**CAC Item C5**

**Staff Report Item 12**

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| **To:** | Ava Community Energy Authority |
| **From:** | Karen Lee, Senior Manager of Power Resources and Virtual Power Plants |
| **Subject:** | Approval of Resolution Authorizing the Chief Executive Officer to Negotiate and Execute Distributed Energy Resource Agreements with OEL US Inc., Shadow Power California LLC, and Sunrun Inc. |
| **Date:** | November 18, 2026 |

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## Summary/Recommendation

This Staff Report requests that the Board of Directors authorize the Chief Executive Officer ("CEO") to finalize negotiations and execute Distributed Energy Resource Agreements with OEL US Inc., Shadow Power California LLC, and Sunrun Inc. for the energy products described herein. The proposed agreements are necessary to achieve customer choice and develop a dependable battery component to Ava's virtual power plant (VPP) at scale.

## Budget Authorization and Financial Impact

On November 19, 2025, the Board authorized the use of previous budget allocations for a new solar photovoltaic and battery system incentive program, called SmartHome Battery Program, and authorized Staff to adjust SmartHome Battery Program design based on market and customer feedback with the approval of the CEO.

Staff proposes to execute Distributed Energy Resource Agreements ("DERAs") with three aggregator counterparties, collectively committing approximately $7.3 million of the SmartHome Battery Program budget:

- Kinergy (contracting entity OEL US Inc.)

- Shadow Power (contracting entity Shadow Power California LLC)
- Sunrun

Final agreements may be executed with a subset of the three counterparties. The Chief Executive Officer may allocate budget and capacity to each counterparty based on final negotiated terms and each counterparty's capabilities.

## Analysis and Context

The program goal of the SmartHome Battery Program is to support community resilience by growing a dependable battery component to our community Virtual Power Plant (VPP) at scale. The SmartHome Battery Program deploys $11.25 million in upfront and ongoing incentives to support community resilience, including up to 19.5 MW of dependable batteries to Ava's community VPP. An additional $3.75 million is allocated to community resilience hubs, an initiative outside the scope of this Staff Report.

The SmartHome Battery Program design provides customers multiple ways to participate:

1. Self-financed systems allow customers to benefit from lower total costs and full battery ownership.
2. Leased systems allow customers to benefit from lower upfront costs and third-party financing.

Working with aggregators provides a pathway for customers with leased systems to participate in the SmartHome Battery Program. To that end, Staff has structured an agreement similar to a wholesale Power Purchase Agreement called a Distributed Energy Agreement (DERA) to procure energy products from aggregations of residential storage resources sited in Ava's service area. The storage resources are required to be charged by paired solar.

## Aggregator Pathway

Ava can achieve the following outcomes for the SmartHome Battery Program and the VPP by working with aggregators:

- Customer choice: About 70% of residential customers in Ava's territory that install solar PV and battery systems finance them through a third-party owner, or "aggregator."[1] Ava has designed the SmartHome Battery Program so customers who lease or finance their solar and battery systems through third-party owners can still participate, through their aggregator.
- Scale: Since the majority of residential customers in Ava's territory that install solar PV and battery systems work with aggregators, Ava can reach scale more quickly by engaging with aggregators.
- Dependable battery component to Ava's VPP: Aggregators have operational experience delivering dispatch services and participating in virtual power plants, and the DERA incentivizes reliable performance. Staff has structured a performance-based monthly payment component along with damages for performance shortfalls.

[1] Not all third-party owners operate as aggregators. For the purposes of the SmartHome Battery Program, any reference to third-party owners is assumed to be an aggregator.

- Learnings: Ava can learn from aggregators, who have operational experience delivering dispatch services and participating in virtual power plants; Ava will also have direct learnings through our own dispatch of the aggregated resources in this SmartHome Battery Program.

## Aggregator Selection

Staff evaluated aggregators based on DERA term markups and the following qualitative criteria:

- Experience and qualifications
- Go to market approach and viability
- Learning potential
- Original equipment manufacturer (OEM) diversity
- Policy engagement

Through inclusion of these criteria, Ava seeks to ensure that aggregators contribute to the outcomes identified above.

## Related Board items:

February 2026: SmartHome Battery Program Launch Update (Informational Item)
November 2025: SmartHome Battery and Resilient Hub Budget Approval and Program Design
January 2024: Fiscal Year Budget Surplus Allocation
April 2024: Solar and Storage Program Informational Item
May 2024: Approval of Lunar Contract
September 2024: Approval of ICF Contract for Program Manual and Installer Training

## Attachments

A. Resolution
B. DERA Form Agreement
C. Presentation

**RESOLUTION NO. R-2026-XX**

**A RESOLUTION OF THE BOARD OF DIRECTORS**

**OF AVA COMMUNITY ENERGY AUTHORITY AUTHORIZING THE CHIEF EXECUTIVE OFFICER TO NEGOTIATE AND EXECUTE DISTRIBUTED ENERGY RESOURCE AGREEMENTS WITH OEL US INC., SHADOW POWER CALIFORNIA LLC, AND SUNRUN INC.**

**WHEREAS** Ava Community Energy Authority ("Ava") was formed as a community choice aggregation agency ("CCA") on December 1, 2016, under the Joint Exercise of Powers Act, California Government Code sections 6500 *et seq.,* among the County of Alameda, and the Cities of Albany, Berkeley, Dublin, Emeryville, Fremont, Hayward, Livermore, Piedmont, Oakland, San Leandro, and Union City to study, promote, develop, conduct, operate, and manage energy-related climate change programs in all of the member jurisdictions. The cities of Newark and Pleasanton, located in Alameda County, along with the City of Tracy, located in San Joaquin County, were added as members of Ava and parties to the Joint Powers Agreement ("JPA") in March of 2020. The city of Stockton was added as a member to Ava in September of 2022. The city of Lathrop was added as a member to Ava in October of 2023. San Joaquin County was added as a member to Ava in July 2024. On October 24, 2023, Ava legally adopted the name Ava Community Energy Authority, where it had previously used the name East Bay Community Energy Authority since its inception.

**WHEREAS** Ava's Board of Directors authorized the use of previous budget allocations to a new solar photovoltaic and battery system incentive program, called SmartHome Battery Program ("Program"), and authorized Staff to adjust Program design based on Program uptake market and customer feedback with the approval of the Chief Executive Officer;

**WHEREAS** Staff determined that engaging with aggregators can help the Program achieve customer choice, scale, a dependable battery component to Ava's virtual power plant, and additional knowledge;

**WHEREAS** Staff solicited market feedback to develop a Pro Forma Distributed Energy Resource Agreement ("DERA");

**WHEREAS** The DERA will allow Ava to procure dispatch services from an aggregation of residential behind-the-meter storage resources sited in Ava's service area;

**WHEREAS** Staff has negotiated DERAs with Kinergy (contracting entity OEL US Inc.), Shadow Power (contracting entity Shadow Power California LLC), and Sunrun (contracting entity Sunrun Inc.).

**NOW, THEREFORE, THE BOARD OF DIRECTORS OF AVA COMMUNITY ENERGY AUTHORITY DOES HEREBY RESOLVE AS FOLLOWS:**

Section 1. The Chief Executive Officer, in consultation with staff and legal counsel, is hereby authorized to negotiate and execute DERAs with OEL US Inc., Shadow Power California LLC, and Sunrun Inc., or their subsidiaries or related parties, that collectively represent approximately $7.3 million of SmartHome Battery Program incentive budget substantially in the form attached to the Staff Report associated with this Resolution. The Chief Executive Officer may allocate budget and capacity to each counterparty based on final negotiated terms and each counterparty's capabilities.

ADOPTED AND APPROVED this 18th day of November, 2026.

_____

Betsy Andersen, Chair

ATTEST:

_____

Adrian Bankhead, Clerk of the Board

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# DISTRIBUTED ENERGY RESOURCE AGREEMENT

## COVER SHEET

**Seller**: [SELLER LEGAL NAME], a [SELLER FORMATION STATE] [SELLER ENTITY TYPE]

**Buyer**: Ava Community Energy Authority, a California joint powers authority

**Execution Date**: [____], 2026

**Description of Portfolio**: An aggregation of behind-the-meter residential Generating Projects and Storage Projects, located in California's Alameda and San Joaquin Counties, as further described under Appendix I.

**Contract Price**: [ ] / kW-month

**Product**: Event-Based Dispatch

**Annual Contract Capacity**:

| Year | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 |
|---|---|---|---|---|---|---|---|---|---|---|
| Annual Contract Capacity (kW) | [ ] | [ ] | [ ] | [ ] | [ ] | [ ] | [ ] | [ ] | [ ] | [ ] |

**Existing Capacity and New Capacity**:

| Customer Type | Existing Capacity (kW) | New Capacity (kW) |
|---|---|---|
| Market Rate | [ ] | [ ] |
| CARE/FERA | [ ] | [ ] |

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**Expected Initial Delivery Date**: [ ]

**Guaranteed Initial Delivery Date**: [ ]

**Delivery Term**: [ ] Contract Years

# DISTRIBUTED ENERGY RESOURCE AGREEMENT

This Distributed Energy Resource Agreement (this "**Agreement**") is made by and between the buyer ("**Buyer**") and the seller ("**Seller**") as of the execution date (the "**Execution Date**"), in each case as set forth on the cover sheet ("**Cover Sheet**") to this Agreement. Seller and Buyer are referred to each individually as a "**Party**" and collectively as the "**Parties**."

## RECITALS

WHEREAS, Seller intends to develop, design, permit, construct, own, and operate the Projects in the Portfolio; and

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

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

## Article 1: DEFINITIONS

1.1 **Contract Definitions**. Capitalized terms used in this Agreement have the following meanings, unless otherwise specified:

"**Affiliate**" of a Person means any other Person that (a) directly or indirectly controls the specified Person; (b) is controlled by or is under direct or indirect common control with the specified Person; or (c) is an officer, director, employee, representative or agent of the Person. For the purposes of this definition, "control", when used with respect to any specified Person, means the power to direct the management or policies of the specified Person, directly or indirectly, through one or more intermediaries.

"**Agreement**" has the meaning set forth in the preamble.

"**Ancillary Services**" has the meaning set forth in the CAISO Tariff.

"**Annual Contract Capacity**" means the projected annual Contract Capacity set forth on the Cover Sheet.

"**Applicable CA Regulations**" means the CAISO's Resource Adequacy Compliance Materials, as may be amended, supplemented or replaced (in whole or in part) from time to time, and all applicable CPUC or CEC regulations and published guidance.

"**API**" means application programming interface.

"**Authorized Person**" means Seller's employees, contractors, agents, auditors, and business partners who have a need to know or otherwise access Customer Information to enable each of Seller and Buyer to perform its respective obligations under this Agreement and who are bound in writing by confidentiality and other obligations sufficient to protect Customer Information in accordance with the terms and conditions of this Agreement.

"**Balancing Authority**" has the meaning set forth in the CAISO Tariff.

"**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 90 days, (c) makes an assignment or any general arrangement for the benefit of creditors, (d) otherwise becomes bankrupt or insolvent (however evidenced), (e) has a liquidator, administrator, receiver, trustee, conservator or similar official appointed with respect to it or any substantial portion of its property or assets, or (f) is generally unable to pay its debts as they fall due.

"**Business Day**" means any day except a Saturday, Sunday, or a Federal Reserve Bank holiday in California.

"**Buyer**" has the meaning set forth in the preamble to this Agreement.

"**Buyer Group**" has the meaning set forth in Section 15.1.

"**CAISO**" means the California Independent System Operator Corporation or any successor entity performing similar functions.

"**CAISO Grid**" means the system of transmission lines and associated facilities of the Participating Transmission Owners that have been placed under the CAISO's operational control.

"**CAISO Tariff**" means the CAISO Fifth Replacement FERC Electric Tariff and protocol provisions, including any CAISO-published procedures or business practice manuals, as they may be amended, supplemented or replaced (in whole or in part) from time to time.

"**CARB**" means the California Air Resources Board or any successor entity performing similar functions.

"**CARE/FERA Customer**" means a Customer who is enrolled in either CARE (California Alternate Rates for Energy) or FERA (Family Electric Rate Assistance).

"**CCPA**" means the California Consumer Privacy Act (Cal. Civ. Code §1798.100 et seq.), as amended by the California Privacy Rights Act (CPRA).

"**CEC**" means the California Energy Commission or any successor agency performing similar statutory functions.

"**CEC Load Forecast Deadline**" means, with respect to each year of the Delivery Term, the deadline for the "LSEs file [Applicable Year] Year-Ahead Load Forecast" milestone in the then-most recent RA Guide.

"**Charging Energy**" means the amount of Energy charged from the Generating Project and stored by the Storage Project.

"**Claim**" has the meaning set forth in Section 15.1(a).

"**Compliance Obligations**" means the Resource Adequacy Requirements, Local Resource Adequacy Requirements, Flexible Resource Adequacy Requirements, and any other resource adequacy or capacity procurement requirements, or associated reliability requirements, imposed on Load Serving Entities by the CPUC pursuant to the CPUC Decisions, by the CAISO, by the WECC, by NERC, or by any other Governmental Authority having jurisdiction.

"**Compliance Showings**" means the total combination of (a) through (c) below that a Load Serving Entity is required to make to the CPUC pursuant to the CPUC Decisions, or to any Governmental Authority having jurisdiction: (a) Local Resource Adequacy Requirements compliance or advisory showings (or similar or successor showings), (b) Resource Adequacy Requirements compliance or advisory showings (or similar or successor showings), and (c) Flexible Resource Adequacy Requirements compliance or advisory showings (or similar or successor showings).

"**Conditions Precedent**" has the meaning set forth in Section 4.2.

"**Confidential Information**" has the meaning set forth in Section 20.1.

"**Confirmation Notice**" means a Downward Change Confirmation Notice or an Upward Change Confirmation Notice, as applicable.

"**Contract Capacity**" means the amount of Product committed on a monthly basis during the Delivery Term by Seller to Buyer, as measured in kW and derived exclusively from the Projects, for the duration of each Load Modification or Event-Based Dispatch event, as applicable.

"**Contract Price**" has the meaning set forth in Section 5.2(c).

"**Contract Year**" means a period of 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 Initial Delivery Date and the last Contract Year shall end at midnight at the end of the day prior to the [__]th anniversary of the Initial Delivery Date.

"**Contractor**" means the EPC Contractor and its subcontractors, as well as Seller or Seller's Affiliates if any such entities are developing, constructing, operating or maintaining the Project during the Term, and any entity or person under contract with Seller or Seller's Affiliates for the purpose of developing, constructing, operating or maintaining the Project during the Term.

"**Controller**" means the entity that determines the purposes and means of processing PII.

"**Costs**" means, with respect to the Non-Defaulting Party, brokerage fees, commissions and other similar third party transaction costs and expenses reasonably incurred by such Party either in terminating any arrangement pursuant to which it has hedged its obligations or entering into new arrangements that replace this Agreement; and all reasonable attorneys' fees and expenses incurred by the Non-Defaulting Party in connection with the termination of this Agreement.

"**Cover Sheet**" has the meaning set forth in the preamble to this Agreement.

"**CPUC**" means the California Public Utilities Commission or any successor entity performing similar functions.

"**CPUC Decisions**" means CPUC Decisions ("D") D.04-10-035, D.05-10-042, D.06-02-007, D.06-04-040, D.06-06-064, D.06-07-031, D.06-12-037, D.07-06-029, D.08-06-031, D.09-06-028, D.10-06-036, D.11-06-022, D.12-06-025, D.13-06-024, D.14-06-050, D.15-06-063, D.16-06-045, D.17-06-027, D.18-06-030, D.18-06-031, D.19-06-026, D.20-06-002, D.20-06-028, D.20-06-031, D.20-12-006, D.21-06-029, D.21-07-014, D.22-03-034, D.22-06-050, D.23-04-010, D.23-06-029, D.24-06-004, D.24-12-003, D.25-06-048, Resolution Nos. E-4017, E-4195, and E-4907 and any other existing or subsequent ruling or decision, or any other resource adequacy Law, however described, as such rulings, decisions, or resource adequacy Laws may be amended or modified from time to time throughout the Term.

"**Credit Rating**" means, with respect to any entity, the rating then assigned to such entity's unsecured, senior long-term debt obligations (not supported by third party credit enhancements) or if such entity does not have a rating for its senior unsecured long-term debt, then the rating then assigned to such entity as an issuer rating by S&P or Moody's. If ratings by S&P and Moody's are not equivalent, the lower rating shall apply.

"**Customer**" means a Person or account that is a residential, retail electric customer of Buyer.

"**Customer Agreement**" means Seller's agreement with a Customer for the installation and operation of a Project as part of the Portfolio.

"**Customer Information**" means Customer-related information that is subject to CPUC rules, regulations or orders or other applicable Laws regarding customer privacy, including California Public Utilities Code Section 8380 et seq.

"**Customer's Performance Data**" has the meaning set forth in Section 21.1.

"**Damage Payment**" means the dollar amount equal to the total amount required to be posted by Seller as Development Security pursuant to Section 10.1.

"**Defaulting Party**" means the Party that is subject to an Event of Default.

"**Delay Notice**" has the meaning set forth in Section 4.1(b).

"**Delivered Quantity**" or "**DQ**" has the meaning set forth in Section 5.2(c)(ii)(C).

"**Delivery Term**" has the meaning set forth in Section 2.2(b).

"**Demand Response Provider**" has the meaning set forth in the CAISO Tariff.

"**Demand Response Services**" has the meaning set forth in the CAISO Tariff.

"**DERMS**" has the meaning set forth in Section 4.2(e).

"**DERMS Integration**" means the following criteria have been met:

(a) **Access and enrollment workflows setup**: Enrollment and un-enrollment workflows established, program eligibility verification mechanism enabled, and authorization configured via per-device Open Authorization or group-level access tokens.

(b) **Access to site details**: Unique site ID, electricity tariff plan, location coordinates, and associated devices mapped.

(c) **Access to device specifications**: Serial number, device type, provisioning stage, capacity (kWh), charge/discharge AC power limits, min/max state of charge, manufacturer/model, and PTO date configured.

(d) **Data pipeline setup**: Telemetry set up via stream, "PUSH API," or "PULL API" at 15-minute or 5-minute interval resolution per device.

(e) **Access to core telemetry metrics**: Solar PV generation, battery charge/discharge and state of charge percent, grid import/export, and total consumption/load metrics provided (or a defined calculation method if load is missing). AC and/or DC metrics according to system coupling.

(f) **Command execution setup**: Method active to dispatch charge/discharge commands specifying target power and state-of-charge, supporting discharge to grid, solar-only charging, and core modes (idle, charge, discharge, self-consumption, full solar charge, full load discharge).

(g) **Status & default modes access**: Method implemented to retrieve command status (received, sent-to-device, completed, error), and the default operational mode.

(h) **Forecasts access**: If only group-level commands are supported, pre- and post-group power forecasts are accessible, both pre- and post- command sending.

(i) **Sandbox phase passed**: Initial API and data connections verified using virtual or sandbox devices.

(j) **Field validation passed**: Telemetry and command dispatch tested on lab or test devices.

(k) **Canary testing passed**: Production groups identified and validated through initial use cases prior to full rollout.

"**DERMS-Provided Data**" means the data fields, as specified in Appendix XV, that (i) derive from [each individual Project's revenue-grade meters or other Project-specific source,] and (ii) Seller provides to Buyer's DERMS through an API connection.

"**Designated DRP/DERP**" has the meaning set forth in Section 5.4(e).

"**Development Security**" means (i) cash or (ii) a Letter of Credit in an amount equal to $30 per kilowatt *multiplied by* the highest Maximum Contract Capacity in the first Contract Year.

"**Disclosing Party**" has the meaning set forth in Section 20.2.

"**Distributed Energy Resource Provider**" has the meaning set forth in the CAISO Tariff.

"**Downward Change Confirmation Notice**" has the meaning set forth in Section 6.7(a)(i).

"**Downward Change Notice**" has the meaning set forth in Section 6.7(a)(i).

"**DRRS**" or "**Demand Response Registration System**" means the application developed by the CAISO to enable wholesale market participation by end-use customers under applicable participation models determined by the CAISO.

"**DSGS Program**" has the meaning set forth in Section 5.4(e).

"**Early Termination Date**" has the meaning set forth in Section 7.2(a).

"**EBD Portfolio Output**" has the meaning set forth in Section 5.2(c)(ii)(C).

"**Effective Hourly Shortfall DQ**" means the effective Hourly Delivered Quantity for purposes of calculating the Shortfall Amount, as calculated under Section 5.3(b)(ii).

"**Electric System Upgrades**" means any upgrades, including, Network Upgrades, Distribution Upgrades, or Interconnection Facilities (as these terms are defined in the CAISO Tariff), that are determined to be necessary by the CAISO, Participating TO, or Utility Distribution Company as applicable, to physically and electrically interconnect the Project to the Utility Distribution Company's/Participating TO's electric system for delivery of Energy from the Project such that the Project can provide Product at all times during the Delivery Term.

"**Energy**" means single- or three-phase, 60-cycle alternating current electric energy, measured in kWhs.

"**Environmental Costs**" means costs incurred in connection with acquiring and maintaining all environmental permits and licenses for the Product, and the Product's and Project's compliance with all applicable environmental Laws, rules and regulations, including capital costs for pollution mitigation or installation of emissions control equipment required to permit or license the Product or Project, all operating and maintenance costs for operation of pollution mitigation or control equipment, costs of permit maintenance fees and emission fees as applicable, and the costs of all emission reduction credits, marketable emission trading credits, and any costs related to greenhouse gas emissions, required by any applicable environmental Laws, rules, regulations, and permits to operate, and costs associated with the disposal and clean-up of Hazardous Substances introduced to a Site or the Project.

"**EPC Contract**" means the Seller's engineering, procurement and construction contract with the EPC Contractor.

"**EPC Contractor**" means Seller's engineering, procurement and construction contractor or such Person performing those functions counterparty to the EPC Contract.

"**ESS**" means energy storage system.

"**Event of Default**" means a Seller's Event of Default or a Party's Event of Default.

"**Event-Based Dispatch**" means the reduction of Buyer's aggregate demand for each hour of an event.

