annual tests pursuant to Section B (“Subsequent Storage Capacity Tests”) in Exhibit O shall be deemed an Excused Event for the purposes of calculating the Monthly Storage Availability.
2. Buyer shall have the right to send one or more representative(s) to witness all Storage Capacity Tests. Buyer shall be responsible for all costs, expenses and fees payable or reimbursable to its representative(s) witnessing any Storage Capacity Test. Except as otherwise specified in Exhibit O, all other costs or revenues associated with any Storage Capacity Test shall be borne by, or accrue to, Seller, as applicable.
3. Following each Storage Capacity Test, Seller shall submit a testing report in accordance with Exhibit O. The Storage Contract Capacity and Efficiency Rate determined pursuant to a Storage Capacity Test shall become the new Storage Contract 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 Exhibit C.

## **Interconnection Capacity**

. Seller shall ensure that throughout the Delivery Term (a) the Facility will have an Interconnection Agreement providing for interconnection capacity available or allocable to the Facility that is no less than the Storage Contract Capacity and (b) Seller shall have sufficient interconnection capacity and rights under such Interconnection Agreement to interconnect the Facility with the CAISO Grid, to fulfill Seller’s obligations under the Agreement, including with respect to Resource Adequacy, and to allow Buyer’s dispatch rights of the Facility to be fully reflected in the CAISO’s market optimization and not result in CAISO market awards that are not physically feasible. Seller shall hold Buyer harmless from any penalties, Imbalance Energy charges, or other costs from CAISO or under the Agreement resulting from Seller’s inability to provide the foregoing interconnection capacity.

## **Station Use**

.  Seller will be responsible for procuring and paying for, or reimbursing Buyer for (to the extent Buyer pays for any Station Use), all Station Use. Seller shall indemnify and hold harmless Buyer from any and all costs, penalties, charges or other adverse consequences that result from 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 is supplied by the applicable utility’s retail service if necessary to avoid any such costs, penalties, charges or other adverse consequences.

## **Facility Operations and Maintenance**

. Buyer shall at all times during the Delivery Term retain dispatch control of the Facility and be responsible for dispatching and coordinating charging of the Facility, in each case through the issuance of Charging Notices and Discharging Notices. Seller shall at all times during the Delivery Term retain all other aspects of operation and maintenance of the Facility in accordance with Prudent Operating Practice and applicable Law and adhering to all operational data, interconnection and telemetry requirements applicable to the Facility.

# TAXES

## **Allocation of Taxes and Charges**.

Seller shall pay or cause to be paid all Taxes on or with respect to the Facility or on or with respect to the sale and making available 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.

## **Cooperation**.

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.

# MAINTENANCE OF THE FACILITY

## **Maintenance of the Facility**.

Seller shall comply with Law and Prudent Operating Practice relating to the operation and maintenance of the Facility and the generation and sale of Product.

## **Maintenance of Health and Safety**.

Seller shall take reasonable safety precautions with respect to the operation, maintenance, repair and replacement of the Facility. If Seller becomes aware of any circumstances relating to the Facility that create an imminent risk of damage or injury to any Person or any Person’s property, Seller shall take prompt, reasonable action to prevent such damage or injury and shall give Notice to Buyer’s emergency contact identified on Exhibit N of such condition. Such action may include, to the extent reasonably necessary, disconnecting and removing all or a portion of the Facility, or suspending the supply of energy or Discharging Energy to Buyer.

## **Shared Facilities**

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 The Parties acknowledge and agree that certain of the Shared Facilities and Interconnection Facilities, and Seller’s rights and obligations under the Interconnection Agreement, may be subject to certain shared facilities or co-tenancy agreements to be entered into among Seller, the Participating Transmission Owner, Seller’s Affiliates, or third parties pursuant to which certain Interconnection Facilities may be subject to joint ownership and shared maintenance and operation arrangements; *provided* that such agreements shall permit Seller to perform or satisfy, and shall not purport to limit, its obligations hereunder.

# METERING

## **Metering**.

Seller shall measure the amount of Charging Energy and Discharging Energy using the 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 as Seller’s cost. Subject to meeting any applicable CAISO requirements, the meters shall be programmed to adjust for Electrical Losses and Station Use in a manner subject to Buyer’s prior written approval, not to be unreasonably withheld. Seller shall obtain and maintain a single CAISO resource ID dedicated exclusively to the Facility. Seller shall not obtain additional CAISO resource IDs for the Facility without the prior written consent of Buyer, which shall not be unreasonably withheld.  Metering will be consistent with the Metering Diagram set forth as Exhibit R, a final version of which shall be provided to Buyer at least thirty (30) days before the Commercial Operation Date. Each meter shall be kept under seal, such seals to be broken only when the meters are to be tested, adjusted, modified or relocated. In the event Seller breaks a seal, Seller shall notify Buyer as soon as practicable. In addition, Seller hereby agrees to provide all meter data to Buyer in a form reasonably acceptable to Buyer, and consents to Buyer obtaining from CAISO the CAISO meter data directly relating to the Facility and all inspection, testing and calibration data and reports. Seller and Buyer shall cooperate to allow both Parties to retrieve the meter reads from the CAISO Market Results Interface – Settlements (MRI-S) (or its successor) or directly from the CAISO meter(s) at the Facility.

## **Meter Verification**.

 Annually, if Seller has reason to believe there may be a meter malfunction, or upon Buyer’s reasonable request, Seller shall test the meter. The tests shall be conducted by independent third parties qualified to conduct such tests. Buyer shall be notified seven (7) days in advance of such tests and have a right to be present during such tests. If a meter is inaccurate it shall be promptly repaired or replaced.

# INVOICING AND PAYMENT; CREDIT

## **Invoicing**.

Seller shall make good faith efforts to deliver an invoice to Buyer for Product within ten (10) days after, but not prior to, the end of each month of the Delivery Term. Each invoice shall reflect (a) records of metered data, including CAISO metering and transaction data sufficient to document and verify the amount of Product delivered by the Facility for any Settlement Period during the preceding month, including the amount of Charging Energy charged by the Facility and the amount of Discharging Energy delivered from the Facility to the Delivery Point, in each case, as read by the Facility Meter, the amount of Replacement RA delivered to Buyer (if any), the LMP prices at the Delivery Point for each Settlement Period, and the Contract Price applicable to such Product in accordance with Exhibit C; (b) access to any records, including invoices or settlement data from the CAISO, necessary to verify the accuracy of any amount; and (c) be in a format reasonably specified by Buyer, covering the services provided in the preceding month determined in accordance with the applicable provisions of this Agreement. Buyer shall, and shall cause its Scheduling Coordinator to, provide Seller with all reasonable access (including, in real time, to the maximum extent reasonably possible) to any records, including invoices or settlement data from the CAISO, forecast data and other information, all as may be necessary from time to time for Seller to prepare and verify the accuracy of all invoices.

## **Payment**.

 Buyer shall make payment to Seller for Product by wire transfer or ACH payment to the bank account designated by Seller in Exhibit N, which may be updated by Seller by Notice hereunder; *provided*, *however*, that changes to the invoices, payment, and wire transfer information set forth in Exhibit N must be made in writing and delivered via certified mail or 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, and shall include contact information for an authorized person who is available by telephone to verify the authenticity of such requested changes. Buyer shall pay undisputed invoice amounts within thirty (30) days after receipt of the invoice. If such due date falls on a weekend or legal holiday, such due date shall be the next Business Day. Payments made after the due date will be considered late and will bear interest on the unpaid balance. If the amount due is not paid on or before the due date or if any other payment that is due and owing from one Party to another is not paid on or before its applicable due date, a late payment charge shall be applied to the unpaid balance and shall be added to the next billing statement. Such late payment charge shall be calculated based on the prime rate published on the date of the invoice in The Wall Street Journal, or, if The Wall Street Journal is not published on that day, the next succeeding date of publication, plus two percent (2%) (the “**Interest Rate**”). If the due date occurs on a day that is not a Business Day, the late payment charge shall begin to accrue on the next succeeding Business Day.

## **Books and 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 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 Ten Thousand Dollars ($10,000).

## **Payment Adjustments; Billing Errors**.

Payment adjustments shall be made if Buyer or Seller discovers there have been good faith inaccuracies in invoicing that are not otherwise disputed under Section 8.5 or an adjustment to an amount previously invoiced or paid is required due to a correction of data by the CAISO; *provided*, *however*, that there shall be no adjustments to prior invoices based upon meter inaccuracies. If the required adjustment is in favor of Buyer, Buyer’s next monthly payment shall be credited in an amount equal to the adjustment. If the required adjustment is in favor of Seller, Seller shall add the adjustment amount to Buyer’s next monthly invoice. Adjustments in favor of either Buyer or Seller shall bear interest, until settled in full, in accordance with Section 8.2, accruing from the date on which the adjusted amount should have been due.

## **Billing Disputes**.

A Party may, in good faith, dispute the correctness of any invoice or any adjustment to an invoice rendered under this Agreement or adjust any invoice for any arithmetic or computational error within 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.

## **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 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.

## **Seller’s Development Security**.

* + 1. To secure its obligations under this Agreement, Seller shall deliver the Development Security to Buyer within thirty (30) days of the Effective Date. Seller shall maintain the Development Security in full force and effect. Within five (5) Business Days following any draw by Buyer on the Development Security, including for payment of Construction Delay Damages or COD Delay Damages, Seller shall replenish the amount drawn such that the Development Security is restored to the amount specified on the Cover Sheet. Upon the earlier of (a) Seller’s delivery of the Performance Security, or (b) sixty (60) days after termination of this Agreement, Buyer shall return the Development Security to Seller, less the amounts drawn in accordance with this Agreement. If the Development Security is a Letter of Credit and the issuer of such Letter of Credit (i) fails to maintain the minimum Credit Rating specified in the definition of Letter of Credit, (ii) indicates its intent not to renew such Letter of Credit and such Letter of Credit expires prior to the Commercial Operation Date, or (iii) fails to honor Buyer’s properly documented request to draw on such Letter of Credit by such issuer, Seller shall have ten (10) Business Days to either post cash or deliver a substitute Letter of Credit in the amount of the Development Security and that otherwise meets the requirements set forth in the definition of Development Security.

## **Seller’s Performance Security**.

To secure its obligations under this Agreement, Seller shall deliver Performance Security to Buyer on or before Commercial Operation Date. If the Performance Security is not in the form of cash or Letter of Credit, it shall be substantially in the form of Guaranty set forth in Exhibit L. Seller shall maintain the Performance Security in full force and effect until the following have occurred: (a) the Delivery Term has expired or terminated early; and (b) all payment obligations of the Seller then due and payable under this Agreement, including compensation for penalties, Termination Payment, indemnification payments or other damages are paid in full (whether directly or indirectly such as through set-off or netting). Within five (5) Business Days after any draw by Buyer on the Performance Security, Seller shall replenish the amount drawn from the Performance Security so that such Performance Security is restored to the amount specified on the Cover Sheet. 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 to draw on such Letter of Credit by such issuer, Seller shall have ten (10) Business Days to either post cash or deliver a substitute Letter of Credit that meets the requirements set forth in the definition of Performance Security. Seller may at its option exchange one permitted form of Development Security or Performance Security for another permitted form of Development Security or Performance Security, as applicable.

## **First Priority Security Interest in Cash or Cash Equivalent Collateral**

. To secure its obligations under this Agreement, and until released as provided herein, Seller hereby grants to Buyer a present and continuing first-priority security interest (“**Security Interest**”) in, and lien on (and right to net against), and assignment of 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 and 8.8 and any and all interest thereon or proceeds resulting therefrom or from the liquidation thereof, whether now or hereafter held by, on behalf of, or for the benefit of Buyer, and Seller agrees to take all action as Buyer reasonably requires in order to perfect Buyer’s Security Interest in, and lien on (and right to net against), such collateral and any and all proceeds resulting therefrom or from the liquidation thereof.

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

1. Exercise any of its rights and remedies with respect to the Development Security and Performance Security, including any such rights and remedies under Law then in effect;
2. Draw on any outstanding Letter of Credit issued for its benefit and retain any cash held by Buyer as Development Security or Performance Security; and
3. Liquidate all Development Security or Performance Security (as applicable) then held by or for the benefit of Buyer free from any claim or right of any nature whatsoever of Seller, including any equity or right of purchase or redemption by Seller.

Buyer shall apply the proceeds of the collateral realized upon the exercise of any such rights or remedies to reduce Seller’s obligations under this Agreement (Seller remains liable for any amounts owing to Buyer after such application), subject to Buyer’s obligation to return any surplus proceeds remaining after these obligations are satisfied in full.

