Pricing and other market-sensitive data within this Contract may be exempt from disclosure under the California Public Records Act and other rules, including but not limited to Government Code Sections 6254(k) and 6255; Evidence Code Sections 1040 and 1060; Civil Code Section 3426.1, and Public Utilities Code Sections 454.5(g) and 583; and Decision 06-06-066 of the California Public Utilities Commission (as amended by D. 21-11-029 and other decisions).

This Contract has been redacted accordingly.

Originals of all Contracts signed by the City as administrator of San José Clean Energy are with the Office of the Community Energy Department.

A redacted audit trail for any non-dated electronically signed contracts is attached.

Contact the Community Energy Department at:

- Email: info@sanjosecleanenergy.org

- Phone: (833) 432-2454 for additional information.
ENERGY STORAGE RESOURCE ADEQUACY AGREEMENT

COVER SHEET

**Seller:** Alpaugh BESS, LLC, a Delaware limited liability company ("Seller")

**Buyer:** City of San José, a California municipal corporation ("Buyer")

**Execution Date:** As of the last dated signature on the signature page hereto.

**Description of Project:** A five [redacted] MWh portion of a [redacted] MWh transmission-connected battery energy storage facility (the remaining portion is the "Related Project") that will also be enrolled and operated in accordance with the applicable rules determined under the CAISO Tariff and the CPUC Resource Adequacy rules (as specified in this Agreement) to fulfill the Resource Adequacy Obligations to Buyer as specified herein, located in Tulare County, in the State of California, as further described in Appendix I.

**Contract Amounts:** As of the Execution Date:

<table>
<thead>
<tr>
<th>RA Attributes</th>
<th>[redacted]</th>
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</table>

  **Local RA Attributes:** The amount associated with the RA Attributes based on the Project’s location.

  **Flexible RA Attributes:** The applicable amount and category associated with the RA Attributes based on the Project’s Operational Characteristics as defined herein.

**Contract Price:** [redacted]

**Storage Contract Capacity:** [redacted]

**Delivery Term:** Twelve (12) Contract Years

**Milestones:**

<table>
<thead>
<tr>
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<th>Date</th>
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<tbody>
<tr>
<td>Obtain Federal and State Discretionary Permits</td>
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<tr>
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<tr>
<td>Procure Major Equipment</td>
<td>[redacted]</td>
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<tr>
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<td>[redacted]</td>
</tr>
<tr>
<td>Milestone</td>
<td>Date</td>
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<td>-------------------------------</td>
<td>------------</td>
</tr>
<tr>
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**Development Security and Delivery Term Security**

Development Security: [Redacted] of Storage Contract Capacity

Delivery Term Security: [Redacted]
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ENERGY STORAGE RESOURCE ADEQUACY AGREEMENT

This Energy Storage Resource Adequacy Agreement ("Agreement") is made by and between Buyer and Seller as of the Execution Date, in each case as set forth on the cover sheet to this Agreement ("Cover Sheet"). 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 Project; 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:

"Accepted Compliance Costs" has the meaning set forth in Section 7.7(c).

"Actual Monthly NQC" has the meaning set forth in Section 6.3(b).

"Additional Storage Capacity" has the meaning set forth in Section 5.6.

"Affiliate" of a Person means any other Person that: (a) directly or indirectly controls the specified Person; or (b) is controlled by or is under direct or indirect common control with the specified 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.

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

"Bid" or "Bidding" shall have the meaning in the CAISO Tariff.
“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 Cover Sheet.

“Buyer Group” has the meaning set forth in Section 16.1.

“Buyer’s Compliance Officer” means the director of Buyer’s Office of Equality Assurance, or any Person appointed to serve in such role by Buyer’s city council.

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

“CAISO Controlled Grid” has the meaning set forth in the CAISO Tariff.

“CAISO Markets” has the meaning set forth in the CAISO Tariff.

“CAISO Tariff” means the California Independent System Operator Corporation Fifth Replacement FERC Electric Tariff (Open Access Tariff), and the CAISO’s Business Practice Manuals (BPMs), operating procedures, and technical bulletins, including the rules, protocols, procedures, and standards attached thereto, as the same may be amended or modified from time-to-time and approved by FERC.

“Capacity Attributes” means, any and all of the following attributes:

(a) RA Attributes,

(b) Local RA Attributes,

(c) Flexible RA Attributes, and

(d) Other Capacity Attributes.

“Capacity Damages” means liquidated damages in an amount equal to

“CARB” means the California Air Resources Board or any successor entity performing similar functions.

“CEC” means the California Energy Commission or any successor entity performing similar functions.

“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 in which Ultimate Parent ceases to own, directly or indirectly through one or more intermediate entities, more than fifty percent (50%) of the outstanding equity interests in Seller, provided that in calculating ownership percentages for all purposes of the foregoing:

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

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

“Charging Energy” means the amount of Energy withdrawn from the Utility Distribution Company’s electrical system, Participating Transmission Owner’s electrical system, the CAISO Controlled Grid, or otherwise, to be stored by the Project.

“CIL Adjustment Factor” has the meaning set forth in Section 6.3(c).

“Claim” has the meaning set forth in Section 16.1(a).

“COD Conditions Precedent” has the meaning set forth in Section 4.2.

“COD Cure Period” has the meaning set forth in Section 4.1(c).

“COD Delay Damages” means liquidated damages in an amount equal to (a) the total Development Security amount required hereunder, divided by

“COD Delay Notice” has the meaning set forth in Section 4.1(c).

“COD Reduced Capacity” has the meaning set forth in Section 5.2(a).

“Commercial Operation Date” means the date stated in Seller’s Notice, substantially in the form of Appendix IV, upon which the Project became Commercially Operable.

“Commercial Operation Deadline” has the meaning set forth on the Cover Sheet, subject to Section 3.1(e) and Section 4.1(c).

“Commercially Operable” with respect to the Project, is a condition occurring after such time as Mechanical Completion has occurred, commissioning is complete, the Project has been released by the EPC Contractor to Seller for commercial operations, and permission to operate has been formally obtained from the applicable transmission or distribution utility.

“Compliance Obligations” means the RAR, Local RAR, Flexible RAR, and any other resource adequacy or capacity procurement requirements imposed on Load Serving Entities (as defined in the CAISO Tariff) by the CPUC pursuant to the CPUC Decisions, by the CAISO, by the WECC, or by any other Governmental Authority having jurisdiction.

“Compliance Showings” means the total combination of (a) through (d) below that a Load Serving Entity (as defined in the CAISO Tariff) is required to make to the CPUC pursuant to the CPUC Decisions, or to any Governmental Authority having jurisdiction: (a) Local RAR compliance or advisory showings (or similar or successor showings), (b) RAR compliance or advisory showings (or similar or successor showings), (c) Flexible RAR compliance or advisory showings (or similar or successor showings), and (d) other Capacity Attributes compliance or advisory showings (or similar or successor showings).

“Confidential Information” has the meaning set forth in Section 21.1.
“Construction Delay Cure Period” has the meaning set forth in Section 3.1(d).

“Construction Delay Damages” means liquidated damages in an amount equal to (a) the total Development Security amount required hereunder, divided by

“Construction Start” has the meaning set forth in Section 3.1(c).

“Construction Start Deadline” means the deadline for Construction Start as set forth on the Cover Sheet, subject to Section 3.1(d).

“Contract Amounts” has the meaning set forth in Section 6.2(b).

“Contract Price” means the amount specified in Section 6.2(c).

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

“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.

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

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

“CPUC Decisions” means CPUC Decisions 04-01-050, 04-10-035, 05-10-042, 06-04-040, 06-06-064, 06-07-031, 07-06-029, 08-06-031, 09-06-028, 10-06-036, 11-06-022, 12-06-025, 1306-024, 14-06-050, and any other existing or subsequent decisions, resolutions or rulings related to resource adequacy, as may be amended from time to time by the CPUC.

“CPUC General Order No. 167-B” means General Order No. 167-B titled “Enforcement of Maintenance and Operation Standards for Electric Generating Facilities” issued by the CPUC.

“CPUC System RA Penalty” is the current monthly penalty price, in $/kw-month, that is applicable pursuant to Resource Adequacy Rulings.

“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

City of San José Energy Storage Resource Adequacy Agreement
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.

“Cycle” means a quantity of Discharging Energy (in MWh) equal to the output of the Project.

“Damage Payment” means the dollar amount to be paid by Seller as the Defaulting Party to Buyer as the Non-Defaulting Party after a Terminated Transaction occurring prior to the occurrence of the Initial Delivery Date, equal to the total amount required to be posted by Seller as Development Security pursuant to Section 11.1, subject to Seller’s Pre-DDD Limit.

“Defaulting Party” means the Party that is subject to an Event of Default.

“Delivery Term” has the meaning set forth in Section 2.2(b).

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

“Designated Fund” has the meaning set forth in Section 22.10(a).

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

“Discharging Energy” means all Energy delivered to the Interconnection Point from the Project, net of the electrical losses, as measured at the metering point by the requisite meter. For the avoidance of doubt, all Discharging Energy will have originally been delivered to the Project as Charging Energy.

“Disclosing Party” has the meaning set forth in Section 21.2.

“Early Termination Date” has the meaning set forth in Section 8.2(a).

“EFC” or “Effective Flexible Capacity” has the meaning given to “Effective Flexible Capacity” in the CAISO Tariff.

“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 MWhs.

“Environmental Costs” means costs incurred in connection with acquiring and maintaining all environmental Permits and licenses for the Project, 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 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.

“Event of Default” means a Seller’s Event of Default or a Party’s Event of Default.

“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.

“Expected Initial Delivery Date” means the date falling sixty (60) days after the Commercial
Operation Date, provided that if such date is any day of the month other than the first day of the month,
such date shall be deemed to be the first day of the following month.

“Expected Quantity” means, with respect to a Showing Month: (i) the sum of the quantity of
Net Qualifying Capacity of the Project (in MW) that is properly shown by Seller or the Project’s SC on a
Supply Plan for such Showing Month such that the quantity is available for matching with Buyer’s
Resource Adequacy Plan for such Showing Month, plus any Holdback Capacity in such Showing Month,
plus Replacement RA provided for such Showing Month; multiplied by (ii) the applicable CIL
Adjustment Factor if an RA Change in Law has occurred.

“FERC” means the Federal Energy Regulatory Commission or any successor entity performing
similar functions.

“Fitch” means Fitch Ratings, Inc. (or any successor to its ratings business).

“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 RAR, exclusive of any RA Attributes, Local RA
Attributes, or Other Capacity Attributes.

“Flexible RAR” means the flexible resource adequacy requirements established for Load Serving
Entities (as defined in the CAISO Tariff) 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) Without limiting the generality of the foregoing, Force Majeure may include, so long as the following events, despite the exercise of reasonable efforts, cannot be avoided by, and are beyond the reasonable control (whether direct or indirect) of and without the fault or negligence of the Party relying thereon as justification for such delay, nonperformance or noncompliance:

(i) acts of God, including landslide, mudslide, lightning, earthquake, storm, hurricane, flood, drought, tornado, hail, ice storms, fire, wildfire or public safety power shut-off, explosion, volcanic eruption or other natural disasters and unusually severe weather-related events that caused failure of performance;

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

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

(iv) epidemic or pandemic, including new governmental restrictions that have not, as of the Execution Date, previously been imposed related to the disease designated COVID-19 or the related virus designated SARS-CoV-2 or any mutations thereof.

(b) Force Majeure does not include:

(i) 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 (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);

(ii) 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);

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

(iv) changes to economic conditions that render a Party’s performance of this Agreement at the Contract Price unprofitable or otherwise uneconomic (including Buyer’s ability to buy Product at a lower price or Seller’s ability to sell Product at a higher price than the Contract Price);

(v) 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;

(vi) Seller’s inability to complete interconnection by the Commercial Operation Deadline, 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;

(vii) Seller’s inability to obtain sufficient Charging Energy, fuel, power or materials to operate the Project, 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;

(viii) 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;

(ix) Seller’s failure to obtain or maintain throughout the Delivery Term Site Control, unless caused solely by an event of Force Majeure of the specific type described in any of subsections (a)(i) through (a)(iv) above;

(x) notwithstanding any other provision of this Agreement, the inability of a Party to make payments when due under the Agreement, unless the cause of such inability is an event that would otherwise constitute an event of Force Majeure described herein that disables the physical or electronic facilities necessary to transfer funds to the payee Party;

(xi) Seller’s inability to obtain sufficient labor, equipment, materials or other resources to build or operate the Project, except to the extent such inability is caused by an event of Force Majeure; and

(x) existing governemental restrictions that previously have been imposed related to the disease designated COVID-19 or the related virus designated SARS-CoV-2 or any mutations thereof as of the Execution Date of this Agreement.

“Force Majeure Failure” has the meaning set forth in Section 9.1(d).

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

“Full Cycle Equivalent” means either (a) a Cycle or (b) the sum of more than one Partial Cycles that equals the Discharging Energy in one Cycle.

“Full Network Model” has the meaning set forth in the CAISO Tariff.

“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.

“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.

“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.

“Guaranteed RA Amount” means the Net Qualifying Capacity (NQC) of the Project equal to

“Guarantor” means, with respect to Seller, any Person that (a) does not already have any material credit exposure to Buyer under any other agreements, guarantees, or other arrangements at the time its Guaranty is issued, (b) is an Affiliate of Seller, or other third party reasonably acceptable to Buyer, (c) has a Credit Rating of A- or better from S&P or a Credit Rating of A3 or better from Moody’s, (d) has a tangible net worth of at least $1bn, (e) is incorporated or organized in a jurisdiction of the United States and is in good standing in such jurisdiction, and (f) executes and delivers a Guaranty for the benefit of Buyer.

“Guaranty” means a guaranty from a Guarantor provided for the benefit of Buyer substantially in the form attached as Appendix VII.

“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.

“Holdback Capacity” has the meaning set forth in Section 6.2(a)(iv).

“IDD Conditions Precedent” has the meaning set forth in Section 5.2.

“IDD Delay Notice” has the meaning set forth in Section 5.1(b)(i).

“IDD Replacement Product” has the meaning set forth in Section 5.3.

“Incremental Resource” means a resource that qualified as incremental per ruling paragraph 3 (pages 9-10) of the Administrative Law Judge’s Finalizing Baseline for Purposes of Procurement Required by CPUC Decision 21-06-035 issued on June 24, 2021 in CPUC rulemaking 20-05-003, but excluding imports.

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

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

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

“Installed Capacity” means the maximum dependable operating capability of the Project to discharge Energy at the requisite meter, and adjusted for electrical losses to the Interconnection Point, that achieves commercial operation (up to but not in excess of the Storage Contract Capacity).
“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 and, as applicable, the Utility Distribution Company, the Participating Transmission Owner, and the CAISO, governing the terms and conditions of the interconnection of the Project with the Utility Distribution Company’s or CAISO’s grid, including any description of the plan for interconnecting the Project to the applicable grid.

“Interconnection Agreement Execution Deadline” means the Interconnection Agreement execution deadline set forth on the Cover Sheet.

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

“Interconnection Point” has the meaning set forth in Appendix I.

“Interest Rate” has the meaning set forth in Section 10.2.

“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 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 or (b) being reasonably acceptable to Buyer, in a form substantially similar to the letter of credit set forth in Appendix V.

“Licensed Professional Engineer” means a person acceptable to Buyer in its reasonable judgment who (a) is licensed to practice engineering in California in accordance with applicable Law including Cal. Bus. & Prof. Code §§ 6700 et seq., (b) has training and experience in the power industry specific to the technology of the Project, (c) has no economic or familial relationship, association, or nexus with Seller or Buyer, other than to meet the obligations of Seller pursuant to this Agreement, (d) is not a representative of a consultant, engineer, contractor, designer or other individual involved in the development of the Project or of a manufacturer or supplier of any equipment installed at the Project, and (e) is licensed in an appropriate engineering discipline for the required certification being made.

City of San José Energy Storage Resource Adequacy Agreement
“**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 RAR.

“**Local RAR**” means the local resource adequacy requirements established for Load Serving Entities (as defined in the CAISO Tariff) by the CPUC pursuant to CPUC Decisions, or by any other Governmental Authority having jurisdiction. Local RAR 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 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.

“**Major Subcontractors**” means any first-tier subcontractor of Seller with which Seller has an agreement having an aggregate value in excess of [redacted] for performance of any part of the Work at the Site.

“**Mechanical Completion**” means that (a) all components and systems of the Project have been properly constructed, installed and functionally tested according to EPC Contract requirements in a safe and prudent manner that does not void any equipment or system warranties or violate any Permits, approvals or Laws; (b) the Project is ready for testing and commissioning, as applicable; (c) Seller has provided written acceptance to the EPC Contractor of mechanical completion as that term is specifically defined in the EPC Contract.

“**Milestones**” means each milestone set forth on the Cover Sheet.

“**Monthly Payment**” has the meaning set forth in Section 6.2(c).

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

“**Must Offer Obligation**” means the day-ahead and real-time availability requirements included within the CAISO Tariff.

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

“**MWh**” means megawatt-hour measured in alternating current, unless expressly stated in terms of direct current.
“NERC” means the North American Electric Reliability Corporation or any successor entity performing similar functions.

“Non-Defaulting Party” has the meaning set forth in Section 8.2.

“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 16.2(a).

“Notification Deadline” means twenty (20) Business Days before the relevant deadlines for the corresponding Compliance Showings applicable to the relevant Showing Month.

“NQC” or “Net Qualifying Capacity” has the meaning given to “Net Qualifying Capacity” in the CAISO Tariff.

“Operational Characteristics” means the operational characteristics set forth in Appendix II, which shall be completed by Seller as specified in Appendix II.

“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.

“Partial Cycle” means a quantity of Discharging Energy (in MWh) that is less than one hundred percent (100%) of the Project’s out.

“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 Controlled 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 8.1(b).

“Performance Assurance” means collateral provided by Seller to Buyer to secure Seller’s obligations under this Agreement and includes Development Security and Delivery Term Security.

“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.

“Permitted Transferee” means (i) any Affiliate of Seller or (ii) any entity that has or is controlled by another Person that has:
(a) A tangible net worth of not less than one hundred fifty million dollars ($150,000,000) or a Credit Rating of at least A- from S&P, A- from Fitch, or A3 from Moody’s; and

(b) At least two (2) years of experience in the ownership and operations of facilities similar to the Project or has retained a third-party with such experience to operate the Project.

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

“Planned Outage” means a CAISO-approved planned or scheduled disconnection, separation, or reduction in capacity of the Project that is conducted for the purposes of carrying out routine repair or maintenance of the Project.

“Point of Interconnection” has the meaning set forth in Appendix I.