"**Excused Event**" means (a) a grid outage resulting from a public safety power shutoff event declared by the Utility Distribution Company (other than as a result of a Force Majeure event); (b) a grid outage resulting from the Utility Distribution Company (other than as a result of a Force Majeure event); (c) an extreme weather alert or warning issued by the National Weather Service; or (d) Force Majeure events.

"**Excused Event Failure**" has the meaning set forth in Section 8.1(d).

"**Execution Date**" has the meaning set forth in the preamble.

"**Exigent Circumstance**" means actual or imminent harm to life or safety, public health, third-party owned property, including a Site, or the environment due to or arising from the Project or portion thereof.

"**Existing Capacity**" means the amount of capacity, as set forth on the Cover Sheet, that is the aggregate Nominated Capacity from battery storage projects installed and operating at Sites prior to Execution Date.

"**Expected Initial Delivery Date**" has the meaning set forth on the Cover Sheet.

"**FERC**" means the Federal Energy Regulatory Commission or any successor entity performing similar functions.

"**Flexible RA Attributes**" means any and all flexible resource adequacy attributes, as may be identified at any time during the Delivery Term by the CPUC, CAISO or other Governmental Authority having jurisdiction that can be counted toward Flexible Resource Adequacy Requirements, exclusive of any RA Attributes, or Local RA Attributes.

"**Flexible Resource Adequacy Requirements**" means the flexible resource adequacy requirements established for Load Serving Entities by the CPUC pursuant to the CPUC Decisions, or by any other Governmental Authority having jurisdiction.

"**Force Majeure**" means any event or circumstance which wholly or partly prevents or delays the performance of any material obligation arising under the Agreement, but only if and to the extent (x) such event is not within the reasonable control, directly or indirectly, of the Party seeking to have its performance obligation excused thereby, (y) the Party seeking to have its performance obligation excused thereby has taken all reasonable precautions and measures in order to prevent or avoid such event or mitigate the effect of such event on such Party's ability to perform its obligations under the Agreement and which by the exercise of due diligence such Party could not reasonably have been expected to avoid and which by the exercise of due diligence it has been unable to overcome, and (z) such event is not the direct or indirect result of the negligence or the failure of, or caused by, the Party seeking to have its performance obligations excused thereby. Additionally:

(a) Force Majeure may include:

(i) acts of God, including landslide, lightning, earthquake, storm, hurricane, flood, drought, tornado, or other natural disasters and weather-related events affecting an entire region which caused failure of performance;

(ii) sabotage, riot, acts of terrorism, war and acts of public enemy; or

(iii) restraint by court order or other Governmental Authority.

(b) Force Majeure does not include:

(i) Covid-19 related restrictions imposed by Governmental Authorities as currently in place as of the Execution Date;

(ii) a failure of performance of any third party, including Participating TO,

Utility Distribution Company, or any other party providing electric interconnection, distribution or transmission service;

(iii) breakage or malfunction of equipment (except to the extent that such failure was caused by an event that would otherwise satisfy the definition of a Force Majeure event as defined above);

(iv) a strike, work stoppage or labor dispute limited only to any one or more of Seller, Seller's Affiliates, the EPC Contractor or subcontractors thereof or any other third party employed by Seller to work on the Project;

(v) Seller's ability to sell the Product at a price greater than the price set forth in this Agreement;

(vi) Seller's inability to obtain permits or approvals of any type for the construction, operation or maintenance of the Project, unless caused solely by an event of Force Majeure of the specific type described in any of subsections (a)(i) through (a)(iv) above;

(vii) Seller's inability to complete interconnection by the Expected Initial Delivery Date, unless such delay is caused solely by an event of Force Majeure of the specific type described in any of subsections (a)(i) through (a)(iv) above;

(viii) Seller's inability to obtain sufficient Charging Energy, fuel, power or materials to operate the Project (including as a result of any public safety power shutoff), except if Seller's inability to obtain sufficient Charging Energy, fuel, power or materials is caused solely by an event of Force Majeure of the specific type described in any of subsections (a)(i) through (a)(iv) above;

(ix) Seller's failure to obtain additional funds, including funds authorized by a state or the federal government or agencies thereof, to supplement the payments made by Buyer pursuant to this Agreement;

(x) Seller's failure to obtain or retain Customers;

(xi) Seller's or seller's agents' inability to install the Project at the Site (whether or not due to Force Majeure affecting a Site); or

(xii) any failure of a Customer to perform (other than as a result of an event of Force Majeure), including the failure of Customer's internet connection and attendant coordination with the DERMS.

"**Gains**" means, with respect to any Party, an amount equal to the present value of the economic benefit to it, if any (exclusive of Costs), resulting from the termination of this Agreement. Factors used in determining the economic benefit to a Party may include, without limitation, reference to information supplied by one or more third parties, which shall exclude Affiliates of the Non-Defaulting Party, including without limitation, quotations (either firm or indicative) of relevant rates, prices, yields, yield curves, volatilities, spreads or other relevant market data in the relevant markets, comparable transactions, forward

price curves based on economic analysis of the relevant markets, settlement prices for comparable transactions at liquid trading hubs, all of which should be calculated for the remaining Delivery Term to determine the value of the Product.

"**GDPR**" means Regulation (EU) 2016/679, the European Union General Data Protection Regulation.

"**Generally Accepted Accounting Principles**" means the standards for accounting and preparation of financial statements established by the Federal Accounting Standards Advisory Board (or its successor agency) or any successor standards adopted pursuant to relevant SEC rule.

"**Generating Project**" means a behind-the-meter solar photovoltaic project co-located with a Storage Project.

"**Governmental Approval**" means all authorizations, consents, approvals, waivers, exceptions, variances, filings, permits, orders, licenses, exemptions, notices to and declarations of or with any Governmental Authority and shall include those siting and operating permits and licenses, and any of the foregoing under any applicable environmental Law, that are required for the development, use and operation of the Project, including any approvals required under the California Environmental Quality Act.

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

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

"**Hourly Delivered Quantity**" has the meaning set forth in Section 5.2(c)(ii).

"**Hourly Shortfall Amount**" means the Shortfall existing during the applicable month-hour or event hour, as calculated under Section 5.3(b)(ii)(A).

"**IDD Cure Period**" has the meaning set forth in Section 4.1(d).

"**IDD Delay Damages**" means liquidated damages in an amount equal to (a) the total Development Security amount required hereunder, divided by (b) 60.

"**Impacted Capacity**" means any Hourly Delivered Quantity that Seller has demonstrated, as provided under Section 5.3(a), is prevented from being delivered by Seller to Buyer as the result of an Excused Event.

"**Indemnifiable Loss(es)**" has the meaning set forth in Section 15.1(a).

"**Initial Delivery Date**" or "**IDD**" has the meaning set forth in Section 2.2(b).

"**Initial Portfolio**" means the Projects, Customers, and corresponding Sites assembled by Seller for purposes of delivering the Product to Buyer under this Agreement, as detailed under the Initial Portfolio List.

"**Initial Portfolio List**" has the meaning set forth in Section 4.2.

"**Installation Charges**" means the installation prices charged by Seller to Customers.

"**Interconnection Agreement**" means the agreement(s) and associated documents (or any successor agreement and associated documentation approved by FERC or the CPUC) by and among Seller or a Customer and, as applicable, the Utility Distribution Company, the Participating Transmission Owner, and the CAISO, governing the terms and conditions of the interconnection of the Projects with the Utility Distribution Company's or CAISO's grid, including any description of the plan for interconnecting the Projects to the applicable grid.

"**Interest Rate**" has the meaning set forth in Section 9.2.

"**Intra-Day Event-Based Dispatch**" means the reduction of Buyer's aggregate demand during an event for which notification is provided the same day as the event itself.

"**Joint Powers Agreement**" means that certain Joint Powers Agreement of Buyer, dated as of December 1, 2016, as amended from time to time, by and among the County of Alameda, the City of Albany, the City of Berkeley, the City of Dublin, the City of Emeryville, the City of Fremont, the City of Hayward, the City of Livermore, the City of Oakland, the City of Piedmont, the City of San Leandro, and the City of Union City.

"**kW**" means kilowatts in alternating current, unless expressly stated in terms of direct current.

"**kWh**" means kilowatt-hour measured in alternating current, unless expressly stated in terms of direct current.

"**Law**" means any statute, law, treaty, rule, regulation, ordinance, code, Permit, enactment, injunction, order, writ, decision, authorization, judgment, decree or other legal or regulatory determination or restriction by a court or Governmental Authority of competent jurisdiction, including any of the foregoing that are enacted, amended, or issued after the Execution Date, and which become effective during the Term; or any binding interpretation of the foregoing.

"**Lender**" means, collectively, any Person (i) providing senior or subordinated construction, interim, back leverage or long-term debt, equity or tax equity financing or refinancing for or in connection with the development, construction, purchase, installation or operation of the Project, whether that financing or refinancing takes the form of private debt (including back-leverage debt), equity (including tax equity), public debt or any other form (including financing or refinancing provided to a member or other direct or indirect owner of Seller), including any equity or tax equity investor directly or indirectly providing financing or refinancing for the Project or purchasing equity ownership interests of Seller or its Affiliates for purposes of providing financing or refinancing for the Project, 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 Project.

"**Letter(s) of Credit**" means one or more irrevocable, standby letters of credit issued by a U.S. commercial bank, or a foreign bank with a U.S. branch, with such bank (a) having a Credit Rating of at least A- with an outlook designation of "stable" from S&P or A3 with an outlook designation of "stable" from Moody's and having assets of at least $10,000,000,000, in a form substantially similar to the letter of credit set forth in Appendix V or (b) being reasonably acceptable to Buyer.

"**LM Portfolio Output**" has the meaning set forth in Section 5.2(c)(ii)(D).

"**Load Modification**" means the reduction of Buyer's aggregate peak demand during a 2-hour period (including any necessary reductions to Buyer's aggregate demand forecast resulting from such demand reduction) in accordance with the Load Modification Schedule and the Applicable CA Regulations.

"**Load Modification Schedule**" means, for Load Modification, a one-year plan submitted by Buyer to Seller by Notice for the upcoming calendar year of the Delivery Term, specifying on a month-by-month basis the hours of day during which the Contract Capacity shall be delivered from the Project and shall be substantially in the form of Appendix XIII.

"**Load Serving Entity**" has the meaning set forth in the CAISO Tariff.

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

"**Local RA Attributes**" means any and all resource adequacy attributes or other locational attributes related to a Local Capacity Area, as may be identified at any time during the Delivery Term by the CPUC, CAISO or other Governmental Authority having jurisdiction, associated with a physical location or point of electrical interconnection within the CAISO's Balancing Authority, that can be counted toward a Local Resource Adequacy Requirements.

"**Local Resource Adequacy Requirements**" means the local resource adequacy requirements established for Load Serving Entities by the CPUC pursuant to CPUC Decisions, or by any other Governmental Authority having jurisdiction. Local Resource Adequacy Requirements may also be known as local area reliability, local resource adequacy, local resource adequacy procurement requirements, or local capacity requirement in other regulatory proceedings or legislative actions.

"**Losses**" means, with respect to any Party, an amount equal to the present value of the economic loss to it, if any (exclusive of Costs), resulting from termination of this Agreement. Factors used in determining economic loss to a Party may include, without limitation, reference to information supplied by one or more third parties, which shall exclude Affiliates of the Non- Defaulting Party, including without limitation, quotations (either firm or indicative) of relevant rates, prices, yields, yield curves, volatilities, spreads or other relevant market data in the relevant markets, comparable transactions, forward price curves based on economic analysis of the relevant markets, settlement prices for comparable transactions at liquid trading hubs, all of which should be calculated for the remaining Delivery Term to determine the value of the Product. If the Non- Defaulting Party is the Seller, then "Losses" shall exclude any loss of federal or state tax credits, grants, or benefits related to the Project or generation therefrom or any costs or fees related to the Site or Project.

"**Market Rate Customer**" means a Customer who is not enrolled in CARE (California Alternate

Rates for Energy) or FERA (Family Electric Rate Assistance).

"**Marketing Requirements**" means, with respect to Seller's marketing of the Program to potential customers or Customers or any third party, (i) Seller's program manager who runs the DERA program has attended a training session conducted by Buyer, (ii) Seller will ensure that Seller's sales and installation staff and the sales and installation staff of Seller's installation partners have been trained by Seller and follow Buyer's marketing protocols, (iii) Seller has conducted internal training for sales staff working in Buyer's Service Territory, (iv) with respect solely to Customers associated with New Capacity, Seller and Seller's installation partners have deposited at such Customer's residence Program-specific marketing materials provided by Ava, (v) Buyer has provided its prior, written approval of all marketing materials or documentation, electronic mailings or written materials of any type that reference Ava or the SmartHome Battery program before such materials are published publicly or shared with potential customers or Customers or any third parties, and (vi) any Upfront Incentive payment made by Seller to Customers will attribute the Upfront Incentive to the Ava Community Energy SmartHome Battery Program.

"**Maximum Contract Capacity**" means the monthly amount of capacity from the Portfolio, as provided under Appendix VII, which shall be no more than 110% of the corresponding Minimum Contract Capacity.

"**Meter**" means each individual Project's revenue-grade meter installed on the individual Project Site.

"**Minimum Contract Capacity**" means the monthly amount of capacity from the Portfolio, as provided under Appendix VII.

"**Monthly Payment**" has the meaning set forth in Section 5.2(c)(iii).

**"Monthly Contract Capacity**" means each Contract Year's monthly profile of the Minimum Contract Capacity and the Maximum Contract Capacity delivered by Seller to Buyer, an example scope of which is set forth under Appendix VII.

"**Moody's**" means Moody's Investors Service, Inc., or its successor.

"**NERC**" means the North American Electric Reliability Corporation or any successor entity performing similar functions.

"**New Capacity**" means amount of capacity, as set forth on the Cover Sheet, that is the aggregate Nominated Capacity from battery storage projects installed on or following Execution Date.

"**Newly Enrolled Customers**" has the meaning set forth in Section 5.4(b).

"**Nominated Capacity**" means capacity, expressed in kW, that is nominated from a Storage Project to participate in the Program (e.g., 40%, 60% or 80% of a Project's nameplate capacity) and can be delivered across a two-hour duration.

"**Non-Defaulting Party**" has the meaning set forth in Section 7.2(a).

"**Notice**" unless otherwise specified in this Agreement, means written communications by a Party to be delivered by hand delivery, United States mail, overnight courier service, or electronic messaging (e-

mail).

"**Notice of Claim**" has the meaning set forth in Section 15.2(a).

"**Notify**" means to provide a Notice.

"**Operational Characteristics**" means the Product-specific operational characteristics set forth under Appendix II(A) and the Product-specific operational characteristics set forth under Appendix II(B).

"**Other Capacity Attributes**" means, exclusive of RA Attributes, Local RA Attributes, and Flexible RA Attributes, any (a) current or future capacity characteristics or attributes, including the ability to generate or charge at given capacity levels, the ability to ramp up or down at a given rate, flexibility or dispatchability attributes, and locational attributes, as may be identified at any time during the Delivery Term by any applicable Law, or voluntary or mandatory program of any Governmental Authority or other Person, (b) certificate, tag, or credit, intended to commoditize or otherwise attribute value resulting from or associated with the characteristics set forth in subsection (a) of this definition, and (c) any accounting construct so that the characteristics or values set forth in subsections (a) or (b) hereof may be counted toward any Compliance Obligations.

"**Participating Transmission Owner**" or "**Participating TO**" means an entity that (a) owns, operates, and maintains transmission lines and associated facilities or has entitlements to use certain transmission lines and associated facilities and (b) has transferred to the CAISO operational control of such facilities or entitlements to be made part of the CAISO Grid.

"**Party**" or "**Parties**" has the meaning set forth in the preamble of this Agreement.

"**Party's Event of Default**" has the meaning set forth in Section 7.1(b).

"**Performance Assurance**" means collateral provided by Seller to Buyer to secure Seller's obligations under this Agreement and includes Development Security and Performance Security.

"**Performance Security**" means, for the applicable Contract Year, (i) cash or (ii) a Letter of Credit in an amount equal to the highest Maximum Contract Capacity for the current year and all remaining Contract Years *multiplied by* the Performance Security Variable for such Contract Year.

"**Performance Security Variable**" means, (a) $100 per kilowatt for the first Contract Year, (b) $80 per kilowatt for the second Contract Year, (c) $75 per kilowatt for the third Contract Year, and (d) $60 per kilowatt for the fourth Contract Year and any subsequent Contract Year.

"**Permit**" means any waiver, exemption, variance, franchise, permit, authorization, consent, ruling, certification, license or similar order of or from, or filing or registration with, or notice to, any Governmental Authority that authorizes, approves, limits or imposes conditions upon a specified activity.

"**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.

"**PII**" or "**Personally Identifiable Information**" means information that identifies, relates to, describes, or could reasonably be linked to an identifiable natural person.

"**Portfolio**" means the Projects, Customers, and corresponding Sites assembled by Seller for purposes of delivering the Product to Buyer under this Agreement, as may be updated or amended from time to time in accordance with this Agreement.

"**Portfolio List**" means a list of Customers in Seller's Portfolio in the form and containing the information set forth in Appendix I.

"**Portfolio Modification**" has the meaning set forth in Section 5.4(b).

"**Portfolio Modification CPs**" has the meaning set forth in Section 5.4(c).

"**Portfolio Safety Plan**" means Seller's written plan that includes the Safeguards and plans to comply with the Safety Requirements, as such Safeguards and Safety Requirements are generally outlined in Appendix VI.

"**Processor**" means the entity that processes PII on behalf of a Controller.

"**Product**" means the product specified on the Cover Sheet, as such product may be changed pursuant to a Product Transition implemented under Section 5.2(b), including Event-Based Dispatch, Load Modification, or Intra-Day Event-Based Dispatch, as applicable.

"**Product Transition Election**" means that election with respect to a Product Transition substantially in the form set forth under Appendix XII.

"**Program**" means the solar and storage incentive program named SmartHome Battery operated by Buyer.

"**Progress Report**" means a reasonably detailed progress report including the items set forth in Appendix III.

"**Project**" or "**Projects**" means the Generating Projects and Storage Projects, the characteristics and criteria related to which is more particularly described in Appendices I, II and IX, that are installed at the Sites, which includes all appurtenant facilities, communications and control systems, and equipment, and from which Seller has agreed to provide the Product to Buyer pursuant to this Agreement.

"**Project Eligibility Criteria**" means the criteria for Generating Projects and Storage Projects, respectively, set forth under **Appendix IX** and all other requirements as Buyer may determine from time to time in its reasonable discretion.

"**Proxy Demand Resource**" has the meaning set forth in the CAISO Tariff.

"**Prudent Operating Practice**" means those practices, methods, codes and acts engaged in or approved by a significant portion of the electric power industry and applicable to energy storage facilities during the relevant time period, or any of the practices, methods and acts which, in the exercise of reasonable judgment in light of the facts known at the time a decision is made, that could have been expected to accomplish a desired result at reasonable cost consistent with good business practices, reliability, safety and expedition. Prudent Operating Practices are not intended to be limited to the optimum practices, methods, or acts to the exclusion of others, but rather to those practices, methods and acts generally accepted or approved by a significant portion of the electric power industry in the relevant region, during the relevant

time period, as described in the immediately preceding sentence. Prudent Operating Practices also includes taking reasonable steps to ensure that:

(a) Safeguards are implemented and maintained for the Portfolio and at each Site and are sufficient to address reasonably foreseeable incidents;

(b) equipment, material, and supplies are sufficient and accessible to operate the Portfolio safety and reliably;

(c) operating personnel are trained, equipped, and capable of responsible operation and maintenance of the Portfolio and at each Site, including identifying and responding to System Emergencies, emergencies, or Exigent Circumstances originating from or impacting the Portfolio or Site;

(d) the Portfolio's material components and control systems are designed, manufactured, and configured to meet the standard of durability and safety generally used for electric power or energy storage facilities operating in the relevant region; and

(e) the Portfolio is appropriately designed, operated, maintained, monitored, and tested to ensure it continues to function safely, reliably, and consistent with the intended design specifications, applicable Laws, and Permits, and over the complete range of environmental conditions reasonably expected to occur at each Site.

"**Quarterly Report**" means the report provided by Seller to Buyer within 30 days after each March 31, June 30, September 30, and December 31 following the Initial Delivery Date in the form attached as Appendix X.

"**RA Attributes**" means, any and all resource adequacy attributes, exclusive of any Local RA Attributes, Flexible RA Attributes and Other Capacity Attributes, as may be identified at any time during the Delivery Term by the CPUC, CAISO or other Governmental Authority having jurisdiction, that can be counted toward Resource Adequacy Requirements and Local Resource Adequacy Requirements.

"**RA Guide**" means the Resource Adequacy and Slice of Day Guide issued by the CPUC, as may be updated from time to time.

"**Receiving Party**" has the meaning set forth in Section 20.2.

"**Reduction Payment**" has the meaning set forth in Section 4.1(d)(iv).

"**Reliability Organization**" means an "Electric Reliability Organization" as defined in Section 215(a)(2) of the Federal Power Act or a "regional entity" as defined in Section 215(a)(7) of the Federal Power Act.

"**Reliability Demand Response Resource**" has the meaning set forth in the CAISO Tariff.

"**Remedial Action Plan**" has the meaning set forth in Section 3.5.

"**Remediation Event**" means the occurrence of any of the following with respect to the Portfolio or a Site: (a) an Exigent Circumstance (b) a Serious Incident; (c) a change in the nature, scope, or

requirements of applicable Laws, Permits, codes, standards, or regulations issued by Governmental Authorities which requires modifications to the Safeguards; (d) a material change to the manufacturer's guidelines that requires modification to equipment or the Portfolio's operating procedures; (e) a failure or compromise of an existing Safeguard; (f) Notice by Buyer pursuant to Section 11.2, in its reasonable discretion, that the Portfolio Safety Plan is not consistent with the Safety Requirements; or (g) any actual condition related to the Portfolio or a Site with the potential to adversely impact the safe construction, operation, or maintenance of the Portfolio or a Site.

"**Remediation Period**" means the time period between the first occurrence of the Remediation Event and the resolution of such Remediation Event which period may not exceed a total of 90 days; provided, however, that Seller may request to extend the Remediation Period by up to 90 days if Seller is unable to resolve the Remediation Event within the initial 90 day period despite exercising diligent efforts (and Buyer shall not unreasonably withhold approval of such extension).