## **Seller Financial Statements**.

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 as posted on the website of the Guarantor’s ultimate parent or the Securities Exchange Commission.

# NOTICES

## **Addresses for the Delivery of Notices**

. Except as provided in Exhibit D, 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 Exhibit N or at such other address or addresses as a Party may designate for itself from time to time by Notice hereunder.

## **Acceptable Means of Delivering Notice**

. Each Notice required, permitted, or contemplated hereunder shall be deemed to have been validly served, given or delivered as follows: (a) if sent by United States mail with proper first class postage prepaid, three (3) Business Days following the date of the postmark on the envelope in which such Notice was deposited in the United States mail; (b) if sent by a regularly scheduled overnight delivery carrier with delivery fees either prepaid or an arrangement with such carrier made for the payment of such fees, the next Business Day after the same is delivered by the sending Party to such carrier; (c) if sent by electronic communication (including electronic mail or other electronic means) and if concurrently with the transmittal of such electronic communication the sending Party provides a copy of such electronic Notice by hand delivery or express courier, at the time indicated by the time stamp upon delivery without any bounce back or rejection; or (d) if delivered in person, upon receipt by the receiving Party. Notwithstanding the foregoing, Notices of outages or other scheduling or dispatch information or requests, may be sent by electronic communication and shall be considered delivered upon successful completion of such transmission.

# FORCE MAJEURE

## **Definition**

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* + 1. “**Force Majeure Event**” means any act or event occurring after the Effective Date 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.
		2. 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; quarantine; 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. For the avoidance of doubt, so long as the event, despite the use of reasonable efforts, cannot be avoided by, and is beyond the reasonable control of (whether direct or indirect) and without the fault or negligence of the Party relying thereon as justification for such delay, nonperformance, or noncompliance, Force Majeure Event may include the impacts of and efforts to combat or mitigate the epidemic disease designated COVID-19 and the related virus designated SARS-CoV-2 and any mutations thereof (“**COVID-19**”).
		3. 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 an increase in component costs for any reason, including foreign or domestic tariffs, Buyer’s ability to buy electric energy at a lower price, or Seller’s ability to sell the Product, or any component thereof, at a higher price, than under this Agreement); (ii) Seller’s inability to obtain permits or approvals of any type for the construction, operation, or maintenance of the Facility, except to the extent such inability is caused by a Force Majeure Event; (iii) the inability of a Party to make payments when due under this Agreement, unless the cause of such inability is an event that would otherwise constitute a Force Majeure Event as described above; (iv) a Curtailment Order; (v) Seller’s inability to obtain sufficient labor, equipment, materials, or other resources to build or operate the Facility except to the extent such inability is caused by a Force Majeure Event; or (vi) any equipment failure except if such equipment failure is caused by a Force Majeure Event.

## **No Liability If a Force Majeure Event Occurs**

* + 1. . Neither Seller nor Buyer shall be liable to the other Party in the event it is prevented from performing its obligations hereunder in whole or in part due to a Force Majeure Event. The Party rendered unable to fulfill any obligation by reason of a Force Majeure Event shall take reasonable actions necessary to remove such inability. Nothing herein shall be construed as permitting that Party to continue to fail to perform after said cause has been removed. Neither Party shall be considered in breach or default of this Agreement if and to the extent that any failure or delay in the Party’s performance of one or more of its obligations hereunder is caused by a Force Majeure Event. Notwithstanding the foregoing, the occurrence and continuation of a Force Majeure Event shall not (a) suspend or excuse the obligation of a Party to make any payments due hereunder, (b) suspend or excuse the obligation of Seller to achieve the Guaranteed Construction Start Date, or 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)(i) or Section 11.1(b)(ii) and receive a Damage Payment upon exercise of Buyer’s default rights pursuant to Section 11.2.

## **Notice**

. Within two (2) Business Days of obtaining knowledge of the commencement of Force Majeure Event, the claiming Party shall provide the other Party with oral notice of the Force Majeure Event, and within two (2) weeks of the commencement 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; *provided* that the failure of the claiming Party to notify the other Party within such two- (2-) Business Day period will not preclude the claiming Party from claiming a Force Majeure hereunder but for any Force Majeure Event notification provided after the two- (2-) Business Day period, the Force Majeure Event will be deemed to have commenced as of the date of such 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 Event, all as known or estimated in good faith by the affected Party. The suspension of performance due to a claim of a Force Majeure Event must be of no greater scope and of no longer duration than is required by the Force Majeure Event.

## **Termination Following Force Majeure Event**

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

# DEFAULTS; REMEDIES; TERMINATION

## **Events of Default**

. An “**Event of Default**” shall mean,

* + 1. with respect to a Party (the “**Defaulting Party**”) that is subject to the Event of Default the occurrence of any of the following:

#### 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;

#### 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 obligation set forth in this Agreement (except to the extent constituting a separate Event of Default set forth in this Section 11.1), and such failure 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);

#### such Party becomes Bankrupt;

#### such Party assigns this Agreement or any of its rights hereunder other than in compliance with Article 14; or

#### 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.

* + 1. with respect to Seller as the Defaulting Party, the occurrence of any of the following:

#### The failure of Seller to achieve Construction Start within one hundred twenty (120) days after the Guaranteed Construction Start Date;

#### The failure of Seller to achieve Commercial Operation within sixty (60) days after the Guaranteed Commercial Operation Date;

#### if, in any two (2) consecutive Contract Years, the average Monthly Storage Availability over the two-year period is less than seventy percent (70%);

#### if, Seller fails to maintain an Efficiency Rate of at least seventy percent (70%) over a rolling 12-month period;

#### if, Seller fails to maintain a Storage Contract Capacity (as determined pursuant to Exhibit O) equal to at least seventy-five percent (75%) of the Storage Contract Capacity set forth on the Cover Sheet for longer than three hundred sixty (360) consecutive days;

#### if not remedied within ten (10) days after Notice thereof, the failure by Seller to deliver a Remedial Action Plan required under Section 2.4;

#### failure by Seller to satisfy the collateral requirements pursuant to Sections 8.7 or 8.8 after Notice and expiration of the cure periods set forth therein, with respect to the Development Security or Performance Security amount in accordance with this Agreement in the event Buyer draws against either for any reason other than to satisfy a Damage Payment, or a Termination Payment, as applicable;

#### 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:

##### 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;

##### the failure of the Guarantor to make any payment required or to perform any other material covenant or obligation in any Guaranty;

##### the Guarantor becomes Bankrupt;

##### the Guarantor shall fail to meet the criteria for an acceptable Guarantor as set forth in the definition of Guarantor;

##### 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

##### the Guarantor shall repudiate, disaffirm, disclaim, or reject, in whole or in part, or challenge the validity of any Guaranty; or

#### 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:

##### 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;

##### the issuer of such Letter of Credit becomes Bankrupt;

##### 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;

##### the issuer of the outstanding Letter of Credit shall fail to honor a properly documented request to draw on such Letter of Credit;

##### 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;

##### such Letter of Credit fails or ceases to be in full force and effect at any time; or

#### 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.

## **Remedies; Declaration of Early Termination Date**.

If an Event of Default with respect to a Defaulting Party shall have occurred and be continuing, the other Party (“**Non-Defaulting Party**”) shall have the following rights:

* + 1. to send Notice, designating a day, no earlier than the day such Notice is deemed to be received and no later than twenty (20) days after such Notice is deemed to be received, as an early termination date of this Agreement (“**Early Termination Date**”) that terminates this Agreement (the “**Terminated Transaction**”) and ends the Delivery Term effective as of the Early Termination Date;
		2. to accelerate all amounts owing between the Parties, and to collect as liquidated damages (i) the Damage Payment (in the case of an Event of Default by Seller occurring before the Commercial Operation Date, including an Event of Default under Section 11.1(b)(i) Section 11.1(b)(ii)), 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);
		3. to withhold any payments due to the Defaulting Party under this Agreement;
		4. to suspend performance; or
		5. 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*, that payment by the Defaulting Party of the Damage Payment or Termination Payment, as applicable, shall constitute liquidated damages and the Non-Defaulting Party’s sole and exclusive remedy for the Terminated Transaction and the Event of Default related thereto[; and, provided further that if Buyer is the Defaulting Party, any remedy is a limited obligation payable solely from the Designated Fund.].

## **Termination Payment**

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

## **Notice of Payment of 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 and whether, in the case of a Termination Payment, the Termination Payment is due to the Non-Defaulting Party. The Notice shall include a written statement explaining in reasonable detail the calculation of such amount and the sources for such calculation. The Termination Payment shall be made to the Non-Defaulting Party, as applicable, within ten (10) Business Days after such Notice is effective.

## **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 five (5) Business Days of receipt of the Non-Defaulting Party’s calculation of the Termination Payment, provide to the Non-Defaulting Party a detailed written explanation of the basis for such dispute. Disputes regarding the Termination Payment shall be determined in accordance with Article 16.

## **Rights And Remedies Are Cumulative**

. Except where an express and exclusive remedy or measure of liquidated damages is provided, the rights and remedies of a Party pursuant to this Article 11 shall be cumulative and in addition to the rights of the Parties otherwise provided in this Agreement.

## **Seller Pre-COD Liability Limitations**

. Notwithstanding any other provision of this Agreement, if this Agreement is terminated pursuant to Section 11.2 prior to the Commercial Operation Date and Seller is the Defaulting Party, Seller’s aggregate liability for any Event of Default other than arising due to fraud, misrepresentation, or willful misconduct shall be limited to an amount equal to the sum of (a) the Damage Payment and (b) the sum of any Construction Delay Damages and COD Delay Damages that are due and owing at the time of such termination.

# LIMITATION OF LIABILITY AND EXCLUSION OF WARRANTIES

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## **No Consequential Damages**.

EXCEPT TO THE EXTENT PART OF AN EXPRESS REMEDY OR MEASURE OF DAMAGES HEREIN, OR PART OF AN ARTICLE 17 INDEMNITY CLAIM, 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.

## **Waiver and Exclusion of Other Damages**.

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

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

TO THE EXTENT ANY DAMAGES REQUIRED TO BE PAID HEREUNDER ARE LIQUIDATED, INCLUDING UNDER SECTIONS 3.8, 4.8, 11.2, 11.3 AND AS PROVIDED IN EXHIBIT B, EXHIBIT C, 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.

# REPRESENTATIONS AND WARRANTIES; AUTHORITY

## **Seller’s Representations and Warranties**.

As of the Effective Date, Seller represents and warrants as follows:

* + 1. 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.
		2. Seller has the power and authority to enter into and perform this Agreement and is not prohibited from entering into this Agreement or discharging and performing all covenants and obligations on its part to be performed under and pursuant to this Agreement, except where such failure does not have a material adverse effect on Seller’s performance under this Agreement. The execution, delivery and performance of this Agreement by Seller has been duly authorized by all necessary limited liability company action on the part of Seller and does not and will not require the consent of any trustee or holder of any indebtedness or other obligation of Seller or any other party to any other agreement with Seller.
		3. 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.
		4. 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.
		5. Seller shall comply with all applicable federal, state and local laws, statutes, ordinances, rules and regulations, and the orders and decrees of any courts or administrative bodies or tribunals, including, without limitation those related to employment discrimination and prevailing wage, non-discrimination and non-preference, and conflict of interest.
		6. Seller shall maintain Site Control throughout the Delivery Term.
		7. Seller shall obtain any and all applicable permits and approvals, including without limitation, environmental clearance under the California Environmental Quality Act (“**CEQA**”) or other environmental law, from the local jurisdiction where the Facility will be constructed. Seller acknowledges that Buyer is purchasing the Product under this Agreement and does not intend to be the lead agency for the Facility.

## **Buyer’s Representations and Warranties**

. As of the Effective Date, Buyer represents and warrants as follows:

* + 1. [Buyer is a municipal corporation 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 the City of San José. 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 applicable Law.[[9]](#footnote-10)][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.[[10]](#footnote-11)]
		2. 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.
		3. The execution and delivery of this Agreement, consummation of the transactions contemplated herein, and fulfillment of and compliance by Buyer with the provisions of this Agreement will not conflict with or constitute a breach of or a default under any Law presently in effect having applicability to Buyer, the documents of formation of Buyer or any outstanding trust indenture, deed of trust, mortgage, loan agreement or other evidence of indebtedness or any other agreement or instrument to which Buyer is a party or by which any of its property is bound.
		4. 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.
		5. 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 this 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.).

## **General Covenants**

. Each Party covenants that commencing on the Effective Date and continuing throughout the Contract Term:

* + 1. 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;
		2. It shall maintain (or obtain from time to time as required) all regulatory authorizations, approvals and permits necessary for the operation of the Facility and for Seller to legally perform its obligations under this Agreement; and
		3. 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.