“Portfolio System RA Product” means system Capacity Attributes eligible to satisfy a Load Serving Entity’s Resource Adequacy Requirements in an amount equal to the Guaranteed RA Amount from one or more electric generating facilities or electric energy storage facilities that qualify as Incremental Resources.

“Product” has the meaning set forth in Section 6.1(a).

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

“Project” means the energy storage facility installed at the Site described in Appendix I, as such may be revised from time to time in accordance with this Agreement.

“Project 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.

“Project Shown NQC” has the meaning set forth in Section 6.3(d)(i).

“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 Project and at each Site and are sufficient to address reasonably foreseeable incidents;
(b) equipment, material, and supplies are sufficient and accessible to operate the Project safety and reliably;

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

(d) the Project’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 Project 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.

“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 RAR and Local RAR.

“RA Change in Law” has the meaning set forth in Section 6.3(c).

“RA Deficiency Amount” has the meaning set forth in Section 6.3(b).

“RA Shortfall” has the meaning set forth in Section 6.3(b).

“RA Shortfall Month” means each Showing Month for which the calculation performed in accordance with Section 6.3(b) shows that an RA Shortfall has occurred.

“RA Substitute Capacity” has the meaning set forth in the CAISO Tariff.

“Receiving Party” has the meaning set forth in Section 21.2.

“Reduced MNQC” has the meaning set forth in Section 6.3(c).

“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.

“Remedial Action Plan” has the meaning set forth in Section 3.6.

“Remediation Event” means any of the following with respect to the Project or a Site: (a) the circumstances resulting in an Exigent Circumstance (b) the circumstances resulting in 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 Project’s operating procedures; (e) a failure or compromise of an existing Safeguard; (f) Notice by Buyer pursuant to Section 12.1, in its reasonable discretion, that the Project Safety Plan is not consistent with the Safety
Requirements; or (g) any actual condition related to the Project or a Site with the potential to adversely impact the safe construction, operation, or maintenance of the Project 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 ___ days; provided, however, that Seller may request to extend the Remediation Period by up to ___ days if Seller is unable to resolve the Remediation Event within the initial ___ day period despite exercising diligent efforts (and Buyer shall not unreasonably withhold approval of such extension), and Seller may request an additional extension of the Remediation Period of up to ___ days if Seller is unable to resolve the Remediation Event within the ___ day extension period despite exercising diligent efforts, which Buyer may approve or reject in its sole discretion. The Remediation Period may not, under any circumstance, continue for more than ___ days from the first occurrence of the Remediation Event.

“Replacement Price” means the cost of the Capacity Attributes of a Product derived from Replacement Project(s).

“Replacement Project(s)” means one or more electric generating facilities or electric storage facilities equivalent to the Project that are capable of providing the requisite Capacity Attributes equivalent to the Product.

“Replacement RA” means the Resource Adequacy Benefits and Capacity Attributes from one or more Replacement Project(s) equivalent to those that would have been provided by the Project with respect to the applicable Showing Month in which a RA Deficiency Amount is due to Buyer, or with respect to the applicable Showing Month for which Seller is required to provide IDD Replacement Product under Section 5.3.

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

“Resold Product” has the meaning set forth in Section 6.1(b).

“Resource Adequacy Benefits” means the rights and privileges attached to the Project that satisfy any entity’s Resource Adequacy Obligations, and includes any local, zonal or otherwise locational attributes associated with the Project.

“Resource Adequacy Obligations” means the procurement obligation of load serving entities, including Buyer, as such obligations are described in the Resource Adequacy Rulings 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” or “RAR” means the Resource Adequacy Resource or successor program requirements established by the CPUC, CAISO or any other regional entity, including submission of a Supply Plan or Resource Adequacy Plan.

“Resource Adequacy Resource” has the meaning set forth in the CAISO Tariff.
“Resource Adequacy Rulings” means CPUC Decisions 04-01-050, 04-10-035, 05-10-042, 06-04-040, 06-06-064, 06-07-031 06-07-031, 07-06-029, 08-06-031, 09-06-028, 10-06-036, 11-06-022, 12-06-025, 13-06-024 and any other existing or subsequent ruling or decision, or any other resource adequacy Law, however described, as such decisions, rulings, Laws, rules or regulations may be amended or modified from time-to-time following the Execution Date of this Agreement.

“S&P” means Standard and Poor’s Financial Services, LLC (a subsidiary of The McGraw-Hill Companies, Inc.) or its successor.

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

“Safety Requirements” means Prudent Operating Practices, CPUC General Order No. 167-B (to the extent applicable to Seller or the Project), 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.

“San José Clean Energy” is Buyer’s community choice aggregation program.

“Scheduling Coordinator” or “SC” has the meaning set forth the CAISO Tariff. Under the terms of this Agreement, the SC may be Seller or Seller’s designated agent (i.e., a third-party).

“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 11.3(a).

“Seller” has the meaning set forth in the preamble to this Agreement.

“Seller’s Event of Default” has the meaning set forth in Section 8.1(a).

“Seller’s Pre-IDD Limit” has the meaning set forth in Section 8.2.

“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 Major Subcontractors, Seller’s employees, agents, or consultants, or authorized visitors to the Site; (c) any property damage greater than one hundred thousand dollars ($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; (e) environmental impacts exceeding those authorized by Permits or applicable Law.

“Settlement Amount” means the Non-Defaulting Party’s Costs and Losses, on the one hand, netted against its Gains, on the other. If the Non-Defaulting Party’s Costs and Losses exceed its Gains, then the Settlement Amount shall be an amount owing to the Non-Defaulting Party. If the Non-Defaulting Party’s Gains exceed its Costs and Losses, then the Settlement Amount shall be zero dollars ($0). The Settlement Amount does not include consequential, incidental, punitive, exemplary or indirect or business interruption damages.
“Shared Facilities” means the gen-tie lines, transformers, substations, or other equipment, permits, contract rights, and other assets and property (real or personal), in each case, as necessary to enable delivery of energy from the Project to the Interconnection Point, including the Interconnection Agreement itself, that are used in common with third parties.

“Showing Month” means the calendar month of the Delivery Term that is the subject of the Compliance Showing, as set forth in the Resource Adequacy Rulings and outlined in the CAISO Tariff. For illustrative purposes only, pursuant to the CAISO Tariff and Resource Adequacy Rulings in effect as of the Execution Date, the monthly Compliance Showings made in June are for the Showing Month of August and the annual Compliance Showing made in October is for the twelve (12) Showing Months of the following year.

“Site” means the real property on which the Project is located, as identified in Appendix I.

“Site Control” means that Seller owns the Site and the Project or has demonstrable contractual real property rights to the Site sufficient for the permitting, control, development and operation of Project delivering the Contract Amounts.

“Site Control Deadline” means the Site Control deadline set forth on the Cover Sheet.

“State of Charge” means (a) the level of charge of the Project relative to (b) the Installed Capacity multiplied by four (4) hours, expressed as a percentage.

“Storage Contract Capacity” means the total capacity of the Project (expressed in whole MWs) that is mechanically available to store electrical Energy, equal to the amount set forth on the Cover Sheet.

“Supply Plan” has the meaning set forth in the CAISO Tariff.

“Supply Plan NQC” has the meaning set forth in Section 6.3(c).

“System Emergency” means any condition that requires, as determined and declared by CAISO or the PTO, automatic or immediate action to (i) prevent or limit harm to or loss of life or property, (ii) prevent loss of transmission facilities or generation supply in the immediate vicinity of the Project, or (iii) to preserve Transmission System reliability.

“Tax” or “Taxes” means all U.S. federal, state and local and any foreign taxes, levies, assessments, surcharges, duties and other fees and charges of any nature imposed by a Governmental Authority, whether currently in effect or adopted during the 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” has the meaning set forth in Section 2.2(a).

“Terminated Transaction” has the meaning set forth in Section 8.2(a).

“Termination Payment” has the meaning set forth in Section 8.3.

“Transmission Provider” means the CAISO.
“Transmission System” means the transmission facilities operated by the CAISO, now or hereafter in existence, which provide energy transmission service downstream from the Point of Interconnection.

“Ultimate Parent” means the Person that owns, directly or indirectly through one or more intermediate entities, more than fifty percent (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 fifty percent (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.

“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;

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

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

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

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

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

(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 Standard 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.

(a) Upon execution by both Parties, this Agreement shall be effective and binding as of the Execution Date.

(b) Seller represents and warrants that that Seller has delivered to Buyer on or before the Execution Date correct and complete copies of Seller’s organizational documents (including any
certification of formation, certification of incorporation, charter, operating agreement, partnership agreement, bylaws, or similar documents) and any existing amendments thereto.

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 corresponding with the anniversary of the Initial Delivery Date. The **Initial Delivery Date** is the first day of the first Showing Month for which Product is delivered; provided that the Initial Delivery Date may not occur until satisfaction of the IDD Conditions Precedent, as set forth in Article 5.

**ARTICLE 3: PROJECT DEVELOPMENT**

3.1 **Project Construction.**

(a) Seller shall achieve Site Control no later than the Site Control Deadline, subject to Section 3.6.

(b) Seller shall develop, design, and construct the Project in timely fashion in order to perform Seller’s obligations under this Agreement.

(c) Seller shall cause the following to occur (“**Construction Start**”) no later than the Construction Start Deadline and shall provide Notice to Buyer certifying the satisfaction of this Section 3.1(c): (i) engagement of the EPC Contractor; (ii) ordering of all long-lead time essential equipment and supplies for the Project, which may be included in the EPC Contract; and (iii) execution of EPC Contract and issuance thereunder a notice to proceed that authorizes the EPC Contractor to mobilize to Site and begin physical construction (including, at a minimum, excavation for foundations or the installation or erection of improvements) at the Site, in each case (i)-(iii), as reasonably necessary so that physical construction of the Project may begin and proceed to completion without foreseeable interruption or material duration.

(d) If Construction Start is not achieved on or before the Construction Start Deadline, then for each day beginning with the day after the Construction Start Deadline through and including the date on which Construction Start occurs, for a period beyond the Construction Start Deadline lasting no more than **Construction Delay Cure Period** (“**Construction Delay Cure Period**”), Seller shall pay Construction Delay Damages to Buyer. Notwithstanding the foregoing or anything to the contrary in this Agreement, the Construction Start Deadline shall be automatically extended on a day-for-day basis, without any obligation of Seller to pay Construction Delay Damages, for the duration of any delay in achieving the Construction Start that arises from any one or more events of Force Majeure. Upon Buyer’s written request, Seller shall provide reasonable documentation demonstrating to Buyer’s reasonable satisfaction that the delay contemplated under this Section 3.1(d) was the result of a Force Majeure event and did not result from Seller’s actions or failure to take commercially reasonable actions. Notwithstanding anything to the contrary in this Agreement, Seller shall receive no extension of the Construction Start Deadline for a Force Majeure event if and to the extent that (i) the delay was due to Seller’s failure to take commercially reasonable actions to meet its requirements and deadlines or does not otherwise satisfy the requirements of a Force Majeure event, (ii) Seller failed to provide the requested documentation required under the immediately preceding sentence or (iii) Seller failed to provide written
Notice of such Force Majeure event to Buyer as required under the terms of this Agreement. On or before the tenth (10th) day of each month, Buyer shall invoice Seller for Construction Delay Damages, if any, accrued during the prior month and, within ten (10) Business Days following Seller’s receipt of such invoice, Seller shall pay Buyer the amount of the Construction Delay Damages set forth in such invoice. Seller agrees that Buyer may draw any Construction Delay Damages that are due to Buyer from the Development Security after providing an invoice for the amounts due if Seller does not pay such amounts by the foregoing due date. Prior to the expiration of the Construction Delay Cure Period, so long as Seller has paid Construction Delay Damages to Buyer in accordance with this Section 3.1(d), such Construction Delay Damages are Buyer’s sole remedy for Seller’s failure to achieve Construction Start on or before the Construction Start Deadline, and such Seller failure shall not be deemed a Seller’s Event of Default. If Seller achieves the Commercial Operation Date by the Commercial Operation Deadline, all Construction Delay Damages paid by Seller shall be refunded to Seller, and Seller may include the request for refund of the Construction Delay Damages with the first invoice to Buyer after the Initial Delivery Date. Each Party agrees that (i) the damages that Buyer would incur due to Seller’s delay in achieving the Construction Start Deadline would be difficult or impossible to predict with certainty, and (ii) the Construction Delay Damages are an appropriate approximation of such damages. Notwithstanding the foregoing, in the event that Seller is unable to (i) achieve Construction Start by the end of the Construction Delay Cure Period or (ii) make the Project Commercially Operable by the end of the COD Cure Period, Buyer shall have the right to declare a Seller Event of Default in accordance with Sections 8.1(a)(iv) or 8.1(a)(v) and receive the Damage Payment upon exercise of Buyer’s default right pursuant to Section 8.2, subject to Seller’s Pre-IDD Limit.

(e) Notwithstanding anything to the contrary herein, the Commercial Operation Deadline shall be automatically extended for all purposes of this Agreement by and to the extent of the following: (i) any extension of the Construction Start Deadline based on a Force Majeure event; and (ii) Seller’s payment of Construction Delay Damages during the Construction Delay Cure Period.

3.2 Interconnection. Seller shall (a) execute all necessary Interconnection Agreements by the Interconnection Agreement Execution Deadline (subject to Section 3.6), (b) comply with all terms and conditions contained therein as necessary for the safe and reliable delivery of the Product, (c) arrange, schedule, and be responsible for any and all electric distribution and transmission service, including any Governmental Approvals required for the foregoing, and (d) be responsible for all costs of interconnecting the Project to the Transmission System. Seller shall (i) 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, and the CAISO Tariff and (ii) implement all CAISO standards and requirements, in the case of each of (i) and (ii), so as to be able to deliver the Product to Buyer. Seller shall have and maintain throughout the Delivery Term interconnection capacity available or allocable to the Project under the Interconnection Agreement that is no less than the Storage Contract Capacity. Seller shall ensure that, during the Delivery Term, Seller shall have sufficient interconnection capacity and rights under or through the Interconnection Agreement to interconnect the Project with the CAISO Controlled Grid and to fulfill its obligations under this Agreement.

3.3 Shared Facilities. The Parties acknowledge and agree that certain of the Shared Facilities and Interconnection Facilities (including a transformer, substation, and associated equipment and real property), and Seller’s rights and obligations under the Interconnection Agreement, may be subject to certain shared facilities or co-tenancy agreements to be entered into among Seller, the Participating Transmission Owner, Seller’s Affiliates, or third parties pursuant to which certain Interconnection Facilities may be subject to joint ownership and shared maintenance and operation arrangements; provided that such agreements (i) shall permit Seller to perform or satisfy, and shall not purport to limit, its obligations hereunder, including providing interconnection capacity for the Project in

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an amount not less than the Storage Contract Capacity, and (ii) provide for separate metering and separate CAISO resource IDs for Project (which will share metering and a CAISO resource ID with the Related Project) and other projects.

3.4 **Metering.** At Seller’s expense, Seller shall obtain and maintain a single CAISO resource ID dedicated exclusively to the Project and the Related Project and shall install, or cause to be installed, all necessary metering and telemetry required by the CAISO to deliver the Product. The meter shall be kept under seal, such seals to be broken only when the meter is to be tested, adjusted, modified or relocated. In the event Seller breaks a seal, Seller shall notify Buyer as soon as practicable.

3.5 **Progress Reports.** Within fifteen (15) days after the close of (i) each calendar quarter from the first calendar quarter following the Execution Date until the Construction Start Deadline, and (ii) each calendar month from the first calendar month following the Construction Start Deadline until the Initial Delivery Date, Seller shall provide to Buyer a Progress Report in a Notice and agree to regularly scheduled meetings between representatives of Buyer and Seller to review such quarterly or monthly, as applicable, reports and discuss Seller’s construction progress. Each Progress Report shall (a) describe the progress towards, including any current or projected delay in, meeting the Milestones, (b) identify any delayed Milestone, including the cause of such delay, and (c) describe Seller’s corrective actions to achieve the missed Milestones and all subsequent Milestones by the Commercial Operation Date. Seller shall also provide Buyer with any reasonably requested documentation, subject to the confidentiality restrictions set forth in this Agreement, directly related to the achievement of the Milestones within ten (10) Business Days of receipt of such request by Seller. For the avoidance of doubt, Seller is solely responsible for the design and construction of the Project, including the location of the Site, obtaining all Permits and approvals to build the Project, the Project layout, and the selection and procurement of the equipment comprising the Project.

3.6 **Remedial Action Plans.** If Seller anticipates that it will not be able to timely satisfy a Milestone, Seller shall submit to Buyer at least thirty (30) days prior to the relevant deadline (or as soon as reasonably practicable if such anticipation arises less than thirty (30) days in advance of the relevant deadline) a remedial action plan ("Remedial Action Plan"), which will 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 achieve the missed deadline, any subsequent Milestones, and the Initial Delivery Date by the Commercial Operation Deadline. Delivery of a Remedial Action Plan shall not relieve Seller of any obligation under this Agreement. So long as Seller complies with its obligations under Section 3.5 and this Section 3.6, however, Seller shall not be considered in default of its obligations under this Agreement solely as a result of failing to timely satisfy a Milestone.

**ARTICLE 4: COMMERCIAL OPERATION DATE**

4.1 **Timing of the Commercial Operation Date.**

(a) **Timely Commercial Operation Date.** Seller shall cause the Commercial Operation Date to occur not earlier than four (4) months prior to, and not later than, the Commercial Operation Deadline.

(b) **Early Commercial Operation Date.** If Seller wishes for the Commercial Operation Date to occur earlier than four (4) months prior to the Commercial Operation Deadline, Seller may provide Buyer with a written request for a specified earlier date, so long as such written request is provided at least sixty (60) days prior to the requested early Commercial Operation Date. If Buyer agrees to the requested earlier date, the Parties shall execute a written amendment to this Agreement.

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memorializing the agreement that each reference to the Commercial Operation Deadline in this Agreement shall thereafter be deemed a reference to such earlier date.