"**Requirements**" means Prudent Operating Practices and all applicable requirements of Law, the Utility Distribution Company, the Transmission Provider, Governmental Approvals, the CAISO, CEC, CPUC, CARB, FERC, NERC, and WECC.

"**Resold Product**" has the meaning set forth in Section 5.1(b).

"**Resource Adequacy**" means the procurement obligation of load serving entities, including Buyer, as such obligations are described in CPUC Decisions D.04-10-035 and D.05-10- 042 and subsequent CPUC decisions addressing Resource Adequacy issues, as those obligations may be altered from time to time, and all other capacity procurement obligations established by any other entity, including the CAISO.

"**Resource Adequacy Plan**" has the meaning set forth in the CAISO Tariff.

"**Resource Adequacy Requirement**" means the Resource Adequacy or successor program requirements established by the CPUC, CAISO or any other regional entity, including submission of a Supply Plan or Resource Adequacy Plan.

"**S&P**" means Standard and Poor's Ratings Group, a division of McGraw- Hill, Inc., or its successor.

"**Safeguard**" means any procedures, practices, or actions with respect to the Portfolio, a Site or Work for the purpose of preventing, mitigating, or containing foreseeable accidents, injuries, damage, release of hazardous material or environmental harm.

"**Safety Remediation Plan**" means a written Notice from Seller to Buyer containing information about a Remediation Event, including (a) the date, time and location of first occurrence, (b) the circumstances surrounding cause, (c) impacts, and (d) detailed information about Seller's plans to resolve the Remediation Event.

"**Safety Requirements**" means Prudent Operating Practices and all applicable safety- related (construed broadly) requirements of Law, the Utility Distribution Company, the Transmission Provider, Governmental Approvals, the CAISO, CARB, FERC, NERC and WECC.

"**SEC**" means the U.S. Securities and Exchange Commission, or any successor entity performing

similar functions.

"**Security Interest**" has the meaning set forth in Section 10.3(a).

"**Seller**" has the meaning set forth in the preamble to this Agreement.

"**Seller Change of Control**" means, except in connection with public market transactions of equity interests of Seller's Ultimate Parent, any circumstance in which Seller's Ultimate Parent as of the Execution Date ceases to be the Ultimate Parent or ceases to own, directly or indirectly through one or more intermediate entities, more than 50% of the outstanding equity interests in Seller; provided that in calculating ownership percentages for all purposes of the foregoing:

(a) any ownership interest in Seller held by Ultimate Parent indirectly through one or more intermediate entities shall not be counted towards Ultimate Parent's ownership interest in Seller unless Ultimate Parent directly or indirectly owns more than 50% of the outstanding equity interests in each such intermediate entity; and

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

"**Seller's Event of Default**" has the meaning set forth in Section 7.1(a).

"**Serious Incident**" means a harmful event that occurs on a Site during the Term arising out of, related to, or connected with the Project or the Site that results in any of the following outcomes: (a) any injury to or death of a member of the general public; (b) the death or permanent, disabling injury to operating personnel, Seller's Contractors or subcontractors, Seller's employees, agents, or consultants, or authorized visitors to the Site; (c) any property damage greater than $100,000.00; (d) release of hazardous material above the limits, or violating the requirements, established by Permits, codes, standards, regulations, Laws or Governmental Authorities; or (e) environmental impacts exceeding those authorized by Permits or applicable Law.

"**Service Territory**" means the territory of the Authority, as such term is defined in the Joint Powers Agreement.

"**Settlement Amount**" means an amount equal to the greater of (a) the amount of Performance Security required under this Agreement and (b) the Non-Defaulting Party's Costs and Losses, on the one hand, netted against its Gains, on the other. The Settlement Amount does not include consequential, incidental, punitive, exemplary or indirect or business interruption damages.

"**Shortfall**" has the meaning set forth in Section 5.3(a).

"**Shortfall Amount**" has the meaning set forth under Section 5.3(b).

"**Shortfall Damages**" has the meaning set forth under Section 5.3(c).

"**Site(s)**" means the real property on which the Project is located, as identified in Appendix I, as updated by Buyer pursuant to Section 5.4(b).

"**SOFR**" means, with respect to any day, the secured overnight financing rate published for such

day by the Federal Reserve Bank of New York, as the administrator of the benchmark, (or a successor administrator) on the Federal Reserve Bank of New York's website.

"**Storage Project**" means a behind-the-meter battery energy storage project accepted by Buyer as having either New Capacity or Existing Capacity, as applicable.

"**Sub-Metered Output**" has the meaning set forth in Section 5.2(c)(ii)(E).

"**Subprocessor**" means any subcontractor engaged to assist in processing PII.

"**Supply Plan**" has the meaning set forth in the CAISO Tariff.

"**System Emergency**" has the meaning set forth in the CAISO Tariff.

"**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 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.

"**Term**" means the duration of over which the Parties shall perform their obligations set forth under this Agreement, as described under Section 2.2(a).

"**Terminated Transaction**" has the meaning set forth in Section 7.1(a).

"**Termination Payment**" has the meaning set forth in Section 7.3.

"**Test Event**" means a scheduled operational activity conducted to verify the Project's performance, DERMS integration, and ability to deliver the Product in accordance with the Contract Capacity.

"**Transmission Provider**" means the CAISO.

"**Ultimate Parent**" means the Person that owns, directly or indirectly through one or more intermediate entities, more than 50% of the outstanding equity interests in Seller and is not controlled (as defined within the definition of "Affiliate") by any other Person; provided that in calculating ownership percentages or determining "control" for all purposes of the foregoing:

(a) any ownership interest in Seller held by a Person indirectly through one or more intermediate entities shall not be counted towards such Person's ownership interest in Seller unless such Person directly or indirectly owns more than 50% of the outstanding equity interests in each such intermediate entity; and

(b) except (i) for purposes of determinations in accordance with paragraph (a) above and (ii) for purposes of determining ownership of the direct equity interests in Seller, any ownership interest held or control exercised by a natural person shall not be taken into account.

"**Upfront Incentive**" has the meaning set forth in Section 5.4(d).

"**Upward Change Confirmation Notice**" has the meaning set forth in Section 6.7(a)(ii).

"**Upward Change Notice**" has the meaning set forth in Section 6.7(a)(ii).

"**Utility Distribution Company**" has the meaning set forth in the CAISO Tariff.

"**WECC**" means the Western Electricity Coordinating Council or its successor entity with similar functions.

"**Work**" means (a) work or operations performed by a Party or on a Party's behalf; and (b) materials, parts or equipment furnished in connection with such work or operations; including (i) warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "a Party's work"; and (ii) the providing of or failure to provide warnings or instructions.

1.2 **Rules of Interpretation**. In this Agreement, except as expressly stated otherwise or unless the context otherwise requires:

(a) headings and the rendering of text in bold and italics are for convenience and reference purposes only and do not affect the meaning or interpretation of this Agreement;

(b) words importing the singular include the plural and vice versa and the masculine, feminine and neuter genders include all genders;

(c) the words "hereof", "herein", and "hereunder" and words of similar import shall refer to this Agreement as a whole and not to any particular provision of this Agreement;

(d) a reference to an article, section, paragraph, clause, Party, appendix, or exhibit is a reference to that section, paragraph, clause of, or that Party, appendix, or exhibit to, this Agreement unless otherwise specified;

(e) a reference to a document or agreement, including this Agreement means such document, agreement or this Agreement including any amendment or supplement to, or replacement, novation or modification of this Agreement, but disregarding any amendment, supplement, replacement, novation or modification made in breach of such document, agreement or this Agreement;

(f) a reference to a Person includes that Person's successors and permitted assigns;

(g) the term "including" means "including without limitation" and any list of examples following such term shall in no way restrict or limit the generality of the work or provision in respect of which such examples are provided;

(h) references to any statute, code or statutory provision are to be construed as a reference to the same as it may have been, or may from time to time be, amended, modified or reenacted, and include references to all bylaws, instruments, orders and regulations for the time being made thereunder or deriving validity therefrom unless the context otherwise requires;

(i) in the event of a conflict, a mathematical formula or other precise description of a concept or a term shall prevail over words providing a more general description of a concept or a term;

(j) references to any amount of money shall mean a reference to the amount in United States Dollars;

(k) words, phrases or expressions not otherwise defined herein that (i) have a generally accepted meaning in Prudent Operating Practice shall have such meaning in this Agreement or (ii) do not have well known and generally accepted meaning in Prudent Operating Practice but that have well known and generally accepted technical or trade meanings, shall have such recognized meanings;

(l) the terms "year" and "calendar year" mean the period of months from January 1 through and including December 31; the term "month" means a calendar month unless otherwise indicated, and a "day" means a 24-hour period beginning at 12:00:01 a.m. and ending at 12:00:00 midnight; provided that a "day" may be 23 or 25 hours on those days on which daylight savings time begins or ends, respectively;

(m) unless otherwise specified herein, where the consent of a Party is required, such consent shall not be unreasonably withheld or unreasonably delayed;

(n) when an action is required to be completed on a Business Day, such action must be completed prior to 5:00 p.m. on such day, Pacific Prevailing Time, and actions occurring after 5:00 p.m. (such as the delivery of a Notice) will be deemed to have occurred on the following Business Day;

(o) all references to Product mean each and all components of the Product unless the context infers a particular component of Product; and

(p) each Party acknowledges that it was represented by counsel in connection with this Agreement and that it or its counsel reviewed this Agreement and that any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of this Agreement.

## Article 2: TERM

2.1 **Effectiveness**. Upon execution by both Parties, this Agreement shall be effective and binding as of the Execution Date.

2.2 **Term**.

(a) The Term of this Agreement shall commence upon the Execution Date and shall continue until the expiration of the Delivery Term (unless terminated earlier in accordance with the terms of this Agreement).

(b) The "**Delivery Term**" is the period commencing on the Initial Delivery Date and continuing for the number of Contract Years specified on the Cover Sheet. The "**Initial Delivery Date**" is the first day of the first calendar month for which Product in the Contract Capacities is delivered; provided that Initial Delivery Date may not occur until satisfaction of the Conditions Precedent set forth in Article 4.

Ava Community Energy

## Article 3: PROJECT DEVELOPMENT

3.1 **Project Construction**.

(a) Seller is solely responsible for the development, design and construction the Project(s), including the location of the Site(s), obtaining all Permits and Governmental Approvals to build the Project(s), the Project layout, and the selection and procurement of the equipment comprising the Project(s). Seller shall develop, design and construct the Project(s) in timely fashion in order to perform Seller's obligations under this Agreement.

3.2 **Interconnection**. Seller shall (a) execute all necessary Interconnection Agreements for the Projects in the Portfolio, (b) comply with all terms and conditions contained therein as necessary for the safe and reliable delivery of the Product, and (c) arrange, schedule and be responsible for any and all electric distribution and transmission service including any Governmental Approvals required for the foregoing. Seller shall fulfill all contractual, metering and applicable interconnection requirements, including Electric System Upgrades and those requirements set forth in the Utility Distribution Company's applicable tariffs, the Participating Transmission Owner's applicable tariffs, the CAISO Tariff and implementing CAISO standards and requirements, so as to be able to deliver the Product to Buyer.

3.3 **Metering**. At Seller's expense, Seller shall install, or cause to be installed, all necessary metering and telemetry required by the CAISO or Utility Distribution Company to deliver the Product. Meters required by CAISO or the Utility Distribution Company shall be owned, maintained and operated by Seller at Seller's sole cost and expense. Each Project shall be separately metered from any other Project, including any paired Generating Project and Storage Project or any other load, generation or storage facility. In addition, Seller shall install, and shall maintain throughout the Delivery Term, revenue-grade meters for each Project capable of measuring and demonstrating on a monthly basis the sufficiency of the Load Modification Delivered Quantities or Event-Based Dispatch Delivered Quantities, as applicable.

3.4 **Progress Reports**. Within 15 days after the close of every calendar month, starting with the first full calendar month following the Execution Date and until the date on which all New Capacity has been incorporated into the Initial Portfolio List or Portfolio List, as applicable, as set forth under Section 5.4(b), Seller shall provide to Buyer a Progress Report in a Notice and agree to regularly scheduled telephonic or video-conferenced meetings (unless otherwise agreed to by the Parties) between representatives of Buyer and Seller to review such monthly reports and discuss Seller's progress to IDD. Seller shall also provide Buyer with any reasonable requested documentation, subject to the confidentiality restrictions set forth in this Agreement, directly related to the achievement of IDD, within ten Business Days of receipt of such request by Seller.

3.5 **Remedial Action Plans**. If Seller previously issued a Delay Notice (as provided under Section 4.1(b)) as the result of its anticipation that it will be delayed in achieving the Initial Delivery Date, Seller shall submit to Buyer no later than 10 days following the issuance of the Delay Notice, a report, which shall describe in detail the actual delay, any anticipated delay beyond the scheduled deadline, the cause of the delay, and Seller's proposed course of action to and the date by which it anticipates it shall achieve the Initial Delivery Date ("**Remedial Action Plan**"). Delivery of a Remedial Action Plan shall not relieve Seller of any obligation under this Agreement.

## Article 4: INITIAL DELIVERY DATE

4.1 **Timing of the Initial Delivery Date**.

(a) **Initial Delivery Date**. Seller shall cause the Initial Delivery Date to occur on, and not prior to, the Expected Initial Delivery Date.

(b) **Anticipated Failure to Meet Expected Initial Delivery Date**. Seller shall provide Buyer with advance Notice of any anticipated delay in achieving the Initial Delivery Date by the Expected Initial Delivery Date, including a true and reasonably detailed explanation of the cause of such delay (a "**Delay Notice**"), at least 90 days in advance of the Expected Initial Delivery Date (or, if Seller's anticipation of such delay does not arise until after such advance window, then as soon as reasonably practicable following such anticipation arising).

(c) **Guaranteed Initial Delivery Date**. Notwithstanding any other provision of this Section 4.1, the "**Guaranteed Initial Delivery Date**" or "**Guaranteed IDD**" shall be the date set forth on the Cover Sheet.

(d) **Extension of Guaranteed Initial Delivery Date and IDD Delay Damages**.

(i) The Guaranteed Initial Delivery Date, subject to the notice and documentation requirements set forth below, may be extended on a day-for-day basis (the "**IDD Cure Period**") due to an event of Force Majeure. Notwithstanding anything to the contrary, the cumulative extensions under the IDD Cure Period shall not exceed for any reason 120 days. In addition, no extension shall be given under the IDD Cure Period (i) if the delay was due to Seller's failure to take commercially reasonable actions to meet its requirements and deadlines, (ii) if Seller is asserting a claim of Force Majeure, and Seller does not satisfy the requirements of an event of Force Majeure, including the notice, documentation, and mitigation requirements under Sections 8.1(b) and 8.1(c) or (iii) if Seller is asserting a claim for any other delay provided for above and Seller fails to provide Notice to Buyer within 30 days after Seller became aware of an actual delay affecting the Project, except that in the case of a delay necessitating a Delay Notice, Seller must provide Notice within seven Business Days of Seller becoming aware of such delay. As used in the preceding sentence, "actual delay" does not include Seller's receipt of generic notices of potential delays.

(ii) If Seller does not achieve IDD for the Initial Portfolio by the Guaranteed IDD, Seller shall pay IDD Delay Damages to Buyer for each day of delay until Seller achieves IDD. Seller shall pay to Buyer in advance on a monthly basis IDD Delay Damages for each day of the month in which IDD has not been achieved, and Buyer shall return a prorated amount thereof to Seller if IDD is achieved during the month for which IDD Delay Damages were paid in advance. Except as otherwise provided under this Section 4.1(d), Seller's failure to achieve timely IDD shall constitute an Event of Default, the liability related to which shall equal the sum of any damages, including IDD Delay Damages, that are due and owing pursuant to this Agreement, plus the Damage Payment. Each day in which Seller pays to Buyer IDD Delay Damages shall result in an extension to the Guaranteed Initial Delivery Date, not to exceed a total of 60 days of extensions by such payment of IDD Delay Damages.

(iii) Prior to the expiration of the IDD Cure Period, so long as Seller has provided a Delay Notice or Notice, as applicable, to Buyer and paid IDD Delay Damages to Buyer in accordance with this Section 4.1(d), Seller's failure to achieve the Initial Delivery Date by the Guaranteed

Initial Delivery Date shall not be deemed a Seller's Event of Default. Upon (A) Seller's failure to provide a Delay Notice to Buyer in accordance with this Section 4.1(d), (B) Seller's failure to pay IDD Delay Damages in accordance with this Section 4.1(d) or (C) Seller's failure to achieve the Initial Delivery Date prior to the expiration of the IDD Cure Period, in each case for any reason other than an extension as the result of an event of Force Majeure or a Buyer Event of Default, Seller will be deemed a Defaulting Party pursuant to Section 7.1(a)(iv).

(iv) Upon the expiration of the IDD Cure Period, if Seller has failed to achieve the Initial Delivery Date with respect to the Initial Portfolio but is capable of achieving the Initial Delivery Date with respect to a portion of the Projects within the Initial Portfolio, which portion could provide no less than 80% of the Contract Capacity, then Buyer shall have the right, in lieu of terminating this Agreement based on such Event of Default, to reduce accordingly the Minimum Contract Capacity and Maximum Contract Capacity, and allow Seller to declare the Initial Delivery Date based on such reductions, in exchange for Seller's one-time payment to Buyer of $50 per kW of such reductions (the "**Reduction Payment**").

4.2 **Conditions Precedent to the Initial Delivery Date**. The following obligations of Seller are conditions precedent to the Initial Delivery Date (collectively the "**Conditions Precedent**") and must be satisfied by Seller, to Buyer's reasonable satisfaction, 15 days before the Guaranteed Initial Delivery Date (subject to the provisions of Sections 4.1(c) and 4.1(d)), unless a different deadline is expressly set forth below, in which case such other deadline shall govern:

(a) Seller has delivered to Buyer an attestation certificate from an officer of Seller certifying that Seller has secured all CAISO and Governmental Approvals as are necessary for the safe and lawful operation and maintenance of the Project and to enable Seller to deliver the Product to Buyer at the Contract Capacities.

(b) Seller has (i) confirmed that each potential customer validly constitutes a Customer, (ii) executed a Customer Agreement with each Customer whose Project is to be a part of the Initial Portfolio as necessary for the safe and lawful operation of the Project and to enable Seller to deliver the Product to Buyer in the Contract Capacities, and (iii) delivered a Customer Agreement template to Buyer demonstrating (A) Seller has rights to the Project's grid services, (B) Seller is prohibited from removing or disabling the Storage Project if a CARE/FERA Customer undergoes a payment or non-material default under the terms of the Customer Agreement, (C) Buyer may enroll the Customer or Project in programs including the DSGS Program and CAISO market participating programs, subject to required Customer authorizations, (D) Seller accepts responsibility for all taxes accrued, if any, on the Upfront Incentives and shall not cause Customer to be responsible for such tax liability , and (E) such Customer Agreements shall remain valid and in full force and effect.

(c) Seller has constructed or caused to be constructed the Projects that are to be part of the Initial Portfolio as of the Initial Delivery Date in accordance with this Agreement to enable Seller to satisfy the obligations of the Seller herein, including the delivery of the Product from the Project at the Contract Capacities.

(d) Seller has executed and complied with any necessary Interconnection Agreement(s) and installed any necessary metering to deliver Product to Buyer in the Contract Capacities, in each case in accordance with the CAISO Tariff and any applicable tariffs of the Utility Distribution Company and the Participating Transmission Owner.

(e) Seller has (i) entered into a separate integration agreement with the provider of Buyer's Distributed Energy Resource Management System ("**DERMS**") and completed DERMS Integration with a mutually agreed testing protocol.

(f) Seller has submitted to Buyer a Portfolio Safety Plan.

(g) Seller is in compliance with the Marketing Requirements.

(h) Seller has provided Buyer 60 days prior to the Initial Delivery Date with a Portfolio List in accordance with Section 5.4(b) that demonstrates Projects and Customers under executed Customer Agreements with Seller are sufficient for Seller to deliver, in aggregate, Product in the Contract Capacities ("**Initial Portfolio List**"). Following delivery of the Initial Portfolio List, Seller may alter from time to time, but no later than 30 days prior to the Guaranteed Initial Delivery Date, the Initial Portfolio List, upon receipt of Buyer's written approval. If Seller provides to Buyer the Initial Portfolio List, but prior to the occurrence of the Guaranteed Initial Delivery Date Seller changes the Initial Portfolio List (following receipt of Buyer's written approval), then this Condition Precedent shall not be satisfied and the date on which Seller provides to Buyer a changed Portfolio List in accordance with this Agreement shall constitute provision of Initial Portfolio List for purposes of this Condition Precedent.

(i) Seller has provided to Buyer the Monthly Contract Capacity for Contract Year 1.

(j) Seller has provided to Buyer documentation of Seller's compliance with the dual participation requirements of Section 5.4(e).

(k) Seller has delivered to Buyer all insurance documents required under Article 16.

(l) Seller has provided Performance Security to Buyer as required by Section 10.2.

(m) Seller has paid Buyer for all amounts owing under this Agreement, if any, including IDD Delay Damages.

(n) No Event of Default on the part of Seller shall have occurred and be continuing and no Remediation Event shall have occurred and remain unresolved.

(o) Seller and Buyer have mutually agreed to the calculation methodologies set forth under Section 5.2(c) and illustrated under Appendix XI.

(p) Seller has submitted to Buyer a document, including the information set forth in Appendix XIV, outlining the Installation Charges for each CARE/FERA Customer and Market Rate Customer.

(q) All Projects within the Portfolio meet the Project Eligibility Criteria.

(r) If applicable, Seller has rendered and Buyer has received the Reduction Payment.

4.3 **Cooperation in Connection with Initial Delivery Date**. The Parties agree that, in order for Seller to achieve the Initial Delivery Date, the Parties may have to perform certain of their Delivery Term obligations in advance of the Initial Delivery Date. The Parties shall cooperate with each other in order for Buyer to be able to utilize the Contract Capacities of Product beginning on the Initial Delivery Date.