## **Prevailing Wage**

. Seller shall use reasonable efforts to ensure that all employees hired by Seller, and its contractors and subcontractors, that will perform construction work or provide services at the Site related to construction of the Facility are paid wages at rates not less than those prevailing for workers performing similar work in the locality as provided by applicable California law, if any (“**Prevailing Wage Requirement**”). Nothing herein shall require Seller, its contractors and subcontractors to comply with, or assume liability created by other inapplicable provisions of any California 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 Facility.

## **Workforce Development**

. Seller shall perform the obligations related to workforce development set forth in Exhibit U, including commitments to using union labor.

## **Community Investment**

. Seller shall perform the obligations related to community investment set forth in Exhibit S.[[11]](#footnote-12)

## **Additional Seller Covenants**

1. .[[12]](#footnote-13)
	1. Nondiscrimination/Non-Preference. Seller shall comply with all laws and agrees to not discriminate against or grant preferential treatment to any person on the basis of race, sex, color, age, religion, sexual orientation, actual or perceived gender identity, disability, ethnicity or national origin. This prohibition applies to recruiting, hiring, demotion, layoff, termination, compensation, fringe benefits, advancement, training, apprenticeship and other terms, conditions, or privileges of employment, subcontracting and purchasing. Seller will include in each subcontract with a Major Subcontractor entered into after the Effective Date of this Agreement these same obligations. This prohibition is not intended to preclude Seller from providing a reasonable accommodation to a person with a disability.
	2. Conflict of Interest. Seller represents that it is familiar with the local and state conflict of interest laws, and agrees to comply with those laws in performing this Agreement. Seller certifies that, as of the Effective Date, it was unaware of any facts constituting a conflict of interest. Seller shall avoid all conflicts of interest in performing this Agreement. Seller has the obligation of determining if the manner in which it performs any part of this Agreement results in a conflict of interest, and shall immediately notify the Buyer in writing if it becomes aware of any facts giving rise to a conflict of interest. Seller’s violation of this subsection (b) is a material breach.
	3. Gifts Prohibited. Chapter 12.08 of the San José Municipal Code prohibits a City of San José officer or designated employee from accepting any gift. Seller shall not offer any City of San José officer or designated employee any gift prohibited by Chapter 12.08.
	4. Disqualification of Former Employees. Chapter 12.10 of the San José Municipal Code prohibits a former City of San José officer and former designated employee from providing services to the City of San José connected with his/her former duties or official responsibilities. Seller shall not use either directly or indirectly any officer, employee or agent to perform any services if doing so would violate Chapter 12.10.

# ASSIGNMENT

## **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. Except as provided in this Article 14, any Change of Control of Seller or direct or indirect change of control of Buyer (whether voluntary or by operation of law) will be deemed an assignment and will require the prior written consent of the other Party, which consent shall not be unreasonably withheld. Any assignment made in violation of the conditions to assignment set out in this Article 14 shall be null and void. Buyer shall 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. Seller shall be responsible for Buyer’s reasonable costs associated with the preparation, review, execution and delivery of documents in connection with any assignment of this Agreement by Seller, including without limitation reasonable attorneys’ fees.

## **Collateral Assignment**

1. .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, Buyer shall in good faith work with Seller and Lenders to agree upon a consent to collateral assignment of this Agreement (“**Collateral Assignment Agreement**”). Each Collateral Assignment Agreement must be in form and substance agreed to by Buyer, Seller and the applicable Lender, such agreement not to be unreasonably withheld. Buyer will not be subject to obligations under more than one Collateral Assignment Agreement at any time. Each Collateral Assignment Agreement must include, among others, the following provisions unless otherwise agreed to by Buyer, Seller and the applicable Lender.
2. Buyer shall give notice of an Event of Default by Seller to the Person(s) to be specified by Lender in the Collateral Assignment Agreement before exercising its right to terminate this Agreement as a result of such Event of Default; provided that such notice shall be provided to Lender at the time such notice is provided to Seller and any additional cure period of Lender agreed to in the Collateral Assignment Agreement shall not commence until Lender has received notice of such Event of Default;
3. Lender will have the right to cure an Event of Default on behalf of Seller if Lender sends a written notice to Buyer before the later of (i) the expiration of any cure period, and (ii) five (5) Business Days after Lender’s receipt of notice of such Event of Default from Buyer, indicating Lender’s intention to cure. Lender must remedy or cure such Event of Default within the cure period under this Agreement and any additional cure periods agreed in the Collateral Assignment Agreement up to a maximum of ninety (90) days (or, in the event of a bankruptcy of Seller or any foreclosure or similar proceeding if required by Lender to cure any Event of Default, an additional reasonable period of time to complete such proceedings and effect such cure not to exceed one hundred eighty (180) days without the written consent of Buyer, which consent shall not be unreasonably withheld), provided that if Lender is prohibited by any court order or bankruptcy or insolvency proceedings from curing the Event of Default or from commencing or prosecuting foreclosure proceedings, the foregoing time periods shall be extended by the period of such prohibition;
4. Following an Event of Default by Seller under this Agreement, Buyer may require Seller (or Lender, if Lender has provided the notice set forth in subsection (b) above) to provide to Buyer a report concerning:
5. The status of efforts by Seller or Lender to develop a plan to cure the Event of Default;
6. Impediments to the cure plan or its development;
7. If a cure plan has been adopted, the status of the cure plan’s implementation (including any modifications to the plan as well as the expected timeframe within which any cure is expected to be implemented); and
8. Any other information which Buyer may reasonably require related to the development, implementation and timetable of the cure plan.

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

1. Lender will have the right to consent before any termination of this Agreement which does not arise out of an Event of Default;
2. Lender will receive prior notice of and the right to approve material amendments to this Agreement, which approval will not be unreasonably withheld, delayed or conditioned;
3. If this Agreement is transferred to Lender pursuant to subsection (b) above, Lender must assume all of Seller’s obligations arising under this Agreement on and after the date of such assumption; *provided*, before such assumption, if Buyer advises Lender that Buyer will require that Lender cure (or cause to be cured) any Event of Default existing as of the transfer date in order to avoid the exercise by Buyer (in its sole discretion) of Buyer’s right to terminate this Agreement with respect to such Event of Default, then Lender at its option, and in its sole discretion, may elect to either:
4. Cause such Event of Default to be cured (other than any Events of Default which relate to Seller’s bankruptcy or similar insolvency proceedings, to representations and warranties made by Seller or to Seller’s failure to perform obligations under other agreements, or which are otherwise personal to Seller), or
5. Not assume this Agreement.
6. If Lender elects to transfer this Agreement, then Lender must cause the transferee to assume all of Seller’s obligations arising under this Agreement arising after the date of such assumption as a condition of the sale or transfer. Such sale or transfer may be made only to an entity that meets the definition of Permitted Transferee;
7. Subject to Lender’s cure of any Events of Defaults under the Agreement in accordance with Section 14.2(f), if (i) this Agreement is rejected in Seller’s Bankruptcy or otherwise terminated in connection therewith Lender or its designee shall have the right to elect within ninety (90) days after such rejection or termination, to enter into a replacement agreement with Buyer having substantially the same terms as this Agreement for the remaining term thereof, and, promptly after Lender’s written request, Buyer must enter into such replacement agreement with Lender or Lender’s designee, or (ii) if Lender or its designee, directly or indirectly, takes possession of, or title to, the Facility after any such rejection or termination of this Agreement, promptly after Buyer’s written request, Lender must itself or must cause its designee to promptly enter into a new agreement with Buyer having substantially the same terms as this Agreement for the remaining term thereof, provided that in the event a designee of Lender, directly or indirectly, takes possession of, or title to, the Facility (including possession by a receiver or title by foreclosure or deed in lieu of foreclosure), if such designee is not an entity that meets the definition of Permitted Transferee then such designee shall be subject to the prior written approval of Buyer, such approval not to be unreasonably withheld.

## **B****uyer Limited Assignment Right**.

 Notwithstanding anything to the contrary, Buyer may make a limited assignment to an entity (“**Limited Assignee**”) that has, or provides a parent guaranty, in form and substance reasonably acceptable to Seller from an entity with an Investment Grade Credit Rating of Buyer’s right to receive Product (which shall not be for retail sale) and its obligation to make payments to Seller, which assignment shall be expressly subject to Limited Assignee’s timely payment of amounts due under this Agreement, at any time upon not less than thirty (30) days’ Notice by delivering a written request for such assignment, which request must include a proposed assignment agreement substantially in the form attached to this Agreement as Exhibit T, with the blanks in such form completed in Buyer’s sole discretion. Provided that Buyer delivers a proposed assignment agreement complying with the previous sentence, Seller agrees to (i) comply with Limited Assignee’s reasonable requests for know-your-customer and similar account opening information and documentation with respect to Seller, including but not limited to information related to forecasted generation, credit rating, and compliance with anti-money laundering rules, the Dodd-Frank Act, the Commodity Exchange Act, the Patriot Act and similar rules, regulations, requirements and corresponding policies, and (ii) promptly execute such assignment agreement and implement such assignment as contemplated thereby, subject only to the countersignature of Limited Assignee and Buyer and Seller’s ability to make the representations and warranties contained therein. Limited Assignee and Buyer shall comply with all reasonable requests received by any Lender in connection with such limited assignment, including providing any requested acknowledgments in any Collateral Assignment Agreement.

# PURCHASE OPTION

## **Purchase Option**.

Seller hereby grants Buyer the exclusive right, but not the obligation, to purchase the Facility at a price equal to the fair market value of the Facility determined in a commercially reasonable manner by a Third-Party Independent Evaluator, as defined below (the “Purchase Option”).  All costs related to the appraisal shall be borne by Seller.  The Purchase Option may be exercised by Buyer by delivering notice to Seller at least twelve (12) months prior to the end of the Delivery Term, with closing to occur on the day after the last day of the Delivery Term.

# DISPUTE RESOLUTION

## **Governing Law**.

This Agreement and the rights and duties of the Parties hereunder shall be governed by and construed, enforced and performed in accordance with the laws of the state of California, without regard to principles of conflicts of Law. To the extent enforceable at such time, each Party waives its respective right to any jury trial with respect to any litigation arising under or in connection with this Agreement. The Parties agree that any suit, action or other legal proceeding by or against any party (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 [Alameda[[13]](#footnote-14)][Santa Clara[[14]](#footnote-15)] County, California.

## **Dispute Resolution**.

[In the event of any dispute arising under this Agreement, within ten (10) days following the receipt of a written Notice from either Party identifying such dispute, the authorized Parties shall meet, negotiate, and attempt, in good faith, to resolve the dispute quickly, informally, and inexpensively. If the Parties are unable to resolve a dispute arising hereunder within the earlier of either thirty (30) days of initiating such discussions, or within forty (40) days after Notice of the dispute, then either Party may seek any and all remedies available to it at law or in equity, subject to the limitations set forth in this Agreement. To the fullest extent permitted under applicable Law, any statute of limitations applicable to a dispute that is mediated by the Parties pursuant to this Agreement shall toll during any period in which such dispute is being mediated in accordance with this Section 16.2.[[15]](#footnote-16)]

[In the event of any dispute arising under this Agreement, within ten (10) days following the receipt of a written Notice from either Party identifying such dispute, the Parties shall meet, negotiate and attempt, in good faith, to resolve the dispute quickly, informally and inexpensively. If the Parties are unable to resolve a dispute arising hereunder within the earlier of either thirty (30) days of initiating such discussions, or within forty (40) days after Notice of the dispute, the Parties shall submit the dispute to mediation prior to seeking any and all remedies available to it at Law in or equity. The Parties will cooperate in selecting a qualified neutral mediator selected from a panel of neutrals and in scheduling the time and place of the mediation as soon as reasonably possible, but in no event later than thirty (30) days after the request for mediation is made. The Parties agree to participate in the mediation in good faith and to share the costs of the mediation, including the mediator’s fee, equally, but such shared costs shall not include each Party’s own attorneys’ fees and costs, which shall be borne solely by such Party. If the mediation is unsuccessful, then either Party may seek any and all remedies available to it at law or in equity, subject to the limitations set forth in this Agreement.[[16]](#footnote-17)]

# INDEMNIFICATION

## **Indemnification**

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[Seller agrees to defend, indemnify and hold harmless Buyer, its directors, officers, agents, attorneys, consultants, employees and representatives from and against all third party claims, demands, losses, liabilities, penalties, and expenses, including reasonable attorneys’ and expert witness fees collectively (“**Indemnifiable Event**”) arising from negligence, willful misconduct, or breach of the Agreement (collectively, “**Indemnifiable Losses**”).[[17]](#footnote-18)]

[Seller agrees to defend, indemnify and hold harmless Buyer, its directors, officers, agents, attorneys, consultants, employees and representatives from and against all claims, demands, losses, liabilities, penalties, and expenses, including reasonable attorneys’ and expert witness fees collectively (“**Indemnifiable Event**”), to the extent such Indemnifiable Event arises out of, pertains to, or relates to any of the following:(a) the negligent act or omission, recklessness or willful misconduct of Seller, its Affiliates, its directors, officers, employees, agents, subcontractors, and anyone directly or indirectly employed by either the Seller or any of its subcontractors or anyone that they control; (b) any infringement of the patent rights, copyright, trade secret, trade name, trademark, service mark or any other proprietary right of any person(s) caused by the Buyer’s use of the Product, deliverables or other items provided by Seller pursuant to the Agreement, or (c) any breach of the Agreement (collectively, “**Indemnifiable Losses**”). The Seller’s indemnity obligations apply to the maximum extent allowed by law and includes defending the City, its officers, employees and agents as set forth in Section 2778 and 2782.8 of the California Civil Code, if applicable. Upon the Buyer’s written request, the Seller, at its own expense, must defend any suit or action that is subject to the Seller’s indemnity obligations. The Seller’s indemnity obligations survive the expiration or earlier termination of the Agreement.[[18]](#footnote-19)]

## **Notice of Claim**.

Subject to the terms of this Agreement and upon obtaining knowledge of an Indemnifiable Loss for which it is entitled to indemnity under this Article 17, Buyer will promptly provide Notice to Seller in writing of any damage, claim, loss, liability or expense which Buyer has determined has given or could give rise to an Indemnifiable Loss under Section 17.1 (“**Claim**”). The Notice is referred to as a “**Notice of Claim**”. A Notice of Claim will specify, in reasonable detail, the facts known to Buyer regarding the Indemnifiable Loss.