(c) **Failure to Meet Commercial Operation Deadline**

(i) Seller shall provide Buyer with advance Notice of any delay in achieving the Commercial Operation Date on the Commercial Operation Deadline, including a true and reasonably detailed explanation of the cause of such delay ("COD Delay Notice"), at least sixty (60) days in advance of the Commercial Operation Deadline (or, if Seller’s anticipation or awareness of such delay does not arise until after such advance window, then as soon as reasonably possible following such anticipation or awareness arising). Notwithstanding the foregoing or anything to the contrary in this Agreement, the Commercial Operation Deadline shall be automatically extended on a day-for-day basis, without any obligation of Seller to pay COD Delay Damages, for the duration of any delay in achieving the Commercial Operation Date that arises from the occurrence of any one or more Force Majeure events. Upon Buyer’s written request, Seller shall provide reasonable documentation demonstrating to Buyer’s reasonable satisfaction that the delay contemplated under this Section 4.1(c) was the result of a Force Majeure event and did not result from Seller’s actions or failure to take commercially reasonable actions. Notwithstanding anything to the contrary in this Agreement, Seller shall receive no extension of the Commercial Operation Deadline for a Force Majeure event if and to the extent that (i) the delay was due to Seller’s failure to take commercially reasonable actions to meet its requirements and deadlines or does not otherwise satisfy the requirements of a Force Majeure event, (ii) Seller failed to provide the requested documentation required under the immediately preceding sentence or (iii) Seller failed to provide written Notice of such Force Majeure event to Buyer as required under the terms of this Agreement. For each day beginning with the day after the Commercial Operation Deadline until and including the date on which the Commercial Operation Date occurs, for a period beyond the Commercial Operation Deadline lasting no more than **COD Cure Period** (“COD Cure Period”), Seller shall, at Seller’s option (i) pay COD Delay Damages to Buyer or (ii) provide Portfolio System RA Product. To the extent that Seller elects to deliver to Buyer Portfolio System RA Product, then Seller shall provide Portfolio System RA Product commencing on the first (1st) day of the Showing Month following the Commercial Operation Deadline continuing through the earlier of (a) the last day of the Showing Month prior to the Showing Month in which the Commercial Operation Date occurs or (b) the termination of this Agreement in accordance with its terms. To the extent that Seller elects to pay to Buyer COD Delay Damages as set forth above, on or before the tenth (10th) day of each month, Buyer shall invoice Seller for any COD Delay Damages accrued during the prior month and, within ten (10) Business Days following Seller’s receipt of such invoice, Seller shall pay Buyer the amount of the COD Delay Damages set forth in such invoice. Buyer may draw any COD Delay Damages that are due to Buyer from the Development Security after providing an invoice for the amounts due if Seller does not pay such amounts by the foregoing due date.

(ii) Prior to the expiration of the COD Cure Period, so long as Seller has provided the COD Delay Notice to Buyer and paid COD Delay Damages to Buyer in accordance with this Section 4.1(c), such COD Delay Damages are Buyer’s sole remedy for Seller’s failure to achieve the Commercial Operation Date on or before the Commercial Operation Deadline, and such Seller failure shall not be deemed a Seller’s Event of Default. Upon (A) Seller’s failure to provide a COD Delay Notice to Buyer in accordance with this Section 4.1(c), (B) Seller’s failure to pay COD Delay Damages in accordance with this Section 4.1(c) or (C) Seller’s failure to achieve the Commercial Operation Date prior to the expiration of the COD Cure Period, in each case for any reason other than a Force Majeure extension or a Buyer Event of Default, Seller will be deemed a Defaulting Party pursuant to Section 8.1(a)(v), and Buyer shall have the right to declare a Seller Event of Default in accordance with Section 8.1(a)(v) and receive the Damage Payment upon exercise of Buyer’s default right pursuant to Section 8.2, subject to Seller’s Pre-IDD Limit.
(iii) Each Party agrees that (A) the damages that Buyer would incur due to Seller’s delay in achieving the Commercial Operation Deadline would be difficult or impossible to predict with certainty and (B) the COD Delay Damages are an appropriate approximation of such damages.

4.2 **Conditions Precedent to the Commercial Operation Date.** Seller shall take all actions and obtain all approvals necessary to meet the obligations of this Agreement and to deliver the Product to Buyer pursuant to the terms of this Agreement. Seller shall provide written Notice to Buyer of the date when the Commercial Operation Date is expected to occur, which Notice must be provided at least twenty (20) days before the Commercial Operation Date actually occurs. The following obligations of Seller are conditions precedent to the Commercial Operation Date (collectively the “COD Conditions Precedent”) and must be satisfied and confirmed via written Notice from Seller to Buyer to Buyer’s reasonable satisfaction:

(a) Seller shall have caused the Project to become Commercially Operable.

(b) The Project has been constructed in accordance with Appendix I of the Agreement.

(c) The Project has been constructed in accordance with the Project Safety Plan.

(d) Seller has obtained all applicable regulatory authorizations, approvals and Permits for the operation of the Project.

(e) Seller has secured and maintained Site Control.

(f) Seller shall have provided to Buyer a certification of Seller and a Licensed Professional Engineer, substantially in the form attached hereto as Appendix IV, demonstrating (i) that the Commercial Operation Date has occurred and (ii) satisfactory completion of the Project at the Site.

(g) Seller has installed equipment for the Project with a nameplate capacity of no less than [REDACTED] of the Storage Contract Capacity.

(h) Seller has commissioned all equipment in accordance with Prudent Operating Practices.

(i) Seller shall have provided Delivery Term Security to Buyer as required by Section 11.2.

(j) Seller shall have 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, including at the Contract Amounts.

(k) No Seller’s Event of Default has occurred or remains uncured.

(l) Seller shall have delivered to Buyer all insurance documents required under Article 17.

(m) Seller shall have paid Buyer for all amounts owing under this Agreement, if any, including Construction Delay Damages and COD Delay Damages.
(n) Seller has designed and built the Project to have a design life for the Delivery Term in accordance with Prudent Operating Practices.

(o) The design and construction of the Project was carried out by one or more qualified organizations in accordance with the designs and requirements of the original equipment manufacturer.

(p) Seller shall have provided to Buyer all documentation reasonably acceptable to Buyer demonstrating that the Project successfully completed all applicable testing and registration procedures required by CAISO to Bid into the CAISO Markets in a manner sufficient to enable delivery of Product to Buyer.

(q) The Project is included in the Full Network Model and has the ability to offer Bids into the CAISO day-ahead and real-time markets.

4.3 **Cooperation in Connection with Commercial Operation Date.** The Parties agree that, in order for Seller to achieve the Commercial Operation Date, the Parties may have to perform certain of their Delivery Term obligations in advance of the Commercial Operation Date.

4.4 **CAISO Bids.** If the achievement of the Commercial Operation Date occurs less than two (2) months before June 1, 2024, then starting on June 1, 2024 (or the Commercial Operation Date, if later), and continuing until the Initial Delivery Date, Seller shall Bid the Product into the CAISO Markets according to the rules for Resource Adequacy Resources in the CAISO Tariff, even if the Product has not been listed on Buyer’s Resource Adequacy Plan.

4.5 **Confirmation of Commercial Operation Date.** Once each of the COD Conditions Precedent has been satisfied by Seller (other than any COD Conditions Precedent that may only be satisfied as of the Commercial Operation Date), Seller shall certify such satisfaction to Buyer in a Notice confirming the anticipated occurrence of the Commercial Operation Date. Buyer shall notify Seller of any disagreement that Seller has satisfied such COD Conditions Precedent (with reasonable detail in regard to each COD Conditions Precedent) within fifteen (15) Business Days of Seller’s Notice. On or promptly following the Commercial Operation Date (in no event later than five (5) Business Days thereafter), Buyer shall provide a Notice to Seller confirming the occurrence of the Commercial Operation Date.

4.6 **Capacity Damages.** If Seller has not installed __________ MW of the Storage Contract Capacity within __________ days after the Commercial Operation Date, Seller shall pay to Buyer Capacity Damages for each MW that the Storage Contract Capacity exceeds the Installed Capacity, and the Storage Contract Capacity, Guaranteed RA Amount, and Contract Amounts shall be adjusted accordingly to reflect the Installed Capacity. On or before the tenth (10th) day of the month after the foregoing deadline for installing the Storage Contract Capacity, Buyer shall invoice Seller for any Capacity Damages owed under this Section 4.6 and, within ten (10) Business Days following Seller’s receipt of such invoice, Seller shall pay Buyer the amount of the Capacity Damages owed hereunder. Buyer may draw any Capacity Damages that are due to Buyer from the Delivery Term Security after providing an invoice to Seller for the amounts due if Seller does not pay such amounts by the foregoing deadline.
ARTICLE 5: INITIAL DELIVERY DATE

5.1 **Timing of the Initial Delivery Date.** Seller shall cause the Initial Delivery Date to occur not earlier than four (4) months prior to the Milestone date specified for the “Initial Delivery Date” on the Cover Sheet, and not later than the Expected Initial Delivery Date.

(a) **Early Initial Delivery Date.** If Seller wishes for the Initial Delivery Date to occur more than four (4) months prior to the Milestone date specified for the “Initial Delivery Date” on the Cover Sheet, then Seller may provide Buyer with a written request for a specified earlier date, so long as such written request is provided at least sixty (60) days prior to the Initial Delivery Date. If Buyer agrees to the requested earlier date, the Parties shall execute a written amendment to this Agreement memorializing the agreement that each reference to the Milestone date specified for the “Initial Delivery Date” in this Agreement shall thereafter be deemed a reference to such earlier date.

(b) **Failure to Meet Expected Initial Delivery Date.**

(i) Seller shall provide Buyer with advance Notice of any delay in achieving the Initial Delivery Date on the Expected Initial Delivery Date, including a true and reasonably detailed explanation of the cause of such delay ("IDD Delay Notice"), at least sixty (60) 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 possible following such anticipation arising). If Seller has not achieved the Initial Delivery Date by the Expected Initial Delivery Date, Seller shall provide Buyer with Replacement RA until the Initial Delivery Date has been achieved in accordance with Section 5.3. Notwithstanding the foregoing or anything to the contrary in this Agreement, the Expected Initial Delivery Date shall be automatically extended on a day-for-day basis, without any obligation of Seller to provide Replacement RA, for the duration of any delay in achieving the Initial Delivery Date that arises from the occurrence of any one or more Force Majeure events. Upon Buyer’s written request, Seller shall provide reasonable documentation demonstrating to Buyer’s reasonable satisfaction that the delay contemplated under this Section 5.1(b) was the result of a Force Majeure event and did not result from Seller’s actions or failure to take commercially reasonable actions.

5.2 **Conditions Precedent to the Initial Delivery Date.** Seller shall take all actions and obtain all approvals necessary to meet the obligations of this Agreement and to deliver the Product to Buyer pursuant to the terms of this Agreement. Seller shall provide written Notice to Buyer of the date when the Initial Delivery Date is expected to occur, which Notice must be provided at least sixty (60) days before the Initial Delivery Date actually occurs. The following obligations of Seller are conditions precedent to the Initial Delivery Date (collectively the “IDD Conditions Precedent”) and must be satisfied and confirmed via written Notice from Seller to Buyer to Buyer’s reasonable satisfaction:

(a) The Project is capable of producing and delivering the Resource Adequacy Benefits and Capacity Attributes of Product in the amount of the Storage Contract Capacity, or if the Commercial Operation Date was achieved in accordance with Section 4.2 for less than one hundred percent of the Storage Contract Capacity, then in the amount for which such the Commercial Operation Date was achieved (the “COD Reduced Capacity”), and a performance test was conducted to confirm this capability.

(b) Seller or its EPC Contractor shall have constructed or caused to be constructed the Project as of the Initial Delivery Date in accordance with this Agreement to enable Seller to satisfy the obligations of Seller herein, including the provision of the Product from the Project.
(c) Seller has obtained NQC listing of the Product in accordance with the CAISO Tariff and CPUC requirements applicable to the Product.

(d) Seller included the requisite RA capacity in the Supply Plan for the initial Showing Month and such Supply Plan has been either (i) accepted or (ii) not accepted due to Buyer’s action or inaction or any circumstances otherwise outside of Seller’s control.

(e) As of the Initial Delivery Date, 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.

5.3 **IDD Replacement Product.** Notwithstanding the provisions of Section 5.2, if Seller is unable to provide Product for the full Storage Contract Capacity as the result of (a) its failure to achieve the Initial Delivery Date by the Expected Initial Delivery Date, or (b) achievement of the Initial Delivery Date at the COD Reduced Capacity, then Seller shall, at no cost to Buyer, provide Buyer with Replacement RA in an amount equal to the Storage Contract Capacity minus the COD Reduced Capacity (if the Initial Delivery Date was achieved for the COD Reduced Capacity) (such difference, is the “**IDD Replacement Product**”) which shall be provided from one or more Replacement Project(s) until Seller either (i) meets the IDD Conditions Precedent with respect to the entire Storage Contract Capacity, or (ii) pays Capacity Damages pursuant to Section 4.6 for any remaining difference between the Storage Contract Capacity and the COD Reduced Capacity. In the event that Seller provides Buyer with IDD Replacement Product, provided that any IDD Replacement Product is communicated by Seller to Buyer with IDD Replacement Product information in a written Notice substantially in the form attached hereto as **Appendix X** at least seventy-five (75) days before the applicable CPUC operating month, then:

(A) the designation of any Replacement Project(s) by Seller shall not require Buyer’s approval so long as the IDD Replacement Product derived from such Replacement Projects meet the “Product” parameters set forth under the Cover Sheet and **Appendix I**;

(B) if the Project is not yet Commercially Operable by the Expected Initial Delivery Date, for the avoidance of doubt, Replacement Project(s) may provide up to [REPLACE WITH REAL NUMBER] of the Storage Contract Capacity in the form of Replacement RA; and

(C) to the extent that Seller complies with this Section 5.3, Seller shall not be liable for damages so long as Seller delivers Product for the full Storage Contract Capacity for each day of each Showing Month from either the Project or Replacement Project(s).

Once Seller has identified in writing any Replacement Project(s) that meet the requirements of this Section 5.3, then any such Replacement Project(s) shall be automatically deemed the accepted replacement of the Project for purposes of this Agreement for the applicable Showing Month. If the amount of delivered IDD Replacement Product is less than required in order for Buyer to receive from Seller the Product in the amount of the full Storage Contract Capacity, then Seller shall be liable for the sum of: (a) the product of the amount (whether positive or negative), if any, by which the Replacement Price paid by Buyer for missing IDD Replacement Product exceeded the Contract Price, if any, and the amount by which the quantity of Replacement RA provided by Seller was less than the IDD Replacement Product required to be provided; plus (b) the out of pocket transaction costs incurred by Buyer to procure the quantity of required Replacement RA. If the total amounts calculated under this Section 5.3 are negative, then neither Buyer nor Seller shall pay any amount under this Section 5.3. Notwithstanding anything to the contrary herein: (1) during any period when Seller’s obligation to provide IDD Replacement Product applies under this Section 5.3, Seller shall not owe Construction Delay Damages, COD Delay Damages, RA Deficiency Amounts, or any other measure of damages under this Agreement; and (2) Seller’s obligations with respect to IDD Replacement Product under this Section 5.3 shall end and

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no longer apply to the portion of the Storage Contract Capacity for which Seller has paid Capacity Damages under Section 4.6, and the Product, Storage Contract Capacity, and Contract Amounts required to be delivered by Seller hereunder shall be reduced by the amount of Storage Contract Capacity for which Seller has paid such Capacity Damages.

5.4 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 for Buyer to be able to utilize the Product beginning on the Initial Delivery Date.

5.5 Confirmation of Initial Delivery Date. Once each of the IDD Conditions Precedent has been satisfied by Seller (other than any IDD Conditions 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 IDD Conditions Precedent (with reasonable detail in regard to each IDD Conditions Precedent) within five (5) Business Days of Seller’s Notice. On or promptly following the Initial Delivery Date (in no event later than five (5) Business Days thereafter), Buyer shall provide a Notice to Seller confirming the occurrence of the Initial Delivery Date.

5.6 Additional Storage Capacity. Seller may, at its sole cost and expense, increase the storage capacity of the Project (any such storage capacity in excess of the Storage Contract Capacity, the “Additional Storage Capacity”). For the avoidance of doubt, Seller shall retain the exclusive right, title and interest to the products and services (including resource adequacy and all related Capacity Attributes) generated by, associated with or attributable to the Additional Storage Capacity, including the exclusive right to use, market, allocate, designate, award, report or sell such products and services, and the right to all revenues generated therefrom.

ARTICLE 6: TRANSACTION

6.1 Product.

(a) During the Term, Seller grants, pledges, assigns, and otherwise commits and shall deliver to Buyer, for Buyer’s exclusive use, all Resource Adequacy Benefits and related Capacity Attributes that may be calculated or derived from the Operational Characteristics, which must be exclusively from the Project (collectively, the “Product”), pursuant to the terms and conditions contained herein. The Operational Characteristics shall be provided by Seller in accordance with Appendix II and once so provided 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”); provided that any such resale shall neither (i) modify any of Seller’s rights or obligations under this Agreement nor (ii) make Seller subject to any liability or obligation to any third party.

(c) Product does not confer to Buyer any right to dispatch or receive Energy from the Project. Seller shall at all times have the right to sell to any third party or into the CAISO Markets all Energy and Ancillary Services, and to retain all revenues and proceeds from such sales for Seller’s own account. For the avoidance of doubt, all Capacity Attributes during the Delivery Term shall be sold and delivered exclusively to Buyer as Product hereunder.

(d) If Seller does not provide adequate and timely Notice of any Planned Outage in accordance with Section 12.1, Seller shall provide Buyer with Replacement RA for any portion of the
Product that cannot be delivered to Buyer due to the Planned Outage, which shall be provided for the 
duration of the Planned Outage.

(c) During the Delivery Term, and except during the pendency of a Buyer Event of 
Default, Seller may not use the Project to provide Resource Adequacy Benefits or related Capacity 
Attributes to any party or entity other than Buyer.

6.2 Purchase and Sale Obligation.

(a) Subject to Seller’s rights under Section 5.3, for each Showing Month of the 
Delivery Term, Seller will sell and deliver to Buyer, and Buyer will purchase and receive from Seller, the 
Expected Quantity consistent with the following:

(i) Seller shall, on a timely basis, submit, or cause the SC to submit, (i) 
monthly Supply Plans and (ii) annual Supply Plans, in accordance with the CAISO Tariff, identifying and 
showing the quantity of Capacity Attributes of Product that is available for matching with Buyer’s 
Resource Adequacy Plan for each Showing Month;

(ii) Seller shall cause the SC to submit written notification to Buyer, no later 
than the Notification Deadline, that the Capacity Attributes of Product for such Showing Month are 
included in the Scheduling Coordinator Supply Plan and available for matching with Buyer’s Resource 
Adequacy Plan;

(iii) if CAISO rejects either the monthly Supply Plan or the Resource 
Adequacy Plan with respect to any part of the Capacity Attributes of Product for the Project or 
Replacement Project(s) in any Showing Month, the Parties shall confer, make such corrections as are 
necessary for acceptance, and resubmit the corrected monthly Supply Plan or Resource Adequacy Plan 
for validation before the applicable deadline for the Showing Month; and

(iv) the Product is delivered and received when the CIRA Tool (or successor 
system) shows that the monthly Supply Plan submitted in compliance with Buyer’s instructions, including 
Buyer’s instructions to withhold all or part of the Capacity Attributes from Seller’s monthly Supply Plan 
for any Showing Month during the Delivery Term, has been accepted for the Product from the Project or 
Replacement Project(s) by CAISO. Any Capacity Attributes that are withheld in whole or in part from 
Seller’s monthly Supply Plan when requested by Buyer’s instructions hereunder ("Holdback Capacity") 
shall be deemed to be part of the Expected Quantity for which Buyer is required to pay Seller under 
Section 6.2(c). For the avoidance of doubt, in the event that Buyer instructs Seller to utilize the Holdback 
Capacity as a means of providing RA Substitute Capacity, provided that such instruction complies with 
the CAISO Tariff and the Project qualifies to provide RA Substitute Capacity, Seller shall comply with 
such instruction, and such RA Substitute Capacity shall derive from Holdback Capacity.