4.4 **Confirmation of Initial Delivery Date**. Once each of the Conditions Precedent has been satisfied by Seller (other than any Condition Precedent that may only be satisfied as of the Initial Delivery Date), Seller shall certify such satisfaction to Buyer in a Notice confirming the anticipated occurrence of the Initial Delivery Date. Buyer shall Notify Seller of any disagreement that Seller has satisfied such Conditions Precedent (with reasonable detail in regard to each Condition Precedent) within 15 Business Days of Seller's Notice. No later than seven Business Days following the Initial Delivery Date, Buyer shall provide a Notice to Seller confirming the occurrence of the Initial Delivery Date in the form of Appendix IV(A).

## Article 5: TRANSACTION

5.1 **Product**.

(a) During the Delivery Term, Seller grants, pledges, assigns, otherwise commits, and covenants to deliver exclusively to Buyer, all of the Product that may be calculated or derived from the Contract Capacity produced by all Projects. The Product must (i) be exclusively from the Projects installed at Sites included within the applicable Portfolio (pursuant to the terms and conditions contained herein, including Portfolio Modification provisions in Section 5.4(c)), and such Projects must remain within such Portfolio, except as otherwise provided herein, for a duration not to exceed 5 years from the date of Ava's approval of the inclusion of such Project within the applicable Portfolio, (ii) result in 100% of each Customer's Nominated Capacity available from each Project being conveyed to Buyer, and (iii) comply at all times during the Delivery Term with the Operational Characteristics, which shall not be modified during the Term.

(b) Buyer shall have the right to re-sell all or a portion of the Product purchased under this Agreement ("**Resold Product**").

5.2 **Purchase and Sale Obligation**.

(a) Initial Product. During the Delivery Term, unless and until a Product Transition occurs under Section 5.2(b), Seller shall deliver to Buyer the Contract Capacity of all Event-Based Dispatch, as applicable, pursuant to the protocols and in consideration of the payments set forth in Section 5.2(c).

(b) Product Transition. After the completion of Contract Year 2 of the Delivery Term, Buyer may, by no less than 120 days' Notice to Seller, elect to receive Intra-Day Event-Based Dispatch or Load Modification, as applicable, rather than Event-Based Dispatch from the Project ("**Product Transition**"). Net Billing Tariff Service customers are ineligible for the Load Modification Product and therefore Buyer may not elect to transition those applicable customers to Load Modification from Event-Based Dispatch. As a condition to Buyer's obligation to take and pay for Intra-Day Event-Based Dispatch or Load Modification, as applicable, for the remainder of the Delivery Term, Seller and Buyer shall execute within five days of Notice thereof the Product Transition Election. Commencing on the first day of the calendar month after Buyer and Seller's execution of the Product Transition Election and for each day of each calendar month during the remainder of the Delivery Term, Seller shall deliver to Buyer and Buyer shall pay for the Contract Capacity of all Intra-Day Event-Based Dispatch or Load Modification, as applicable. Upon a Product Transition, and for the remainder of the Delivery Term, the Product shall be either (i) Intra-Day Event-Based Dispatch and not Event-Based Dispatch or (ii) Load Modification and not Event-Based Dispatch, the distinction of which shall be applicable only for the purposes of this Section 5.2(b); all other provisions with respect to Event-Based Dispatch under the terms of this Agreement shall refer to Intra-Day

Event-Based Dispatch, mutatis mutandis. For clarity, the Product Transition may occur not more than one time during the Delivery Term. For additional clarity, if the Product Transition changes the Product from Event-Based Dispatch to Intra-Day Event-Based Dispatch, Buyer may, but shall not be obligated to, call an Intra-Day Event-Based Dispatch event in the calendar month in which the Product Transition occurs.

(c) Payment. The provisions of this Section 5.2(c) shall apply to the payment obligations for the delivery of Product under the terms of this Agreement. Subject to Section 9.2, Buyer shall pay Seller on a monthly basis for the Delivered Quantities as set forth under this Section 5.2(c), and all such payments shall constitute the entirety of the amount due to Seller from Buyer for the purchase of the Product.

(i) Each monthly invoice prepared by Seller pursuant to Article 9 shall include an Excel spreadsheet file in the form of Appendix XI that uses DERMS-Provided Data to substantiate the quantity of Load Modification or Event-Based Dispatch, as applicable, in kW, delivered to Buyer from the Portfolio, which in the case of Load Modification, shall be consistent with the Load Modification Schedule for the applicable month. Each monthly invoice will be based on the average Hourly Delivered Quantity ("**Delivered Quantity**" or "**DQ**"), calculated as follows:

(A) For all Load Modification, Delivered Quantity for the month is the sum of the two Hourly Delivered Quantity values, *divided by* two.

(B) For all Event-Based Dispatch, Delivered Quantity for the month is the sum of all Hourly Delivered Quantities for the month, *divided by* the number of event hours in the month.

(ii) where the "**Hourly Delivered Quantity**" is the amount of Product delivered for each month-hour or event hour, determined as follows:

(A) for Load Modification, for each month-hour of the Load Modification Schedule, delivered in accordance with the Load Modification Schedule and calculated on an aggregate basis across all Projects, (1) is initially determined by calculating the LM Portfolio Output, and then (2) is averaged across all Load Modification delivery days (as specified under Appendix II(A)) in such month.

(B) for Event-Based Dispatch, for each event hour, calculated on an aggregate basis across all Projects, and equal to the EBD Portfolio Output.

For purposes of the definition of "Hourly Delivered Quantity",

(C) "**EBD Portfolio Output**" means, with respect to Event-Based Dispatch, the Sub-Metered Output summed across all Projects and capped at the Maximum Contract Capacity for each hour

(D) "**LM Portfolio Output**" means, with respect to Load Modification, the Sub-Metered Output summed across all Projects and capped at the Maximum Contract Capacity for each hour; and

(E) "**Sub-Metered Output**" means the sub-metered output of each Project, in kW, measured at the inverter as (i) an hourly measurement or (ii) the average of the four 15-minute interval measurements within the hour.

(iii) For all Product that Seller delivers during the Delivery Term in accordance with this Agreement, Buyer shall, in accordance with Article 9, pay Seller a monthly payment ("**Monthly Payment**" or "**MP**") as follows:

MP = DQ * CP

where,

DQ = the Delivered Quantity; and

CP = the contract price set forth on the Cover Sheet ("**Contract Price**").

(iv) The following are provided for the sake of clarity:

(A) Buyer has no obligation to pay Seller for Load Modification that is delivered outside the parameters of the applicable Load Modification Schedule, or Event-Based Dispatch that is delivered outside the applicable event parameters.

(B) If there are no dispatches requested by Buyer in a calendar month, the DQ is equivalent to the average DQ of the three most recent months where event dispatches have occurred.

(C) Regardless of the Product type, the Delivered Quantity for each month-hour or event hour, as applicable, is expected to meet the Minimum Contract Capacity.

(D) If the Delivered Quantity is less than or equal to the Maximum Contract Capacity, Buyer shall pay Seller the Contract Price for such Delivered Quantity. If the Delivered Quantity is greater than the Maximum Contract Capacity, Buyer shall pay Seller for the Delivered Quantity associated with such Maximum Contract Capacity, but Buyer shall not pay Seller for any amounts of Delivered Quantity above such Maximum Contract Capacity.

5.3 **Shortfall Amount and Shortfall Damages**.

(a) **Shortfalls Generally and Impacted Capacity**. Seller's failure to deliver the Delivered Quantity for any reason other than as a result of an Excused Event shall constitute a shortfall (a "**Shortfall**"), which shall be calculated both hourly and monthly, as detailed under this Section 5.3. Seller may claim that a Shortfall or part of a Shortfall should be deemed Impacted Capacity if (i) the LM Portfolio Output or EBD Portfolio Output, as applicable, in that hour is less than 100% of Minimum Contract Capacity, (ii) Seller has provided documentation demonstrating that the applicable Projects and attendant Sites were adversely affected by an Excused Event, and (iii) the claimed Impacted Capacity is equivalent to the ESS's contribution of capacity to the Minimum Contract Capacity for applicable Projects (as delineated under Appendix I), and in the case of (i), (ii), and (iii), Buyer has verified the foregoing; provided, however, that if any of the foregoing conditions (i), (ii) or (iii) are not met, the Impacted Capacity shall be deemed to be zero.

(b) **Shortfall Amount Calculation**.

(i) The amount of Shortfall determined during an applicable calendar month (a "**Shortfall Amount**") shall be calculated as follows:

(A) For Load Modification, the sum of all Hourly Shortfall Amounts for such month, *divided by* 2.

(B) For Event-Based Dispatch, the sum of all Hourly Shortfall Amounts for such month, *divided by* the number of hours in the month where there is a Shortfall Amount greater than 0.

(ii) The Hourly Shortfall Amount shall arise to the extent that the Effective Hourly Shortfall DQ for a month-hour or event hour, as applicable, is less than the Minimum Contract Capacity.

(A) The Hourly Shortfall Amount shall be calculated as follows:

(1) For Load Modification, the Minimum Contract Capacity minus the Effective Hourly Shortfall DQ, for each month-hour of the Load Modification Schedule.

(2) For Event-Based Dispatch, the Minimum Contract Capacity minus the Effective Hourly Shortfall DQ, for each event hour where Impacted Capacity equals 0. For clarity, the Hourly Shortfall Amount is zero if Impacted Capacity is greater than zero.

(B) The "Effective Hourly Shortfall DQ" shall be calculated as follows:

(1) For Load Modification, for each month-hour, is the LM Portfolio Output averaged across all Load Modification delivery days in such month but excluding any days with Impacted Capacity greater than zero.

(2) For Event-Based Dispatch, for each event hour, is the EBD Portfolio Output.

(iii) For clarity, examples of the calculation of Effective Hourly Shortfall DQ, Hourly Shortfall Amount, and Shortfall Amount are provided under Appendix XI.

(c) **Shortfall Damages**. "**Shortfall Damages**" means an amount equal to $12/kW-month *multiplied by* the applicable Shortfall Amount. Seller shall pay to Buyer Shortfall Damages as liquidated damages, which shall be the sole remedy for the accumulation of the applicable Shortfall Amount during the applicable month. Notwithstanding the foregoing, if there are zero dispatches of Product during a calendar month, Shortfall Damages shall not accrue during such month.

5.4 **Customers**.

(a) **Seller Obligation to Obtain Customers**. Seller shall obtain or cause to be obtained the Customers necessary to enable the safe and reliable delivery of Product in the Contract Capacities to Buyer during the Delivery Term. Seller's efforts to obtain potential customers or to market to Customers shall at all times comply with the Marketing Requirements. Seller shall enter into a Customer Agreement with each such Customer, complete all necessary registration forms regarding such Customers, submit any necessary documentation regarding such Customers and comply with all other requirements of the Utility Distribution Company, CAISO, CPUC or any other applicable Governmental Authority. Product provided to Buyer must come exclusively from Projects installed at Sites listed in the Portfolio List in accordance with Section 5.4(b). Customers must meet the definition of a "Customer" during and throughout the Delivery Term in order to be included in the Portfolio List. Subject to the dual enrollment limitations of Section 5.4(e), notwithstanding Seller's obligations set forth under this Section 5.4(a) or any other provision of this Agreement, Ava may enroll the Customer or Project under which such Customer is associated in programs including but not limited to the DSGS Program and CAISO market participating programs.

(b) **Seller's Portfolio List**. As of the Guaranteed IDD and throughout the Delivery Term, Seller shall maintain an Initial Portfolio List or Portfolio List, as applicable. So long as the amount of Existing Capacity and New Capacity (measured in kW) remains static, Seller may (i) unenroll, re-enroll or replace Customers from whom the Existing Capacity and New Capacity no more than once per calendar month, if customer unenrollments affect 5% or more of the Minimum Contract Capacity, and (ii) enroll Customers with New Capacity (the "**Newly Enrolled Customers**") no more than once per calendar month, in each case by altering Seller's Portfolio, subject to the requirements of this Section 5.4 and Article 11 (a "**Portfolio Modification**"); *provided*, *however*, Seller may only implement such Portfolio Modification upon the prior diligence and written approval of Buyer as set forth under Section 5.4(c).

(c) **Portfolio Modification**. The following obligations of Seller are conditions precedent to a Portfolio Modification (collectively the "**Portfolio Modification CPs**") and must be satisfied by Seller, to Buyer's reasonable satisfaction, in order to effectuate a Portfolio Modification:

(i) Seller has submitted to Buyer all documentation required to confirm that the Projects integrated into the Portfolio meet the Project Eligibility Criteria and the applicable Operational Characteristics, as determined by Buyer in its sole and reasonable discretion.

(ii) Seller has submitted to Buyer all documentation related to the Installation Charges, including the information set forth in Appendix XIV for each Newly Enrolled Customer.

(iii) Seller has submitted to Buyer an updated Portfolio List reflecting all proposed changes since Seller's distribution of the Initial Portfolio List or previously revised Portfolio List, as applicable.

(iv) With respect to Newly Enrolled Customers, Seller has complied with the requirements of Section 5.4(d).

(v) Seller has delivered to Buyer an attestation certificate from an officer of Seller certifying that Seller has secured all CAISO and Governmental Approvals as are necessary for the safe and lawful operation and maintenance of the Project and to enable Seller to deliver the Product to Buyer at the Contract Capacities.

(vi) Seller has (i) confirmed that each potential customer validly constitutes a Customer, (ii) executed a Customer Agreement with each Customer whose Project is to be a part of the Portfolio Modification as necessary for the safe and lawful operation of the Project and to enable Seller to deliver the Product to Buyer in the Contract Capacities, (iii) confirmed to Buyer that each executed Customer Agreement, which Seller will provide to Buyer upon request, demonstrates that (A) Seller has rights to the Project's grid services, (B) Seller is prohibited from removing or disabling the Storage Project if a CARE/FERA Customer undergoes a payment or non-material default under the terms of the Customer Agreement, (C) Ava may enroll the Customer or Project in programs including but not limited to the DSGS Program and CAISO market participating programs, (D) Seller accepts responsibility for all taxes accrued, if any, on the Upfront Incentives and shall not cause Customer to be responsible for such tax liability, and (E) such Customer Agreements shall remain valid and in full force and effect.

(vii) Seller has constructed or caused to be constructed the Projects that are to be part of the Portfolio Modification in accordance with this Agreement to enable Seller to satisfy the obligations of the Seller herein, including the delivery of the Product from the Project at the Contract Capacities.

(viii) Seller has executed and complied with any necessary Interconnection Agreement(s) and installed any necessary metering to deliver Product to Buyer in the Contract Capacities, in each case in accordance with the CAISO Tariff and any applicable tariffs of the Utility Distribution Company and the Participating Transmission Owner.

(ix) Seller has completed the integration with the DERMS and implemented a mutually agreed testing protocol.

(x) Seller has maintained a Portfolio Safety Plan.

(xi) Seller is in compliance with the Marketing Requirements.

(xii) Seller has provided to Buyer documentation of Seller's compliance with the dual participation requirements of Section 5.4(e).

(xiii) Seller maintains all insurance documents required under Article 16.

(xiv) Seller maintains Performance Security for the benefit of Buyer, as required by Section 10.2.

(xv) Seller has paid Buyer for all amounts owing under this Agreement, if any.

(xvi) No Event of Default on the part of Seller shall have occurred and be continuing and no Remediation Event shall have occurred and remain unresolved.

(xvii) Seller has submitted to Buyer a document, including the information set forth in Appendix XIV, outlining the Upfront Incentive amount paid out to each CARE/FERA Customer and Market Rate Customer associated with New Capacity.

Following Buyer's review and confirmation that (a) the Projects comprising such revised Portfolio List meet the Portfolio Modification CPs and (b) Seller complies with the Portfolio

Modification CPs, such Portfolio Modification shall be implemented by Seller no later than 15 days after Buyer confirms (1) the successful completion of all Portfolio Modification CPs and the execution of the Notice in the form of Appendix IV(B) and (2) the receipt of any additional Customer Information reasonably requested by Buyer in connection with this Agreement. Any such Portfolio Modifications shall be included in the next issued Quarterly Report. A Portfolio Modification may not alter (i) the Portfolio from the Portfolio description set forth on the Cover Sheet, (ii) the Operational Characteristics set forth in Appendices II(A) and II(B), (iii) the Project Eligibility Criteria set forth in Appendix IX, (iv) the Portfolio's ability to deliver Product in the Contract Capacities throughout the Delivery Term or (v) any of Seller's obligations under this Agreement.

(d) **Upfront Incentives**. For newly constructed Storage Projects that are determined by Buyer to (i) be successfully installed on or after the Execution Date, (ii) be part of the Initial Portfolio or to have been added to the Portfolio as part of a Portfolio Modification, and (iii) not replace a Project as part of a Portfolio Modification, Seller is eligible to receive a one-time upfront incentive for each Project (the "**Upfront Incentive**"), which (y) shall be paid out on a quarterly basis following Buyer's approval of the payment of such Upfront Incentive and shall otherwise be subject to the payment obligations set forth under Article 9, and (z) shall be calculated as (a) for Market Rate Customers, the product of $180/kW and the Nominated Capacity, which amount shall not exceed the product of (1) the Generating Project nameplate capacity in kW * 1.25 and (2) $180/kW and (b) for CARE/FERA Customers, the product of $1,000/kW and the Nominated Capacity, which amount shall not exceed the product of (1) the Generating Project nameplate capacity in kW * 1.25 and (2) $1,000/kW. Notwithstanding the foregoing, the following limitations shall apply:

(i) With respect to an individual Project and individual Customer, Seller shall return in full (or in part, as specified below) the Upfront Incentive to Buyer, the payment of which shall be rendered no later than 30 days following Buyer's issuance of notice thereof, if Buyer reasonably determines that:

(A) a Customer did not meet the definition of Customer at the time of enrollment in the Initial Portfolio List or Portfolio List, as applicable;

(B) a Storage Project did not meet the definition of Project at the time of enrollment in the Initial Portfolio List or Portfolio List, as applicable;

(C) a Storage Project receives incentives, from Buyer and other sources, that exceed the total cost of the Storage Project, in which case, Seller shall return to Buyer such amount by which such incentives exceed the cost of the Storage Project;

(D) a Storage Project pertaining to a CARE/FERA Customer is removed from the applicable Site within 5 years of installation as the result of a Customer's non-material default or payment default under the Customer Agreement;[1] or

(E) a CARE/FERA Customer did not meet the definition of CARE/FERA Customer at the time of enrollment in the Initial Portfolio List or Portfolio List, as applicable.

[1] NTD: Buyer should be reimbursed for substantial CARE/FERA Upfront Incentives if a system is removed from a Customer's Site during a period when the system can still be reinstalled elsewhere. To discuss with Seller.

(ii) With respect to all Projects and all Customers, no matter the number of Projects or Customers to which such event applies, (a) Seller shall return in full to Buyer all Upfront Incentives with respect to all Customers and all Projects, the payment of which shall be rendered no later than 30 days following Buyer's issuance of notice thereof, and (b) the New Capacity shall be capped at the kW amount actually installed as of the date on which Buyer determines that any of the following circumstances arose (as documented via Notice) and any outstanding kW allocated for installation shall be discontinued, if Buyer reasonably determines that (i) the Installation Charges for CARE/FERA Customers are materially higher than those for Market Rate Customers of roughly the same installation quarter, Project type and Project size, or do not reflect any material reduction attributable to the Program; or (ii) Seller fails to satisfy the Marketing Requirements.

(e) **Dual and Prohibited Participation**. Seller may not include in the Portfolio those Customers who are registered in programs or resources administered by the CPUC, the CAISO (including as a Proxy Demand Resource or Reliability Demand Response Resource), the CEC (including in the Demand Side Grid Support Program (the "**DSGS Program**")), the Utility Distribution Company, an applicable Governmental Authority or a third-party program implementer, except for the Allowed Programs (as defined below). Ava reserves the right to register Customers and/or Sites in the CAISO DRRS, the DSGS Program, and other applicable programs, including the CAISO Energy (as defined in the CAISO Tariff) and Ancillary Services markets. Upon enrollment of each Project in the Portfolio, Seller shall obtain all authorizations required by the CAISO, CPUC, or other Governmental Authority for the registration of the Projects in such programs, and shall provide such authorizations to Buyer upon request. If Buyer elects to register all or any portion of the Portfolio in DRRS or otherwise to participate in the CAISO markets, either directly or through a Demand Response Provider or Distributed Energy Resource Provider designated by Buyer (the "**Designated DRP/DERP**"), Seller shall (i) execute and deliver any instruments and documents necessary to evidence Buyer or the Designated DRP/DERP's contractual entitlement to provide the applicable products and services, including Energy (as defined in the CAISO Tariff), Ancillary Services, and/or Demand Response Services in accordance with the CAISO Tariff and the Designated DRP/DERP's agreement with CAISO, and (ii) otherwise use commercially reasonable efforts to facilitate Buyer or the Designated DRP/DERP's enrollment of projects in the DRRS, as applicable, and ongoing provision of Energy (as defined in the CAISO Tariff), Ancillary Services, and/or Demand Response Services from the Projects. Ava agrees to provide at least 3 months notice prior to enrolling Customers in the CAISO market, including the DRRS, the DSGS Program, or other applicable programs. For the avoidance of doubt, any liquidated damages incurred by Ava associated with the participation in an external program shall be Ava's liability only. The "**Allowed Programs**" are: (i) Ava SmartHome Charging and (ii) Self-Generation Incentive Program (SGIP) for CARE/FERA Customers only, as Buyer may revise from time to time, in its sole discretion, documented via Notice; provided, that (y) participation of Customers in both the Portfolio and Allowed Programs does not impair (in whole or in part) Seller's ability to perform its obligations under this Agreement and (z) Seller complies with all rules and requirements of the Allowed Programs set forth by Buyer, the CPUC, the CAISO, the Utility Distribution Company, an applicable Governmental Authority or a third-party program implementer. Notwithstanding the foregoing, Seller may submit a written request for Buyer to approve (in its sole discretion) dual enrollment of a Customer in a program not part of the Allowed Programs. Buyer will respond to Seller's request within 14 days. A failure by Seller or a Customer to achieve participation in the Allowed Programs shall not in any way limit or excuse Seller's obligations to Buyer under this Agreement.