## **Failure to Provide Notice**.

 A failure to give timely Notice or to include any specified information in any Notice as provided in Section 17.2 will not affect the rights or obligations of any Party hereunder except and only to the extent that, as a result of such failure, any Party which was entitled to receive such Notice was deprived of its right to recover any payment under its applicable insurance coverage or was otherwise materially damaged as a direct result of such failure.

## **Defense of Claims**

. If, within thirty (30) Business Days after giving a Notice of Claim regarding a Claim to Seller pursuant to Section 17.2, Buyer receives Notice from Seller that Seller has elected to assume the defense of such Claim, Seller will not be liable for any legal expenses subsequently incurred by Buyer in connection with the defense thereof; provided, however, that if Seller fails to take reasonable steps necessary to defend diligently such Claim within thirty (30) Business Days after receiving Notice from Buyer that Buyer believes Seller has failed to take such steps, or if Seller has not undertaken fully to indemnify Buyer in respect of all Indemnifiable Losses relating to the matter, Buyer may assume its own defense, and Seller will be liable for all reasonable costs or expenses, including attorneys’ fees, paid or incurred in connection therewith. Without the prior written consent of Buyer, Seller will not enter into any settlement of any Claim which would lead to liability or create any financial or other obligation on the part of Buyer for which Buyer is not entitled to indemnification hereunder; provided, however, that Seller may accept any settlement without the consent of Buyer if such settlement provides a full release to Buyer and no requirement that Buyer acknowledge fault or culpability. If a firm offer is made to settle a Claim without leading to liability or the creation of a financial or other obligation on the part of Buyer for which Buyer is not entitled to indemnification hereunder and Seller desires to accept and agrees to such offer, Seller will give Notice to Buyer to that effect. If Buyer fails to consent to such firm offer within thirty (30) calendar days after its receipt of such Notice, Buyer may continue to contest or defend such Claim and, in such event, the maximum liability of Seller to such Claim will be the amount of such settlement offer, plus reasonable costs and expenses paid or incurred by Buyer up to the date of such Notice.

## **Subrogation of Rights**

. Upon making any indemnity payment, Seller will, to the extent of such indemnity payment, be subrogated to all rights of Buyer against any third party in respect of the Indemnifiable Loss to which the indemnity payment relates; provided that until Buyer recovers full payment of its Indemnifiable Loss, any and all claims of Seller against any such third party on account of said indemnity payment are hereby made expressly subordinated and subjected in right of payment to Buyer’s rights against such third party. Without limiting the generality or effect of any other provision hereof, Buyer and Seller shall execute upon request all instruments reasonably necessary to evidence and perfect the above-described subrogation and subordination rights.

## **Rights and Remedies are Cumulative**

. Except for express remedies already provided in this Agreement, the rights and remedies of a Party pursuant to this Article 17 are cumulative and in addition to the rights of the Parties otherwise provided in this Agreement.

# INSURANCE

## **Insurance**

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* + 1. General Liability. Seller shall maintain, or cause to be maintained at its sole expense, (i) commercial general liability insurance, including sudden and accidental pollution coverage, products and completed operations and personal injury insurance, with a minimum amount of Two Million Dollars ($2,000,000) per occurrence, and an annual aggregate of not less than Five Million Dollars ($5,000,000), endorsed to provide contractual liability in said amount, specifically covering Seller’s obligations under this Agreement and including Buyer as an additional insured but only to the extent of the liabilities assumed hereunder by Seller; and (ii) an umbrella insurance policy in a minimum amount of liability of Ten Million Dollars ($10,000,000). Defense costs shall be provided as an additional benefit and not included with the limits of liability. Such insurance shall contain standard cross-liability and severability of interest provisions. Insurance may be evidenced through primary and excess policies.
		2. Employer’s Liability Insurance. Employers’ Liability insurance shall be One Million Dollars ($1,000,000.00) for injury or death occurring as a result of each accident. With regard to bodily injury by disease, the One Million Dollar ($1,000,000) policy limit will apply to each employee.
		3. Workers’ Compensation Insurance. Seller, if it has employees, shall also maintain at all times during the Contract Term workers’ compensation and employers’ liability insurance coverage in accordance with applicable requirements of California Law.
		4. Business Auto Insurance. Seller shall maintain at all times during the Contract Term business auto insurance for bodily injury and property damage with limits of One Million Dollars ($1,000,000) per occurrence. Such insurance shall cover liability arising out of Seller’s use of all owned (if any), non-owned and hired vehicles, including trailers or semi-trailers in the performance of this Agreement.
		5. Construction All-Risk Insurance. Seller shall maintain or cause to be maintained during the construction of the Facility construction all-risk form property insurance covering the Facility during such construction periods, and naming the Seller (and Lender if any) as the loss payee.
		6. Contractor’s Pollution Liability. Seller shall maintain or cause to be maintained during the construction of the Facility prior to the Commercial Operation Date, Pollution Legal Liability Insurance in the amount of Two Million Dollars ($2,000,000) per occurrence and in the aggregate, naming the Seller (and Lender if any) as additional named insured.
		7. Subcontractor Insurance. Seller shall require all of its subcontractors to carry the same levels of insurance as Seller.  All subcontractors shall include Seller as an additional insured to (i) comprehensive general liability insurance; (ii) workers’ compensation insurance and employers’ liability coverage; and (iii) business auto insurance for bodily injury and property damage. All subcontractors shall provide a primary endorsement and a waiver of subrogation to Seller for the required coverage pursuant to this Section 18.1(g).
		8. Evidence of Insurance. Prior to the Effective Date and upon annual renewal of required insurance coverage thereafter, Seller shall deliver to Buyer certificates of insurance evidencing such coverage as is required to be in effect at the times specified above. These 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.

# CONFIDENTIAL INFORMATION

## **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 pricing and other commercially sensitive terms and conditions of, and proposals and negotiations related to, this Agreement, and (b) information that either Seller or Buyer stamps or otherwise identifies as “confidential” or “proprietary” before disclosing it to the other. Confidential Information does not include (i) information that was publicly available at the time of the disclosure, other than as a result of a disclosure in breach of this Agreement; (ii) information that becomes publicly available through no fault of the recipient after the time of the delivery; (iii) information that was rightfully in the possession of the recipient (without confidential or proprietary restriction) at the time of delivery or that becomes available to the recipient from a source not subject to any restriction against disclosing such information to the recipient; and (iv) information that the recipient independently developed without a violation of this Agreement.

## **Duty to Maintain Confidentiality**

. Confidential Information will retain its character as Confidential Information but may be disclosed by the recipient (the “**Receiving Party**”) if and to the extent such disclosure is required (a) to be made by any requirements of Law, (b) pursuant to an order of a court or (c) in order to enforce this Agreement. If the Receiving Party becomes legally compelled (by interrogatories, requests for information or documents, subpoenas, summons, civil investigative demands, or similar processes or otherwise in connection with any litigation or to comply with any applicable law, order, regulation, ruling, regulatory request, accounting disclosure rule or standard or any exchange, control area or independent system operator 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. 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. The Parties acknowledge and agree that this Agreement, and information and documentation provided in connection with this Agreement, including Confidential Information, may be subject to the California Public Records Act (Government Code Section 7920 et seq.), and Buyer shall incur no liability arising out of any disclosure of such information or documentation provided in connection with this Agreement, including Confidential Information, that is subject to public disclosure under the California Public Records Act.

## **Irreparable Injury; Remedies**

. 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, 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.

## **Disclosure to Lenders, Etc.**

. Notwithstanding anything to the contrary in this Article 19, Confidential Information may be disclosed by Seller to any actual or potential Lender or any of its Affiliates, and Seller’s actual or potential agents, consultants, contractors, or trustees, so long as the Person to whom Confidential Information is disclosed agrees in writing to be bound by the confidentiality provisions of this Article 19 to the same extent as if it were a Party.

## **Press Releases**

. 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. For the purposes of this section and to the extent the information is not prohibited by law from disclosure, press release does not include records released by Buyer, including annual comprehensive financial reports; memorandums or reports to Buyer's city council; documentations submitted to regulatory agencies; disclosures related to public financings; and production of records required by subpoena, court order*,* or under the California Public Records Act (Government Code Section 7920 et seq.).

# MISCELLANEOUS

## **Entire Agreement; Integration; Exhibits**

. This Agreement, together with the Cover Sheet and Exhibits attached hereto, constitutes the entire agreement and understanding between Seller and Buyer with respect to the subject matter hereof and supersedes all prior agreements relating to the subject matter hereof, which are of no further force or effect. The Exhibits attached hereto are integral parts hereof and are made a part of this Agreement by reference. The headings used herein are for convenience and reference purposes only. In the event of a conflict between the provisions of this Agreement and those of the Cover Sheet or any Exhibit, the provisions of first the Cover Sheet, and then this Agreement shall prevail, and such Exhibit shall be corrected accordingly. This Agreement shall be considered for all purposes as prepared through the joint efforts of the Parties and shall not be construed against one Party or the other Party as a result of the preparation, substitution, submission or other event of negotiation, drafting or execution hereof.

## **Amendments**

. 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.

## **No Waiver**

. Waiver by a Party of any default by the other Party shall not be construed as a waiver of any other default.

## **No Agency, Partnership, Joint Venture or Lease**

. Seller and the agents and employees of Seller shall, in the performance of this Agreement, act in an independent capacity and not as officers or employees or agents of Buyer. Under this Agreement, Seller and Buyer intend to act as energy seller and energy purchaser, respectively, and do not intend to be treated as, and shall not act as, partners in, co-venturers in or lessor/lessee with respect to the Facility or any business related to the Facility. This Agreement shall not impart any rights enforceable by any third party (other than a permitted successor or assignee bound to this Agreement or, to the extent set forth herein, any Lender) or Indemnified Party.

## **Severability**

. In the event that any provision of this Agreement is unenforceable or held to be unenforceable, the Parties agree that all other provisions of this Agreement have force and effect and shall not be affected thereby. The Parties shall, however, use their best endeavors to agree on the replacement of the void, illegal or unenforceable provision(s) with legally acceptable clauses which correspond as closely as possible to the sense and purpose of the affected provision and this Agreement as a whole.

## **Mobile-Sierra**

. Notwithstanding any other provision of this Agreement, neither Party shall seek, nor shall they support any third party seeking, to prospectively or retroactively revise the rates, terms or conditions of service of this Agreement through application or complaint to FERC pursuant to the provisions of Section 205, 206 or 306 of the Federal Power Act, or any other provisions of the Federal Power Act, absent prior written agreement of the Parties. Further, absent the prior written agreement in writing by both Parties, the standard of review for changes to the rates, terms or conditions of service of this Agreement proposed by a Party shall be the “public interest” standard of review set forth in United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956) and Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348 (1956). Changes proposed by a non-Party or FERC acting *sua sponte* shall be subject to the most stringent standard permissible under applicable law.

## **Counterparts; Electronic Signatures**.

 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.