(b) For each day of each Showing Month during the Delivery Term, Seller agrees to 
deliver all of the Product to Buyer, including in the amounts and categories set forth on the Cover Sheet, 
as adjusted (i) due to the payment of Capacity Damages pursuant to Section 4.6, if applicable, and/or 
(ii) by dividing by the CIL Adjustment Factor, if applicable due to an RA Change in Law (as so adjusted, 
the "Contract Amounts"); provided that Seller’s obligation to deliver the Contract Amounts for any 
Showing Month shall be reduced without liability or penalty to Seller if Seller is unable to deliver all of 
any portion of the Contract Amounts due to Force Majeure; provided, however, that Seller complies with 
applicable requirements of Article 9 with respect to any Force Majeure; provided, further, that in the 
event of any RA Change in Law, the sum of the quantity shown by Seller for the Project on a Supply 
Plan, plus any Holdback Capacity from the Project, plus Replacement RA provided for the Showing
Month, shall be increased by multiplying such total quantity by the applicable CIL Adjustment Factor, as specified in the definition of Expected Quantity.

(c) For all Capacity Attributes of the Product that Seller delivers during the Delivery Term in accordance with this Agreement, Buyer shall, in accordance with Article 10, pay Seller a monthly payment ("Monthly Payment" or "MP") as follows:

\[ MP = EQ \times CP \times 1,000 \] (rounded to the nearest penny (two decimal places))

where,

\[ EQ = \text{means, with respect to a Showing Month, the Expected Quantity for such Showing Month;} \]

\[ CP = \text{the contract price set forth on the Cover Sheet ("Contract Price").} \]

6.3 Damages for Failure to Provide Contract Amounts.

(a) The Parties acknowledge and agree that if Seller fails to provide the Guaranteed RA Amount as required hereunder (from the Project or Replacement Projects, as applicable), except to the extent that such failure of delivery was due to or arose from a RA Change in Law, and except to the extent not delivered due to any Planned Outage for which Seller provided timely Notice to Buyer in accordance with Section 12.1, then Seller shall pay to Buyer the applicable RA Deficiency Amount for each RA Shortfall Month as liquidated damages due to Buyer, and as Buyer’s sole remedy, for the Capacity Attributes that Seller failed to convey to Buyer.

(b) RA Deficiency Amount Calculation. For each RA Shortfall Month, Seller shall pay to Buyer an amount (the “RA Deficiency Amount”) equal to the product of (i) the positive difference, expressed in kW, of (A) the Guaranteed RA Amount (reduced for amounts that Seller is not required to deliver pursuant to Section 6.2(b) or due to a Planned Outage for which Seller provided timely Notice to Buyer in accordance with Section 12.1), and (B) the value of “EQ” used in Section 6.2(c) for such Showing Month, including all amounts included in the definition of Expected Quantity (the “Actual Monthly NQC”), (such difference, the “RA Shortfall”), and (ii) the sum of (a) the CPUC System RA Penalty and (b) the CPM Soft Offer Cap, provided that: Seller may, as an alternative to paying RA Deficiency Amounts, provide Replacement RA for all or part of the RA Shortfall, provided that any Replacement RA capacity is communicated by Seller to Buyer with Replacement RA product information in a written Notice substantially in the form attached hereto as Appendix X at least five (5) Business Days prior to the applicable Notification Deadline.

(c) RA Change in Law. Notwithstanding anything in this Agreement to the contrary, if, in any given month, following the Execution Date, a change in Law occurs that results in or gives rise to a reduction in the maximum Resource Adequacy Resource benefits, NQC, EFC, or other measure of Capacity Attributes that resources of the same type and Operational Characteristics as the Project are eligible to provide (including, without limitation, due to effective load carrying capability (ELCC) adjustments) (a “RA Change in Law”), thereby resulting in or giving rise to a reduction in the maximum achievable Net Qualifying Capacity, Effective Flexible Capacity, or other Capacity Attributes of the Project, then (i) for the purposes of determining the Monthly Payment, no failure to deliver the Contract Amounts shall be deemed to have occurred and the CIL Adjustment Factor shall be applied as specified in the definition of Expected Quantity, and (ii) the RA Shortfall for such month shall be equal to the positive difference, expressed in kW, of (x) the Guaranteed RA Amount (reduced for amounts that Seller is not required to deliver pursuant to Section 6.2(b) or due to a Planned Outage for which Seller
provided timely Notice to Buyer in accordance with Section 12.1, and (y) the product of (1) the Supply Plan NQC after the RA Change in Law, multiplied by (2) the CIL Adjustment Factor, where:

(i) the “Supply Plan NQC” means, with respect to a Showing Month, the sum of (A) the quantity of Net Qualifying Capacity of the Project (in MW) that is properly shown by Seller or the Project’s SC on a Supply Plan for such Showing Month such that the quantity is available for matching with Buyer’s Resource Adequacy Plan for such Showing Month, plus (B) Holdback Capacity for such Showing Month, if any, plus (C) Replacement RA provided for such Showing Month, if any;

(ii) the “CIL Adjustment Factor” means the original Contract Amount set forth in the Cover Sheet (reduced due to the payment of Capacity Damages pursuant to Section 4.6, if applicable) divided by the Reduced MNQC;

(iii) the “Reduced MNQC” means the new maximum achievable Net Qualifying Capacity of the Project after the most recent RA Change in Law, including any RA Change in Law that reduces the Net Qualifying Capacity due to any effective load carrying capability adjustments; provided, that, for clarification, the Reduced MNQC shall reflect reductions in Net Qualifying Capacity that are generally applicable to resources of the same type as the Project as a result of any RA Change in Law, but shall not reflect any reductions in Net Qualifying Capacity that are caused solely by the Project’s demonstrated forced outage rate, performance failures, or maximum capacity testing results; and

(iv) this Section 6.3(c) is intended to produce a calculation of RA Shortfall that is consistent with the calculation performed under Section 6.3(b), and Section 6.3(b) and this Section 6.3(c) should be interpreted to produce the same calculation of RA Shortfall.

(d) Sample Calculations. For illustrative purposes only, below are sample calculations of the RA Shortfall and Monthly Payment that assume an RA Change in Law has occurred.

(i) Example 1. Assume that an RA Change in Law reduces the Project’s maximum achievable Net Qualifying Capacity from 5 MW to 4 MW. Assume that Seller shows 4 MW from the Project on the Supply Plan for the Showing Month (illustrated in the tables below as “Project Shown NQC”) and provides zero Replacement RA. The RA Shortfall and Monthly Payment are calculated as:

| Guaranteed RA Amount = | 5 MW |
| Reduced MNQC = | 4 MW |
| CIL Adjustment Factor = | 1.25 |
| Supply Plan NQC = | 4 MW |
| Project Shown NQC = | 4 MW |
| Holdback Capacity = | 0 MW |
| Replacement RA = | 0 MW |
| RA Shortfall = | 5 MW – (4 MW * 1.25) = |
| | 5 MW – 5 MW = 0 MW |
| Monthly Payment = | (4 MW * 1.25) = |
| | 5 MW * Contract Price * 1,000 |

(ii) Example 2: Assume that an RA Change in Law reduces the Project’s maximum achievable Net Qualifying Capacity from 5 MW to 4 MW. Assume that Seller shows 2 MW from the Project on the Supply Plan (i.e., Project Shown NQC) for the Showing Month and provides zero Replacement RA. The RA Shortfall and Monthly Payment are calculated as:

City of San José Energy Storage Resource Adequacy Agreement
Guaranteed RA Amount = 5 MW  
Reduced MNQC = 4 MW  
CIL Adjustment Factor = 1.25  
Supply Plan NQC = 2 MW  
Project Shown NQC = 2 MW  
Holdback NQC = 0 MW  
Replacement RA = 0 MW  
RA Shortfall = 5 MW – (2 MW * 1.25) = 5 MW – 2.5 MW = 2.5 MW  
Monthly Payment = (2 * 1.25) = 2.5 MW * Contract Price * 1,000

(iii) Example 3: Assume that an RA Change in Law reduces the Project’s maximum achievable Net Qualifying Capacity from 5 MW to 4 MW. Assume that Seller shows 3 MW from the Project on the Supply Plan for the Showing Month (i.e., Project Shown NQC) and provides 1 MW of Replacement RA. The RA Shortfall and Monthly Payment are calculated as:

Guaranteed RA Amount = 5 MW  
Reduced MNQC = 4 MW  
CIL Adjustment Factor = 1.25  
Supply Plan NQC = 4 MW  
Project Shown NQC = 3 MW  
Holdback NQC = 0 MW  
Replacement RA = 1 MW  
RA Shortfall = 5 MW – (4 MW * 1.25) = 5 MW – 5 MW = 0 MW  
Monthly Payment = (4 * 1.25) = 5 MW * Contract Price * 1,000

(iv) Example 4: Assume that an RA Change in Law reduces the Project’s maximum achievable Net Qualifying Capacity from 5 MW to 4 MW. Assume that 4 MW is available, but Buyer requests 1 MW of Holdback Capacity and Seller shows 3 MW from the Project on the Supply Plan for the Showing Month (i.e., Project Shown NQC). The RA Shortfall and Monthly Payment are calculated as:

Guaranteed RA Amount = 5 MW  
Reduced MNQC = 4 MW  
CIL Adjustment Factor = 1.25  
Supply Plan NQC = 4 MW  
Project Shown NQC = 3 MW  
Holdback NQC = 1 MW  
Replacement RA = 0 MW  
RA Shortfall = 5 MW – (4 MW * 1.25) = 5 MW – 5 MW = 0 MW  
Monthly Payment = (4 * 1.25) = 5 MW * Contract Price * 1,000

(v) Example 5: Assume that an RA Change in Law reduces the Project’s maximum achievable Net Qualifying Capacity from 5 MW to 4 MW. Assume that the Project experiences a Planned Outage that is properly noticed in accordance with Section 12.1 for the Project and
Seller is unable to provide the Contract Amounts due to the Planned Outage. Seller shows 0 MW from the Project on the Supply Plan for the Showing Month (i.e., Project Shown NQC). The RA Shortfall and Monthly Payment are calculated as:

<table>
<thead>
<tr>
<th>Guaranteed RA Amount</th>
<th>0 MW</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reduced MNQC</td>
<td>4 MW</td>
</tr>
<tr>
<td>CIL Adjustment Factor</td>
<td>1.25</td>
</tr>
<tr>
<td>Supply Plan NQC</td>
<td>0 MW</td>
</tr>
<tr>
<td>Project Shown NQC</td>
<td>0 MW</td>
</tr>
<tr>
<td>Holdback NQC</td>
<td>0 MW</td>
</tr>
<tr>
<td>Replacement RA</td>
<td>0 MW</td>
</tr>
<tr>
<td>RA Shortfall</td>
<td>0 MW - (0 MW * 1.25) = 0 MW - 0 MW = 0 MW</td>
</tr>
<tr>
<td>Monthly Payment</td>
<td>(0 MW * 1.25) = 0 MW * Contract Price * 1,000</td>
</tr>
</tbody>
</table>

**ARTICLE 7: OPERATIONS**

7.1 **Operations.** Seller shall at all times retain operational control of the Project and be responsible for operation and maintenance of the Project.

7.2 **Charging Energy.** As between Buyer and Seller, Seller shall be responsible for procuring and delivering all of the Charging Energy to the Project and paying all of the associated costs of such Charging Energy. Seller shall be entitled to retain all revenues received for the sale of Energy and Ancillary Services and otherwise with respect to Discharging Energy.

7.3 **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.

7.4 **Buyer’s Compliance Obligations; 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 reasonably necessary to ensure that Buyer can use Product, including enabling Buyer to apply Product towards Buyer’s Compliance Obligations, or sell Resold Product in accordance with Section 6.1(b), 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) Subject to Section 7.6, 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 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.

7.5 **Scheduling.**

(a) Seller shall be the SC or shall designate a qualified third party to fulfill such role for the Project in order to deliver Product (whether from the Project or in the form of Replacement RA) to Buyer during the Delivery Term in accordance with the terms of this Agreement. Seller shall be solely responsible for all costs associated with the SC. Subject to Section 7.6, Seller shall take, or cause its SC to take, all necessary steps to qualify itself and the Project in such other manner identified and approved by the CAISO and CPUC that permits Seller to provide Product to Buyer. Seller, as the Project’s SC, shall be responsible for all settlement functions with the CAISO related to the Project.

(b) Subject to Section 7.6, Seller shall (i) comply, and shall cause SC to comply, with all registration and reporting requirements, all applicable CAISO Tariff provisions, CPUC Decisions, and all other applicable rules, requirements or Laws, including any Bidding of the Project to meet any Must Offer Obligations, in order to deliver the Product to Buyer and allow Buyer to use the Product to satisfy Buyer’s Compliance Obligations and (ii) take all reasonable steps necessary for executing all documents or instruments necessary to enable Buyer to use all of the Capacity Attributes committed by Seller to Buyer pursuant to this Agreement.

(c) Buyer shall have no liability for the failure of Seller 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. In no event shall Buyer be required to use or change its utilization of its owned or controlled assets or market positions to minimize a RA Shortfall.

7.6 **Changes in Law.**

(a) In the event of any change in Requirements, other than any RA Change in Law, which shall be governed by Section 6.3(c), by the CPUC, CAISO or other Governmental Authority or Person having jurisdiction over Capacity Attributes that results in 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 sixty (60) days after delivery of such request, to agree upon changes to this Agreement or to resolve issues relating to changes to this Agreement, then either Party may submit issues pertaining to changes to this Agreement to the dispute resolution process set forth in Section 20.2. 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, a Force Majeure, 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.

(b) For the avoidance of doubt, 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 cause Seller or Seller’s SC to do so, and Buyer shall retain and receive any and all related revenues.

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City of San José Energy Storage Resource Adequacy Agreement
7.7 **Compliance Expenditure Cap.**

(a) If a change in Laws occurring after the Execution Date has increased Seller’s known or reasonably expected costs to comply with Seller’s obligations under this Agreement with respect to obtaining, maintaining, conveying or effectuating Buyer’s use of (as applicable) the Product (any action required to be taken by Seller to comply with such change in Law, a “Compliance Action”), then the Parties agree that the maximum aggregate amount of costs and expenses Seller shall be required to bear during the Delivery Term to comply with all of such obligations shall be capped at [amount] per MW of Storage Contract Capacity in aggregate over the Delivery Term (the “Compliance Expenditure Cap”).

(b) If Seller reasonably anticipates the need to incur out-of-pocket expenses in excess of the Compliance Expenditure Cap in order to take any Compliance Action, Seller shall provide Notice to Buyer of such anticipated out-of-pocket expenses.

(c) Buyer will have sixty (60) days to evaluate such Notice (during which time period Seller is not obligated to take any Compliance Actions described in the Notice) and shall, within such time, either (1) agree to reimburse Seller for all or some portion of the costs and expenses that exceed the Compliance Expenditure Cap (such Buyer-agreed upon costs, the “Accepted Compliance Costs”), or (2) waive Seller’s obligation to take such Compliance Actions, or any part thereof for which Buyer has not agreed to reimburse Seller. If Buyer does not respond to a Notice given by Seller under this Section 7.7 within sixty (60) days after Buyer’s receipt of same, Buyer shall be deemed to have waived its rights to require Seller to take the Compliance Actions that are the subject of the Notice, and Seller shall have no further obligation to take, and no liability or obligation under this Agreement for any failure to take, such Compliance Actions until such time as Buyer agrees to pay such Accepted Compliance Costs.

(d) If Buyer agrees to reimburse Seller for the Accepted Compliance Costs, then Seller shall take the Compliance Actions covered by the Accepted Compliance Costs as agreed upon by the Parties and Buyer shall reimburse Seller for Seller’s actual costs and expenses to effect the Compliance Actions, not to exceed the Accepted Compliance Costs, within sixty (60) days from the time that Buyer receives an invoice and documentation of such costs and expenses from Seller.

(e) Notwithstanding anything to the contrary in this Section 7.7, an RA Change in Law shall be governed by Section 6.3(c) and Seller shall not be required to show that it has incurred costs and expenses up to the Compliance Expenditure Cap to obtain the relief specified in Section 6.3(c) with respect to an RA Change in Law.

7.8 **Information Sharing and Shared Learning.** Seller understands and acknowledges that Buyer is entering into this Agreement in part to maintain compliance with California’s Resource Adequacy Program and CPUC Decision 21-06-035 requiring procurement to address mid-term reliability. Throughout the Term, upon Buyer’s request, Seller agrees to share such information with Buyer as is necessary to demonstrate compliance with the programs and other Product-related compliance programs as may arise. Should the sharing of certain data with Buyer constitute a breach of Seller’s confidentiality or result in sharing commercially sensitive information that may negatively impact Seller’s ability to achieve the full value of the Project or associated resource, then Seller shall share such required information directly with the relevant Governmental Authority and provide confirmation to Buyer that information sharing has occurred.
ARTICLE 8: EVENTS OF DEFAULT; REMEDIES

8.1 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 11, and Seller fails to provide replacement Performance Assurance within fifteen (15) Business Days of Buyer’s written demand therefor in accordance with Article 11; 

(ii) any material misrepresentation or omission, in any metering or submetering, Supply Plan, 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 fifteen (15) Business Days of Seller’s receipt of Notice thereof;

(iii) other than Replacement RA pursuant to a written Notice executed in substantially the form of Appendix X, Seller intentionally or knowingly delivers, or attempts to deliver, Product that is not produced by the Project;

(iv) Seller fails to achieve Construction Start by the Construction Start Deadline for reasons other than Force Majeure, subject to Section 3.1(d) and after the end of the Construction Delay Cure Period identified therein;

(v) Seller fails to achieve the Commercial Operation Date by the Commercial Operation Deadline for reasons other than Force Majeure, subject to Section 4.1(c)(iii) and after the end of the COD Cure Period identified therein;

(vi) Intentionally Omitted;

(vii) Intentionally Omitted;

(viii) the failure by Seller to comply with operational obligations set forth in the CAISO Tariff, including but not limited to, maintaining a minimum State of Charge and acting in compliance with the Must Offer Obligations, which failure is not cured within ten (10) Business Days of Seller’s receipt of Notice thereof;

(ix) failure by Seller to satisfy the collateral requirements pursuant to Sections 11.1 or 11.2 after Notice and expiration of the cure periods set forth therein, including the failure to replenish the Development Security or Delivery Term Security amount in accordance with this Agreement in the event Buyer draws against either for any reason other than to satisfy a Damage Payment or a Termination Payment; and

(x) failure by Seller to pay to Buyer the Capacity Damages and such failure is not remedied within ten (10) Business Days after Notice thereof.