(f) **Seller's Relationship with Customer**. The terms and conditions of the Customer Agreements governing the relationship between Seller and a Customer with respect to such Customer's participation in the Portfolio are independent of Buyer, and Buyer shall have no responsibility with respect

to such Customers for purposes of the Portfolio. Seller shall independently resolve any disputes arising between Seller and any Customer.

(g) **Right of First Refusal for Retired Projects**. For the capacity associated with Projects that have been included in the Portfolio for five years and retired from the Portfolio, Seller shall provide 30 days' prior written notice to Buyer if it intends to sell any Product or grid service associated with such Project, and Buyer shall have the right of first refusal with respect to such Product or grid service.

## Article 6: OPERATIONS

6.1 **Operations**. Seller shall at all times retain operational control of the Project and be responsible for operation and maintenance of the Project in compliance with all applicable Law and Prudent Operating Practice, and Buyer shall have no liability for the failure of Seller, any Customer, or any Project owner or operator to comply with any applicable Law, Requirements, or other requirement of the Transmission Provider or Utility Distribution Company, including any penalties, charges or fines imposed for such noncompliance.

6.2 **Charging Energy**. Seller shall ensure that all the Charging Energy delivered to a Storage Project shall derive from the paired Generating Project.

6.3 **Standard of Care**. In performing all of its obligations under this Agreement, including in its scheduling, interconnection, operation and maintenance of the Project, Seller shall comply with all Requirements and Safety Requirements.

6.4 **Buyer's Use and Certification of Product.**

(a) During the Term, Seller shall take all actions, including executing all documents or instruments, complying with all applicable registration, certification and reporting requirements of all applicable Governmental Authorities and other Persons, as such requirements may be amended from time to time, that are necessary to ensure that Buyer can use Product (including, solely in the event of a Product Transition, enabling Buyer to apply Product towards Buyer's Compliance Obligations), or sell Resold Product, at all times during the Delivery Term. Promptly following Buyer's written request, Seller agrees to take all actions and execute or provide any documents, information, or instruments with respect to Product reasonably necessary to enable Buyer to comply with the requirements of any Governmental Authority.

(b) During the Delivery Term, Seller shall, at no cost to Buyer, obtain and maintain CAISO and all applicable Governmental Authority certification(s) for all elements of the Product for which certification is or may become required in order to enable Buyer to receive and use such Product (including, solely in the event of a Product Transition, use of such Product to satisfy its Compliance Obligations). If Buyer is required under applicable Law to obtain such certification, Seller shall take all actions within its control to ensure that Buyer is able to secure such certification. Seller, at no cost to Buyer, shall take all other actions during the Delivery Term, including submission of all reports and other filings with CAISO and applicable Governmental Authorities, that are required to be taken by Seller to ensure that Buyer can receive the Product and shall take all actions within its control to assist Buyer in taking actions required to be taken by Buyer with regard to receipt of Product.

6.5 **Delivery Term (Outside of Contract Year One) Monthly Contract Capacities**.

(a) With respect to Load Modification, for each year of the Delivery Term (other than the initial Contract Year), Seller shall provide a proposed Monthly Contract Capacity for a Contract Year in the prior Contract Year and by no later than 30 calendar days before the CEC Load Forecast Deadline.

(b) With respect to Event-Based Dispatch, Seller shall provide a proposed Monthly Contract Capacity for a Contract Year (other than the initial Contract Year) by no later than October 1st of the prior Contract Year.

(c) The monthly average of Minimum Contract Capacity for a Contract Year may not deviate by more than 25% from the corresponding Annual Contract Capacity and may not exceed the Annual Contract Capacity unless Buyer approves.

(d) At all times during the Delivery Term, Seller shall operate the Projects to provide, as applicable, (i) Load Modification in the Contract Capacities as specified in the applicable Load Modification Schedule or (ii) Event-Based Dispatch in the Contract Capacities.

(e) If, for a particular Contract Year, Seller is unable to commit to a Minimum Contract Capacity that is, on average on a monthly basis, not less than 75% and not more than 100% of the Annual Contract Capacity for such Contract Year, Seller shall pay to Buyer Enrollment Damages. "**Enrollment Damages**" mean liquidated damages equal to Annual Contract Capacity for the relevant Contract Year minus the average monthly Minimum Contract Capacity for such Contract Year, multiplied by $50/kW. The amount of Enrollment Damages for which Seller shall be liable in a given Contract Year shall not exceed $75,000. If Seller has paid Enrollment Damages or Enrollment Damages have been waived (as provided under Section 6.6 below), the Annual Contract Capacity for the remaining Contract Years may be reduced by the amount equal to Annual Contract Capacity for the relevant Contract Year minus the average monthly Minimum Contract Capacity for such year.

6.6 **Waiver of Enrollment Damages**. Buyer may, in its sole discretion, waive Enrollment Damages if Seller provides documentation demonstrating that Seller has taken Commercially Reasonable Efforts to market its offering and enroll Customers into the Program. For the purposes of this Section 6.6, "Commercially Reasonable Efforts" shall mean: (i) Seller has not marketed other or competing programs to potential storage customers in Buyer's Service Territory between [X and Y dates]; (ii) Seller has performed at least [X] e-mail marketing and [X] direct mail marketing campaigns targeting the relevant Service Territory between [X and Y dates]; and (iii) Seller has performed at least [X] field marketing events in Buyer's Service Territory during at least [Z many] weekends between [X and Y dates]. Seller will not be exempt from Enrollment Damages if Seller acquired Customers but enrolled such Customers into a program other than the Program.

6.7 **Changes in Law**.

(a) In the event of any change in Requirements by the CEC, CPUC, CAISO, or other Governmental Authority or Person results in a *decrease* to the amount of Product that may be calculated or derived from the Operational Characteristics (including any extension by the CEC, CPUC or CAISO of the required duration of energy storage resources for Load Modification or Event-Based Dispatch, as applicable), Seller shall exercise commercially reasonable efforts to maintain the Contract Capacities. If despite such efforts Seller is unable to maintain the Contract Capacities as a result of such change in

requirements, then either Party may provide Notice to the other Party, once it is reasonably evident that the Contract Capacities cannot be maintained, specifying the altered amounts of Product ("**Downward Change Notice**"). Following a Downward Change Notice, Buyer will confirm via Notice to Seller the amended Contract Capacities and Contract Capacity based on such change and the date that Seller shall commence delivery of such amended amounts ("**Downward Change Confirmation Notice**").

(i) In the event of any change in Requirements by the CEC, CPUC, CAISO or other Governmental Authority or Person results in an *increase* to the amount of Product that may be calculated or derived from the Operational Characteristics (including in the case of a new category of Load Modification or Event-Based Dispatch, as applicable, or following a Product Transition, Event-Based Dispatch or Load Modification, as applicable), then either Party shall provide Notice to the other Party as soon as practicable following knowledge of such change specifying the altered amounts of Product ("**Upward Change Notice**"). Following an Upward Change Notice, Buyer shall have sole discretion over whether to accept a corresponding increase to any Contract Capacity. If Buyer chooses to accept such increase, Buyer will confirm via Notice to Seller the amended Contract Capacities based on such change and the date that Seller shall commence delivery of such amended amounts ("**Upward Change Confirmation Notice**"). If Buyer declines to accept any such increase, Seller shall have the right to sell to third parties any resulting Product that is in excess of the Contract Capacities.

(ii) The Contract Capacities shall automatically adjust upon the date set forth in the Confirmation Notice without further need for the Parties to amend this Agreement. Until such date, Seller shall continue to deliver the Contract Capacities of Product as stated prior to the Confirmation Notice, unless otherwise required by Law or other Requirements.

(b) In the event a centralized capacity market develops within the WECC region, Buyer will have exclusive right to offer, bid, or otherwise submit the Product for re-sale in such markets, or to cause Seller or Seller's SC to do so, and Buyer shall retain and receive any and all related revenues.

(c) If a change in CAISO, CEC or CPUC Requirements renders this Agreement or any provisions hereof incapable of being performed or administered, then either Party may request that Buyer and Seller enter into negotiations to make the minimum changes to this Agreement necessary to make this Agreement capable of being performed and administered, while attempting to preserve to the maximum extent possible the benefits, burdens, and obligations set forth in this Agreement as of the Execution Date. Upon delivery of such a request, Buyer and Seller shall engage in such negotiations in good faith. If Buyer and Seller are unable, within 60 days after delivery of such request, to agree upon changes to this Agreement or to resolve issues relating to changes to this Agreement, then either Party may submit issues pertaining to changes to this Agreement to the dispute resolution process set forth in Section 19.2. Notwithstanding the foregoing, (i) a change in cost shall not in and of itself be deemed to render this Agreement or any of the provisions hereof incapable of being performed or administered, or constitute, or form the basis of, an Excused Event, and (ii) all of unaffected provisions of this Agreement shall remain in full force and effect during any period of such negotiation or dispute resolution.

(d) Without limitation or modification of Section 6.6 or Section 6.7(c), in the event of any change in Requirements by the CPUC, CEC, CAISO, or other Governmental Authority or Person that significantly modifies the market mechanisms or regulatory construct for delivery of Load Modification or Event-Based Dispatch, as applicable, or following a Product Transition, Event-Based Dispatch or Load Modification, as applicable, from resources similar to and including the Project (but that does not fall under Section 6.7(c)), either Party may provide Notice to the other Party requesting that the Parties discuss in

good faith changes to this Agreement that would enable each Party to preserve to the maximum extent possible the benefits, burdens, and obligations set forth in this Agreement as of the Execution Date. Upon delivery of such a request, Buyer and Seller shall engage in such negotiations in good faith for a period of at least 60 days but shall have no further obligation or rights under this Section 6.7(d).

## Article 7: EVENTS OF DEFAULT; REMEDIES

7.1 **Events of Default**.

(a) Seller will be deemed a Defaulting Party upon the occurrence of any of the following (each a "**Seller's Event of Default**"):

(i) Seller fails to satisfy a Performance Assurance requirement set forth in Article 10 and Seller fails to provide replacement Performance Assurance within [ ] Business Days of Buyer's written demand therefor in accordance with Article 10;

(ii) any material misrepresentation or omission, in any metering or submetering, Load Modification Schedule, Supply Plan, the Portfolio List, report, or Notice with regard to delivery of the Product, or undue delay or withholding of such data, report or Notice, which misrepresentation or undue delay or withholding is not cured within ten Business Days after Notice from Buyer thereof;

(iii) Seller intentionally or knowingly delivers, or attempts to deliver Product that is not produced by the Project, except as specified in Section 5.1;

(iv) Seller fails (A) to deliver a Delay Notice or Notice, as applicable, in accordance with Section 4.1(d) or (B) to achieve the Initial Delivery Date by the Guaranteed Initial Delivery Date for reasons other than Force Majeure, subject to Section 4.1(d)(iii);

(v) Seller (A) fails in any month to deliver Delivered Quantities to Buyer equal to at least 50% of the Minimum Contract Capacity or (B) incurs Shortfall Damages for more than three consecutive or non-consecutive months in any 12-month period during the Delivery Term; or

(vi) In any year in the Delivery Term, aggregate Delivered Quantities are less than 85% of the Minimum Contract Capacities for such period; or

(b) Either Party will be deemed a Defaulting Party upon the occurrence of any of the following (each a "**Party's Event of Default**"):

(i) the failure by such Party to make, when due, any payment required pursuant to this Agreement and such failure is not remedied within ten Business Days after Notice thereof;

(ii) any representation or warranty made by such Party under 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 30 days after Notice thereof, or such longer additional period, not to exceed an additional 60 days, if the Defaulting Party is unable to remedy such default within such initial 30 days period despite exercising best efforts;

(iii) the failure by such Party to perform any material covenant or obligation set forth in this Agreement, including any failure by Seller to comply with all Requirements and Safety Requirements in accordance with Section 6.3, except to the extent constituting a separate Event of Default, and such failure is not remedied within 30 days after Notice thereof, or such longer additional period, not to exceed an additional 90 days, if the Defaulting Party is unable to remedy such default within such initial 30 days period despite exercising best efforts;

(iv) such Party becomes Bankrupt;

(v) such Party assigns this Agreement or any of its rights hereunder other than in compliance with Article 18; or

(vi) such Party consolidates or amalgamates with, or merges with or into, or transfers all or substantially all of its assets to, another entity and, at the time of such consolidation, amalgamation, merger or transfer, the resulting, surviving or transferee entity fails to assume all the obligations of such Party under this Agreement to which it or its predecessor was a party by operation of Law or pursuant to an agreement reasonably satisfactory to the other Party.

7.2 **Remedies; Declaration of Early Termination Date**. If an Event of Default with respect to a Defaulting Party has occurred, the other Party ("**Non-Defaulting Party**") shall have the following rights:

(a) to send Notice, designating a day, no earlier than the day such Notice is deemed to be received and no later than 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;

(b) to accelerate all amounts owing between the Parties, and to collect as liquidated damages (i) the Damage Payment, in the case of an Event of Default by Seller occurring before the Initial Delivery Date, including an Event of Default under Section 7.1(a)(iv), or (ii) the Termination Payment calculated in accordance with Section 7.3 below, in the case of any other Event of Default by either Party;

(c) to withhold any payments due to the Defaulting Party under this Agreement;

(d) to suspend performance;

(e) to exercise any right or remedy set forth in this Agreement;

(f) to exercise any other right or remedy available at law or in equity, including specific performance or injunctive relief, except where an express and exclusive remedy or measure of damages is provided under this Agreement; and

(g) in the case of Contract Years 2 and beyond with respect to an Event of Default by Seller, Buyer may reject Seller's proposed Monthly Contract Capacity and require Seller to deliver the Contract Capacity in the amounts required by the immediately preceding Contract Year's Monthly Contract Capacity if the Seller's proposed Monthly Contract Capacity is greater than the immediately preceding Contract Year's Monthly Contract Capacity;

provided, however, 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, except as otherwise specified herein, for any Terminated Transaction and the Event of Default related thereto.

7.3 **Termination Payment**. The Termination Payment ("**Termination Payment**") for a Terminated Transaction shall be the aggregate of the Settlement Amount 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. The Non-Defaulting Party shall calculate a Settlement Amount for the Terminated Transaction as of the Early Termination Date. Third parties supplying information for purposes of the calculation of Gains or Losses may include, without limitation, dealers in the relevant markets, end-users of the relevant product, information vendors and other sources of market information. The Settlement Amount shall not include consequential, incidental, punitive, exemplary, indirect or business interruption damages. Without prejudice to the Non-Defaulting Party's duty to mitigate, the Non-Defaulting Party shall not have to enter into replacement transactions to establish a Settlement Amount. Each Party agrees and acknowledges that (a) the actual damages that the Non-Defaulting Party would incur in connection with a Terminated Transaction would be difficult or impossible to predict with certainty, (b) the Damage Payment or Termination Payment described in Section 7.2 or this Section 7.3, as applicable, is a reasonable and appropriate approximation of such damages, and (c) the Damage Payment or Termination Payment described in Section 7.2 or this Section 7.3, as applicable, is the exclusive remedy of the Non-Defaulting Party in connection with a Terminated Transaction but shall not otherwise act to limit any of the Non-Defaulting Party's rights or remedies if the Non-Defaulting Party does not elect a Terminated Transaction as its remedy for an Event of Default by the Defaulting Party.

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

7.5 **Disputes with Respect to Termination Payment**. If the Defaulting Party disputes the Non-Defaulting Party's calculation of the Termination Payment, in whole or in part, the Defaulting Party shall, within five 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 19.

7.6 **Rights and Remedies Are Cumulative**. Except where an express and exclusive remedy or measure of damages is provided, the rights and remedies of a Party pursuant to this Article 7 shall be cumulative and in addition to the rights of the Parties otherwise provided in this Agreement.

## Article 8: FORCE MAJEURE; EXCUSED EVENTS

8.1 **Excused Event**.

(a) **Effect of Excused Event**. A Party shall not be considered to be in default in the performance of its obligations to the extent that the failure or delay of its performance is due to an Excused Event, and the non-affected Party shall be excused from its corresponding performance obligations for the

period of the affected Party's failure or delay of performance. The burden of proof for establishing the existence and consequences of an Excused Event lies with the Party initiating the claim.

(b) **Notice of Excused Event**. The Party desiring to invoke the Excused Event as a cause for delay in its performance of, or failure to perform, any obligation hereunder, shall provide prompt (and in any event within five days of its knowledge of the Excused Event) Notice to the other Party in the form of a letter identifying the Excused Event and describing in detail the particulars of the occurrence giving rise to the Excused Event, including the expected duration, when known, and the effect of such Excused Event. Failure to provide timely Notice constitutes a waiver of a claim of Excused Event. Promptly, but in any event within ten days after a Notice is given pursuant to the preceding sentence, the Parties shall meet to discuss the basis and terms upon which the arrangements set out in this Agreement shall be continued taking into account the effects of such event of Excused Event.

(c) **Mitigation of Excused Event**. The suspension of a Party's performance under the Agreement due to a claim of Excused Event shall be of no greater scope and of no longer duration than is required by the Excused Event. A Party suspending performance due to an Excused Event shall take, or cause to be taken, such action as may be necessary to void, or nullify, or otherwise to mitigate, in all material respects, the effects of such Excused Event. The Parties shall take all reasonable steps to resume normal performance under this Agreement after the cessation of any Excused Event.

(d) **Exceptions to Excused Event**. Notwithstanding any other provision of this Agreement, loss of connectivity by Seller or any Customer, unless such loss of connectivity is the direct result of a Force Majeure event, shall not be considered an Excused Event and none of the remedies or procedures set forth in this Article 8 shall apply.

(e) **Excused Event Failure or Force Majeure Failure**. Subject to Section 8.1(a), Buyer shall have the right, but not the obligation, to terminate this Agreement after the occurrence of the following, each constituting a "**Excused Event Failure**":

(i) if during the Delivery Term:

(A) due to an Excused Event, Seller is unable to meet its obligations under this Agreement (including any failure to deliver Delivered Quantities to Buyer equal to the Contract Capacities) for a period greater than 120 consecutive days;

(B) an aggregate [ %] of all Projects are destroyed or rendered inoperable by an Excused Event; or

(ii) if Seller is unable, due solely to an event of Force Majeure, to achieve the Initial Delivery Date by 120 days after the Guaranteed Initial Delivery Date.

8.2 **Effect of Termination for Excused Event Failure**. If Buyer exercises its termination right in connection with an Excused Event Failure under Section 8.1(e), then the Agreement shall terminate without further liability of either Party to the other, effective upon the date set forth in Buyer's Notice of termination, subject to each Party's satisfaction of all of the final payment and survival obligations set forth in Section 22.3.

## Article 9: INVOICING AND PAYMENT

9.1 **Invoicing**. Seller shall make good faith efforts to deliver an invoice, in arrears, to Buyer no sooner than ten Business Days after the end of each month of the Delivery Term for all amounts due from Buyer to Seller under this Agreement, including as separate line items, as applicable: (a) the Monthly Payment, (b) Upfront Incentives, and (c) other compensatory adjustments required by this Agreement, including adjustments for Taxes. Each invoice shall (i) be calculated based solely on DERMS-Provided Data, (ii) contain data sufficient to document and verify all invoice amounts, including any relevant records or settlement data (including with respect to all settlement calculations derived as set forth under Appendix XI), necessary to verify the accuracy of any amount, and (iii) be in a format specified by Buyer. In the event that any DERMS-Provided Data contains any missing information for any reason other than as a result of an Excused Event, the Parties shall make good faith efforts to agree to replace such data with information from an appropriate source; provided, that Buyer may refuse payment, in its sole discretion, for any amounts not supported by accurate DERMS-Provided Data. In the event that Buyer has a reasonable suspicion that any DERMS-Provided Data may be inaccurate, Buyer may notify Seller of such suspicion, and the Parties shall make good faith efforts to agree on appropriate revisions to the relevant data. If Buyer notifies Seller of such suspicion after the applicable invoice(s) has been issued, Seller shall promptly deliver a revised invoice to Buyer upon the Parties' agreement to appropriate revisions. If Buyer notifies Seller of such suspicion before the applicable invoice(s) has been issued, Seller shall not issue an invoice until the relevant data has been agreed by both Parties. If the Parties are unable agree on appropriate revisions to the relevant data, the dispute shall be resolved pursuant to Sections 9.4 and/or 19.2.

9.2 **Payment**. Buyer shall make payment to Seller by wire transfer or ACH payment to the bank account provided on each monthly invoice. Buyer shall pay undisputed invoice amounts within 45 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 an annual interest rate equal to the three-month SOFR, 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.

9.3 **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 9.4 or an adjustment to an amount previously invoiced or paid is required due to a correction of data by CAISO. 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 9.2, accruing from the date on which the adjusted amount should have been due.

9.4 **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 12 months of the date of 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 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 9.3. Any dispute with respect to an invoice is waived if the other Party is not notified in accordance with this Section 9.4 within 12 months after the date of the invoice 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 12-month period. If an invoice is not rendered within 12 months after the close of the month during which performance occurred, the right to payment for such performance is waived.

9.5 **Netting of Payments**. The Parties hereby agree that they may discharge mutual debts and payment obligations due and owing to each other on the same date through netting, in which case all amounts owed by each Party to the other Party for the purchase and sale of Product during the monthly billing period under this Agreement or otherwise arising out of this Agreement, including any related damages (including Shortfall Damages), interest, and payments (including Monthly Payments) or credits, shall be netted so that only the excess amount remaining due shall be paid by the Party who owes it.

## Article 10: PERFORMANCE ASSURANCE

10.1 **Seller's Development Security**. To secure its obligations under this Agreement, Seller shall deliver Development Security to Buyer within 30 days of the Execution Date. Seller shall maintain the Development Security in full force and effect and Seller shall within five Business Days after any draw thereon replenish the Development Security in the event Buyer collects or draws down any portion of the Development Security for any reason permitted under this Agreement other than to satisfy a Termination Payment. Upon the earlier of (a) Seller's delivery of the Performance Security, or (b) 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 at any time the Development Security ceases to be in full force, and if 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 Guaranteed IDD or (iii) fails to honor Buyer's properly documented request to draw on such Letter of Credit by such issuer, Seller shall have ten Business Days to deliver a substitute Letter of Credit that meets the requirements set forth in the definition of Development Security.