## **Electronic Delivery**

. 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.

## **Binding Effect**

. This Agreement shall inure to the benefit of and be binding upon the Parties and their respective successors and permitted assigns.

## **No Recourse to Members of Buyer**.[[19]](#footnote-20)

 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.

## **City of San José Designated Fund and Limited Obligations**.[[20]](#footnote-21)

1. Designated Fund. Buyer is a municipal corporation and is precluded under the California State Constitution and applicable law from entering into obligations that financially bind future governing bodies without an appropriation for such obligation, and, therefore, nothing in this Agreement shall constitute an obligation of future legislative bodies of Buyer to appropriate funds for purposes of this Agreement; provided, however, that (i) Buyer has created and set aside a designated fund for San José Clean Energy as further described in Section 4.80.4050 of the City of San José Municipal Code (the “**Designated Fund**”) for payment of its obligations under this Agreement, (ii) as set forth in Section 4.80.4060 of the City of San José Municipal Code, all monies derived from the operation of San José Clean Energy, including revenues for sale of electricity, payment from other entities, and any financing proceeds associated with San José Clean Energy’s obligation will be deposited in the Designated Fund, and (iii) subject to the requirements and limitations of applicable law and taking into account other available money specifically authorized by the San José City Council and allocated and appropriated to the San José Clean Energy’s obligations, Buyer agrees to establish San José Clean Energy rates and charges that are sufficient to maintain revenues in the Designated Fund necessary to pay its obligations under this Agreement and all of Buyer’s payment obligations under its other contracts for the purchase of energy and related products for San José Clean Energy. Buyer shall provide Seller with reasonable access to account balance information with respect to the Designated Fund during the Term.
2. Limited Obligations. Buyer’s payment obligations under this Agreement are special limited obligations of Buyer payable solely from the Designated Fund and are not a charge upon the revenues or general fund of the City of San José or upon any non- San José Clean Energy moneys or other property of the Energy Department or the City of San José.

## **Forward Contract**

. The Parties intend that this Agreement constitutes a “forward contract” within the meaning of the U.S. Bankruptcy Code, and Buyer and Seller are “forward contract merchants” within the meaning of the U.S. Bankruptcy Code. Each Party further agrees that, for all purposes of this Agreement, each Party waives and agrees not to assert the applicability of the provisions of 11 U.S.C. § 366 in any bankruptcy proceeding wherein such Party is a debtor. In any such proceeding, each Party further waives the right to assert that the other Party is a provider of last resort to the extent such term relates to 11 U.S.C. §366 or another provision of 11 U.S.C. § 101-1532.

## **Further Assurances**

. Each of the Parties hereto agree to provide such information, execute and deliver any instruments and documents and to take such other actions as may be necessary or reasonably requested by the other Party which are not inconsistent with the provisions of this Agreement and which do not involve the assumptions of obligations other than those provided for in this Agreement, to give full effect to this Agreement and to carry out the intent of this Agreement.

*[Signatures on following page]*

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

|  |  |
| --- | --- |
| **[SELLER]**By: Name: Title: Date:  | **[AVA COMMUNITY ENERGY AUTHORITY, a California joint powers authority**By: Name: Title: Date: ]**[CITY OF SAN JOSÉ, a California municipal corporation**By: Name: Title: Date: ]**Approved as to form:**By: Name: Title: Date:  |

**EXHIBIT A**

**FACILITY DESCRIPTION**

**Site Name**:

**Site includes all or some of the following APNs**:

**County:**

**Type of Facility**: [*e.g., Lithium-Ion*]

**Energy Management Software**:Seller must provide remotely operable, 2-4 second timestamps, data historian (at least 5 years of storage), SCADA/AGC communication and operability with the Facility controller and offtaker, and include the following applications/modes:

• Dynamic Voltage Support

• Shifting

• Regulation

• Flexible Ramp

• Spinning Reserve

• ITC compliance

**Operating Characteristics of Facility**:

 **Maximum Stored Energy Level at COD (MWh)**:

 **Maximum Charging Capacity at COD**:

 **Maximum Discharging Capacity at COD**:

**Operating Restrictions of Facility**:See Exhibit Q

**Storage Contract Capacity**: See definition in Section 1.1

**Maximum Output**:

**Delivery Point**:Facility PNode

**Facility Meter Locations**:See Exhibit R

**Facility Interconnection Point**:

**Facility PNode**:

**Participating Transmission Owner**:

**EXHIBIT B**

**FACILITY CONSTRUCTION AND COMMERCIAL OPERATION**

1. **Facility Construction**.
	1. “**Construction Start**” will occur once Seller has acquired all applicable regulatory authorizations, approvals and permits for the construction of the Facility, engaged all major contractors and ordered all major equipment and supplies as, in each case, can reasonably be considered necessary so that physical construction of the Facility may begin and proceed to completion without foreseeable interruption of material duration, and executed an engineering, procurement, and construction contract or an equipment supply agreement and a balance of plant contract and issued thereunder a notice to proceed that authorizes the contractor to mobilize to Site and begin physical construction of the Facility 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 J hereto, and the date certified therein shall be the “**Construction Start Date**.” Seller shall cause Construction Start to occur no later than the Guaranteed Construction Start Date.
	2. The “**Guaranteed Construction Start Date**” means the Expected Construction Start Date, subject to extensions on a day-for-day basis for the Development Cure Period.
	3. If Seller fails to achieve Construction Start on or before the Guaranteed Construction Start Date, Seller shall pay Construction Delay Damages to Buyer for each day of delay in achieving Construction Start. Construction Delay Damages shall be paid to Buyer in arrears on a monthly basis. Buyer shall invoice Seller for Construction Delay Damages, if any, accrued during the prior month and, within ten (10) Business Days following Seller’s receipt of such invoice, Seller shall pay Buyer the amount of Construction Delay Damages set forth in such invoice. Construction Delay Damages shall be refundable to Seller pursuant to Section 2.b of this Exhibit B. The Parties agree that Buyer’s receipt of Construction Delay Damages shall be Buyer’s sole and exclusive remedy for Seller’s unexcused delay in achieving the Construction Start Date, but shall (x) not be construed as Buyer’s declaration that an Event of Default has occurred under any provision of Section 11.1 and (y) not limit Buyer’s right to declare an Event of Default pursuant to Section 11.1(b)(i) and receive a Damage Payment upon exercise of Buyer’s default right pursuant to Section 11.2.
2. **Commercial Operation of the Facility**. “**Commercial Operation**” means the condition existing when (i) 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 H (the “**COD Certificate**”) (ii) Seller has notified Buyer in writing that it has provided the required documentation to Buyer and met the conditions for achieving Commercial Operation, and (iii) Buyer has acknowledged to Seller in writing that Buyer agrees that Commercial Operation has been achieved. The “**Commercial Operation Date**” shall be either (i) the later of (x) the Expected Commercial Operation Date, or (y) the date on which Commercial Operation is achieved.
	1. Seller shall cause Commercial Operation for the Facility to occur by the Expected Commercial Operation Date (as such date may be extended by the Development Cure Period (defined below), the “**Guaranteed Commercial Operation Date**”). Seller shall notify Buyer that it intends to achieve Commercial Operation at least sixty (60) days before the anticipated Commercial Operation Date.
	2. If Seller achieves Commercial Operation for the Facility by the Guaranteed Commercial Operation Date, all Construction Delay Damages paid by Seller shall be refunded to Seller. Seller shall include a request for refund of the Construction Delay Damages with the first invoice to Buyer after Commercial Operation.
	3. If Seller does not achieve Commercial Operation by the Guaranteed Commercial Operation Date, as it may be extended as provided herein, Seller shall pay COD Delay Damages to Buyer for each day after the Guaranteed Commercial Operation Date until the Commercial Operation Date and such COD Delay Damages shall be paid to Buyer in advance on a monthly basis. A prorated amount will be returned to Seller if COD is achieved during the month for which COD Delay Damages were paid in advance. The Parties agree that Buyer’s receipt of COD Delay Damages shall be Buyer’s sole and exclusive remedy for Seller’s failure to achieve the Commercial Operation Date on or before the Guaranteed Commercial Operation Date, but shall (x) not be construed as Buyer’s declaration that an Event of Default has occurred under any provision of Section 11.1 and (y) not limit Buyer’s right to declare an Event of Default pursuant to Section 11.1(b)(ii) and receive a Damage Payment upon exercise of Buyer’s default right pursuant to Section 11.2.
3. **Termination for Failure to Achieve Commercial Operation**. If the Facility has not achieved Commercial Operation withinsixty (60) days after the Guaranteed Commercial Operation Date, Buyer may elect to terminate this Agreement in accordance with Sections 11.1(b)(ii) and 11.2.
4. **Extension of the Guaranteed Dates**. The Guaranteed Construction Start Date and the Guaranteed Commercial Operation Date shall both, subject to notice and documentation requirements set forth below, be extended on a day-for-day basis due to Force Majeure Event for a period of up to one-hundred twenty (120) days on a cumulative basis (the “**Development Cure Period**”). No extension shall be given under the Development Cure Period (a) if the delay was due to Seller’s failure to take commercially reasonable actions to meet its requirements and deadlines, (b) Seller does not satisfy the requirements of a Force Majeure Event, including the notice and documentation requirements under Section 10.3. Upon request from Buyer, Seller shall promptly provide documentation demonstrating to Buyer’s reasonable satisfaction that the delay was the result of a Force Majeure Event and did not result from Seller’s actions or failure to take commercially reasonable actions.
5. **Failure to Reach** **Storage Contract Capacity**. If, at Commercial Operation, the Installed Battery Capacity is less than one hundred percent (100%) of the Storage Contract Capacity, Seller shall have one hundred twenty (120) days after the Commercial Operation Date to install additional capacity or Network Upgrades such that the Installed Battery Capacity is equal to (but not greater than) one hundred percent (100%) of the Storage Contract Capacity, and Seller shall provide to Buyer a new certificate substantially in the form attached as Exhibit I hereto specifying the new Installed Battery Capacity. If Seller fails to construct the Storage Contract Capacity by such date, Seller shall pay “**Capacity Damages**” to Buyer, in an amount equal to Two Hundred Fifty Thousand Dollars ($250,000) for each MWAC that the Storage Contract Capacity exceeds the Installed Battery Capacity, and the Storage Contract Capacity and other applicable portions of the Agreement shall be adjusted accordingly.

**EXHIBIT C**

**COMPENSATION**

Buyer shall compensate Seller for the Product in accordance with this Exhibit C.

* + 1. Storage Rate. All Storage Product shall be paid on a monthly basis at the Storage Rate *multiplied by* 1,000, *multiplied by* the Storage Contract Capacity for such month, as adjusted for the most recent Storage Capacity Test, *multiplied* by the Round-Trip Efficiency Factor, *multiplied by* the Availability Adjustment for such month (as determined under Exhibit P) and pro-rated for the first and last month of the Delivery Term if the Delivery Term does not start on the first day of a calendar month. Such payment constitutes the entirety of the amount due to Seller from Buyer for the Storage Product. In addition to adjustments pursuant to the Storage Capacity Test, the Storage Contract Capacity shall be reduced for each MW that is unavailable due to a Force Majeure Event lasting for more than five (5) consecutive days until such time as the Force Majeure Event ends for such Storage Capacity. If the Storage Contract Capacity is adjusted pursuant to a Storage Capacity Test on any day other than the first day of a calendar month, payment shall be calculated separately for each portion of the month in which the different Storage Contract Capacity is applicable.
		2. Liquidated Damages for Failure to Achieve Guaranteed Efficiency Rate. If during any month during the Delivery Term, the Efficiency Rate applicable to such month or partial month is 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 is less than the Guaranteed Efficiency Rate, *by* (iii) Buyer’s average cost of procuring Charging Energy for such month, which amount shall be credited by Seller against amounts owed by Buyer in the applicable monthly invoice.
		3. Tax Credits. The Parties agree that the Storage Rate is not subject to adjustment or amendment if Seller fails to receive any Tax Credits, or if any Tax Credits expire, are repealed or otherwise cease to apply to Seller or the Facility in whole or in part, or Seller or its investors are unable to benefit from any Tax Credits. Seller shall bear all risks, financial and otherwise, throughout the Contract Term, associated with Seller’s or the Facility’s eligibility to receive Tax Credits or to qualify for accelerated depreciation for Seller’s accounting, reporting or Tax purposes. The obligations of the Parties hereunder, including those obligations set forth herein regarding the purchase and price for and Seller’s obligation to deliver Product, shall be effective regardless of whether the sale of Product is eligible for, or receives Tax Credits during the Contract Term.