(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 (10) 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 thirty (30) days after Notice thereof, or such longer additional period, not to exceed an additional sixty (60) days, if the Defaulting Party is unable to remedy such default within such initial thirty (30) days period despite exercising commercially reasonable efforts;

(iii) the failure by such Party to perform any material covenant or obligation set forth in this Agreement, including any failure by Seller to comply with Article 6: or Section 7.4 or with any Requirement or Safety Requirement in accordance with Section 7.3, in any case except to the extent constituting a separate Event of Default, and such failure is not remedied within thirty (30) days after Notice thereof, or such longer additional period, not to exceed an additional ninety (90) days, if the Defaulting Party is unable to remedy such default within such initial thirty (30) days period despite exercising commercially reasonable efforts;

(iv) such Party becomes Bankrupt;

(v) such Party assigns this Agreement or any of its rights hereunder other than in compliance with Article 19: ; 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.

8.2 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 twenty (20) days after such Notice is deemed to be received, as an early termination date of this Agreement (“Early Termination Date”) that terminates this Agreement (the “Terminated Transaction”) and ends the Delivery Term effective as of the Early Termination Date;

(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 occurrence of the Initial Delivery Date, including an Event of Default under Section 8.1(a)(v), subject to Seller’s Pre-IDD Limit, or (ii) the Termination Payment calculated in accordance with Section 8.3 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 pending termination of this Agreement;

(d) to suspend performance pending termination of this Agreement; or

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(c) 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; provided, that payment by the Defaulting Party of the Damage Payment or Termination Payment, as applicable, shall constitute liquidated damages and the Non-Defaulting Party’s sole and exclusive remedy for any Terminated Transaction and the Event of Default related thereto; provided further, that notwithstanding anything to the contrary in this Agreement, Seller’s maximum liability hereunder in the event of an Event of Default by Seller occurring prior to the Initial Delivery Date, or due to Seller’s failure to achieve the Initial Delivery Date, including liability for all Construction Delay Damages, COD Delay Damages, and the Damage Payment, shall not in the aggregate exceed an amount equal to two (2) times the Development Security (“Seller’s Pre-IDD Limit”).

8.3 Termination Payment. The payment owed by the Defaulting Party to the Non-Defaulting Party for a Terminated Transaction occurring after the occurrence of the Initial Delivery Date (“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 8.2 (subject to Seller’s Pre-IDD Limit) or this Section 8.3, as applicable, is a reasonable and appropriate approximation of such damages, and (c) the Damage Payment or Termination Payment described in Section 8.2 (subject to Seller’s Pre-IDD Limit) or this Section 8.3, 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.

8.4 Notice of Payment of Termination Payment or Damage 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 or Damage Payment, as applicable, is due to or from the Non-Defaulting Party. The Notice shall include a written statement explaining in reasonable detail the calculation of such amount and the sources for such calculation. The Termination Payment or Damage Payment (subject to Seller’s Pre-IDD Limit), as applicable, less any applicable deductions, shall be made to or from the Non-Defaulting Party, as applicable, within ten (10) Business Days after such Notice is effective.

8.5 Disputes with Respect to Termination Payment. If the Defaulting Party disputes the Non-Defaulting Party’s calculation of the Termination Payment, in whole or in part, the Defaulting Party shall, within ten (10) 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 20: .
8.6 Limitation on Seller’s Ability to Make or Agree to Third-Party Sales from the Project after Early Termination Date. If the Agreement is terminated prior to the occurrence of the Initial Delivery Date for any reason except due to Buyer’s Event of Default, neither Seller nor Seller’s Affiliates may sell, market or deliver any Product associated with or attributable to the Project to a party other than Buyer for a period of following such Early Termination Date, unless prior to selling, marketing or delivering such Product, or entering into the agreement to sell, market or delivery such Product to a party other than Buyer, Seller or Seller’s Affiliates provide Buyer with a written offer to sell the Product on terms and conditions materially similar to the terms and conditions contained in this Agreement (including price) and Buyer fails to accept such offer within forty-five (45) days of Buyer’s receipt thereof. Neither Seller nor Seller’s Affiliates may sell or transfer the Project, or any part thereof, or land rights or interests in the Site (including the interconnection queue position of the Project) so long as the limitations contained in this Section 8.6 apply, unless the transferee agrees to be bound by the terms set forth in this Section 8.6.

8.7 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 8 shall be cumulative and in addition to the rights of the Parties otherwise provided in this Agreement.

ARTICLE 9: FORCE MAJEURE

9.1 Force Majeure.

(a) Effect of Force Majeure. 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 a Force Majeure 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 event of Force Majeure lies with the Party initiating the claim.

(b) Notice of Force Majeure. Within five (5) Business Days of becoming aware of a Force Majeure event, the claiming Party shall provide the other Party with oral notice of the Force Majeure event, and within two (2) weeks of rendering such oral notice the claiming Party shall provide the other Party with Notice in the form of a letter describing in detail the occurrence giving rise to the Force Majeure event, including the nature, cause, estimated date of commencement thereof, and the anticipated extent of any delay or interruption in performance. Failure to provide timely Notice constitutes a waiver of the Force Majeure event for the period prior to the date Notice was provided. Upon written request from Buyer, Seller shall provide documentation demonstrating to Buyer’s reasonable satisfaction that each day of the claimed delay was the result of a Force Majeure event and did not result from Seller’s actions or failure to exercise due diligence or take reasonable actions. The claiming Party shall promptly notify the other Party in writing of the cessation or termination of such Force Majeure event, all as known or estimated in good faith by the affected Party. The suspension of performance due to a claim of a Force Majeure event must be of no greater scope and of no longer duration than is required by the Force Majeure event.

(c) Mitigation of Force Majeure. The suspension of a Party’s performance under the Agreement due to a claim of Force Majeure shall be of no greater scope and of no longer duration than is required by the Force Majeure event. A Party suspending performance due to Force Majeure 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 event of Force Majeure. The Parties shall take all reasonable steps to resume normal performance under this Agreement after the cessation of any Force Majeure event. If Seller cannot meet the Construction Start Deadline or the Commercial Operation Deadline as a result of
a Force Majeure event declared by Seller in accordance with this Agreement, then Seller shall work
diligently to resolve the effect of the Force Majeure and provide evidence of its efforts promptly upon
Buyer’s written request.

(d) **Force Majeure Failure.** Subject to Section 9.1(a), Buyer shall have the right,
but not the obligation, to terminate this Agreement after the occurrence of the following, each constituting
a “Force Majeure Failure”:

(i) if during the Delivery Term:

(A) due to a Force Majeure event, Seller is unable to meet its
obligations under this Agreement (including any failure to deliver the Expected Quantity to Buyer equal
to the Contract Amounts) for a period greater than ______________________; or

(B) the Project is destroyed or rendered inoperable by an event of
Force Majeure; or

(ii) if Seller is unable, due solely to a Force Majeure event, to achieve the
Initial Delivery Date by the date that is ______________________ after the original Commercial
Operation Deadline specified in the Cover Sheet (before any extensions).

(e) **Effect of Termination for Force Majeure Failure.** If Buyer exercises its
termination right in connection with a Force Majeure Failure under Section 9.1(d), 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, and, with respect to a termination under Section 9.1(d)(i), shall
return to Seller the Delivery Term Security.

**ARTICLE 10: INVOICING AND PAYMENT**

10.1 **Invoicing.** Seller shall make good faith efforts to deliver an invoice, in arrears, to Buyer
no sooner than ten (10) 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 applicable: (a) the Monthly Payment and (b)
other compensatory adjustments required by this Agreement, including adjustments for Taxes. Each
invoice shall (i) contain data sufficient to document and verify all amounts included therein, including any
relevant records, invoices or settlement data from CAISO, necessary to verify the accuracy of any amount
and (ii) be in a format specified by Buyer.

10.2 **Payment.** Buyer shall make payment to Seller by wire transfer or ACH payment to the
bank account provided on each monthly invoice by the later of (i) ten (10) days after Buyer’s receipt of
Seller’s invoice and (ii) the twentieth (20th) day of the Showing Month (and if such twentieth (20th) day is
not a Business Day, the following Business Day). Buyer shall pay undisputed invoice amounts within
thirty (30) days after receipt of the invoice. If such due date falls on a weekend or legal holiday, such due
date shall be the next Business Day. Payments made after the due date will be considered late and will
bear interest on the unpaid balance. If the amount due is not paid on or before the due date or if any other
payment that is due and owing from one Party to another is not paid on or before its applicable due date, a
late payment charge shall be applied to the unpaid balance and shall be added to the next billing
statement. Such late payment charge shall be calculated based on an annual interest rate equal to the
three-month prime rate (or any equivalent successor rate accepted by a majority of major financial
institutions) published on the date of the invoice in The Wall Street Journal (or, if The Wall Street Journal
is not published on that day, the next succeeding date of publication), plus two percent (2%) (the

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“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.

10.3 Books and Records. To facilitate payment and verification, each Party shall maintain all books and records necessary for billing and payments, including copies of all invoices under this Agreement, for a period of at least five (5) years or as otherwise required by Law. Upon five (5) Business Days’ Notice to the other Party, either Party shall be granted access to the accounting books and records within the possession or control of the other Party pertaining to all invoices generated pursuant to this Agreement. Seller acknowledges that in accordance with Government Code Section 8546.7, Seller may be subject to audit by the California State Auditor with regard to Seller’s performance of this Agreement because the compensation under this Agreement exceeds $10,000.

10.4 Payment Adjustments; Billing Errors. Payment adjustments shall be made if Buyer or Seller discovers there have been good faith inaccuracies in invoicing that are not otherwise disputed under Section 10.5 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 10.2, accruing from the date on which the adjusted amount should have been due.

10.5 Billing Disputes. A Party may, in good faith, dispute the correctness of any invoice or any adjustment to an invoice rendered under this Agreement or adjust any invoice for any arithmetic or computational error within twelve (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 (5) Business Days of such resolution along with interest accrued at the Interest Rate from and including the original due date to but excluding the date paid. Inadvertent overpayments shall be returned via adjustments in accordance with Section 10.4. Any dispute with respect to an invoice is waived if the other Party is not notified in accordance with this Section 10.5 within twelve (12) months after the invoice is rendered or subsequently adjusted, except to the extent any misinformation was from a third party not affiliated with any Party and such third party corrects its information after the twelve (12) month period. If an invoice is not rendered within twelve (12) months after the close of the month during which performance occurred, the right to payment for such performance is waived.

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

ARTICLE 11: PERFORMANCE ASSURANCE

11.1 Seller’s Development Security. To secure its obligations under this Agreement, Seller shall deliver Development Security to Buyer within thirty (30) Business Days of the Execution Date. Seller shall maintain the Development Security in full force and effect and Seller shall within five (5) Business Days after any draw thereon replenish the Development Security in the event Buyer collects or
draws down any portion of the Development Security for any reason permitted under this Agreement other than to satisfy a Damage Payment or Termination Payment. Upon the earlier of (a) Seller’s delivery of the Delivery Term Security or (b) sixty (60) days after termination of this Agreement, Buyer shall return the Development Security to Seller, less the amounts drawn in accordance with this Agreement. If the Development Security is a Letter of Credit and the issuer of such Letter of Credit (i) fails to maintain the minimum Credit Rating specified in the definition of Letter of Credit, (ii) indicates its intent not to renew such Letter of Credit and such Letter of Credit expires prior to the Commercial Operation Deadline, or (iii) fails to honor Buyer’s properly documented request to draw on such Letter of Credit by such issuer, Seller shall have ten (10) Business Days to either post cash or deliver a substitute Letter of Credit that meets the requirements set forth in the definition of Development Security.

11.2 **Seller’s Delivery Term Security.** To secure its obligations under this Agreement, Seller shall deliver Delivery Term Security to Buyer on or before the Commercial Operation Deadline. If the Delivery Term Security is not in the form of cash or Letter of Credit, it shall be substantially in the form set forth in Seller shall maintain the Delivery Term Security in full force and effect, and shall within five (5) Business Days after any draws made by Buyer in accordance with this Agreement (other than to satisfy a Termination Payment) replenish the Delivery Term 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 Delivery Term Security. If the Delivery Term Security is a Letter of Credit and the issuer of such Letter of Credit (i) fails to maintain the minimum Credit Rating set forth in the definition of Letter of Credit, (ii) indicates its intent not to renew such Letter of Credit and such Letter of Credit expires prior to the end of the Delivery Term, or (iii) fails to honor Buyer’s properly documented request to draw on such Letter of Credit by such issuer, Seller shall have ten (10) Business Days to either post cash or deliver a substitute Letter of Credit that meets the requirements set forth in the definition of Delivery Term Security.

11.3 **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, Delivery Term Security, any other cash collateral and cash equivalent collateral posted pursuant to Sections 11.1 and 11.2 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 Delivery Term Security, Buyer may do any one or more of the following (in each case subject to the final sentence of this Section 11.3):

(i) Exercise any of its rights and remedies with respect to the Development Security and Delivery Term 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 Delivery Term Security; and

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(iii) Liquidate all Development Security or Delivery Term 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.

11.4  **Seller Financial Information.** If requested by Buyer, Seller shall deliver to Buyer (a) within one hundred twenty (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 sixty (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, consistently applied. In the event a Guaranty is provided as Delivery Term Security in lieu of cash or a Letter of Credit, Seller shall provide to Buyer, or cause the Guarantor to provide to Buyer, unaudited quarterly and annual audited financial statements of the Guarantor (including a balance sheet and statements of income and cash flows), all prepared in accordance with Generally Accepted Accounting Principles in the United States, consistently applied.

**ARTICLE 12: MAINTENANCE OF THE PROJECT**

12.1  **Maintenance of the Project.** Seller shall comply with Law and Prudent Operating Practice relating to the operation and maintenance of the Project, the generation and sale of Product, and the disposal and recycling of any equipment associated with the Project, including without limitation batteries. Seller shall not during the months of June through September, inclusive, schedule any non-emergency maintenance that reduces the storage capability of the Project by more than ten percent (10%), unless (i) such outage is required to avoid damage or injury to the Project, property or persons, (ii) such maintenance is necessary to maintain equipment warranties and cannot be scheduled outside the months of June through September, (iii) such outage is required in accordance with Prudent Operating Practice or (iv) the Parties agree otherwise in writing. By June 1 of each Contract Year, Seller shall provide written Notice to Buyer of any Planned Outages scheduled for the following Contract Year. Seller may modify the schedule for such Planned Outages by providing Notice of such modification to Buyer not later than the Notification Deadline applicable to the Showing Month during which the Planned Outage was originally scheduled to commence or, if earlier, the Showing Month during which the rescheduled Planned Outage will commence. Seller shall use commercially reasonable efforts to accommodate reasonable requests of Buyer with respect to adjusting the timing of any such modifications. Other than as part of Seller’s ongoing augmentation, maintenance, and improvement of the Project and the implementation of any Additional Storage Capacity, Seller shall not (a) replace or augment existing batteries in the Project unless for critical maintenance purposes or (b) increase the capacity of the Project, in each case unless Buyer provides its prior written consent, which shall not be unreasonably withheld; provided, however, that Seller may, without Buyer’s consent, perform routine maintenance and undertake augmentation, improvement, or modification of the Project, including repairs and replacements of all or portions of the Project with newer technology, if such Work is done in accordance with Prudent Operating Practice and does not prevent Seller from meeting its obligations under this Agreement or increase the Storage Contract Capacity to a level in excess of the originally stated amount.

12.2  **Maintenance of Health and Safety.** Seller shall take reasonable safety precautions with respect to the operation, maintenance, repair, and replacement of the Project. If Seller becomes aware of
any circumstances relating to the Project that create an imminent risk of damage or injury to any Person or any Person’s property, Seller shall take prompt action to prevent such damage or injury and shall give Notice to Buyer’s emergency contact identified on Appendix VIII of such condition. Such action may include, to the extent reasonably necessary, disconnecting and removing all or a portion of the Project.

ARTICLE 13: TAXES

13.1 Taxes. Seller shall pay or cause to be paid all Taxes (a) on or with respect to the Project 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 thirty (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.

13.2 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.

13.3 Business Tax. Seller shall obtain a city business tax certificate or exemption, if qualified, and will maintain such certificate or exemption for the duration of the Delivery Term.

ARTICLE 14: LIMITATION OF LIABILITY AND EXCLUSION OF WARRANTIES

14.1 No Consequential Damages. EXCEPT TO THE EXTENT PART OF AN EXPRESS REMEDY, INDEMNITY PROVISION, OR MEASURE OF DAMAGES HEREIN, NEITHER PARTY SHALL BE LIABLE TO THE OTHER OR ITS INDEMNIFIED PERSONS FOR ANY SPECIAL, PUNITIVE, EXEMPLARY, INDIRECT, OR CONSEQUENTIAL DAMAGES, OR LOSSES OR DAMAGES FOR LOST REVENUE OR LOST PROFITS, WHETHER FORESEEABLE OR NOT, ARISING OUT OF, OR IN CONNECTION WITH THIS AGREEMENT, BY STATUTE, IN TORT OR CONTRACT. 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.

14.2 Waiver and Exclusion of Other Damages.
(a) 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.

(b) TO THE EXTENT ANY DAMAGES REQUIRED TO BE PAID HEREUNDER ARE LIQUIDATED, INCLUDING UNDER SECTIONS 3.1(d), 5.1(b), 8.1(a)(vii), 8.2, AND 8.3, 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.

(c) 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 15: REPRESENTATIONS; WARRANTIES; COVENANTS**

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

(a) Seller is a limited liability company, duly organized, validly existing and in good standing under the laws of the State of Delaware, 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 limited liability company 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 or other Governmental Approvals and authorizations that have not yet been obtained by Seller and are not yet required for performance hereunder, the documents of formation of Seller or any outstanding trust indenture, deed of trust, mortgage, loan agreement or other evidence of indebtedness or any other agreement or instrument to which Seller is a party or by which any of its property is bound.
(d) This Agreement has been duly executed and delivered by Seller. This Agreement is a legal, valid, and binding obligation of Seller enforceable in accordance with its terms, except as limited by Laws of general applicability limiting the enforcement of creditors’ rights or by the exercise of judicial discretion in accordance with general principles of equity.