10.2 **Seller's Performance Security**. To secure its obligations under this Agreement, Seller shall deliver Performance Security to Buyer on or before the Initial Delivery Date to replace the Development Security. Performance Security shall be updated prior to the start of each Contract Year to account for changes to the Performance Security Variable or to the highest Maximum Contract Capacity for the remaining Calendar Years, if any. Seller shall maintain the Performance Security in full force and effect, and shall within five Business Days after any draws made by Buyer in accordance with this Agreement (other than to satisfy a Termination Payment) replenish the Performance Security, until the following have occurred: (a) the Delivery Term has expired or terminated early; and (b) all payment obligations of Seller then due and payable under this Agreement, including compensation for penalties, Termination Payment, indemnification payments or other damages are paid in full (whether directly or indirectly such as through set-off or netting). Following the occurrence of both events, Buyer shall promptly return to Seller the unused portion of the Performance Security. If at any time the Performance Security ceases to be in full force or fails to satisfy the requirements of its applicable form, Seller shall have ten Business Days to deliver a substitute Performance Security that meets the requirements set forth in the definition of Performance Security.

10.3 **First Priority Security Interest in Cash or Cash Equivalent Collateral.**

(a) To secure its obligations under this Agreement, and until released as provided herein, Seller hereby grants to Buyer a present and continuing first-priority security interest ("**Security Interest**") in, and lien on (and right to net against), and assignment of the Development Security, Performance Security, any other cash collateral and cash equivalent collateral posted pursuant to Sections 10.1 and 10.2 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 of a Seller's Event of Default or a Party's Event of Default on the part of Seller, an Early Termination Date resulting from a Seller's Event of Default or a Party's Event of Default on the part of 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 10.3):

(i) 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;

(ii) 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

(iii) 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.

(b) 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.

10.4 **Seller Financial Information**. If requested by Buyer, Seller shall deliver to Buyer (a) within 120 days following the end of each fiscal year, a copy of Seller's annual report containing unaudited consolidated financial statements for such fiscal year, if available, (or audited consolidated financial statements for such fiscal year if otherwise available) and (b) within 60 days after the end of each of its first three fiscal quarters of each fiscal year, a copy of such Seller's quarterly report containing unaudited consolidated financial statements for such fiscal quarter, if available. In all cases the statements shall be for the most recent accounting period and shall be prepared in accordance with Generally Accepted Accounting Principles. Notwithstanding anything else herein to the contrary, to the extent Seller is a publicly traded corporation on a nationally recognized stock exchange, the obligation to deliver financial statements pursuant to Section 10.4 herein shall be waived.

## Article 11: SAFETY

11.1 **Safety**. Seller shall, and shall cause its Affiliates and Contractors to, design, construct, operate, and maintain the Project and conduct all Work or cause all Work to be conducted in accordance with the Safety Requirements. Seller shall, and shall cause its Affiliates and Contractors to, take all actions to comply with the Safety Requirements.

11.2 **Reporting Serious Incidents**. Seller shall provide Notice of a Serious Incident to Buyer within five Business Days of occurrence. The Notice of Serious Incident must include the time, date, and location of the incident, the Contractor or Customer(s) involved in the incident (as applicable), the circumstances surrounding the incident, the immediate response and recovery actions taken, and a description of any impacts of the Serious Incident. Seller shall cooperate and provide reasonable assistance and cause each of its Contractors and Customer(s) to cooperate and provide reasonable assistance, to Buyer with any investigations and inquiries by Governmental Authorities that arise as a result of the Serious Incident.

11.3 **Remediation**.

(a) Seller shall resolve any Remediation Event within the Remediation Period. Within ten Business Days of the date of the first occurrence of any Remediation Event, Seller shall provide a Safety Remediation Plan to Buyer for Buyer's review.

(b) Seller shall cooperate, and cause each of its Contractors to cooperate, with Buyer in order for Seller to provide any report relating to a Remediation Event, in a form and level of detail that is acceptable to Buyer which incorporates information, analysis, investigations or documentation, as applicable or as requested by Buyer.

## Article 12: TAXES

12.1 **Taxes**. Seller shall pay or cause to be paid all Taxes (a) on or with respect to the Portfolio and (b) 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 time and place contemplated under this Agreement. 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 time and place contemplated under this Agreement (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 30 days after the Execution 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.

12.2 **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.

**Article 13: LIMITATIONS**

13.1 **No Consequential Damages**. EXCEPT TO THE EXTENT PART OF AN EXPRESS REMEDY OR MEASURE OF DAMAGES HEREIN, OR PART OF AN ARTICLE 15 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.

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

(a) 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.

(b) SELLER HEREBY EXPRESSLY ASSUMES RESPONSIBILITY FOR ALL CLAIMS OF ANY CUSTOMER, POTENTIAL CUSTOMER OR THIRD-PARTY ARISING OUT OF OR ATTRIBUTABLE TO ANY ACTS OR OMISSIONS OF SELLER IN THE IMPLEMENTATION OF THE PORTFOLIO SAFETY PLAN. SELLER COVENANTS NOT TO MAKE, BRING OR INVOLVE BUYER IN ANY CLAIM AND FOREVER RELEASES AND DISCHARGES BUYER FROM LIABILITY UNDER SUCH CLAIMS.

(c) 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.

(d) TO THE EXTENT ANY DAMAGES REQUIRED TO BE PAID HEREUNDER ARE LIQUIDATED, INCLUDING UNDER SECTIONS 4.1(d), 5.3(c), 6.5(e), 7.2, AND 7.3, 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.

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

## Article 14: REPRESENTATIONS; WARRANTIES; COVENANTS

14.1 **Seller's Representations and Warranties**. As of the Execution Date, Seller represents and warrants as follows:

(a) Seller is a [___], duly organized, validly existing and in good standing under the laws of the State of [___], and is qualified to conduct business in the State of California and each jurisdiction where the failure to so qualify would have a material adverse effect on the business or financial condition of Seller.

(b) Seller has the power and authority to enter into and perform this Agreement and is not prohibited from entering into this Agreement or discharging and performing all covenants and obligations on its part to be performed under and pursuant to this Agreement. The execution, delivery and performance of this Agreement by Seller has been duly authorized by all necessary action on the part of Seller (evidence of such due authorization Seller shall provide to Buyer if requested) and does not and will not require the consent of any trustee or holder of any indebtedness or other obligation of Seller or any other party to any other agreement with Seller.

(c) The execution and delivery of this Agreement, consummation of the transactions contemplated herein, and fulfillment of and compliance by Seller with the provisions of this Agreement will not conflict with or constitute a breach of or a default under any Law presently in effect having applicability to Seller, subject to any Permits that have not yet been obtained by Seller, the documents of formation of Seller or any outstanding trust indenture, deed of trust, mortgage, loan agreement or other evidence of indebtedness or any other agreement or instrument to which Seller is a party or by which any of its property is bound.

(d) This Agreement has been duly executed and delivered by Seller. This Agreement is a legal, valid and binding obligation of Seller enforceable in accordance with its terms, except as limited by laws of general applicability limiting the enforcement of creditors' rights or by the exercise of judicial discretion in accordance with general principles of equity.

(e) Each Project is located in Buyer's Service Territory.

(f) Seller will be responsible for obtaining all Permits and Governmental Approvals necessary to construct and operate the Project, including, without limitation, environmental clearance under the California Environmental Quality Act or other environmental Law, from the local jurisdiction where the Project is or will be constructed. Seller will be the applicant on any California Environmental Quality Act documents.

(g) Seller is familiar with conflict of interest Laws, including the California Political Reform Act, and Buyer's board policies governing conflicts of interest; Seller is in compliance with such Laws and board policies and does not know of any facts that would violate such Laws and board policies; Seller and its officers and agents have not, directly or indirectly, offered, paid, promised, or authorized the giving of money or anything of value to any employee, director, officer of Buyer or governmental official in Alameda County, California for the purpose of influencing any act or decision of such employee, director, officer or government official in her official capacity; no officer or agent of Seller (i) is a government official in Alameda County, California or a family member of a government official in Alameda County, California or (ii) has a personal, business, or other relationship or association with any government official in Alameda County, California or family member thereof who may have responsibility for or oversight of any activities of Buyer; Seller does not employ any government official in Alameda County, California or family member thereof.

14.2 **Buyer's Representations and Warranties**. As of the Execution Date, Buyer represents and warrants as follows:

(a) Buyer is a joint powers authority and a validly existing community choice aggregator, duly organized, validly existing and in good standing under the laws of the State of California and the rules, regulations and orders of the California Public Utilities Commission, and is qualified to conduct business in each jurisdiction of the Joint Powers Agreement members. All Persons making up the governing body of Buyer are the elected or appointed incumbents in their positions and hold their positions in good standing in accordance with the Joint Powers Agreement and other Law.

(b) Buyer has the power and authority to enter into and perform this Agreement and is not prohibited from entering into this Agreement or discharging and performing all covenants and obligations on its part to be performed under and pursuant to this Agreement, except where such failure does not have a material adverse effect on Buyer's performance under this Agreement. The execution, delivery and performance of this Agreement by Buyer has been duly authorized by all necessary action on the part of Buyer and does not and will not require the consent of any trustee or holder of any indebtedness or other obligation of Buyer or any other party to any other agreement with Buyer.

(c) The execution and delivery of this Agreement, consummation of the transactions contemplated herein, and fulfillment of and compliance by Buyer with the provisions of this Agreement will not conflict with or constitute a breach of or a default under any Law presently in effect having applicability to Buyer, the documents of formation of Buyer or any outstanding trust indenture, deed of trust, mortgage, loan agreement or other evidence of indebtedness or any other agreement or instrument to which Buyer is a party or by which any of its property is bound.

(d) This Agreement has been duly executed and delivered by Buyer. This Agreement is a legal, valid and binding obligation of Buyer enforceable in accordance with its terms, except as limited by laws of general applicability limiting the enforcement of creditors' rights or by the exercise of judicial discretion in accordance with general principles of equity.

(e) Buyer warrants and covenants that with respect to its contractual obligations under this Agreement, it will not claim immunity on the grounds of sovereignty or similar grounds with respect to itself or its revenues or assets from (i) suit, (ii) jurisdiction of court (provided that such court is located within a venue permitted in law and under the Agreement), (iii) relief by way of injunction, order for specific performance or recovery of property, (iv) attachment of assets, or (v) execution or enforcement of

any judgment; provided, however that nothing in this Agreement shall waive the obligations or rights set forth in the California Tort Claims Act (Government Code Section 810 et seq.).

(f) Buyer is a "local public entity" as defined in Section 900.4 of the Government Code of the State of California.

14.3 **General Covenants**. Each Party covenants that commencing on the Execution Date and continuing throughout the Term 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 the State of California and each jurisdiction where the failure to so qualify would have a material adverse effect on its business or financial condition.

14.4 **Covenants of Seller**. Seller covenants to and for the benefit of Buyer that throughout the Delivery Term (unless another time period is specified):

(a) Seller will (i) acquire and maintain all Governmental Approvals necessary for the construction, operation, and maintenance of the Project consistent with Safety Requirements, including any approvals required under the California Environmental Quality Act, (ii) Notify Buyer of any material modifications or lapse in renewal of Governmental Approvals, and (iii) at Buyer's request, provide to Buyer digital copies of any Governmental Approvals.

(b) Seller will deliver the Product to Buyer free and clear of all liens, security interests, claims and encumbrances or any interest therein or thereto by any Person.

(c) Seller will take no action or permit any Person (other than Buyer) to take any action that would impair in any way Buyer's ability to rely on the Project in order to satisfy its Compliance Obligations.

(d) Seller shall operate the Project during the Delivery Term in accordance with Appendices I and II and Safety Requirements.

(e) Seller shall comply with all Utility Distribution Company, Participating Transmission Owner, and CAISO Tariff requirements applicable to energy storage facilities.

## Article 15: INDEMNITIES

15.1 **Indemnity by Seller**.

(a) Seller shall defend, indemnify and hold harmless Buyer, its directors, officers, agents, attorneys, employees, and representatives ("**Buyer Group**") from and against all third party or Customer claims arising out of this Agreement, demands, losses, liabilities, penalties, and expenses, including reasonable attorneys' and expert witness fees, however described (collectively, "**Claims**"), which arise out of or relate to or are in any way connected with (i) Seller's delivery of the Product to Buyer, (ii) Seller's or its Affiliates' ownership, development, construction, operation or maintenance of the Project, including the Project(s) and the Site(s); (iii) Seller's or its Affiliates' actions or inactions, including but not limited to (A) Seller's or its Affiliates' breach of this Agreement or other agreements related to the development, construction, ownership, operation or maintenance of the Project, the Project(s), Seller's Portfolio, Customer(s), or Site (including any Claims relating to a Shortfall Amount) and (B) Seller's or its Affiliates' willful, fraudulent or negligent actions or inactions; (iv) any environmental matters associated with the

Project, including the disposal and transportation of Hazardous Substances by or on behalf of the Seller or at the Seller's direction or agreement; (v) any agreement between Seller or its Affiliates and a third party including any Customer Agreement; (vi) the participation of Customers in the Project (or the solicitation thereof); (vii) Seller's or its Affiliates' violation of any applicable Law, Requirements, or other requirements of Transmission Provider, Utility Distribution Company, NERC, WECC or Reliability Organization; in each case including any loss, claim, action or suit, for or on account of injury to, bodily or otherwise, or death of, persons, or for damage to or destruction or economic loss of property (including real or tangible personal property) belonging to Buyer, Seller, Seller's Affiliates, Customers, or others, excepting only such losses that are solely caused by the willful misconduct or gross negligence of a member of the Buyer Group (collectively, "**Indemnifiable Losses**").

(b) Seller shall defend, indemnify and hold harmless the Buyer Group from and against all Claims incurred by or brought against Buyer in connection with Environmental Costs.

15.2 **Notice of Claim**.

(a) **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 15, Buyer will promptly Notify Seller in writing of any Claim which Buyer has determined has given or could give rise to an Indemnifiable Loss under Section 15.1. 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.

(b) **Failure to Provide Notice**. A failure to give prompt Notice or to include any specified information in any Notice as provided in this Section 15.2 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 and, provided further, Seller is not obligated to indemnify Buyer for the increased amount of any Indemnifiable Loss which would otherwise have been payable to the extent that the increase resulted from the failure to deliver timely a Notice of Claim.

15.3 **Defense of Claims**. If, within ten days after giving a Notice of Claim regarding a Claim to Seller pursuant to Section 15.2(b), Buyer receives Notice from Seller that Seller has elected to assume the defense of such Claim as provided in the last sentence of Section 15.2(b), 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 ten 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 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 ten 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.

15.4 **Subrogation of Rights**. Upon making any indemnity payment, Seller will, to the extent of such indemnity payment, be subrogated to all rights of the Buyer against any third party in respect of the Indemnifiable Loss to which the indemnity payment relates; provided that (a) Seller is in compliance with its obligations under this Agreement in respect of such Indemnifiable Loss, and (b) until Buyer recovers full payment of its Indemnifiable Loss, any and all claims of the 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.

15.5 **Rights and Remedies are Cumulative**. The rights and remedies of a Party pursuant to this Article 15 are cumulative and in addition to the rights of the Parties otherwise provided in this Agreement, except with respect to any expressly exclusive remedies herein.

## Article 16: INSURANCE

16.1 **Insurance**. Throughout the Term, Seller shall procure and maintain the following insurance coverage and require and cause its Contractors to maintain the same levels of coverage. For the avoidance of doubt, the obligations of the Seller in this Section 16.1 constitute a material obligation of this Agreement.

(a) **Workers' Compensation and Employers' Liability**.

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

(ii) Employers' liability insurance will not be less than $1,000,000.00 for injury or death occurring as a result of each accident. With regard to bodily injury by disease, the $1,000,000 policy limit will apply to each employee.

(b) **Commercial General Liability**.

(i) Commercial general liability insurance, including products and completed operations and personal injury insurance, in a minimum amount of $2,000,000 per occurrence, and an annual aggregate of not less than $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 named insured.

(ii) An umbrella insurance policy in a minimum limit of liability of $10,000,000.

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

(c) **Business Auto**.

(i) Business auto insurance for bodily injury and property damage with limits of $1,000,000 per occurrence.

(ii) Such insurance shall cover liability arising out of Seller's use of all owned (if any), non-owned and hired vehicles, including trailers or semi-trailers in the performance of the Agreement.

(d) **Construction All-Risk Insurance**. During the construction of the Project prior to the Initial Delivery Date, construction all-risk form property insurance covering the Project and naming Seller (and Lender if any) as the loss payee.

(e) **Contractor's Pollution Liability.**

(i) If the scope of Work involves areas of known pollutants or contaminants, pollution liability coverage will be required to cover bodily injury, property damage, including clean-up costs and defense costs resulting from sudden, and accidental conditions, including the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, hydrocarbons, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water shall be maintained.

(ii) The limit will be at least $2,000,000 each occurrence for bodily injury and property damage.

(iii) The policy will endorse Buyer as additional insured.

(f) **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 16.1(f).

16.2 **Evidence of Insurance**. Within 10 days after the Execution Date and upon annual renewal thereafter, Seller shall deliver to Buyer certificates of insurance evidencing the coverage required under this Agreement. These certificates shall specify that Buyer shall be given at least 30 days prior Notice by Seller in the event of any material modification, reduction, cancellation or termination of coverage. Such insurance shall be primary coverage without right of contribution from any insurance of Buyer.

16.3 **Failure to Comply**. If Seller fails to comply with any of the provisions of this Article 16, Buyer may, but is not obligated, to purchase the insurance coverage required under Section 16.1 and set off the cost thereof from any amounts owed by Buyer to Seller under this Agreement.

## Article 17: RECORDS AND AUDIT RIGHTS

17.1 **Operations Logs**. Seller shall maintain a complete and accurate log of all material operations. Such log will include, but not be limited to, information on charging, discharging, availability,

maintenance performed, outages, energy characteristics of the energy storage systems and similar information relating to the availability, testing and operation of the Project. Seller shall provide this information electronically to Buyer on a monthly basis. At the request of Buyer or any Governmental Authority having jurisdiction over any of the Requirements, Seller shall provide all records demonstrating that the Project is operated and maintained in accordance with Requirements.

17.2 **Records and Audit.**

(a) Seller shall provide access to such financial records and personnel required by Buyer in order to facilitate Buyer's compliance with applicable Law and Generally Accepted Accounting Principles.

(b) 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 five years or as otherwise required by Law. Seller will make all records available to Buyer at its principal place of business during normal working hours.

17.3 **General Audit Right**. Buyer has the right during normal working hours, and after reasonable Notice, to examine Seller's records to the extent reasonably necessary to verify (a) Seller's compliance with this Agreement (including Section 14.4), (b) the accuracy of any statement including the Portfolio Safety Plan or other documents that supplement this Agreement, and (c) any charge, or computation made pursuant to this Agreement. If such examination reveals any material inaccuracy, necessary adjustments shall be made promptly.

17.4 **State Auditor**. In accordance with 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 if the compensation under this Agreement exceeds $10,000.00.

17.5 **Data Request Cooperation**. Each Party shall use reasonable efforts to assist the other Party in gathering information for and preparing responses to data requests and other inquiries from Governmental Authorities or Public Records Act requests that are related to or associated with the Project, delivery of Product or this Agreement, subject to the requirements of Article 20.

## Article 18: ASSIGNMENT

18.1 **General Prohibition on Assignments**. Except as provided below, Seller may not directly or indirectly assign this Agreement or its rights or obligations under this Agreement, without the prior written consent of Buyer, which consent shall not be unreasonably withheld or delayed. In the event of any Seller Change of Control, the Party experiencing the change of control shall provide the other Party with 30 days' prior written notice thereof.

18.2 **Collateral Assignment.**

(a) Subject to the provisions of this Section 18.2, Seller has the right to assign this Agreement as collateral for any financing or refinancing of the Portfolio or the Projects. Seller has the right to assign the Projects and Customer Agreements in connection with any financing or refinancing of the Projects.

(b) In connection with any collateral assignment of this Agreement for purposes of the financing or refinancing of the Project by Seller, Buyer agrees to work with Seller and Lender to agree upon

a consent to collateral assignment of this Agreement ("**Collateral Assignment Agreement**"). The Collateral Assignment Agreement must be in form and substance agreed to by Buyer, Seller and Lender.

18.3 **Assignment to Seller Affiliate**. Except as may be precluded by, or would cause Buyer to be in violation of the Political Reform Act (Cal. Gov. Code section 81000 et seq.) or the regulations thereto, Cal. Government Code section 1090, Buyer's Conflict of Interest Code/Policy or any other conflict of interest Law, Seller may, without the prior written consent of Buyer, transfer or assign this Agreement, including through a Seller Change of Control, to an Affiliate of Seller, provided that such assignment shall not release Seller from its obligations under this Agreement unless such Affiliate has financial strength and technical capabilities equal to or greater than that of Seller.

18.4 **Unauthorized Assignment; Costs.**

(a) Any assignment or purported assignment in violation of this Article 18 is void.

(b) No assignment of this Agreement shall be effective unless such assignment is memorialized in a written agreement signed by the assignee and, except in connection with a collateral financing, in which agreement the assignee assumes all of the assignor's obligations and liabilities under this Agreement.

(c) 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, including without limitation reasonable attorneys' fees.

## Article 19: DISPUTE RESOLUTION

19.1 **Governing Law**. This Agreement and the rights and duties of the Parties hereunder shall be governed by and construed, enforced, and performed in accordance with the laws of the State of California, without regard to principles of conflicts of law. 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 Northern District of California, or the courts of the State of California sitting in the County of Alameda, California.

19.2 **Dispute Resolution**. In the event of any dispute arising under this Agreement, within ten 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 30 days of initiating such discussions, or within 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 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. 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 19.2.

## Article 20: CONFIDENTIAL INFORMATION

20.1 **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.

20.2 **Duty to Maintain Confidentiality**. Confidential Information will retain its character as Confidential Information but may be disclosed by the recipient (the "**Receiving Party**") if and to the extent such disclosure is required (a) to be made by any requirements of Law, (b) pursuant to an order of a court or (c) in order to enforce this Agreement. If the Receiving Party becomes legally compelled (by interrogatories, requests for information or documents, subpoenas, summons, civil investigative demands, or similar processes or otherwise in connection with any litigation or to comply with any applicable law, order, regulation, ruling, regulatory request, accounting disclosure rule or standard or any exchange, control area or independent system operator 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.