**EXHIBIT D**

**SCHEDULING COORDINATOR RESPONSIBILITIES**

### Buyer as Scheduling Coordinator for the Facility. Upon Initial Synchronization of the Facility to the CAISO Grid, Buyer shall be the Scheduling Coordinator or designate a qualified third party to provide Scheduling Coordinator services with the CAISO for the Facility. At least thirty (30) days prior to the Initial Synchronization of the Facility to the CAISO Grid, (i) Seller shall take all actions and execute and deliver to Buyer and the CAISO all documents necessary to authorize or designate Buyer (or Buyer’s designee) as the Scheduling Coordinator for the Facility effective as of the Initial Synchronization of the Facility to the CAISO Grid, and (ii) Buyer shall, and shall cause its designee to, take all actions and execute and deliver to Seller and the CAISO all documents necessary to authorize or designate Buyer or its designee as the Scheduling Coordinator for the Facility effective as of the Initial Synchronization of the Facility to the CAISO Grid. On and after Initial Synchronization of the Facility to the CAISO Grid, Seller shall not authorize or designate any other party to act as the Facility’s Scheduling Coordinator, nor shall Seller perform for its own benefit the duties of Scheduling Coordinator, and Seller shall not revoke Buyer’s authorization to act as the Facility’s Scheduling Coordinator unless agreed to by Buyer. Buyer (as the Facility’s SC) shall submit Schedules to the CAISO in accordance with this Agreement and the applicable CAISO Tariff, protocols and Scheduling practices for Product on a day-ahead, hour-ahead, fifteen-minute market or real time basis, as determined by Buyer. Buyer shall cause its Scheduling Coordinator to reasonably cooperate with Seller during the testing and commissioning of the Facility prior to the Commercial Operation Date.

### Notices. 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, transmission to the personnel designated to receive such information.

### CAISO Costs and Revenues. Except as otherwise set forth below and in Sections 4.3(f) and 4.10 of the Agreement, 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 associated with delivery of Resource Adequacy Benefits from the Facility (including Non-Availability Charges (as defined in the CAISO Tariff)); provided that any Availability Incentive Payments (as defined in the CAISO Tariff) are for the benefit of Seller and for Seller’s account and that any Non-Availability Charges (as defined in the CAISO Tariff) are the responsibility of the Seller and for Seller’s account. In addition, if during the Delivery Term, the CAISO implements or has implemented any sanction or penalty related to scheduling, outage reporting, or generator operation, and any such sanctions or penalties are imposed upon the Facility or to Buyer as Scheduling Coordinator due to failure by Seller to abide by the CAISO Tariff or any CAISO directive, including Curtailment Orders, 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.

### CAISO Settlements. Buyer (as the Facility’s SC) shall be responsible for all settlement functions with the CAISO related to the Facility. Buyer shall render a separate invoice to Seller for any CAISO payments, charges or penalties (“**CAISO Charges Invoice**”) for which Seller is responsible under this Agreement. CAISO Charges Invoices shall be rendered after settlement information becomes available from the CAISO that identifies any CAISO charges. Notwithstanding the foregoing, Seller acknowledges that the CAISO will issue additional invoices reflecting CAISO adjustments to such CAISO charges. Buyer will review, validate, and if requested by Seller under paragraph (e) below, dispute any charges that are the responsibility of Seller in a timely manner and consistent with Buyer’s existing settlement processes for charges that are Buyer’s responsibilities. Subject to Seller’s right to dispute and to have Buyer pursue the dispute of any such invoices, Seller shall pay the amount of CAISO Charges Invoices within ten (10) Business Days of Seller’s receipt of the CAISO Charges Invoice. If Seller fails to pay such CAISO Charges Invoice within that period, Buyer may net or offset any amounts owing to it for these CAISO Charges Invoices against any future amounts it may owe to Seller under this Agreement. The obligations under this Section with respect to payment of CAISO Charges Invoices shall survive the expiration or termination of this Agreement.

### Dispute Costs. 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.

### Terminating Buyer’s Designation as Scheduling Coordinator. 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.

### Master Data File and Resource Data Template; Master Resource Database. The Parties will collaborate to comply with the applicable deadlines for filing and updating the information for the Facility in the Master Resource Database and Master Data File. Seller shall provide the data 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 at least five (5) Business Days before the deadline for submission to CAISO and Buyer (as SC) shall promptly provide such data to CAISO. Seller shall provide the data that is required for the CPUC’s Master Resource Database for the Facility consistent with this Agreement to Buyer for review and approval at least five (5) Business Days before the deadline for submission of such to the CPUC. Neither Party shall change such CAISO or CPUC 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) and CPUC’s Master Resource Database for this Facility remains consistent with the actual operating characteristics of the Facility and provide such information to Buyer for review at least five (5) Business Days prior to submission to the CAISO or CPUC as applicable.

### NERC Reliability Standards.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, 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 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. The utilization of union labor by Seller’s principal EPC contractor.
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. Any other documentation reasonably requested by Buyer.

**EXHIBIT F**

**FORM OF MONTHLY FORECAST**

**Storage Capacity, MW Per Hour – [*Insert Month*]**

|  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
|  | **1:00** | **2:00** | **3:00** | **4:00** | **5:00** | **6:00** | **7:00** | **8:00** | **9:00** | **10:00** | **11:00** | **12:00** | **13:00** | **14:00** | **15:00** | **16:00** | **17:00** | **18:00** | **19:00** | **20:00** | **21:00** | **22:00** | **23:00** | **24:00** |
| **Day 1** |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| **Day 2** |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| **Day 3** |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| **Day 4** |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| **Day 5** |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| **[insert additional rows for each day in the month]** |
| **Day 29** |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| **Day 30** |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| **Day 31** |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |

**EXHIBIT G**

**[RESERVED]**

**EXHIBIT H**

**FORM OF COMMERCIAL OPERATION date certifIcate**

This certification (“**Certification**”) of Commercial Operation is delivered by [licensed professional engineer] (“**Engineer**”) to [Ava Community Energy Authority, a California joint powers authority][City of San José, a municipal corporation] (“**Buyer**”) in accordance with the terms of that certain Energy Storage Service Agreement dated [Date] by and between [Entity name, state of formation, type of 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 Facility is fully operational, and interconnected, fully integrated and synchronized with the Transmission System.
2. Seller has installed equipment for the Facility with a nameplate capacity of no less than ninety-five percent (95%) of the Storage Contract Capacity.
3. Seller has commissioned all Facility equipment in accordance with its respective manufacturer’s specifications.
4. 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 the CAISO.
5. The Facility is fully capable of charging, storing and discharging energy up to no less than ninety-five percent (95%) of the Storage Contract Capacity and receiving instructions to charge, store and discharge energy, all within the operational constraints and subject to the applicable Operating Restrictions.
6. Authorization to parallel the Facility was obtained from the Participating Transmission Owner.
7. The Transmission Provider has provided documentation supporting full unrestricted release for Commercial Operation.
8. The PTO has provided notification supporting Commercial Operation, in accordance with the PTO Tariff, as applicable.
9. Seller shall have caused the Facility to be included in the Full Network Model and has the ability to offer Bids into the CAISO Day-Ahead Market and Real-Time Market.

EXECUTED by [*Licensed Professional Engineer*]

this \_\_\_\_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_.

[licensed professional engineer]

By:

Printed Name:

Title:

**EXHIBIT I**

**FORM OF installed Capacity certifIcate**

This certification (“**Certification**”) of Installed Capacity is delivered by [licensed professional engineer] (“**Engineer**”) to [Ava Community Energy Authority, a California joint powers authority][City of San José, a municipal corporation] (“**Buyer**”) in accordance with the terms of that certain Energy Storage Service Agreement dated [Date] by and between [Entity name, state of formation, type of 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 Storage Capacity Test demonstrated a maximum operating capability that can be sustained for four (4) consecutive hours to discharge electric energy of \_\_ MWAC to the Delivery Point, in accordance with the testing procedures, requirements and protocols set forth in Section 4.9 and Exhibit O (the “Installed Battery Capacity”).

EXECUTED 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 (“**Certification**”) is delivered by [Entity name, state of formation, type of entity] (“**Seller**”) to [Ava Community Energy Authority, a California joint powers authority][City of San José, a municipal corporation] (“**Buyer**”) in accordance with the terms of that certain Energy Storage Service Agreement dated [Date] by and between 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.

Seller hereby certifies and represents to Buyer the following:

* 1. Construction Start (as defined in Exhibit B of the Agreement) has occurred, and a copy of the notice to proceed that Seller issued to its contractor as part of Construction Start is attached hereto;
	2. the Construction Start Date occurred on [Date] (the “**Construction Start Date**”); and
	3. the precise Site on which the Facility is located is, which must be within the boundaries of the previously identified Site: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

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

[SELLER ENTITY]

By:

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]

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

Beneficiary:

[Ava Community Energy Authority, a California joint powers authority][City of San José, a California municipal corporation]

Ladies and Gentlemen:

By the order of [*Entity name, state of formation, type of entity*] (“Applicant”), we, [*Bank name and address*] (“Issuer”) hereby issue our Irrevocable Standby Letter of Credit No. [*XXXXXX*] (the “Letter of Credit”) in favor of [Ava Community Energy Authority, a California joint powers authority][City of San José, a California municipal corporation] (“Beneficiary”), for an amount not to exceed the aggregate sum of U.S. $[*XXXXXX*] (United States Dollars [*XXXXXX*] and 00/100), pursuant to that certain Energy Storage Service Agreement dated as of [*Date*] and as amended (the “Agreement”) between Applicant and Beneficiary. This Letter of Credit shall become effective immediately and shall expire on [*Date*] which is one year after the issue date of this Letter of Credit, or any expiration date extended in accordance with the terms hereof (the “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 Beneficiary’s 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. [*XXXXXX*] (“Drawing Certificate”).

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

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

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

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

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

This Letter of Credit is issued subject to the rules of the ‘International Standby Practices 1998’, International Chamber of Commerce Publication No. 590 (“ISP98”) and, as to matters not addressed by ISP98, shall be governed and construed in accordance with the laws of state of California.

Notwithstanding any reference in this Letter of Credit to any other documents, instruments or agreements (other than as set forth in the immediately preceding paragraph), this Letter of Credit contains the entire agreement between Beneficiary and Issuer relating to the obligations of Issuer hereunder.

Please address all correspondence regarding this Letter of Credit to the attention of the Letter of Credit Department at [*Bank name and address*], referring specifically to Issuer’s Letter of Credit No. [*XXXXXX*]. For telephone assistance, please contact Issuer’s Standby Letter of Credit Department at [*Bank phone number*] 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: [Ava Community Energy Authority][City of San José], [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*]

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

[*Officer name*]

[*Officer title*]

Exhibit A:

Drawing Certificate

(DRAW REQUEST SHOULD BE ON BENEFICIARY’S LETTERHEAD)

[*Bank name and address*]

Ladies and Gentlemen:

The undersigned, a duly authorized representative of [Ava Community Energy Authority, a California joint powers authority][City of San José, a California municipal corporation], as beneficiary (the “Beneficiary”) of the Irrevocable Letter of Credit No. [*XXXXXX*] (the “Letter of Credit”) issued by [*Bank name*] (the “Bank”) by order of [*Entity name, state of formation, type of entity*] (the “Applicant”), hereby certifies to the Bank as follows:

1. Applicant and Beneficiary are party to that certain Energy Storage Service Agreement dated as of [*Date*] (the “Agreement”).

2. Beneficiary is making a drawing under this Letter of Credit in the amount of U.S. $[*XXXXXX*] 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. $[*XXXXXX*], 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 [Ava Community Energy Authority][City of San José] 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 [Ava Community Energy Authority][City of San José] by wire transfer in immediately available funds to the following account: [*Specify account information*]

[Ava Community Energy Authority][City of San José]

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Name and Title of Authorized Representative

Date\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**EXHIBIT L**

**FORM OF GUARANTY**

This Guaranty (this “Guaranty”) is entered into as of [\_\_\_\_\_] (the “Effective Date”) by and between [Entity name, state of formation, type of entity] (“Guarantor”), and [Ava Community Energy Authority, a California joint powers authority][City of San José, a California municipal corporation] (together with its successors and permitted assigns, “Buyer”).

Recitals

Buyer and [Entity name, state of formation, type of entity] (“Seller”), entered into that certain Energy Storage Service Agreement (as amended, restated or otherwise modified from time to time, the “ESSA”) dated as of [\_\_\_\_], 20\_\_.

Guarantor is entering into this Guaranty as Performance Security to secure Seller’s obligations under the ESSA, as required by Section 8.8 of the ESSA.

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 ESSA.

Initially capitalized terms used but not defined herein have the meaning set forth in the ESSA.