(e) The Project is located in the State of California.

(f) Seller is familiar with conflict of interest Laws, including the California Political Reform Act, and Buyer’s city council policies governing conflicts of interest; Seller is in compliance with such Laws and city council policies and does not know of any facts that would violate such Laws and city council 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 the State of 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 the State of California or a family member of a government official in the State of California or (ii) has a personal, business or other relationship or association with any government official in the State of 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 the State of California or family member thereof.

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

(a) Buyer is a municipal corporation, duly organized, validly existing, and in good standing under the laws of the State of California and the rules, regulations, and orders of the California Public Utilities Commission, and is qualified to conduct business in the State of California. All Persons making up the governing body of Buyer are the elected or appointed incumbents in their positions.

(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 as a public entity generally has sovereign immunity, and may only be held liable if a statute is found declaring it liable or under the state and federal constitution. Buyer acknowledges that sovereign immunity does not affect liability based on contract, and in turn Buyer’s
obligation under this Agreement based on contract, and Buyer covenants that it will not claim sovereign immunity from enforcement of Seller’s rights and remedies, or Buyer’s obligations, under this Agreement.

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

15.3 **General Covenants.**

(a) 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;

(b) It shall maintain (or obtain from time to time as required) all regulatory authorizations necessary for it to legally perform its obligations under this Agreement; and

(c) It shall perform its obligations under this Agreement in compliance with all terms and conditions in its governing documents and in material compliance with any Law.

15.4 **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 from the County of Tulare, California 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.

(f) Seller shall comply with all federal, state and local laws, statutes, ordinances, rules and regulations, and the orders and decrees of any courts or administrative bodies or tribunals, including, without limitation those related to employment discrimination and prevailing wage, non-discrimination and non-preference, and conflict of interest.

(g) Seller shall obtain any and all Permits and approvals, including without limitation, environmental clearance under the California Environmental Quality Act (“CEQA”) or other environmental Law, from the local jurisdiction where the Project is or will be constructed. For the

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avoidance of doubt, Buyer is solely a purchaser of the Product and does not intend to be the lead agency for the Project.

(h) Seller shall not, and shall not cause or allow its subcontractors to, discriminate against, or grant preferential treatment to any person on the basis of race, sex, color, age, religion, sexual orientation, actual or perceived gender identity, disability, ethnicity or national origin. This prohibition applies to recruiting, hiring, demotion, layoff, termination, compensation, fringe benefits, advancement, training, apprenticeship and other terms, conditions, or privileges of employment, subcontracting and purchasing. Seller will inform all subcontractors of these obligations. This prohibition is subject to the following conditions: (i) the prohibition is not intended to preclude Seller from providing a reasonable accommodation to a person with a disability; (ii) Buyer’s Compliance Officer may require Seller to file, and cause any Seller’s subcontractor to file, reports demonstrating compliance with this section. Any such reports shall be filed in the form and at such times as Buyer’s Compliance Officer designates. They shall contain such information, data and/or records as Buyer’s Compliance Officer determines is needed to show compliance with this provision.

(i) Seller represents that it is familiar with the local and state conflict of interest laws and agrees to comply with those laws in performing this Agreement. Seller certifies that, as of the Execution Date, it was unaware of any facts constituting a conflict of interest or creating an appearance of a conflict of interest. Seller shall avoid all conflicts of interest or appearances of conflicts of interest in performing this Agreement. Seller has the obligation of determining if the manner in which it performs any part of this Agreement results in a conflict of interest or an appearance of a conflict of interest, and shall immediately notify Buyer in writing if it becomes aware of any facts giving rise to a conflict of interest or the appearance of a conflict of interest. Seller’s violation of this Section 15.4(i) is a material breach.

(j) Seller shall perform its obligations under this Agreement in conformance with San José City Council Policy 1-19, entitled “Prohibition of City Funding for Purchase of Single serving Bottled Water,” and San José City Council Policy 4-6, entitled “Environmentally Preferable Procurement Policy,” as those policies may be amended from time to time. The Parties acknowledge and agree that in no event shall a breach of this Section 15.4(j) be a material breach of this Agreement or otherwise give rise to an Event of Default or entitle Buyer to terminate this Agreement.

(k) Seller represents that it is familiar with Chapter 12.08 of the San José Municipal Code, which generally prohibits an officer or designated employee of Buyer from accepting any gift. Seller shall not offer any officer or designated employee of Buyer any gift prohibited by Chapter 12.08 of the San José Municipal Code. Seller’s violation of this Section 15.4(k) is a material breach.

(l) Seller represents that it is familiar with Chapter 12.10 of the San José Municipal Code, which generally prohibits a former officer or former designated employee of Buyer from providing services to Buyer connected with his/her former duties or official responsibilities. Seller shall not use either directly or indirectly any officer, employee or agent to perform any services if doing so would violate Chapter 12.10 of the San José Municipal Code.

15.5 **Prevailing Wage.** Seller shall use reasonable efforts to ensure that all employees hired by Seller, and its Contractors and Major Subcontractors, that will perform construction Work or provide services at the Site related to construction of the Project are paid wages at rates not less than those prevailing for workers performing similar work in the locality as provided by applicable California Law, if any. Nothing herein shall require Seller, its Contractors, and subcontractors to comply with, or assume liability created by other inapplicable provisions of any California labor Laws. Buyer agrees that Seller’s
obligations under this Section 15.5 will be satisfied upon the execution of a project labor agreement related to construction of the Project.

15.6 Workforce Development and Supplier Diversity. Seller agrees to, or cause its Contractors to, complete an annual supplier diversity and labor practices questionnaire provided by Buyer and, upon request of Buyer, to comply with similar regular reporting requirements related to diversity and labor practices from time to time.

ARTICLE 16: INDEMNITIES

16.1 Indemnity by Seller.

(a) Seller shall defend, indemnify and hold harmless, at its own expense, Buyer, its directors, officers, agents, attorneys, consultants, employees, and representatives ("Buyer Group") from and against all third party claims, 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 and the Site; (iii) Seller’s or its Affiliates’ actions or inactions, including Seller’s breach of this Agreement or other agreements related to the development, construction, ownership, operation or maintenance of the Project Site; (iv) any environmental matters associated with the Project, including the disposal and transportation of Hazardous Substances by or on behalf of Seller or at Seller’s direction or agreement; (v) any agreement between Seller or its Affiliates and a third party; (vi) 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 belonging to Buyer, Seller, Seller’s Affiliates, or others; (vii) Seller’s willful conduct, negligent acts or omissions, or recklessness; or (viii) any infringement of the patent rights, copyright, trade secret, trade name, trademark, service mark or any other proprietary rights of any Person caused by Buyer’s use of the Product, deliverables or other items provided by Seller pursuant to the requirements of this Agreement, excepting only such losses to the extent 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 harmless from and against all Claims incurred by or brought against Buyer in connection with Environmental Costs.

(c) Seller’s indemnity obligations apply to the maximum extent allowed by Law and includes defending Buyer, its officers, employees, and agents as set forth in Section 2778 and 2782.8 of the California Civil Code, if applicable.

16.2 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 16, Buyer will promptly Notify Seller in writing of any Claim that Buyer has determined has given or could give rise to an Indemnifiable Loss under Section 16.1. 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 timely Notice or to include any specified information in any Notice as provided in this Section 16.2 will not affect the rights or obligations of any Party hereunder except and only to the extent that, as a result of such failure, Seller 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.

16.3 **Defense of Claims.** If, within thirty (30) days after giving a Notice of Claim regarding a Claim to Seller pursuant to Section 16.2(a), Buyer receives Notice from Seller that Seller has elected to assume the defense of such Claim, Seller will not be liable for any legal expenses subsequently incurred by Buyer in connection with the defense thereof; provided, however, that if Seller fails to take reasonable steps necessary to defend diligently such Claim within thirty (30) 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 that 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 (10) 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.

16.4 **Subrogation of Rights.** Upon making any indemnity payment, Seller will, to the extent of such indemnity payment, be subrogated to all rights of Buyer against any third party in respect of the Indemnifiable Loss to which the indemnity payment relates; provided that (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 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.

16.5 **Rights and Remedies are Cumulative.** The rights and remedies of a Party pursuant to this Article 16: are cumulative and in addition to the rights of the Parties otherwise provided in this Agreement, except with respect to any expressly exclusive remedies herein.

**ARTICLE 17: INSURANCE**

17.1 **Insurance.**

(a) **General Liability.** Seller shall maintain, or cause to be maintained at its sole expense, (i) commercial general liability insurance, including products and completed operations and personal injury insurance, with a limit of Two Million Dollars ($2,000,000) per occurrence, and an annual aggregate of not less than Five Million Dollars ($5,000,000), endorsed to provide contractual liability in said amount, specifically covering Seller’s obligations under this Agreement and including Buyer as an additional insured but only to the extent of the liabilities assumed hereunder by Seller. Such insurance shall contain standard cross-liability and severability of interest provisions.

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(b) **Employer’s Liability Insurance.** Seller, if it has employees, shall maintain employers’ liability insurance with limits of One Million Dollars ($1,000,000) for injury or death occurring as a result of each accident. With regard to bodily injury by disease, the One Million Dollar ($1,000,000) policy limit will apply to each employee.

(c) **Workers Compensation Insurance.** Seller, if it has employees, shall also maintain at all times during the Delivery Term workers’ compensation and employers’ liability insurance coverage in accordance with applicable requirements of the law of the state in which the Work is being performed.

(d) **Business Auto Insurance.** Seller shall maintain at all times during the Term business auto insurance for bodily injury and property damage with limits of One Million Dollars ($1,000,000) per occurrence. Such insurance shall cover liability arising out of Seller’s use of all owned (if any), non-owned and hired vehicles, including trailers or semi-trailers in the performance of the Agreement.

(e) **Umbrella Liability Insurance.** Seller shall maintain or cause to be maintained an umbrella liability policy with a limit of liability of ten million dollars ($10,000,000) per occurrence and in the aggregate. Such insurance shall be excess of the general liability, employer’s liability, and business auto insurance coverages. Seller may choose any combination of primary and excess or umbrella liability policies to meet the insurance limits required under Sections 17.1(a), 17.1(b), and 17.1(d) above.

(f) **Construction All-Risk Insurance.** Seller shall maintain or cause to be maintained during the construction of the Project prior to the Commercial Operation Date, construction all-risk form property insurance covering the Project during such construction periods and naming Seller (and Lender if any) as the loss payee.

(g) **Contractor’s Pollution Liability.** Seller shall maintain or cause its subcontractor to maintain during the construction of the Project prior to the Commercial Operation Date, Pollution Legal Liability Insurance in the amount of two million dollars ($2,000,000) per occurrence and in the aggregate, naming Seller (and Lender if any) as additional named insured.

(h) **Property Insurance.** On and after the Commercial Operation Date, provided it is commercially available and commensurate with similar projects, Seller shall maintain or cause to be maintained insurance against loss or damage from all causes under standard “all risk” property insurance coverage in amounts that are not less than the replacement value of the Project, other than for perils which are typically subject to sublimits in the commercial insurance market.

(i) **Subcontractor Insurance.** Seller shall require all of its subcontractors to carry the types and levels of insurance commensurate with the nature of their work. Seller shall endeavor for subcontractors to include Buyer as an additional insured to (i) commercial general liability insurance; (ii) employers’ liability coverage; (iii) business auto insurance for bodily injury and property damage and (iv) excess liability coverage. The subcontractor’s insurance shall be primary without right of contribution from any insurance of Buyer, and shall include a waiver of subrogation with respect to Buyer for the required coverage pursuant to this Section 17.1(i).

17.2 **Evidence of Insurance.** Prior to the Execution Date and upon annual renewal of required insurance coverage thereafter, Seller shall deliver to Buyer certificates of insurance evidencing such coverage as is required to be in effect at the times specified above. These certificates shall specify that Buyer shall be given at least thirty (30) days’ prior Notice by Seller in the event of any material
modification, cancellation or termination of coverage with the exception of non-payment of premium, in which case Notice shall be ten (10) days. Such insurance shall be primary coverage without right of contribution from any insurance of Buyer. Any other insurance maintained by Seller is for the exclusive benefit of Seller and shall not in any manner inure to the benefit of Buyer.

17.3 **Failure to Comply with Insurance Requirements.** If Seller fails to comply with any of the provisions of this Article 17, Seller, among other things and without restricting Buyer’s remedies under the Law or otherwise, shall, at its own cost and expense, act as an insurer and provide insurance in accordance with the terms and conditions above. With respect to the required general liability, umbrella liability, and commercial automobile liability insurance, Seller shall provide a current, full and complete defense to Buyer, its subsidiaries and Affiliates, and their respective officers, directors, shareholders, agents, employees, assigns, and successors in interest, in response to a third-party claim in the same manner that an insurer would have, had the insurance been maintained in accordance with the terms and conditions set forth above. In addition, alleged violations of the provisions of this Article 17 means that Seller has the initial burden of proof regarding any legal justification for refusing or withholding coverage and Seller shall face the same liability and damages as an insurer for wrongfully refusing or withholding coverage in accordance with the laws of California.

**ARTICLE 18: RECORDS AND AUDIT RIGHTS**

18.1 **Operations Logs.** Seller shall maintain a complete and accurate log of all material operations on a daily basis. Such log will include, but not be limited to, information on charging, discharging, availability, maintenance performed, outages, electrical 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, the CPUC, or the staff of the CPUC, Seller shall provide all records demonstrating that the Project is operated and maintained in accordance with Requirements.

18.2 **Records and Audit.**

(a) Seller shall provide access to such financial records and personnel reasonably 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 (5) years or as otherwise required by Law. Seller will make all records reasonably available to Buyer at its principal place of business during normal working hours, upon reasonable advance Notice.

18.3 **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 15.4), (b) the accuracy of any statement including the Project 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.

18.4 **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 ten thousand dollars ($10,000.00).
18.5 **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 21:

18.6 **Access Rights.** Seller agrees to allow Buyer, the Utility Distribution Company or Transmission Provider, the Commission, and/or the CEC, and the authorized representatives of such entities, reasonable access to Seller’s facilities to conduct measurement and evaluation activities related to this Agreement, subject to compliance with Seller’s on-site safety and security requirements.

**ARTICLE 19: ASSIGNMENT**

19.1 **General Prohibition on Assignments.** Except as provided below, neither Party may assign this Agreement or its rights or obligations under this Agreement, without the prior written consent of the other Party, which consent shall not be unreasonably withheld. Any Seller Change of Control or direct or indirect change of control of Buyer (whether voluntary or by operation of law) will be deemed an assignment and will require the prior written consent of the other Party; provided, however, that in no event shall a sale of Con Edison Clean Energy Businesses, Inc. to RWE Renewables Americas, LLC that occurs within two (2) years after the Execution Date constitute a Seller Change of Control or otherwise require Buyer’s consent. Buyer will have no obligation to provide any consent, or enter into any agreement, that materially and adversely affects any of Buyer’s rights, benefits, risks or obligations under this Agreement, or to modify the Agreement, except as set forth below. Seller shall be responsible for Buyer’s reasonable third-party costs, including reasonable attorneys’ fees, associated with the preparation, review, execution, and delivery of documents in connection with any assignment of this Agreement.

19.2 **Collateral Assignment.** Subject to the provisions of this Section 19.2, Seller has the right to assign this Agreement as collateral for any financing or refinancing of the Project. In connection with any financing or refinancing of the Project by Seller, upon request of Seller, Buyer shall in good faith work with Seller and Lender to agree upon a consent to collateral assignment of this Agreement (“Collateral Assignment Agreement”). The Collateral Assignment Agreement shall include the following provisions:

(a) Buyer shall give Notice of an Event of Default by Seller to the Person(s) to be specified by Lender in the Collateral Assignment Agreement, before exercising its right to terminate this Agreement as a result of such Event of Default; provided that such Notice shall be provided to Lender at the time such Notice is provided to Seller and the cure period of Lender shall not commence until Lender has received Notice of such Event of Default;

(b) Following an Event of Default by Seller under this Agreement, Buyer may require Seller or Lender to provide to Buyer a report concerning:

(i) The status of efforts by Seller or Lender to develop a plan to cure the Event of Default;

(ii) Impediments to the cure plan or its development;

(iii) If a cure plan has been adopted, the status of the cure plan’s implementation (including any modifications to the plan as well as the expected timeframe within which any cure is expected to be implemented); and

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(iv) Any other information which Buyer may reasonably require related to
the development, implementation and timetable of the cure plan.

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

(c) Lender will have the right to cure an Event of Default on behalf of Seller, only if
Lender sends a written Notice to Buyer before the later of (i) the expiration of any cure period, and (ii) ten
(10) Business Days after Lender’s receipt of Notice of such Event of Default from Buyer, indicating
Lender’s intention to cure. Lender must remedy or cure the Event of Default within the cure period under
this Agreement and any additional cure periods agreed in the Collateral Assignment Agreement, which
shall not exceed a maximum of sixty (60) days (or one hundred twenty (120) days in the event of a
bankruptcy of Seller, or any foreclosure or similar proceeding if required by Lender to cure any Event of
Default);

(d) Lender will have the right to consent before any termination of this Agreement
which does not arise out of an Event of Default;

(e) Lender will receive prior Notice of and the right to approve material amendments
to this Agreement, which approval will not be unreasonably withheld, delayed or conditioned;

(f) If Lender, directly or indirectly, takes possession of, or title to the Project
(including possession by a receiver or title by foreclosure or deed in lieu of foreclosure), Lender must
assume all of Seller’s obligations arising under this Agreement and all related agreements (subject to such
limits on liability as are mutually agreed to by Seller, Buyer, and Lender as set forth in the Collateral
Assignment Agreement); provided, before such assumption, if Buyer advises Lender that Buyer will
require that Lender cure (or cause to be cured) any Event of Default existing as of the possession date in
order to avoid the exercise by Buyer (in its sole discretion) of Buyer’s right to terminate this Agreement
with respect to such Event of Default, then Lender at its option, and in its sole discretion, may elect to
either:

(i) Cause such Event of Default to be cured, or

(ii) Not assume this Agreement;

(g) If Lender elects to sell or transfer the Project (after Lender directly or indirectly,
takes possession of, or title to the Project), or sale of the Project occurs through the actions of Lender (for
example, a foreclosure sale where a third party is the buyer, or otherwise), then Lender shall cause the
transferee or buyer to assume all of Seller’s obligations arising under this Agreement and all related
agreements as a condition of the sale or transfer. Such sale or transfer may be made only to an entity that
(i) meets the definition of Permitted Transferee and (ii) is an entity that Buyer is permitted to contract
with under applicable Law; and

Subject to Lender’s cure of any Events of Defaults under the Agreement in accordance with
Section 19.2(f), if (i) this Agreement is rejected in Seller’s bankruptcy or otherwise terminated in
connection therewith Lender shall have the right to elect within thirty (30) days after such rejection or
termination, to cause Buyer to enter into a replacement agreement with Seller having the same terms as
this Agreement for the remaining term thereof, or (ii) if Lender or its designee, directly or indirectly, takes
possession of, or title to, the Project (including possession by a receiver or title by foreclosure or deed in

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lieu of foreclosure) after any such rejection or termination of this Agreement, promptly after Buyer’s written request, Lender must itself or must cause its designee to promptly enter into a new agreement with Buyer having the same terms as this Agreement for the remaining term thereof, provided that in the event a designee of Lender, directly or indirectly, takes possession of, or title to, the Project (including possession by a receiver or title by foreclosure or deed in lieu of foreclosure), such designee shall be approved by Buyer, not to be unreasonably withheld.