20.3 **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.

20.4 **Permitted Disclosure.** Notwithstanding anything to the contrary in this Article 20, each Party may disclose Confidential Information to such Party's Affiliates, actual or potential Lenders or investors or purchasers (including tax credit purchasers), actual or potential agents, consultants, contractors, trustees, members, employees or officers, and in the case of Buyer, to actual or potential limited assignees, so long as the Person (other than a Person that has an ethical duty to Buyer or Seller, as applicable) to whom

Confidential Information is disclosed either is bound by similarly restrictive confidentiality obligations as those contained in this Agreement, or agrees in writing to be bound by the confidentiality provisions of this Article 20 to the same extent as if it were a Party. In addition, Buyer may disclose a redacted version (or an unredacted version if required by Law) of this Agreement, or any portion thereof, and any information, data, analyses, documents, and materials furnished or made available to Buyer in connection with this Agreement to the CAISO, the CPUC, and all divisions thereof, the CEC, the CARB, and any other Governmental Authority having jurisdiction over Buyer or this Agreement; provided that Buyer shall use reasonable efforts to limit, to the extent possible, the ability of any such applicable Governmental Authority to further disclose such information that qualifies as Confidential Information and is eligible for confidential or protective treatment under the respective regulatory agency's rules, orders, or decisions on confidential or protected information.

20.5 **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 20.5 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 board or city council, as applicable; 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.).

20.6 **Customer Information**. Seller shall comply with all applicable Laws relating to the protection of Customer Information, including California Public Utilities Code Section 8380, *et seq.* and the "Rules Regarding Privacy and Security Protections for Energy Usage Data" adopted by the CPUC.

## Article 21: DATA ACCESS AND PROTECTION

21.1 **Data Access; Usage Data**. Seller understands and acknowledges that Buyer is entering into this Agreement in part to gain operational and market information regarding the performance, efficiency, operations, maintenance, and multiple uses of energy storage and storage assets as an integral part of Buyer's portfolio of assets to meet its customers' needs as well as to gain an understanding of the impact of energy storage on load forecasting as a load serving entity. Prior to the Initial Delivery Date, Seller shall integrate with Buyer's DERMS to report data regarding the generation and/or charging and discharging profile of the applicable Project(s) at the applicable Site(s) (collectively, the "**Customer's Performance Data**"). The Customer's Performance Data may include, without limitation, data from the Meter or Project, technical logs, generation characteristics, charging characteristics, discharging characteristics, and any other information that Buyer may reasonably request. Throughout the Delivery Term, Seller shall provide the DERMS-Provided Data to Buyer on a 15-minute basis and at a 15-minute latency. The DERMS-Provided Data shall be consistent with all other data available to Buyer through DERMS. Seller shall bear sole and exclusive responsibility with respect to the operation of the DERMS and its coordination with the Storage Project. Throughout the Term, Seller agrees to share additional information with Buyer, which may include additional meter data and hourly charging and discharging data on a device level, but excluding cost or similar proprietary information, upon Buyer's reasonable request, with such information to be treated by Buyer as Confidential Information. Except with respect to services, attributes, or products delivered to Customers pursuant to Customer Agreements or products or services related to renewable energy credits (which shall not require any Notice to Buyer), for information related to Seller's multiple uses of the Project, Seller shall promptly provide Notice to Buyer any time it provides any services, attributes, or products from the Project to a third party.

21.2 **Customer Personal Information and Representations and Warranties of Seller.** Seller represents and warrants the following:

(a) Seller has (i) represented to Customer that Buyer is an Authorized Person of Seller and (ii) the written authority to provide Buyer with Customer Information.

(b) Seller represents and warrants to Buyer that each Customer Agreement contains the following provisions:

(i) Customer has provided explicit, written authorization allowing for the use of their Project(s)' generation, charging, and discharging data to be reviewed by Buyer to determine Customer's eligibility to participate in the Program.

(c) Customer has provided explicit, written agreement to the terms and conditions associated with participation in the DSGS Program. Customer has provided explicit, written confirmation that it is not registered as a CAISO Proxy Demand Resource or Reliability Demand Response Resource.

21.3 **Data Processing.** The Parties shall comply in all respects with the rights and obligations set forth in Appendix XVI.

## Article 22: GENERAL PROVISIONS

22.1 **Entire Agreement; Integration; Exhibits**. This Agreement 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 Cover Sheet and any exhibit, appendix, or other attachment hereto is an integral part hereof and is made a part of this Agreement by reference. This Agreement shall be considered for all purposes as prepared through the joint efforts of the Parties and shall not be construed against one Party or the other as a result of the preparation, substitution, submission or other event of negotiation, drafting or execution hereof.

22.2 **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.

22.3 **Survival**. Applicable provisions of this Agreement shall continue in effect after termination, to the extent necessary to enforce or complete the duties, obligations or responsibilities of the Parties arising prior to termination. Notwithstanding anything to the contrary in this Agreement, (a) all rights under Sections 15.1 through 15.5 (Indemnities) and any other indemnity rights survive the end of the Term without limit, (b) all audit rights under Sections 17.2 and 17.3 survive the end of the Term for an additional one year, or as required by applicable Law, (c) all rights and obligations under Article 20 survive the end of the Term without limit, and (d) all provisions relating to limitations of liability survive without limit.

22.4 **Waivers**. Waiver by a Party of any default by the other Party shall not be construed as a waiver of any other default. Any waiver of a default under this Agreement must appear in a writing signed by the waiving Party.

22.5 **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 Product seller and Product 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 Project, the Product or any business related to the Project. 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 indemnitee. In no event shall Buyer's receipt or review of any Seller submission, or Buyer's monitoring of Project data or cooperation in Project operations be construed as an assumption of any responsibility, liability or obligation of Seller for the design, construction or operation of the Project.

22.6 **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.

22.7 **Mobile Sierra**. Notwithstanding any 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 the FERC pursuant to the provisions of the Federal Power Act, absent prior written agreement of the Parties. Further, absent the prior written agreement in writing by both Parties, the standard of review for changes to the rates, terms or conditions of service of this Agreement proposed by a Party, a non-Party, or the FERC acting sua sponte shall be the "public interest" standard of review set forth in *United States Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956)* and *Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348 (1956)* , and clarified by *Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1 of Snohomish, 554 U.S. 527 (2008)* and *NRG Power Mrkt'g, LLC v. Maine Pub. Util. Comm'n, 558 U.S. 165 (2010)*.

22.8 **Counterparts**. This Agreement may be executed in one or more counterparts, all of which taken together shall constitute one and the same instrument and each of which shall be deemed an original.

22.9 **Electronic Delivery**. This Agreement may be duly executed and delivered by a Party by execution and electronic format (including portable document format (.pdf)) delivery of the signature page of a counterpart to the other Party, provided that any digital signatures are in compliance with California Code of Regulations, Title 2, Division 7, Chapter 10, Sections 22000- 22005.

22.10 **No Recourse to Members of Buyer**. Buyer is organized as a joint powers authority in accordance with the Joint Exercise of Powers Act of the State of California (Government Code Section 6500, et seq.) pursuant to its Joint Powers Agreement and is a public entity separate from its constituent members. Buyer shall solely be responsible for all debts, obligations and liabilities accruing and arising out of this Agreement. Seller shall have no rights and shall not make any claims, take any actions or assert any remedies against any of Buyer's constituent members, or the employees, contractors, directors, officers, consultants or advisors or Buyer or its constituent members, in connection with this Agreement.

22.11 **Forward Contract**. The Parties acknowledge and agree that this Agreement constitutes a "forward contract" within the meaning of the U.S. Bankruptcy Code, and Buyer and Seller are "forward contract merchants" within the meaning of the U.S. Bankruptcy Code. Each Party further agrees that, for

all purposes of this Agreement, each Party waives and agrees not to assert the applicability of the provisions of 11 U.S.C. § 366 in any bankruptcy proceeding wherein such Party is a debtor. In any such proceeding, each Party further waives the right to assert that the other Party is a provider of last resort to the extent such term relates to 11 U.S.C. §366 or another provision of 11 U.S.C. § 101-1532.

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

## Article 23: NOTICES

23.1 **Addresses for the Delivery of Notices**. Any Notice required, permitted or contemplated hereunder shall be in writing, shall be addressed to the Party to be notified at the address set forth on Appendix VIII or at such other address or addresses as a Party may designate for itself from time to time by Notice hereunder.

23.2 **Time of Delivery**. Except as expressly provided otherwise, each Notice required, permitted, or contemplated hereunder shall be deemed to have been validly served, given or delivered if sent by electronic mail at the time indicated by the time stamp upon delivery, except that if received after 5:00 PM Pacific Prevailing Time, it shall be deemed received on the next Business Day. Notwithstanding the foregoing, Notices of outages or other scheduling or dispatch information or requests, may be sent by electronic mail, or any other mutually-acceptable form of electronic communication, and shall be considered delivered upon successful completion of such transmission. Notices sent pursuant to Article 7 (Event of Default), Article 15 (Indemnities), and Article 19 (Dispute Resolution) must concurrently be sent by hand delivery or overnight carrier with delivery fees either prepaid or an arrangement with such carrier made for the payment of such fees.

[*Signature Page Follows*]

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

[___],
a [_____] [_____]

By:
Name:
Title:

AVA COMMUNITY ENERGY AUTHORITY,
a California joint powers authority

By:
Name:
Title:

**APPENDIX I**

**PORTFOLIO LIST**

Provided by Seller to Buyer as of [_____]

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | | | | | | | | |

**Enrollment and Device Data**

Account Holder First Name

Account Holder Last Name

Street Address

City

State

Zip Code

Account Number

ESS Installation Date

ESS Installer

Number of ESS

ESS Manufacturer

ESS Make and Model

ESS Device ID

ESS Discharge Power (kW)

ESS Nominal Energy (kWh)

ESS Nominal Energy times Nominated Capacity % (kWh)

ESS Nominated Capacity (%)

Capacity Contribution of ESS to the Minimum Contract Capacity (kW)

On-Site Paired Solar Capacity (kW)

Paired Solar Installation Date

Income Qualified (Y/N) [Income Qualified means participating in CARE or FERA]

Existing or New Solar: [Existing Solar / New Solar]

Existing or New ESS: [Existing ESS / New ESS]

Enrollment Date

Unenrollment Date

Re-enrollment Date

Status (Active/Inactive)

By submitting this Portfolio List to Buyer, Seller attests as of the date signed below, that all of the information is accurate and that the Customers and Projects comprising this Portfolio List are in compliance with the terms of the Agreement.

| | |
|---|---|
| Signature: | |
| Name: | |
| Title: | |
| Date: | |

# APPENDIX II(A)

## PRODUCT-SPECIFIC OPERATIONAL CHARACTERISTICS

**The following describes the Product-Specific Operational Characteristics required for the delivery of the Product.**

**Load Modification Parameters**

Duration: 2 hours

Month of year that may be included in the Load Modification Schedule: All months

Day of week that may be included in the Load Modification Schedule: All weekdays

Hours of day that may be included in the Load Modification Schedule: All hours

**Event-Based Dispatch Parameters**

Duration: 1 hour

Minimum Number of Events per Calendar Year: 5

Maximum Number of Events per Calendar Year: 80

Maximum Number of Events per Day: 2

Month of year that events may be called: Any month

Day of week that events may be called: Any day

Hours of day that events may be called: Any hour

# APPENDIX II(B)

## PROJECT-SPECIFIC OPERATIONAL CHARACTERISTICS

**Storage Project**

- Configured such that it is charged only by a paired Generating Project;
- Configured to export Energy to the CAISO Grid;
- Has the requisite terms in the Interconnection agreement to export Energy to the CAISO Grid;
- Has received permission to operate from the Utility Distribution Company; and

## APPENDIX III

## PROGRESS REPORTING FORM

Each Progress Report must include the following items:

1. Executive summary.
2. Projects' description.
3. Description of any material planned changes to the Project(s) or the Site(s).
4. Schedule showing progress on Projects' implementation generally and achieving of the Guaranteed Initial Delivery Date.
5. Summary of activities during the previous month, including any OSHA labor hour reports.
6. Forecast of activities scheduled for the current calendar quarter.
7. Written description about the progress relative to the Initial Delivery Date, including whether Seller is on schedule with respect to the same.
8. List of issues that are likely to potentially affect achievement of the Initial Delivery Date.
9. Table showing the % capacity of the Initial Portfolio that has reached certain development milestones: Customers signed and authorized, Installation Commenced, Installation Complete, Operations Commenced.
10. Indicative pictures, in sufficient quantity and of appropriate detail, to document progress toward the achievement of the Guaranteed Initial Delivery Date of a representative portion of Projects to be included in Portfolio. Pictures pertaining to 10% or fewer of individual Projects included in Portfolio to be provided to Buyer at Buyer's discretion.
11. Compliance with requirements imposed by any Governmental Authority.
12. Written description of workforce development activities such as developed relationships with local electrical schools and programs to recruit, train, and utilize local talent, contingent on resource availability, project volume, and hiring needs.
13. Any other documentation reasonably requested by Buyer.

**APPENDIX IV(A)**

**CERTIFICATION OF ACHIEVEMENT OF THE INITIAL DELIVERY DATE**

This certification of achievement of the Initial Delivery Date (this "Certification") is delivered by [_____], a [_____] ("Seller"), to Ava Community Energy Authority, a California joint powers authority ("Buyer"), in accordance with the terms of that certain Distributed Energy Resource Agreement dated [_____] ("Agreement") by and between Seller and Buyer. All capitalized terms used in this Certification but not otherwise defined herein shall have the respective meanings assigned to such terms in the Agreement.

Seller hereby certifies and represents to Buyer the following:

1. Seller has delivered to Buyer an attestation certificate from an officer of Seller certifying that Seller has secured all CAISO and Governmental Approvals as are necessary for the safe and lawful operation and maintenance of the Project and to enable Seller to deliver the Product to Buyer at the Contract Capacities.

2. Seller has (i) confirmed that each potential customer validly constitutes a Customer, (ii) executed a Customer Agreement with each Customer whose Project is to be a part of the Initial Portfolio as necessary for the safe and lawful operation of the Project and to enable Seller to deliver the Product to Buyer in the Contract Capacities, and (iii) delivered a Customer Agreement template to Buyer demonstrating (A) Seller has rights to the Project's grid services, (B) Seller is prohibited from removing or disabling the Storage Project if a CARE/FERA Customer undergoes a payment or non-material default under the terms of the Customer Agreement, (C) Ava may enroll the Customer or Project in programs including but not limited to the DSGS Program and CAISO market participating programs, (D) Seller accepts responsibility for all taxes accrued, if any, on the Upfront Incentives, and shall at no time cause Customer to be responsible for such tax liability, and (E) such Customer Agreements shall remain valid and in full force and effect.

3. Seller has constructed or caused to be constructed the Projects that are to be part of the Initial Portfolio as of the Initial Delivery Date in accordance with this Agreement to enable Seller to satisfy the obligations of the Seller herein, including the delivery of the Product from the Project at the Contract Capacities.

4. Seller has executed and complied with any necessary Interconnection Agreement(s) and installed any necessary metering to deliver Product to Buyer in the Contract Capacities, in each case in accordance with the CAISO Tariff and any applicable tariffs of the Utility Distribution Company and the Participating Transmission Owner.

5. Seller has (i) entered into a separate integration agreement with the provider of Buyer's DERMS and completed the integration process with a mutually agreed DERMS integration testing protocol, or (ii) if the integration process and testing protocol has not yet been completed as of IDD, Seller has demonstrated commercially reasonable efforts to complete integration with such system by the fourth week anniversary of the Guaranteed IDD.

6. Seller has submitted to Buyer a Portfolio Safety Plan.

7. Seller is in compliance with the Marketing Requirements.

8. Seller has provided Buyer as of the Execution Date with an Initial Portfolio List. Following the Execution Date, Seller may alter from time to time, but no later than 30 days prior to the Guaranteed Initial Delivery Date, the Initial Portfolio List, upon receipt of Buyer's written approval. If Seller provides to Buyer the Initial Portfolio List, but prior to the occurrence of the Initial Delivery Date Seller changes the Initial Portfolio List (following receipt of Buyer's written approval), then this Condition Precedent shall not be satisfied and the date on which Seller provides to Buyer a changed Portfolio List in accordance with this Agreement shall constitute provision of Initial Portfolio List for purposes of this Condition Precedent.

9. Seller has provided to Buyer the Monthly Contract Capacity for Contract Year 1.

10. Seller has provided to Buyer documentation of Seller's compliance with the dual participation requirements of Section **Error! Reference source not found.**.

11. Seller has delivered to Buyer all insurance documents required under **Error! Reference source not found.**.

12. Seller has provided Performance Security to Buyer as required by Section **Error! Reference source not found.**.

13. Seller has paid Buyer for all amounts owing under this Agreement, if any, including IDD Delay Damages.

14. No Event of Default on the part of Seller shall have occurred and be continuing and no Remediation Event shall have occurred and remain unresolved.

15. Seller and Buyer have mutually agreed to the calculation methodologies set forth under Section **Error! Reference source not found.** and illustrated under Appendix XI.

16. Seller has submitted to Buyer a document, including the information set forth in Appendix XIV, outlining the Installation Charges for each CARE/FERA Customer and Market Rate Customer.

17. All Projects within the Portfolio meet the Project Eligibility Criteria.

18. If applicable, Seller has rendered and Buyer has received the Reduction Payment.

**SELLER:**

Signature:_____

Name:_____

Title:_____

Date:_____

**APPENDIX IV(B)**

**CERTIFICATION OF ACHIEVEMENT OF PORTFOLIO MODIFICATION**

This certification of achievement of a Portfolio Modification (this "Certification") is delivered by [_____], a [_____] ("Seller"), to Ava Community Energy Authority, a California joint powers authority ("Buyer"), in accordance with the terms of that certain Distributed Energy Resource Agreement dated [_____] ("Agreement") by and between Seller and Buyer. All capitalized terms used in this Certification but not otherwise defined herein shall have the respective meanings assigned to such terms in the Agreement.

Seller hereby certifies and represents to Buyer the following:

1. Seller has submitted to Buyer all documentation required to confirm that the Projects integrated into the Portfolio meet the Project Eligibility Criteria and the applicable Operational Characteristics, as determined by Buyer in its sole and reasonable discretion.

2. Seller has submitted to Buyer all documentation related to the Installation Charges, including the information set forth in Appendix XIV for each Newly Enrolled Customer.

3. Seller has submitted to Buyer an updated Portfolio List reflecting all proposed changes since Seller's distribution of the Initial Portfolio List or previously revised Portfolio List, as applicable.

4. With respect to Newly Enrolled Customers, Seller has complied with the requirements of Section 5.4(d).

5. Seller has delivered to Buyer an attestation certificate from an officer of Seller certifying that Seller has secured all CAISO and Governmental Approvals as are necessary for the safe and lawful operation and maintenance of the Project and to enable Seller to deliver the Product to Buyer at the Contract Capacities.

6. Seller has (i) confirmed that each potential customer validly constitutes a Customer, (ii) executed a Customer Agreement with each Customer whose Project is to be a part of the Portfolio Modification as necessary for the safe and lawful operation of the Project and to enable Seller to deliver the Product to Buyer in the Contract Capacities, (iii) confirmed to Buyer that each executed Customer Agreement, which Seller will provide to Buyer upon request, demonstrates that (A) Seller has rights to the Project's grid services, (B) Seller is prohibited from removing or disabling the Storage Project if a CARE/FERA Customer undergoes a payment or non-material default under the terms of the Customer Agreement, (C) Ava may enroll the Customer or Project in programs including but not limited to the DSGS Program and CAISO market participating programs, (D) Seller accepts responsibility for all taxes accrued, if any, on the Upfront Incentives, and shall at no time cause Customer to be responsible for such tax liability, and (E) such Customer Agreements shall remain valid and in full force and effect.

7. Seller has constructed or caused to be constructed the Projects that are to be part of the Portfolio Modification in accordance with this Agreement to enable Seller to satisfy the obligations of the Seller herein, including the delivery of the Product from the Project at the Contract Capacities.

8. Seller has executed and complied with any necessary Interconnection Agreement(s) and installed any necessary metering to deliver Product to Buyer in the Contract Capacities, in each case in accordance with the CAISO Tariff and any applicable tariffs of the Utility Distribution Company and the Participating Transmission Owner.

9. Seller has completed the integration with the DERMS and implemented a mutually agreed DERMS integration testing protocol.

10. Seller has maintained a Portfolio Safety Plan.

11. Seller is in compliance with the Marketing Requirements.

12. Seller has provided to Buyer documentation of Seller's compliance with the dual participation requirements of Section 5.4(e).

13. Seller maintains all insurance documents required under Article 16.

14. Seller maintains Performance Security for the benefit of Buyer, as required by Section 10.2.

15. Seller has paid Buyer for all amounts owing under this Agreement, if any.

16. No Event of Default on the part of Seller shall have occurred and be continuing and no Remediation Event shall have occurred and remain unresolved.

17. Seller has submitted to Buyer a document, including the information set forth in Appendix XIV, outlining the Installation Charges for each CARE/FERA Customer and Market Rate Customer.

**SELLER:**

Signature:_____

Name:_____

Title:_____

Date:_____

**APPENDIX V**

**FORM OF LETTER OF CREDIT**

[Issuing Bank Letterhead and Address]

IRREVOCABLE STANDBY LETTER OF CREDIT NO. [XXXXXXX]

Date: _____
Bank Ref.: _____
Amount: US$_____
Expiration Date: _____

Beneficiary:

Ava Community Energy Authority
1999 Harrison Street, Suite 2300
Oakland, CA 94612
Attn: Marie Fontenot, Sr. Vice President of Power Resources
and Jason Bartlett, Senior Finance Manager

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 ("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 Distributed Energy Resource 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 your duly authorized representative, in the form attached hereto as Exhibit A, containing one of the two alternative paragraphs set forth in paragraph 2 therein, referencing our Letter of Credit No. [*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 on 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.

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

This Letter of Credit is 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 the state of California.