Agreement

1. **Guaranty**. For value received, Guarantor does hereby unconditionally, absolutely and irrevocably guarantee, as primary obligor and not as a surety, to Buyer the full, complete and prompt payment by Seller of any and all amounts and payment obligations now or hereafter owing from Seller to Buyer under the ESSA, including, without limitation, compensation for penalties, the Termination Payment, indemnification payments or other damages, as and when required pursuant to the terms of the ESSA (the “Guaranteed Amount”), provided, that Guarantor’s aggregate liability under or arising out of this Guaranty shall not exceed \_\_\_\_\_\_\_\_ Dollars ($\_\_\_\_\_\_\_\_\_\_\_). The Parties understand and agree that any payment by Guarantor or Seller of any portion of the Guaranteed Amount shall thereafter reduce Guarantor’s maximum aggregate liability hereunder on a dollar-for-dollar basis. This Guaranty is an irrevocable, absolute, unconditional and continuing guarantee of the full and punctual payment and performance, and not of collection, of the Guaranteed Amount and, except as otherwise expressly addressed herein, is in no way conditioned upon any requirement that Buyer first attempt to collect the payment of the Guaranteed Amount from Seller, any other guarantor of the Guaranteed Amount or any other Person or entity or resort to any other means of obtaining payment of the Guaranteed Amount. In the event Seller shall fail to duly, completely or punctually pay any Guaranteed Amount as required pursuant to the ESSA, Guarantor shall promptly pay such amount as required herein.
2. **Demand Notice**. For avoidance of doubt, a payment shall be due for purposes of this Guaranty only when and if a payment is due and payable by Seller to Buyer under the terms and conditions of the Agreement. If Seller fails to pay any Guaranteed Amount as required pursuant to the ESSA for five (5) Business Days following Seller’s receipt of Buyer’s written notice of such failure (the “Demand Notice”), then Buyer may elect to exercise its rights under this Guaranty and may make a demand upon Guarantor (a “Payment Demand”) for such unpaid Guaranteed Amount. A Payment Demand shall be in writing and shall reasonably specify in what manner and what amount Seller has failed to pay and an explanation of why such payment is due and owing, with a specific statement that Buyer is requesting that Guarantor pay under this Guaranty. Guarantor shall, within five (5) Business Days following its receipt of the Payment Demand, pay the Guaranteed Amount to Buyer.
3. **Scope and Duration of Guaranty**. This Guaranty applies only to the Guaranteed Amount. This Guaranty shall continue in full force and effect from the Effective Date until the earlier of the following: (x) all Guaranteed Amounts have been paid in full (whether directly or indirectly through set-off or netting of amounts owed by Buyer to Seller), or (y) replacement Performance Security is provided in an amount and form required by the terms of the ESSA. 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:
4. the extension of time for the payment of any Guaranteed Amount, or
5. any amendment, modification or other alteration of the ESSA, or
6. any indemnity agreement Seller may have from any party, or
7. any insurance that may be available to cover any loss, except to the extent insurance proceeds are used to satisfy the Guaranteed Amount, or
8. 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 ESSA 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
9. the release, modification, waiver or failure to pursue or seek relief with respect to any other guaranty, pledge or security device whatsoever, or
10. 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
11. 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 ESSA or perform its obligations thereunder, (B) lack of due execution, delivery, validity or enforceability, including of the ESSA, or (C) Seller’s inability to pay any Guaranteed Amount or perform its obligations under the ESSA, or
12. any other event or circumstance that may now or hereafter constitute a defense to payment of the Guaranteed Amount, including, without limitation, statute of frauds and accord and satisfaction;

provided that, subject to Guarantor’s payment of a Guaranteed Amount in accordance with Paragraph 2, Guarantor reserves the right to assert for itself in a subsequent proceeding 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 ESSA, but that are expressly waived under any provision of this Guaranty).

1. **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 ESSA, 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:
2. 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;
3. the obligation to pay any Guaranteed Amount shall be modified, supplemented or amended in any respect in accordance with the terms of the ESSA;
4. subject to Section 9, 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
5. 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.
6. **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.
7. **Representations and Warranties**. Guarantor hereby represents and warrants that (a) it has all necessary and appropriate [*limited liability company][corporate*] powers and authority and the legal right to execute and deliver, and perform its obligations under, this Guaranty, (b) this Guaranty constitutes its legal, valid and binding obligations enforceable against it in accordance with its terms, except as enforceability may be limited by bankruptcy, insolvency, moratorium and other similar laws affecting enforcement of creditors’ rights or general principles of equity, (c) the execution, delivery and performance of this Guaranty does not and will not contravene Guarantor’s organizational documents, any applicable Law or any contractual provisions binding on or affecting Guarantor, (d) there are no actions, suits or proceedings pending before any court, governmental agency or arbitrator, or, to the knowledge of the Guarantor, threatened, against or affecting Guarantor or any of its properties or revenues which may, in any one case or in the aggregate, adversely affect the ability of Guarantor to enter into or perform its obligations under this Guaranty, and (e) no consent or authorization of, filing with, or other act by or in respect of, any arbitrator or Governmental Authority, and no consent of any other Person (including, any stockholder or creditor of the Guarantor), that has not heretofore been obtained is required in connection with the execution, delivery, performance, validity or enforceability of this Guaranty by Guarantor.
8. **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 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: [\_\_\_\_]

### **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 County of [Alameda][Santa Clara], California.

### **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 ESSA. 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:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**EXHIBIT M**

**FORM OF REPLACEMENT RA NOTICE**

This Replacement RA Notice (this “**Notice**”) is delivered by [Entity name, state of formation, type of entity] (“**Seller**”) to [Ava Community Energy Authority, a California joint powers authority][City of San José, a municipal corporation] (“**Buyer**”) in accordance with the terms of that certain Energy Storage Service Agreement dated [*Date*] by and between Seller and Buyer (“**Agreement**”). 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(c) of the Agreement, Seller hereby provides the below Replacement RA product information:



[SELLER ENTITY]

By:

Its:

Date:

**EXHIBIT N**

**NOTICES**

| **[\_\_\_\_\_\_\_\_\_\_\_\_\_\_]** | [Ava Community Energy Authority][City of San José]  |
| --- | --- |
| **All Notices:** Street: City: Attn: Phone: Email:  | **All Notices:** Street: City: Attn: Phone: Email:  |
| **Reference Numbers:**Duns: Federal Tax ID Number:  | **Reference Numbers:**Duns: Federal Tax ID Number:  |
| **Invoices:**Attn: Phone: Email:  | **Invoices:**Attn: Phone: Email:  |
| **Scheduling:**Attn: Phone: Email:  | **Scheduling:**Attn: Phone: Email:  |
| **Confirmations:**Attn:Phone:Email: | **Confirmations:**Attn:Phone:Email: |
| **Payments:** Attn: Phone: Email:  | **Payments:** Attn: Phone: Email:  |
| **Wire Transfer:**BNK: ABA: ACCT:  | **Wire Transfer:**BNK: ABA: ACCT:  |
| **Credit and Collections:**Attn: Phone: Email: | **Credit and Collections:**Attn: Phone: Email:  |
| **With additional Notices of an Event of Default to:**Attn: Phone: Email:  | **With additional Notices of an Event of Default to:**Attn: Phone: Email:  |

**EXHIBIT O**

**STORAGE CAPACITY TESTS**

**Storage Capacity Test Notice and Frequency**

A. Commercial Operation Date Storage Capacity Test. 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 shall be performed in accordance with this Exhibit O and shall establish the initial Storage Contract Capacity and Efficiency Rate hereunder based on the actual capacity and round-trip efficiency of the Facility determined by such Storage Capacity Test.

B. Subsequent Storage Capacity Tests. Following the Commercial Operation Date, once each Contract Year Seller will perform a Storage Capacity Test and will give Buyer ten (10) Business Days prior Notice of such test. At least twice per Contract Year, Buyer shall have the right to require Seller to schedule and complete a Storage Capacity Test. In addition, Buyer shall have the right to require a test or retest of the Storage Capacity Test at any time upon no less than five (5) Business Days prior written Notice to Seller if Buyer provides data with such Notice reasonably indicating that the Storage Contract 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 written Notice to Buyer (or any shorter period reasonably acceptable to Buyer consistent with Prudent Operating Practice).

C. Test Results and Re-Setting of Storage Contract Capacity and Efficiency Rate. No later than five (5) days following any Storage Capacity Test, Seller shall submit a testing report detailing results and findings of the test. The report shall include Facility Meter readings and plant log sheets verifying the operating conditions and output of the Facility. In accordance with Section 4.9(c) of the Agreement and Part II(I) below, the actual Efficiency Rate and Storage Contract Capacity determined pursuant to a Storage Capacity Test (up to, but not in excess of, the original Storage Contract Capacity set forth on the Cover Sheet, as such original Storage Contract Capacity on the Cover Sheet may have been adjusted (if at all) pursuant to Exhibit B) shall become the new Storage Contract Capacity and Efficiency Rate at the beginning of the day following the completion of the test for calculating the Storage Rate 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 Exhibit O. For ease of reference, a Storage Capacity Test is sometimes referred to in this Exhibit O as a “SCT”. Buyer or its representative may be present for the SCT and may, for informational purposes only, use its own metering equipment (at Buyer’s sole cost).

PART II. REQUIREMENTS APPLICABLE TO ALL STORAGE CAPACITY TESTS.

1. Purpose of Test. Each SCT shall:
	1. Determine an updated Storage Contract Capacity;
	2. Determine the amount of Energy required to fully charge the Facility;
	3. Determine the Facility charge ramp rate;
	4. Determine the Facility discharge ramp rate;
	5. Determine an updated Efficiency Rate.
2. Test Elements. Each SCT shall include the following test elements:
* The measurement of charging energy exclusive of Station Use and Electrical Losses, as measured by the Facility Meter or other mutually agreed meter, that is required to charge the Facility up to the Maximum Stored Energy Level not to exceed the Storage Contract Output (MWh) (“Energy In”);
* The measurement of discharging energy exclusive of Station Use and Electrical Losses, as measured by the Facility Meter or other mutually agreed meter, that is discharged from the Facility 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 (as defined in Exhibit A) at the Facility Meter (MW);
* Electrical input at Maximum Charging Capacity (as defined in Exhibit A) at the Facility Meter (MW);
	+ Amount of time between the Facility’s electrical output going from 0 to Maximum Discharging Capacity;
	+ Amount of time between the 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.
1. Parameters. During each SCT, the following parameters shall be measured and recorded simultaneously for the Facility, at ten (10) minute intervals:

(1) discharge time (minutes);

(2) charging energy (MWh);

(3) discharging energy (MWh);

(4) Stored Energy Level (MWh).

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

(1) Relative humidity (%);

(2) Barometric pressure (inches Hg) near the horizontal centerline of the Facility; and

(3) Ambient air temperature (°F).

1. Test Showing. Each SCT must demonstrate that the Facility:

(1) successfully started;

(2) operated for at least four (4) consecutive hours at Maximum Discharging Capacity;

(3) operated for at least four (4) consecutive hours at Maximum Charging Capacity;

(4) has a Storage Capacity of an amount that is, at least, equal to the Maximum Stored Energy Level (as set forth in Exhibit Q); and

(5) is able to deliver Discharging Energy to the Delivery Point as measured by the Facility Meter for four (4) consecutive hoursat a rate equal to the Maximum Discharging Capacity.

1. Test Conditions.
2. General. At all times during a SCT, the Facility shall be operated in compliance with Prudent Operating Practices and all operating protocols recommended, required or established by the manufacturer for operation at Maximum Discharging Capacity and Maximum Charging Capacity (as each is defined in Exhibit A).
3. Abnormal Conditions. If abnormal operating conditions that prevent the recordation of any required parameter occur during a SCT, Seller may postpone or reschedule all or part of such SCT in accordance with Part II.G below.
4. Instrumentation and Metering. Seller shall provide all instrumentation, metering and data collection equipment required to perform the SCT. The instrumentation, metering and data collection equipment electrical meters shall be calibrated in accordance with Prudent Operating Practice.
5. Incomplete Test. 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.
6. Final Report. 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, Efficiency Rate, Maximum 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.G.