19.3 **Permitted Assignment by Seller.** 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, 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 Change of Control, to an Affiliate of Seller. In addition, Buyer’s written consent will not be required for the transfer or assignment of this Agreement, including through a Change of Control, to any Person succeeding to all or substantially all of the assets of Seller (whether voluntary or by operation of law and whether by assignment or Change of Control), if, and only if:

(i) the assignee (or Seller after a Change of Control) is a Permitted Transferee;

(ii) Seller has given Buyer Notice at least fifteen (15) Business Days before the date of such proposed assignment or Change of Control;

(iii) such assignment or Change of Control does not violate applicable Law, including any Law relating to conflicts of interests;

(iv) for any assignment of this Agreement only, Seller has provided Buyer a written agreement signed by the Person to which Seller wishes to assign its interests confirming that (x) provides that such Person will assume all of Seller’s obligations and liabilities under this Agreement upon such transfer or assignment, (y) certifies that such Person meets the definition of a Permitted Transferee, and (z) certifies that such assignment does not violate applicable Law, including any Law relating to conflicts of interests; and

(v) for any Change of Control, Seller has provided Buyer written confirmation that (1) Seller after the Change of Control meets the definition of a Permitted Transferee, and (2) such Change of Control does not violate applicable Law, including any Law relating to conflicts of interests.

19.4 **Unauthorized Assignment; Costs.**

(a) Any assignment or purported assignment in violation of this Article 19 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.
(d) Buyer shall have no obligation to provide any consent or enter into any agreement that materially and adversely affects any of Buyer’s rights, benefits, risks or obligations under this Agreement or to modify such Agreement.

ARTICLE 20: GOVERNING LAW; DISPUTE RESOLUTION

20.1 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. To the extent enforceable at such time, each Party waives its respective right to any jury trial with respect to any litigation arising under or in connection with this Agreement. The Parties agree that any suit, action or other legal proceeding by or against any Party (or its Affiliates or designees) with respect to or arising out of this Agreement shall be brought in the federal courts of the United States Northern District of California or the courts of the State of California sitting in the County of Santa Clara, California. Each of the Parties hereto hereby consents to the adjudication of all claims pursuant to judicial reference as provided in California Code of Civil Procedure Section 638, and the judicial referee shall be empowered to hear and determine all issues in such reference, whether fact or law. Each of the Parties hereto represents that each has reviewed this waiver and consent and each knowingly and voluntarily waives its jury trial rights and consents to judicial reference following consultation with legal counsel on such matters. In the event of litigation, a copy of this Agreement may be filed as a written consent to a trial by the court or to judicial reference under California Code of Civil Procedure Section 638 as provided herein.

20.2 Dispute Resolution. In the event of any dispute arising under this Agreement, within ten (10) days following the receipt of a written Notice from either Party identifying such dispute, the Parties shall meet, negotiate, and attempt, in good faith, to resolve the dispute quickly, informally, and inexpensively. If the Parties are unable to resolve a dispute arising hereunder within the earlier of either thirty (30) days of initiating such discussions, or within forty (40) days after Notice of the dispute, then either Party may seek any and all remedies available to it at law or in equity, subject to the limitations set forth in this Agreement. To the fullest extent permitted under applicable Law, any statute of limitations applicable to a dispute that is mediated by the Parties pursuant to this Agreement shall toll during any period in which such dispute is being mediated in accordance with this Section 20.2.

ARTICLE 21: CONFIDENTIAL INFORMATION

21.1 Definition of Confidential Information. The following constitutes “Confidential Information,” whether oral or written, which is delivered by Seller to Buyer or by Buyer to Seller including: (a) the terms and conditions of, and proposals and negotiations related to, this Agreement, and (b) information that either Seller or Buyer stamps or otherwise identifies as “confidential” or “proprietary” before disclosing it to the other. Confidential Information does not include (i) information that was publicly available at the time of the disclosure, other than as a result of a disclosure in breach of this Agreement; (ii) information that becomes publicly available through no fault of the recipient after the time of the delivery; (iii) information that was rightfully in the possession of the recipient (without confidential or proprietary restriction) at the time of delivery or that becomes available to the recipient from a source not subject to any restriction against disclosing such information to the recipient; and (iv) information that the recipient independently developed without a violation of this Agreement.

21.2 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 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. Notwithstanding any other provision set forth herein, each Party hereto acknowledges and agrees that 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 the Receiving Party 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.

21.3 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, at 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.

21.4 Disclosure to Lenders, Etc. Notwithstanding anything to the contrary in this Article 21: Confidential Information may be disclosed by Seller to any actual or potential Lender or any of its Affiliates, and Seller’s actual or potential agents, advisors, actual or potential investors, consultants, contractors, or trustees, so long as the Person (other than a Person that has an ethical duty to Seller) to whom Confidential Information is disclosed agrees in writing to be bound by confidentiality provisions no less stringent than those in this Article 21: (subject to customary survival terms). Seller shall provide written Notice to Buyer of any disclosure of Confidential Information pursuant to this Section 21.4, including the identity of the party receiving such Confidential Information.

21.5 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. A Party’s consent shall not be unreasonably withheld, conditioned or delayed.

ARTICLE 22: GENERAL PROVISIONS

22.1 Entire Agreement; Integration; Appendices. 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, (i) all rights under Sections 16.1 through 16.5 (Indemnities) and any other indemnity rights survive the end of the Term or earlier termination of the Agreement, (ii) all audit rights under Sections 18.2 and 18.3 survive the end of the Term for an additional one (1) year, or as required by applicable Law, (iii) all rights and obligations under Article 21: (Confidentiality) survive for five (5) years following the termination of this Agreement, and (iv) 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) (as may be amended or supplemented from time to time). Changes proposed by a non-Party or FERC acting sua sponte shall be subject to the most stringent standard permissible under applicable Law.

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
22.10 **Designated Fund and Limited Obligations.**

(a) **Designated Fund.** Buyer is a municipal corporation and is precluded under the State of California’s Constitution and applicable Laws from entering into obligations that finally bind future governing bodies without an appropriation for such obligation, and, therefore, nothing in this Agreement shall constitute an obligation of future legislative bodies of Buyer to appropriate funds for purposes of this Agreement; provided, however, that (i) Buyer has created and set aside a designated fund for San José Clean Energy as further described in Section 4.80.4050 of the City of San José Municipal Code (the “**Designated Fund**”) for payment of its obligations under this Agreement, (ii) as set forth in Section 4.80.4060 of the City of San José Municipal Code, all monies derived from the operation of San José Clean Energy, including revenues for sale of electricity, payment from other entities, and any financing proceeds associated with San José Clean Energy’s obligation will be deposited in the Designated Fund, and (iii) subject to the requirements and limitations of applicable Law and taking into account other available money specifically authorized by the San José City Council and allocated and appropriated to the San José Clean Energy’s obligations, Buyer agrees to establish San José Clean Energy rates and charges that are sufficient to maintain revenues in the Designated Fund necessary to pay its obligations under this Agreement and all of Buyer’s payment obligations under its other contracts for the purchase of energy and related products for San José Clean Energy. Buyer shall provide Seller with reasonable access to account balance information with respect to the Designated Fund during the Term.

(b) **Limited Obligations.** Buyer’s payment obligations under this Agreement are special limited obligations of Buyer payable solely from the Designated Fund and are not a charge upon the revenues or general fund of Buyer or upon any non- San José Clean Energy moneys or other property of Buyer’s community energy department or Buyer.

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.** Seller agrees to use commercially reasonable efforts to cooperate with respect to any future changes to this Agreement needed to satisfy requirements of Governmental Authorities associated with changes in Law to maximize benefits to Buyer, including: (i) modification of the description of Capacity Attributes as may be required, including updating the Agreement to reflect any mandatory contractual language required by Governmental Authorities; or (ii) submission of any reports, data, or other information required by Governmental Authorities; provided that Seller shall have no obligation to modify this Agreement, or take other actions not required under this Agreement, if such modifications or actions would materially adversely affect, or could reasonably be expected to have or result in a material adverse effect on, any of Seller’s rights, benefits, risks and/or obligations under this Agreement. 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.

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City of San José Energy Storage Resource Adequacy Agreement
22.13 **Binding Effect.** This Agreement shall inure to the benefit of and be binding upon the Parties and their respective successors and permitted assigns.

**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.** Each Notice required, permitted, or contemplated hereunder shall be deemed to have been validly served, given or delivered as follows: (a) if sent by United States mail with proper first class postage prepaid, three (3) Business Days following the date of the postmark on the envelope in which such Notice was deposited in the United States mail; (b) if sent by a regularly scheduled overnight delivery carrier with delivery fees either prepaid or an arrangement with such carrier made for the payment of such fees, the next Business Day after the same is delivered by the sending Party to such carrier; (c) if sent by electronic communication (including electronic mail or other electronic means) and if concurrently with the transmittal of such electronic communication the sending Party provides a copy of such electronic Notice by hand delivery, United States mail, or express courier, at the time indicated by the time stamp upon delivery; or (d) if delivered in person, upon receipt by the Receiving Party. Notwithstanding the foregoing, invoices sent pursuant to Section 10.1, Notices of outages or other scheduling or dispatch information or requests, may be sent by electronic communication and shall be considered delivered upon successful completion of such transmission.

[Signature Page Follows]
SIGNATURES

IN WITNESS WHEREOF, the parties have caused this Agreement to be duly executed as of the date specified below.

ALPAUGH BESS, LLC, a Delaware limited liability company

By: Mark A Noves
Name: Mark Noves
Title: President and CEO
Date: Mar 16, 2023

CITY OF SAN JOSÉ, a California municipal corporation

By: Zachary Struyk
Name: Zachary Struyk
Title: Assistant Director, Community Energy
Date: Mar 16, 2023

APPROVED AS TO FORM:

Enrique Fernandez, Deputy City Attorney

Mar 16, 2023
APPENDIX I
DESCRIPTION OF PROJECT

Site Name: Alpaugh

Site includes all or some of the following APNs:

County: Tulare

CEQA Lead Agency: Tulare County Resources Management Agency

Type of Storage Facility: Battery

Energy Management Software: N/A

Storage Contract Capacity: As defined on Cover Sheet

Maximum Output

Maximum Charging Capacity: 

Maximum Discharging Capacity: 

Maximum Stored Energy Level: 

Point of Interconnection: Corcoran – Olive Sw Station 115 kV

Participating Transmission Owner: PG&E
APPENDIX II

OPERATIONAL CHARACTERISTICS

Seller shall populate and deliver to Buyer this Appendix II no later than five (5) Business Days after the achievement of the Commercial Operation Date.

Physical Location and Interconnection Point

Shall be as set forth in Appendix I.

Discharging and Charging

Maximum continuous discharge power (Dmax): MW
Minimum continuous discharge power (Dmin): MW
Maximum discharge duration at constant Dmax: (hours)

Maximum continuous charge power (Cmax): MW
Minimum continuous charge power (Cmin): MW
Maximum charge duration at constant Cmax: (hours)

Amount of Energy released to fully discharge: MWh
Amount of Energy required to fully charge: MWh (from Grid, Charged by Connected Solar)

Ramp Rates

[Describe ramp rates. If ramp rates vary with loading level, please provide a ramp rate for each segment within the operational range in which it differs. If ramp rates vary based on the operating mode (e.g., regulation), please provide separately.]

Dmin to Dmax: ____ MW/second
Cmin to Cmax: ____ MW/second
Dmax to Dmin: ____ MW/second
Cmax to Cmin: ____ MW/second

System Response Time

[Timing should commence with system at a steady-state starting value and end when system has reached a steady-state ending value. Idle means that the system is neither charging nor discharging, but is online and available for immediate operation. Time should include time from notification.]
Idle to Dmax: __
Idle to Cmax: __
Dmax to Cmax: ______
Cmax to Dmax: __
Dmin to Cmin: __
Cmin to Dmin: __

[For the purpose of filling out this Appendix, Discharge (Charge) Start-up Time is the amount of time needed to go from non-operation to Dmin (Cmin). (The state of non-operation includes but is not limited to being unsynchronized to the grid.) Provide in seconds if appropriate.]

Discharge Start-up time (from notification to Dmin): ___ seconds
Charge Start-up time (from notification to Cmin): ___ seconds
Discharge Start-up Fuel: _n/a_ MMBtu

**Starts and other Run Time Limitations**

[Describe start limitations. Include any daily or annual start limitations. Insert constraints, if any, on run hours and a brief description of the reason for such constraint(s).]

Start limitations: ___ ______
Run hour limitations: ___ ______

[Describe minimum times.]

The minimum run time after a Discharge Start-up is ___ seconds
The minimum run time after a Charge Start-up is ___ seconds
The minimum down time after a shutdown is ___ seconds
APPENDIX III

PROGRESS REPORTING FORM

Each Progress Report must include the following items:

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

CERTIFICATION
FOR COMMERCIAL OPERATION

This certification of commercial operation ("Certification") is delivered by each of [[_____]] ("Seller") and [[_____]] ("Engineer") to City of San José ("Buyer") in accordance with the terms of that certain Energy Storage Resource Adequacy 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 and Engineer each hereby certify and represent to Buyer that, severally and not jointly, (i) the Project became Commercially Operable on [[____]] and (ii) each condition precedent under Section 4.2 of the Agreement has been achieved.

SELLER:

Signature: ____________________________
Name: ______________________________
Title: ______________________________
Date: ________________________________

ENGINEER:

Signature: ____________________________
Name: ______________________________
Title: ______________________________
Date: ________________________________
License: ______________________________
Number: ______________________________
LPE Stamp: ____________________________

City of San José Energy Storage Resource Adequacy Agreement
APPENDIX V

FORM OF LETTER OF CREDIT

[Issuing Bank Letterhead and Address]

IRREVOCABLE STANDBY LETTER OF CREDIT NO. [XXXXXXX]

Date:
Bank Ref.:
Amount: US$[XXXXXXX]
Expiry Date:

Beneficiary:

City of San José
88 South 4th Street, Suite 130
San Jose, CA 95112

Ladies and Gentlemen:

By the order of [Publisher], we, [insert bank name and address] (“Issuer”) hereby issue our Irrevocable Standby Letter of Credit No. [XXXXXXX] (the “Letter of Credit”) in favor of City of San José, a California municipal corporation (“Beneficiary”), for an amount not to exceed the aggregate sum of U.S. $[XXXXXXX] (United States Dollars [XXXXXXX] and 00/100), pursuant to that certain Energy Storage Agreement dated as of _____ and as amended (the “Agreement”) between Applicant and Beneficiary. This Letter of Credit shall become effective immediately and shall expire on [Insert Date] which is one year after the issue date of this Letter of Credit, or any expiration date extended in accordance with the terms hereof (the “Expiration Date”).

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

The Drawing Certificate may be presented by (a) physical delivery, (b) as a PDF attachment to an e-mail to [bank email address] or (c) facsimile to [bank fax number [XXX-XXX-XXXX]]. If presentation is made by facsimile or e-mail, Beneficiary shall contact the Issuer at [insert phone number] to confirm our receipt of the transmission.

The original of this Letter of Credit (and all amendments, if any) is not required to be presented in connection with any presentation 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.

City of San José Energy Storage Resource Adequacy Agreement
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 (1) year period beginning on the present Expiration Date hereof and upon each anniversary for such date, unless at least one hundred twenty (120) days prior to any such Expiration Date we have sent to you written Notice by overnight courier service that we elect not to extend this Letter of Credit, in which case it will expire on the date specified in such Notice. No presentation made under this Letter of Credit after such Expiration Date will be honored.

This Letter of Credit is subject to the Uniform Customs and Practice for Documentary Credits (2007 Revision) International Chamber of Commerce Publication No. 600 (the “UCP”), except to the extent that the terms hereof are inconsistent with the provisions of the UCP, including but not limited to Articles 14(b) and 36 of the UCP, in which case the terms of this Letter of Credit shall govern. As to matters not addressed by the UCP, this Letter of Credit shall be governed by and construed in accordance with the laws of the State of California, without reference to the conflict of law provisions thereof that would direct the application of the laws of another jurisdiction. In the event of an act of God, riot, civil commotion, insurrection, war or any other cause beyond Issuer’s control (as defined in Article 36 of the UCP) that interrupts Issuer’s business and causes the place for presentation of the Letter of Credit to be closed for business on the last day for presentation, the Expiration Date of the Letter of Credit will be automatically extended without amendment to a date thirty (30) calendar days after our place for presentation reopens for business.

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

All notices to Beneficiary shall be in writing and are required to be sent by certified letter, overnight courier, or delivered in person to: City of San José, 88 South 4th Street, Suite 130, San José, CA 95112. Only notices to Beneficiary meeting the requirements of this paragraph shall be considered valid. Any notice to Beneficiary which is not in accordance with this paragraph shall be void and of no force or effect.

[Bank Name]

[Insert officer name]
[Insert officer title]
(DRAW REQUEST SHOULD BE ON BENEFICIARY’S LETTERHEAD)

Drawing Certificate

[Insert Bank Name and Address]

Ladies and Gentlemen:

The undersigned, a duly authorized representative of City of San José, a California municipal corporation, 88 South 4th Street, Suite 130, San Jose, CA 95112, as beneficiary (the “Beneficiary”) of the Irrevocable Letter of Credit No. [XXXXXX] (the “Letter of Credit”) issued by [insert bank name] (the “Bank”) by order of [insert name] (the “Applicant”), hereby certifies to the Bank as follows:

1. Applicant and Beneficiary are party to that certain Energy Storage Agreement dated as of __________, 20__ (the “Agreement”).

2. Beneficiary is making a drawing under this Letter of Credit in the amount of U.S. $__________, because a Seller Event of Default (as such term is defined in the Agreement) has occurred or other occasion provided for in the Agreement where Beneficiary is authorized to draw on the letter of credit has occurred.