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, Attn: Marie Fontenot, Vice President of Power Resources and Jason Bartlett, Senior Finance Manager, 1999 Harrison Street, Suite 2300, Oakland, CA 94612. 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: (DRAW REQUEST SHOULD BE ON BENEFICIARY'S LETTERHEAD)

Drawing Certificate

[*Bank name and address*]

Ladies and Gentlemen:

The undersigned, a duly authorized representative of Ava Community Energy Authority, a California joint powers authority, 1999 Harrison Street, Suite 2300, Oakland, CA 94612, 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 Distributed Energy Resource 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's 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 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 by wire transfer in immediately available funds to the following account: [*Specify account information*].

Ava Community Energy Authority

_____

[*Name and Title of Authorized Representative*]

Date_____

# APPENDIX VI

## PORTFOLIO SAFETY PLAN AND DOCUMENTATION

**Portfolio Safety Plan Elements:**

**Part One: Safety Requirements and Safety Programs**

Identify the applicable safety-related codes, standards, and regulations (CSR) which govern the design, construction, operation, and maintenance of the Project using the proposed technology.

Describe the Seller's and the Seller's Contractor(s)' safety programs and policies. Describe Seller's compliance with any safety-related industry standards or any industry certifications (American National Standards Institute (ANSI), International Organization for Standardization (ISO), etc.), if applicable.

**Part Two: Portfolio Design and Description**

Describe Seller's safety engineering approach to select equipment and design systems and the Project to reduce risks and mitigate the impacts of safety-related incidents, including cascading failures, excessive temperatures, thermal runaways, fires, explosions, disk fractures, hazardous chemical releases.

Describe the results of any failure mode effects analyses (FMEA) or similar safety engineering evaluations. In the case of lithium ion batteries, describe the safety-related reasons, including design features and historical safety records, for selecting particular anode and cathode materials and a particular manufacturer.

Provide a list of major facility components, systems, materials, and associated equipment, which includes but is not limited to, the following information:

a) Equipment manufacturer's datasheet, model numbers, etc.,
b) Technical specifications,
c) Equipment safety-related certifications (e.g. UL),
d) Safety-related systems, and
e) Approximate volumes and types of hazardous materials expected to be on Site.

**Part Three: Portfolio Safety Management**

Identify and describe any hazards and risks to life, safety, public health, property, or the environment due to or arising from the Project. Describe the Seller's applicable site-specific safety plans, risk mitigation, Safeguards and layers of protection, including but not necessarily limited to:

a) Engineering controls,
b) Work practices,
c) Administrative controls,
d) Personal protective equipment and procedures,
e) Incident response and recovery plans,
f) Contractor pre-qualification and management,
g) Operating procedures,
h) Emergency plans,
i) Training and qualification programs,
j) Disposal, recycle, transportation and reuse procedures, and

k) Physical security measures.

## APPENDIX VII

## MONTHLY CONTRACT CAPACITY

| Month | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Minimum Contract Capacity (kW) | | | | | | | | | | | | |
| Maximum Contract Capacity (kW) | | | | | | | | | | | | |

**APPENDIX VIII**

**NOTICES**

| **SELLER** | **BUYER** |
|---|---|
| **All Notices:**<br><br>Street:<br>City:<br>Attn:<br>Phone:<br>Email: | **All Notices:**<br><br>Street:<br>City:<br>Attn:<br>Phone:<br>Email: |
| **Invoices:**<br>Attn:<br>Phone:<br>E-mail: | **Invoices:**<br>Attn:<br>Phone:<br>E-mail: |
| **Scheduling:**<br>Attn:<br>Phone:<br>Email: | **Scheduling:**<br>Attn:<br>Phone:<br>Email: |
| **Payments:**<br>Attn:<br>Phone:<br>E-mail: | **Payments:**<br>Attn:<br>Phone:<br>E-mail: |
| **Wire Transfer:**<br>BNK:<br>ABA:<br>ACCT: | **Wire Transfer:**<br>BNK:<br>ABA:<br>ACCT: |
| **Emergency Contact:**<br>Attn:<br>Phone:<br>E-mail: | **Emergency Contact:**<br>Attn:<br>Phone:<br>E-mail: |

## APPENDIX IX

## GENERATING PROJECT AND STORAGE PROJECT ELIGIBILITY CRITERIA

- **Generating Projects**
  - Has a Generating Project's Project-Specific Operational Characteristics (as set forth under Appendix II(B)).
  - Co-located with a Storage Project.
  - Customer meets the definition of a "Customer" during and throughout the Delivery Term.
  - Seller has met the obligations set forth under Sections 4.2(a)-(g) and (i)-(q) under the Agreement.
  - Is within Buyer's Service Territory.
  - [_____]

- **Storage Projects**
  - Has a Storage Project's Project-Specific Operational Characteristics (as set forth under Appendix II(B)).
  - Customer meets the definition of a "Customer" during and throughout the Delivery Term.
  - Seller has met the obligations set forth under Sections 4.2(a)-(g) and (i)-(q) under the Agreement.
  - Is within Buyer's Service Territory.
  - Customer meets the following specifications:
    - Customer must be an existing customer of Buyer with an account that is paid and current as of the date on which Seller submits to Buyer the Portfolio Modification Documentation;
    - Customer must be at least 18 years of age;
    - Customer must be the owner of the property where the Storage Project is to be installed OR Customer has the written permission of the property owner to install the Storage Project; and
    - Customer has purchased and will maintain and use, each at its own expense, all utility, Wi-Fi, internet access, communications, and other equipment and devices necessary to participate in the Program.
  - CARE/FERA Customer meets the following specifications:
    - Customer must be enrolled in the CARE (California Alternate Rates for Energy) or FERA (Family Electric Rate Assistance) program as of the date of enrollment in Portfolio.

**APPENDIX X**

**FORM OF QUARTERLY REPORT**

Each Quarterly Report must include the following items:

1. Executive Summary.

2. Description of any changes to the Portfolio List, delineated by Existing Capacity and New Capacity.

3. Summary of activities scheduled for the current quarter.

4. Performance overview, including but not limited to:

   a. Summary of monthly performance compared to the Monthly Contract Capacity.

   b. Overview of Excused Events by month, including location, Impacted Capacity, and number of Customers impacted for each Excused Event.

   c. Cumulative performance summary for the calendar year.

5. If Seller was subject to Shortfall Damages during the calendar months covered by the applicable Quarterly Report, a description of the reason for related Shortfall.

6. Any other documentation reasonably requested by Buyer.

**APPENDIX XI**

**SETTLEMENT CALCULATIONS**

**Load Modification Example**

*[Sheet 1 of Excel to be attached.]*

**Event-Based Dispatch Example**

Unless otherwise specified in the applicable Product Transition Election, the Event-Based Dispatch settlement calculations shall apply to Intra-Day Event-Based Dispatch, mutatis mutandis.

*[Sheet 2 of Excel to be attached.]*

**APPENDIX XII**

**PRODUCT TRANSITION ELECTION**

This election of Product Transition (this "Election") is delivered by [_____], a [_____] ("Seller"), to Ava Community Energy Authority, a California joint powers authority ("Buyer"), in accordance with the terms of that certain Distributed Energy Resource Agreement dated [_____] ("Agreement") by and between Seller and Buyer. All capitalized terms used in this Election but not otherwise defined herein shall have the respective meanings assigned to such terms in the Agreement.

Buyer hereby notifies Seller, and Seller hereby acknowledges and agrees, that Buyer hereby elects and shall receive, as of [_____], 20[__], the following Product under the Agreement:

[___] Intraday Event-Based Dispatch

[___] Load Modification

**BUYER:**

Signature:_____

Name:_____

Title:_____

Date:_____

**SELLER:**

Signature:_____

Name:_____

Title:_____

Date:_____

## APPENDIX XIII

## FORM OF ANNUAL LOAD MODIFICATION SCHEDULE

**Applicable? [Y/N] If N, the below may remain blank.**

| Month | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Load Modification Hour 1 (Hour End) | | | | | | | | | | | | |
| Load Modification Hour 2 (Hour End) | | | | | | | | | | | | |

**APPENDIX XIV**

**INSTALLATION CHARGES**

- Equipment costs:
  - ESS cost
  - Inverter cost (if applicable)
  - Solar cost (if applicable)
  - Other equipment costs (i.e., electrical panel upgrades, etc.)
- Installation labor costs
- Permitting & interconnection costs
- SmartHome Battery Upfront Incentive amount
- Other incentives amount (i.e., Investment Tax Credit, SGIP, etc.)
- Net costs
- Select how SmartHome Battery Upfront Incentive was applied, with the following options:
  - Reduced upfront payment
  - Lower monthly payments
  - Lower interest rate
  - Other
- Contract term
- Customer upfront payment (pre-incentives)
- Customer upfront payment (post-incentives)
- Monthly payment (pre-incentives)
- Monthly payment (post-incentives)
- Interest rate (pre-incentives)
- Interest rate (post-incentives)
- Total customer obligation over contract term (pre-incentives)
- Total customer obligation over contract term (post-incentives)

# APPENDIX XV

# DERMS-PROVIDED DATA

**Performance Data**:

The following should be provided on a 15-minute basis for each Project and Device ID.

ESS OEM

Inverter AC input (kW)

Inverter AC output (kW)

ESS state of charge (%)

Grid import (kW)

Grid export (kW)

ESS power flows – discharge (kW)

ESS power flows – charge (kW)

Available ESS energy (kWh)

Solar output (kW)

Customer's household consumption (kW)

**APPENDIX XVI**

**DATA PROCESSING**

1. Purpose and Scope. This Appendix XVI forms part of the Agreement between the Parties and governs the Parties' respective obligations related to the collection, use, disclosure, retention, processing, and protection of Personally Identifiable Information under the Agreement. This Appendix XVI prevails over any conflicting data protection terms in the Agreement.
2. CPUC Compliance. Seller shall comply with all applicable CPUC privacy and data security rules, decisions, and regulations, including but not limited to those related to (i) customer data confidentiality; (ii) access controls; (iii) permissible data sharing; and (iv) customer-specific usage, meter, and contact information. Seller shall adhere to all required technical and organizational measures imposed by the CPUC applicable to Seller's performance under the Agreement.
3. CCPA Compliance.
    3.1. Service Provider Obligations. For PII subject to the CCPA, Seller acts as a service provider pursuant to Cal. Code Regs. tit. 11, § 7051 and shall not (i) sell or share PII; (ii) retain, use, or disclose PII for any purpose other than performing services under this Appendix XVI; (iii) combine PII with other data except as permitted by CCPA and its regulations.
    3.2. Consumer Rights. Seller shall promptly undertake to diligently assist Buyer in responding to verified consumer requests, including access, deletion, correction, and opt-out preference signal recognition where applicable.
    3.3. Security Requirements. Seller shall maintain reasonable security procedures and practices appropriate to the nature and sensitivity of PII, but in no less than the standard in the industry.
4. GDPR. If Seller processes PII subject to the GDPR, the following shall apply:
    4.1. Role of Parties. Buyer is the Controller; Seller is the Processor unless otherwise expressly stated.
    4.2. Instructions. Seller may process PII only pursuant to Buyer's documented instructions.
    4.3. International Transfers. Seller shall implement a valid transfer mechanism (e.g., EU Standard Contractual Clauses) in the event that Seller conducts any cross-border processing.
    4.4. Data Subject Rights. Seller shall undertake commercially reasonable efforts to assist Buyer in fulfilling its GDPR obligations toward data subjects.
5. Security Measures. Seller shall implement and maintain appropriate technical and organizational measures to protect PII, including but not limited to the following:
    5.1. Encryption at rest and in transit;
    5.2. Access controls and authentication protocols;
    5.3. Logging and monitoring of access to PII;
    5.4. Regular backups and disaster recovery procedures;
    5.5. Periodic security testing and audits;

5.6. Incident detection, investigation, and breach notification processes;

5.7. Subprocessor security obligations consistent with this Appendix XVI.

6. Subprocessors. Seller shall not engage any Subprocessor without Buyer's prior written approval. Seller shall ensure Subprocessors are bound by data protection obligations no less protective than those in this Appendix XVI. Seller shall notify Buyer without unreasonable delay and no later than 72 hours of any data request received directly and shall not respond except as instructed by Buyer.

7. Incident Notification. Seller shall notify Buyer without unreasonable delay and no later than 72 hours after becoming aware of any actual or suspected breach involving PII processed in Seller's performance under the Agreement. Notifications must include the following:

   7.1. Nature of the incident;

   7.2. Categories and approximate number of affected individuals;

   7.3. Anticipated consequences;

   7.4. Steps taken or proposed to address and mitigate the incident.

8. Audits. Upon reasonable written notice, Buyer may request documentation demonstrating Seller's compliance with this Appendix XVI, including audit reports, certifications, or summaries of third-party assessments.

9. Return of Materials. Upon termination or expiration of Agreement, Seller shall (i) return PII to Buyer upon request; (ii) permanently delete PII (including from backups) unless retention is legally required; and (iii) certify deletion upon Buyer's request. To the extent that Seller maintains secure back-ups or other records with a deletion schedule established via Seller's data security policy, this Appendix XVI shall survive with regard to such data of Buyer's until it is securely deleted.

Attachment Staff Report Item 12C

Ava Community Energy



# SmartHome Battery – Aggregator Distributed Energy Resource Agreements

Karen Lee | November 18, 2026

# Introduction and Level-Setting

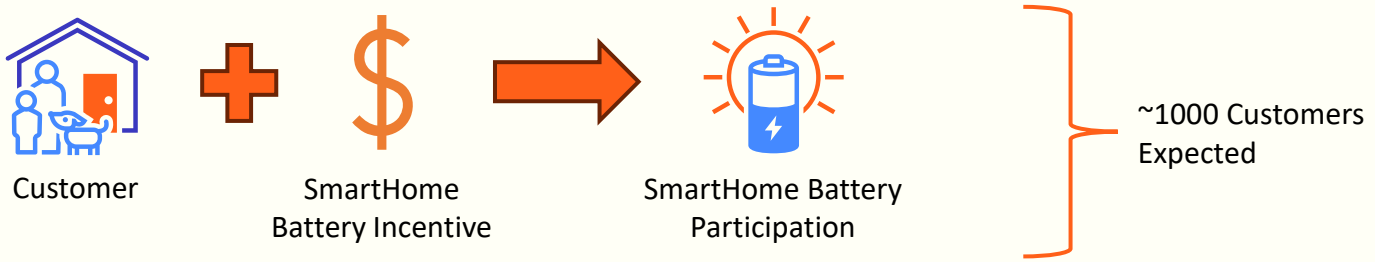
- Staff is presenting Ava's approach to transacting with aggregators for the SmartHome Battery Program. Aggregators own dispatch rights to residential batteries and can monetize federal tax credits.
- Staff has structured a PPA-like contract to procure energy products from aggregations of residential solar and storage systems. This is called the Distributed Energy Resource Agreement, also known as the "DERA" or aggregator agreement.
- The DERA is an innovative contracting structure designed to develop a reliable resource that can reduce Ava's wholesale power procurement costs, benefiting all customers while supporting those who install solar and storage. If successful, the program can scale to deliver broader benefits.
- **Staff is seeking approval for three DERAs.**
- Ava has been operating a Virtual Power Plant ("VPP") of ~1,000 systems with the aggregator Sunrun since 2022. The lessons learned from that program, called Resilient Home, have informed this strategy.



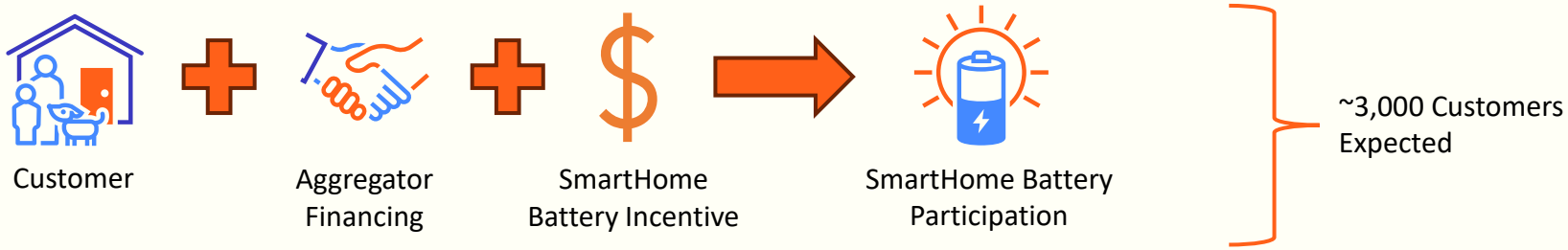
# Ava SmartHome Battery Program Background

- **Program Goal**: Support community resilience by growing a **dependable** battery component to our community Virtual Power Plant (VPP) at **scale**.
- **Context**: SmartHome Battery deploys $11.25 million in upfront and ongoing incentives to support community resilience, up to 19.5 MW of dependable batteries to Ava's community VPP.
  - Note: $3.75 million allocated towards community resilience hubs
- **Program Design**: Provides customers multiple ways to participate.

1. Self-financed systems: Customers benefit from lower total costs and full battery ownership.




2. Leased systems: Customers benefit from lower upfront costs and third-party financing.



# Comparison to Resilient Home Contract



| | Resilient Home Contract | SmartHome Battery DERA |
|---|---|---|
| **Product** | Load Modification | Load Modification or Event-Based Dispatch |
| **Distributed Energy Resource Management System (DERMS)** | No DERMS integration | Integration with Ava's DERMS |
| **Shortfall Damages** | Yes | Yes |
| **Engagement** | One provider (Sunrun) | Ava plans to execute DERAs with +/- three different aggregators |
| **Customer Participation Pathway** | Participate through the sole aggregator (Sunrun), with a new battery | Participate through an aggregator, with an existing or new battery |
| **Marketing** | • Ava and Sunrun led marketing efforts | • Aggregator leads marketing, using existing sales and marketing channels<br>• Aggregators are required to attend Ava training and seek Ava approval on program materials |

# DERA Terms



| | |
|---|---|
| **Product** | **Load Modification**: battery dispatch on a 2-hour schedule defined by Ava<br>**Event-Based Dispatch**: battery dispatch with 24-hour notice (80 x 1-hour events; max 2 per day) |
| **Upfront Incentive** | • Based on New Capacity and paid to Seller.<br>• $180/kW and $1,000/kW times Nominated Capacity for Market Rate & CARE/FERA.<br>• Same incentive as customer-owned. |
| **Performance-Based Monthly Payments** | • Paid based on monthly assessments of Delivered Quantity (DQ).<br>• Performance shortfalls are subject to **Shortfall Damages**.<br>• Same incentive as customer-owned. |
| **Annual Contract Capacity** | At DERA execution, Seller commits to an Annual Contract Capacity. |
| **Monthly Minimum & Maximum Contract Capacity** | • Prior to each Contract Year, Seller provides a Monthly Minimum Contract Capacity that is 75% - 100% of the Annual Contract Capacity.<br>• If Seller cannot commit to Monthly Contract Capacity that is 75% of the Annual, Seller can pay $50/kW **Enrollment Damages** (i.e., a capacity buydown) to reduce Contract Capacity for the remaining years.<br>• This balances Ava's need for firm capacity commitments, while providing some flexibility for Seller. |

# DERA Terms – Part 2



| | |
|---|---|
| **Contract Term** | • 5 to 7 years, with initial deliveries starting in 2027 or 2028 |
| **Initial Delivery Date (IDD)** | • Eligibility of customers, sites, and battery systems are verified<br>• DERMS integration complete<br>• Delays subject to **IDD Delay Damages** |
| **Collateral** | • **Development Security** to securitize the Initial Delivery Date milestone<br>• **Performance Security** to securitize capacity deliveries throughout contract term. |
| **Buyer Termination Rights** | • Material misrepresentation Shortfall Damages incurred in >3 months in a 12-month period<br>• Aggregate DQ is less than 85% of the Minimum Contract Capacity across a year<br>• Monthly DQ is less than 50% of the Minimum Contract Capacity for a month |
| **Seller Termination Rights** | • Failure by Buyer to make a required payment and failure is not remedied within 10 Business Days after Notice |

# DERA Development and Aggregator Selection



## DERA Development

In October 2025, Staff developed a DERA term sheet and engaged with over 10 leading aggregators to solicit feedback on commercial terms.

## Negotiation

Staff took the feedback and developed a Pro Forma DERA, then commenced negotiations with the interested parties.

## Aggregator Selection

Of the 10 aggregators, half expressed interest in the program and engaged in negotiations with Ava.

Ava reached agreement on commercial terms with the three selected aggregators: Kinergy, Shadow Power, and Sunrun.

# Aggregator Qualifications



| | Kinergy | Shadow Power | Sunrun |
|---|---|---|---|
| Overview | • Kinergy has operated DER and VPP programs across the U.S., Australia, Japan, and Europe.<br>• Kinergy is owned by Origin Energy, an Australian company, with a Palo Alto address. | • Shadow Power finances, owns, and operates distributed battery fleets. Team has developed VPP's with CA investor-owned utilities, SMUD, and CCAs.<br>• Headquartered in New York. | • Sunrun is nation's largest residential battery VPP aggregator and the partner for Ava's Resilient Home program.<br>• Headquartered in San Francisco. |
| Experience | Medium | Medium | **High** |
| Go to Market Approach | Medium | Medium | **High** |
| Learning Potential | **High** | Medium | Low |
| Original Equipment Manufacturer (OEM) Diversity (not final) | **High** (Enphase, Tesla, SolarEdge, FranklinWH, Delta) | Low (Tesla, Lunar) | Low (Tesla, Lunar) |
| Policy Engagement | Low | Low | **High** |

# Budget Impact



- The allocated capacity will utilize approximately $7.3 million of SmartHome Battery incentive budget.
- This budget supports 14.57 MW of capacity, with 12.41 MW to Market Rate and 2.16 MW to CARE/FERA.
- CEO may allocate budget and capacity to each counterparty based on final negotiated terms and each counterparty's capabilities.



# DERA Summary

- **Purpose:** Procure energy products from aggregators, diversifying the SmartHome Battery customer participation pathways and supporting program scale and reliability
- **Structure:** PPA-like agreement with damages assessed for underperformance. Final agreements will be substantially in the form of the attached document
- **Approval:** Request that the Board authorize CEO to finalize negotiations and execute DERAs with Kinergy (OEL US Inc.), Shadow Power (Shadow Power California LLC), and Sunrun (Sunrun Inc.)
  - Ava may not execute contracts with all three counterparties