1. Supplementary Storage Capacity Test Protocol. No later than sixty (60) days prior to commencing Facility construction, Seller shall deliver to Buyer for its review and approval (such approval not to be unreasonably delayed or withheld) an updated supplement to this Exhibit O with additional and supplementary details, procedures and requirements applicable to Storage Capacity Tests based on the then current design of the Facility (“Supplementary Storage Capacity Test Protoco**l**”). 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.
2. Adjustment to Storage Contract 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 product of (i) the original Storage Contract Capacity set forth on the Cover Sheet, as such original Storage Contract Capacity on the Cover Sheet may have been adjusted (if at all) under this Agreement, multiplied by (ii) four (4) hours), shall be divided by four (4) hours to determine the Storage Contract Capacity, which shall be expressed in MWAC, and shall be the new Storage Contract Capacity in accordance with Section 4.9(c) of the Agreement until updated pursuant to a subsequent Storage Capacity Test.
3. Adjustment to Efficiency Rate. 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), measured at the Facility Meter location, exclusive of Electrical Losses to the Delivery Point and separately metered Station Use associated with battery cooling and other thermal management equipment, and expressed as a percentage, shall be the new Efficiency Rate, and shall be used for the calculation of liquidated damages (if any) under Exhibit C until updated pursuant to a subsequent Storage Capacity Test.

Part III. SUPPLEMENTARY STORAGE CAPACITY TEST PROTCOL

1. **Conditions Precedent to SCT**
* Control System Functionality: The Facility control system shall be successfully configured to receive data from the battery system, exchange distributed network protocol 3 data with the Buyer SCADA device, and transfer data to the database server for the calculation, recording and archiving of data points.
* Communications: Remote Terminal Unit (RTU) testing should be successfully completed prior to SCT. The interface between Buyer’s RTU and the Facility SCADA system should be fully tested and functional prior to starting testing. This includes verification of data transmission pathway between the Buyer’s RTU and Seller’s control system interface and the ability to record SCADA data.
* Commissioning Checklist: Commissioning Checklist shall be successfully completed on all installed facility equipment, including verification that all controls, set points, and instruments of the control system are configured.
* Control System Functionality: The control system is operable within the requirements and has been successfully configured to receive data from the battery system and transfer data to the onsite servers for the calculation, recording and archiving of data points.
* The following Commercial Operation tests will be repeated annually:
	+ - * PMAX Capacity Test
			* Round-Trip Efficiency and Energy Test
1. **PMAX Capacity Test**
2. Purpose: This test will demonstrate the PMAX and will hold the Facility’s maximum operating level (MW), up to the Storage Contract Capacity, for up to five (5) minutes (“Qualified Power Capacity”).
3. Procedure:
4. System starting state: The Facility will be in the on-line state with each battery subsystem at 100% usable state of charge (SOC) and at an initial active power level of 0 MW and reactive power level of 0 MVAR.
5. Record the Facility active power level at the Facility Meter.
6. Command the Facility to follow a signal equal to the Facility’s maximum operating level for five (5) minutes.
7. Record and store the Facility active power response. Measurements will be made at the point of interconnection (POI) and by the control system with a recording in the Facility historian.
8. System end state: The Facility will be in the on-line state and at a commanded active power level of 0 MW.

|  |
| --- |
| Pass/Fail Criteria |
| The Facility active power response and the commanded level shall be within ±2% as measured by the sum of values at the POI. The time to full output shall be less than 100 ms. The hold period of such active power value shall be five (5) minutes and recorded in the control system historian. |
| Passed | Failed | Date: |
|  |   |  |
| Test Performed by: |  |
| Test Witnessed by: |  |

Notes/Test Conditions:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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1. **Round-Trip Efficiency and Energy Test**
2. The following test demonstrates the updated Efficiency Rate and amount of energy required to fully charge the Facility (when performed annually or ad hoc).
	* 1. The resulting quantity of discharging energy is the Energy Out (as reported in Part II.B above) and the resulting quantity of charging energy is the Energy In (as reported in Part II.B above).
		2. The Qualified Energy is the sum of the total quantity of Discharging Energy at the Facility Meter.
3. The Facility will be operated in both the charge and discharge directions in the following order:
4. [Seller to specify, example language below]
5. *[Set each Battery Subsystem to [3%] SOC.*
6. *Allow each Battery Subsystem to enter background cell balancing mode by maintaining a SOC of [3% for 20 minutes]. After the background cell balancing mode begins the system can be operated as normal. Allow the cell balancing function to operate in the background for at least 24 hours to allow the automatic cell balancing procedure to reach completion. This time may be reduced based on equipment suppliers’ recommendations.*
7. *Discharge each Battery Subsystem to 0% SOC.*
8. *Immediately perform the Round-Trip Efficiency and Capacity Test set forth below.]*
9. To be valid, the SCT must be started within twenty-four (24) hours of the end of the period (greater than four days) during which cell balancing was completed. For the duration of the SCT, the Control System will be configured to have the power limiting mechanisms disabled, and each battery subsystem shall be configured to follow the charge and discharge current limits specified by their respective battery management system.
10. Procedure:
11. System Starting State: The Facility will be in the on-line state with each Battery Subsystem at 0% SOC.
12. Verify that in the previous twenty-four (24) hour period, each Battery Subsystem completed the cell balancing procedure allowing full cell balancing to occur, as described in steps i-iv.
13. Verify that ambient temperature measurements at all Battery Subsystems are between [18°C and 28 °C ] throughout this test.
14. Record initial values of each Battery Subsystem SOC.
15. Command a real power charge that results in an AC power of Facility’s full charging power and continue the charge until the power is 2% different.
16. Record and store the AC energy charged to the system as measured at the POI meter. Measurements will be made by the POI meter with recording in the Facility historian.
17. Within 5 minutes, command a real power discharge that results in an AC power output of the Facility’s maximum discharge power.
18. Maintain the discharging until the power is 2% different.
19. Record and store the AC energy discharged as measured at the Facility Meter. Measurements will be made by the Facility Meter with recording in the Facility historian.

|  |
| --- |
| Pass/Fail Criteria |
| The measured Efficiency Rate is greater than or equal to the Guaranteed Efficiency Rate. The Qualified Energy is greater than or equal to the Storage Contract Output. |
| Passed | Failed | Date: |
|  |  |  |
| Test Performed by: |  |
| Test Witnessed by: |  |

Notes/Test Conditions:

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**EXHIBIT P**

**STORAGE FACILITY AVAILABILITY**

**Monthly Storage Availability**

Calculation of Monthly Storage Availability. Seller shall calculate the “**Monthly Storage Availability**” in a given month using the formula set forth below:

|  |  |
| --- | --- |
| Monthly Storage Availability (%) =  | [MNTHHRSm- UNAVAILHRSm] |
| [MNTHHRSm] |

where:

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

MNTHHRSm is the total number of hours for the month;

UNAVAILHRS*m*, is the total number of hours in the month during which the Facility was unavailable to deliver Storage Product as reported in ether (a) Seller’s most recent Availability Notice or (b) by Seller’s real-time EMS data feed to Buyer for the Facility, for any reason other than the occurrence of any of the following (each, an “**Excused Event**”): a Force Majeure Event, Curtailments Orders, Buyer Default, Buyer Dispatched Tests, required annual tests pursuant to Section B (“Subsequent Storage Capacity Tests”) in Exhibit O, System Emergencies, or the Operating Restrictions in Exhibit Q. To be clear, hours of unavailability caused by any Excused Event will not be included in UNAVAILHRS*m* for such month. Any other event that results in unavailability of the Facility for less than a full hour (as reported in either (a) or (b) above) will count as an equivalent percentage of the applicable hour(s) for this calculation. Additionally, if during any applicable hour the Facility is available, but for less than the full amount of the then effective Storage Contract Capacity, the UNAVAILHRS*m* for such hour shall be calculated as an equivalent percentage of such hour in proportion to the amount of available Storage Contract Capacity.

If the Facility or any component thereof was previously deemed unavailable for an hour or part of an hour, and Seller provides a revised Availability Notice indicating the Facility is available for that hour or part of an hour by 5:00 a.m. of the morning Buyer schedules or Bids the Facility in the Day-Ahead Market, the Facility will be deemed to be available to the extent set forth in the revised Availability Notice.

If the Facility or any component thereof was previously deemed unavailable for an hour or part of an hour and Seller provides a revised Notice indicating the Facility is available for that hour or part of an hour at least sixty (60) minutes prior to the time the Buyer is required to schedule or Bid the Facility in the Real-Time Market, and the Facility is dispatched in the Real-Time Market, the Facility will be deemed to be available to the extent set forth in the revised Notice.

**Availability Adjustment**

The applicable “**Availability Adjustment**” or “**AA**” is calculated as follows:

1. If the Monthly Storage Availability is greater than or equal to the Guaranteed Storage Availability, then:

AA = 100%

1. If the Monthly Storage Availability is less than 98% but greater than or equal to 70%, then:

AA = 100% - [(98% - Monthly Storage Availability) x 2]

1. If the Monthly Storage Availability is less than 70%, then:

AA = 0

**EXHIBIT Q**

**OPERATING RESTRICTIONS**

The Parties will develop and finalize the Operating Restrictions prior to the Commercial Operation Date, provided that 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 Exhibit Q, (iii) will include protocols and parameters for Seller’s operation of the Facility in the absence of Charging Notices, Discharging Notices or other similar instructions from Buyer relating to the use of the Facility, and (iv) may include Facility Scheduling, Operating Restrictions and Communications Protocols.

|  |  |
| --- | --- |
| **Interconnection Capacity Limit:** |  |
| **Maximum Stored Energy Level:** |  |
| **Minimum Stored Energy Level:** |  |
| **Maximum Charging Capacity:** |  |
| **Minimum Charging Capacity:** |  |
| **Maximum Discharging Capacity:** |  |
| **Minimum Discharging Capacity:** |  |
| **Maximum State of Charge (SOC) during Charging:** | 100% |
| **Minimum State of Charge (SOC) during Discharging:** | 0% |
| **Ramp Rate:** |  |
| **Annual Cycles:** | [365/465] Cycles per Contract Year with no monthly cap |
| **Maximum Time at Minimum Stored Energy Level:** |  |
| **Grid Charging of Facility:** | Yes |
| **Other Operating Limits:** | N/A |
| **Ancillary Services Capability:** | Yes  |

**EXHIBIT R**

**METERING DIAGRAM**

**[***To be provided by Seller***]**

**EXHIBIT S**

**COMMUNITY INVESTMENT**

Seller shall donate $\_\_\_\_\_\_\_\_\_\_\_\_ to Ava’s Community Investment Fund(“Community Investment Funds”), with fifty percent (50%) due within sixty (60) days after the Effective Date of the ESSA, and fifty percent (50%) due on or before the Guaranteed Construction Start Date. The Community Investment Funds will be utilized by Buyer for community investment activities.

**EXHIBIT T**

**FORM OF LIMITED ASSIGNMENT AGREEMENT**

**[***To be provided by Buyer***]**

**EXHIBIT U**

**WORKFORCE DEVELOPMENT**

Seller shall use commercially reasonable efforts to achieve the following workforce objectives related to the construction and operation of the Facility:

1. [*To be completed by the Parties.*]
2. [*To be completed by the Parties.*]
3. [*To be completed by the Parties.*]
4. [*To be completed by the Parties.*]
5. [*To be completed by the Parties.*]
6. [*To be completed by the Parties.*]
1. NTD – The definition of “Contract Year” is based on calendar years, not 12-month periods starting on COD. Contract Year 1 will be COD through December 31, all Contract Years other than the first and last Contract Year will be Jan 1 through December 31, and the last Contract Year will be Jan 1 through midnight of the day prior to the anniversary of the Commercial Operation Date.

 [↑](#footnote-ref-2)
2. NTD – This dollar amount is equal to the amount of the Development Security divided by 60. [↑](#footnote-ref-3)
3. NTD – This dollar amount is equal to the amount of the Development Security divided by 120. [↑](#footnote-ref-4)
4. Applies to SJCE only. [↑](#footnote-ref-5)
5. Applies to Ava only. [↑](#footnote-ref-6)
6. Applies to Ava only. [↑](#footnote-ref-7)
7. Applies to SJCE only. [↑](#footnote-ref-8)
8. NTD – Buyer may require addition provisions under this section depending on the characteristics of the resource. [↑](#footnote-ref-9)
9. Applies to SJCE only. [↑](#footnote-ref-10)
10. Applies to Ava only. [↑](#footnote-ref-11)
11. Required for Ava. [↑](#footnote-ref-12)
12. Applies to SJCE only. [↑](#footnote-ref-13)
13. Applies to Ava only. [↑](#footnote-ref-14)
14. Applies to SJCE only. [↑](#footnote-ref-15)
15. SJCE’s Section 16.2 [↑](#footnote-ref-16)
16. Ava’s Section 16.2 [↑](#footnote-ref-17)
17. Applies to Ava only. [↑](#footnote-ref-18)
18. Applies to SJCE only. [↑](#footnote-ref-19)
19. Applies to Ava only. [↑](#footnote-ref-20)
20. Applies to SJCE only. [↑](#footnote-ref-21)