OR

Beneficiary is making a drawing under this Letter of Credit in the amount of U.S. $__________, which equals the full available amount under the Letter of Credit, because Applicant is required to maintain the Letter of Credit in force and effect beyond the expiration date of the Letter of Credit but has failed to provide Beneficiary with a replacement Letter of Credit or other acceptable instrument within thirty (30) days prior to such expiration date.

3. The undersigned is a duly authorized representative of City of San José and is authorized to execute and deliver this Drawing Certificate on behalf of Beneficiary.

You are hereby directed to make payment of the requested amount to City of San José by wire transfer in immediately available funds to the following account:

[Specify account information]

City of San José

_______________________________

Name and Title of Authorized Representative

Date______________________________

City of San José Energy Storage Resource Adequacy Agreement
APPENDIX VI

PROJECT SAFETY PLAN AND DOCUMENTATION

Project 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, maintenance of the Project using the proposed technology.

Describe Seller’s and 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: Project 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: Project 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 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

FORM OF GUARANTY

This Guaranty (this “Guaranty”) is entered into as of [_____] (the “Effective Date”) by and between [_____], a [_____] (“Guarantor”), and City of San José, a California municipal corporation (together with its successors and permitted assigns, “Buyer”).

Recitals

A. Buyer and [SELLER ENTITY], a [_____] (“Seller”), entered into that certain Energy Storage Agreement (as amended, restated or otherwise modified from time to time, the “ESA”) dated as of [_____], 20__.

B. Guarantor is entering into this Guaranty as Delivery Term Security to secure Seller’s obligations under the ESA, as required by Section 11.2 of the ESA.

C. It is in the best interest of Guarantor to execute this Guaranty inasmuch as Guarantor will derive substantial direct and indirect benefits from the execution and delivery of the ESA.

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

Agreement

1. Guaranty. For value received, Guarantor does hereby unconditionally, absolutely and irrevocably guarantee, as primary obligor and not as a surety, to Buyer the full, complete and prompt payment by Seller of any and all amounts and payment obligations now or hereafter owing from Seller to Buyer under the ESA, including, without limitation, compensation for penalties, the Termination Payment, indemnification payments or other damages, as and when required pursuant to the terms of the ESA (the “Obligations”), and any and all expenses (including reasonable attorneys’ fees) reasonably incurred by Beneficiary in enforcing its rights under this Guaranty (the “Guaranteed Amount”), provided, that Guarantor’s aggregate liability under or arising out of this Guaranty shall not exceed [_____] Dollars ($[________]). The Parties understand and agree that any payment by Guarantor or Seller of any portion of the Guaranteed Amount shall thereafter reduce Guarantor’s maximum aggregate liability hereunder on a dollar-for-dollar basis. This Guaranty is an irrevocable, absolute, unconditional and continuing guarantee of the full and punctual payment and performance, and not of collection, of the Guaranteed Amount and, except as otherwise expressly addressed herein, is in no way conditioned upon any requirement that Buyer first attempt to collect the payment of the Guaranteed Amount from Seller, any other guarantor of the Guaranteed Amount or any other Person or entity or resort to any other means of obtaining payment of the Guaranteed Amount. In the event Seller shall fail to duly, completely or punctually pay any Guaranteed Amount as required pursuant to the ESA, Guarantor shall promptly pay such amount as required herein.

2. Demand Notice. For avoidance of doubt, a payment shall be due for purposes of this Guaranty only when and if a payment is due and payable by Seller to Buyer under the terms and conditions of the Agreement. If Seller fails to pay any Guaranteed Amount as required pursuant to the ESA for five (5) Business Days following Seller’s receipt of Buyer’s written notice of such failure (the “Demand Notice”), then Buyer may elect to exercise its rights under this Guaranty and may make a demand upon Guarantor (a “Payment Demand”) for such unpaid Guaranteed Amount. A Payment Demand shall be in writing and shall reasonably specify in what manner and what amount Seller has failed to pay and an explanation of why such payment is due and owing, with a specific statement that Buyer is requesting that
Guarantor pay under this Guaranty. Guarantor shall, within ten (10) Business Days following its receipt of the Payment Demand, pay the Guaranteed Amount to Buyer.

3. **Scope and Duration of Guaranty.** This Guaranty applies only to the Guaranteed Amount. This Guaranty shall continue in full force and effect from the Effective Date until the earlier of the following: (x) when, in accordance with the terms of the ESA, all Guaranteed Amounts have been paid in full (whether directly or indirectly through set-off or netting of amounts owed by Buyer to Seller), or (y) replacement Delivery Term Security is provided in an amount and form required by the terms of the ESA. Further, this Guaranty (a) shall remain in full force and effect without regard to, and shall not be affected or impaired by any invalidity, irregularity or unenforceability in whole or in part of this Guaranty, and (b) subject to the preceding sentence, shall be discharged only by complete performance of the undertakings herein. The Guarantor waives any defense based on or arising out of the unenforceability of the Obligations or any part thereof from any cause. Without limiting the generality of the foregoing, the obligations of the Guarantor hereunder shall not be released, discharged, or otherwise affected and this Guaranty shall not be invalidated or impaired or otherwise affected for the following reasons:

(i) the extension of time for the payment of any Guaranteed Amount, or

(ii) any amendment, modification or other alteration of the ESA, or

(iii) any indemnity agreement Seller may have from any party, except to the extent it offsets a Guaranteed Amount, or

(iv) any insurance that may be available to cover any loss, except to the extent insurance proceeds are used to satisfy the Guaranteed Amount, or

(v) any voluntary or involuntary liquidation, dissolution, receivership, insolvency, bankruptcy, assignment for the benefit of creditors, reorganization, arrangement, composition or readjustment of, or other similar proceeding affecting, Seller or any of its assets, including but not limited to any rejection or other discharge of Seller’s obligations under the ESA imposed by any court, trustee or custodian or any similar official or imposed by any law, statute or regulation, in each such event in any such proceeding, or

(vi) the release, modification, waiver or failure to pursue or seek relief with respect to any other guaranty, pledge or security device whatsoever, or

(vii) any payment to Buyer by Seller that Buyer subsequently returns to Seller pursuant to court order in any bankruptcy or other debtor-relief proceeding, or

(viii) those defenses based upon (A) the legal incapacity or lack of power or authority of any Person, including Seller and any representative of Seller to enter into the ESA or perform its obligations thereunder, (B) lack of due execution, delivery, validity or enforceability, including of the ESA, or (C) Seller’s inability to pay any Guaranteed Amount or perform its obligations under the ESA, or

(ix) any other event or circumstance that may now or hereafter constitute a defense to payment of the Guaranteed Amount, including, without limitation, statute of frauds and accord and satisfaction.

Subject to Guarantor’s payment of the Payment Demand in accordance with Section 2 above, Guarantor reserves the right to assert for itself in a subsequent action for recoupment any set-offs, counterclaims, and other defenses that Seller is or may be entitled to arising from or out of the ESA, except for any defenses
that are expressly waived under this Guaranty, including bankruptcy, insolvency, dissolution or liquidation of Seller, or the lack of power or authority of Seller to enter into the ESA and to perform its obligations hereunder.

4. Waivers by Guarantor. Guarantor hereby unconditionally waives as a condition precedent to the performance of its obligations hereunder, with the exception of the requirements in Paragraph 2, (a) notice of acceptance, presentment or protest with respect to the Guaranteed Amounts and this Guaranty, (b) notice of any action taken or omitted to be taken by Buyer in reliance hereon, (c) any requirement that Buyer exhaust any right, power or remedy or proceed against Seller under the ESA, and (d) any event, occurrence or other circumstance which might otherwise constitute a legal or equitable discharge of a surety. Without limiting the generality of the foregoing waiver of surety defenses, it is agreed that the occurrence of any one or more of the following shall not affect the liability of Guarantor hereunder:

   (i) at any time or from time to time, without notice to Guarantor, the time for payment of any Guaranteed Amount shall be extended, or such performance or compliance shall be waived;

   (ii) the obligation to pay any Guaranteed Amount shall be modified, supplemented or amended in any respect in accordance with the terms of the ESA;

   (iii) any (a) sale, transfer or consolidation of Seller into or with any other entity, (b) sale of substantial assets by, or restructuring of the corporate existence of, Seller or (c) change in ownership of any membership interests of, or other ownership interests in, Seller; or

   (iv) the failure by Buyer or any other Person to create, preserve, validate, perfect or protect any security interest granted to, or in favor of, Buyer or any Person.

5. Subrogation. Notwithstanding any payments that may be made hereunder by the Guarantor, Guarantor hereby agrees that until the earlier of payment in full of all Guaranteed Amounts or expiration of the Guaranty in accordance with Section 3, it shall not be entitled to, nor shall it seek to, exercise any right or remedy arising by reason of its payment of any Guaranteed Amount under this Guaranty, whether by subrogation or otherwise, against Seller or seek contribution or reimbursement of such payments from Seller.

6. Representations and Warranties. Guarantor hereby represents and warrants that (a) it has all necessary and appropriate [limited liability company][corporate] powers and authority and the legal right to execute and deliver, and perform its obligations under, this Guaranty, (b) it has a Credit Rating assigned by S&P of A- or higher, or by Moody’s of A3 or higher, to its unsecured, senior long-term debt obligations (not supported by third party credit enhancements), or if it does not have a rating for its senior unsecured long-term debt, then the rating then assigned to such entity as an issuer rating, provided, that if the ratings by S&P and Moody’s are not equivalent, the lower rating shall apply, (c) it has a tangible net worth of at least One Hundred Million Dollars ($100,000,000), (d) it will treat its obligations under this Guaranty pari passu with its senior unsecured debt obligations, (e) Guarantor has subjected itself to the jurisdiction of the state and federal courts of Santa Clara County, California and agrees to be subject to service of process in connection therewith, (f) this Guaranty constitutes its legal, valid and binding obligations enforceable against it in accordance with its terms, except as enforceability may be limited by bankruptcy, insolvency, moratorium and other similar laws affecting enforcement of creditors’ rights or general principles of equity, (g) the execution, delivery and performance of this Guaranty does not and will not contravene Guarantor’s organizational documents, any applicable Law or any contractual provisions binding on or affecting Guarantor, (h) there are no actions, suits or proceedings pending before any court, governmental agency or arbitrator, or, to the knowledge of the Guarantor, threatened, against or affecting Guarantor or any of its properties or revenues which may, in any one case or in the aggregate,
adversely affect the ability of Guarantor to enter into or perform its obligations under this Guaranty, and (i) no consent or authorization of, filing with, or other act by or in respect of, any arbitrator or Governmental Authority, and no consent of any other Person (including, any stockholder or creditor of the Guarantor), that has not heretofore been obtained is required in connection with the execution, delivery, performance, validity or enforceability of this Guaranty by Guarantor.

7. **Notices.** Notices under this Guaranty shall be deemed received if sent to the address specified below: (i) on the day received if served by overnight express delivery, and (ii) four Business Days after mailing if sent by certified, first-class mail, return receipt requested. If transmitted by facsimile, such notice shall be deemed received when the confirmation of transmission thereof is received by the party giving the notice. Any party may change its address or facsimile to which notice is given hereunder by providing notice of the same in accordance with this Paragraph 8.

   If delivered to Buyer, to it at
     
     [___]
     
     Attn: [___]
     
     Fax: [___]

   If delivered to Guarantor, to it at
     
     [___]
     
     Attn: [___]
     
     Fax: [___]

8. **Governing Law and Forum Selection.** This Guaranty shall be governed by, and interpreted and construed in accordance with, the Laws of the United States and the State of California, excluding choice of law rules. The Parties agree that any suit, action or other legal proceeding by or against any party (or its Affiliates or designees) with respect to or arising out of this Guaranty shall be brought in the federal courts of the United States or the courts of the State of California sitting in the City and County of Santa Clara, California.

9. **Miscellaneous.** This Guaranty shall be binding upon Guarantor and its successors and assigns and shall inure to the benefit of Buyer and its successors and permitted assigns pursuant to the ESA. No provision of this Guaranty may be amended or waived except by a written instrument executed by Guarantor and Buyer. This Guaranty is not assignable by Guarantor without the prior written consent of Buyer. No provision of this Guaranty confers, nor is any provision intended to confer, upon any third party (other than Buyer’s successors and permitted assigns) any benefit or right enforceable at the option of that third party. This Guaranty embodies the entire agreement and understanding of the parties hereto with respect to the subject matter hereof and supersedes all prior or contemporaneous agreements and understandings of the parties hereto, verbal or written, relating to the subject matter hereof. If any provision of this Guaranty is determined to be illegal or unenforceable (i) such provision shall be deemed restated in accordance with applicable Laws to reflect, as nearly as possible, the original intention of the parties hereto and (ii) such determination shall not affect any other provision of this Guaranty and all other provisions shall remain in full force and effect. This Guaranty may be executed in any number of separate counterparts, each of which when so executed shall be deemed an original, and all of said counterparts taken together shall be deemed to constitute one and the same instrument. This Guaranty may be executed and delivered by electronic means with the same force and effect as if the same was a fully executed and delivered original manual counterpart.

[Signature on next page]
IN WITNESS WHEREOF, the undersigned has caused this Guaranty to be duly executed and delivered by its duly authorized representative on the date first above written.

GUARANTOR:

[_____]

By:____________________________________

Printed Name:__________________________

Title:___________________________________

BUYER:

[_____]

By:____________________________________

Printed Name:__________________________

Title:___________________________________

By:____________________________________

Printed Name:__________________________

Title:___________________________________
**APPENDIX VIII**

**NOTICES**

<table>
<thead>
<tr>
<th>SELLER</th>
<th>BUYER</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>All Notices:</strong></td>
<td><strong>All Notices:</strong></td>
</tr>
<tr>
<td>Street: 100 Summit Lake Dr., Suite 210</td>
<td>Street: 88 South 4th Street, Suite 130</td>
</tr>
<tr>
<td>City: Valhalla, NY 10595</td>
<td>City: San Jose, CA 95112</td>
</tr>
<tr>
<td>Attn: Office of the President, General Counsel, VP Utility Scale Assets</td>
<td>Attn: Deputy Director of Power Resources</td>
</tr>
<tr>
<td>Phone: [redacted]</td>
<td>Phone: (408) 535-4999</td>
</tr>
<tr>
<td>Email: [redacted]</td>
<td>Email: <a href="mailto:procurement@sanjosecleanenergy.org"> procurement@sanjosecleanenergy.org</a></td>
</tr>
</tbody>
</table>

**With additional Notices of an Event of Default or Potential Event of Default to:**

Hall Energy Law PC

| Phone: [redacted] |
| Email: [redacted] |

**and to:**

City of San José

| Attn: Director of Finance |
| 200 East Santa Clara Street |
| San Jose, CA 95113 |
| Phone: [redacted] |
| Email: [redacted] |

**and to:**

City of San José

| Office of the City Attorney |
| Attn: Deputy City Attorney, Community Energy |
| 200 East Santa Clara Street |
| San Jose, CA 95113 |
| Direct: (408) 535-1900 |
| Email: [ cao.main@sanjoseca.gov](mailto:cao.main@sanjoseca.gov) |

**Invoices:**

| Attn: [redacted] |
| Phone: [redacted] |
| E-mail: [redacted] |

**Invoices:**

City of San José

| Attn: Division Manager, Risk Management, Contracts, & Administration |
| Phone: [redacted] |
| Email: [ invoices@sanjosecleanenergy.org](mailto:invoices@sanjosecleanenergy.org) |

**Scheduling:**

| Attn: [redacted] |
| Phone: [redacted] |
| E-mail: [redacted] |

**Scheduling:**

| Attn: [redacted] |
| Phone: [redacted] |
| Email: [redacted] |

**Alternative:**

City of San José Energy Storage Resource Adequacy Agreement
<table>
<thead>
<tr>
<th>Payments:</th>
<th>Payments:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Attn: Asset Accounts Payable</td>
<td>City of San José</td>
</tr>
<tr>
<td>Phone:</td>
<td>Attn: Accounts Receivable</td>
</tr>
<tr>
<td>E-mail:</td>
<td>Phone:</td>
</tr>
<tr>
<td></td>
<td>Email: <a href="mailto:Invoices@sanjosecleanenergy.org">Invoices@sanjosecleanenergy.org</a></td>
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<table>
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<th>Wire Transfer:</th>
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<table>
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<tr>
<th>Emergency Contact:</th>
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</thead>
<tbody>
<tr>
<td>Attn: Regional Manager – Southwest</td>
<td></td>
</tr>
<tr>
<td>Phone:</td>
<td></td>
</tr>
<tr>
<td>E-mail:</td>
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</tr>
</tbody>
</table>

Attn: ScheduleCoordinators@ncpa.com
APPENDIX IX

[RESERVED]
APPENDIX X

FORM OF REPLACEMENT RA NOTICE

This Replacement RA Notice (this “Notice”) is delivered by [_____] (“Seller”) to City of San José, a California municipal corporation (“Buyer”), in accordance with the terms of that certain Energy Storage Resource Adequacy Agreement dated [______] (“Agreement”) by and between Seller and Buyer. All capitalized terms used in this Notice but not otherwise defined herein shall have the respective meanings assigned to such terms in the Agreement.

Pursuant to Section 6.3(b) of the Agreement, Seller hereby provides the below Replacement RA product information:

<table>
<thead>
<tr>
<th>Unit Information¹</th>
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<tbody>
<tr>
<td>Name</td>
</tr>
<tr>
<td>Location</td>
</tr>
<tr>
<td>CAISO Resource ID</td>
</tr>
<tr>
<td>Unit SCID</td>
</tr>
<tr>
<td>Prorated Percentage of Unit Factor</td>
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<tr>
<td>Resource Type</td>
</tr>
<tr>
<td>Point of Interconnection with the CAISO</td>
</tr>
<tr>
<td>Controlled Grid (“substation or transmission line”)</td>
</tr>
<tr>
<td>Path 26 (North or South)</td>
</tr>
<tr>
<td>LCR Area (if any)</td>
</tr>
<tr>
<td>Deliverability restrictions, if any, as described in most recent CAISO deliverability assessment</td>
</tr>
<tr>
<td>Run Hour Restrictions</td>
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<td>Delivery Period</td>
</tr>
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</table>

<table>
<thead>
<tr>
<th>Month</th>
<th>Unit CAISO MW (MW)</th>
<th>Unit Contract Quantity (MW)</th>
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<tbody>
<tr>
<td>January</td>
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<td>November</td>
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<tr>
<td>December</td>
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</tr>
</tbody>
</table>

¹ To be repeated for each unit if more than one.

City of San José Energy Storage Resource Adequacy Agreement
APPENDIX XII

METERING DIAGRAM

A single line diagram appears on the next page.