EXECUTION VERSION

ENERGY STORAGE RESOURCE ADEQUACY AGREEMENT

COVER SHEET

**Seller:** EDPR Scarlet II LLC ("Seller")

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

**Description of Facility:** The [REDACTED] EDPR Scarlet II LLC facility, a co-located energy storage facility, located in Fresno County, California, as further described in Exhibit A.

**Milestones:**

<table>
<thead>
<tr>
<th>Milestone</th>
<th>Date for Completion</th>
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<tbody>
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<td>Evidence of Site Control</td>
<td></td>
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<tr>
<td>Documentation of Conditional Use Permit if required</td>
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<tr>
<td>Seller’s receipt of Phase I and Phase II Interconnection study results for Seller’s Interconnection Facilities</td>
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<tr>
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<tr>
<td>Expected Commercial Operation Date</td>
<td>06/01/2024</td>
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**Delivery Term:** Eleven (11) Contract Years

**Storage Contract Capacity:** [REDACTED]

**Guaranteed RA Amount:** [REDACTED]

**Contract Price**

The Contract Price shall be:

<table>
<thead>
<tr>
<th>Contract Year</th>
<th>Contract Price</th>
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<tbody>
<tr>
<td>1 - 11</td>
<td>[REDACTED]</td>
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Product:

- Storage Capacity
- ✓ Capacity Attributes (select options below as applicable)
  - □ Energy Only Status
  - ✓ Interim Deliverability Status and Expected Interim Deliverability Status Date: The RA Guarantee Date as defined herein
- □ Ancillary Services

Scheduling Coordinator:  Seller/Seller Third-Party SC

Development Security and Performance Security

Development Security: [Redacted]

Performance Security: [Redacted]
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ENERGY STORAGE RESOURCE ADEQUACY AGREEMENT

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

RECITALS

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

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

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. The following terms, when used herein with initial capitalization, shall have the meanings set forth below:

"AC" means alternating current.

"Accepted Compliance Costs" has the meaning set forth in Section 3.6(c).

"Actual Monthly NQC" has the meaning set forth in Section 3.5(b).

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

"Agreement" has the meaning set forth in the Preamble and includes any Exhibits, schedules and any written supplements hereto, and the Cover Sheet.

"Alternating Current" or "AC" means alternating current.

"Ancillary Services" means all ancillary services, products and other attributes, if any, associated with the Facility, in each case as defined in the CAISO Tariff from time to time that the
Facility is at the relevant time actually physically capable of providing consistent with the terms and conditions of this Agreement, applicable Law, the Interconnection Agreement, and Prudent Operating Practice.

“**Bankrupt**” means with respect to any entity, such entity (a) files a petition or otherwise commences, authorizes or acquiesces in the commencement of a proceeding or cause of action under any bankruptcy, insolvency, reorganization or similar Law, (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.

“**Business Day**” means any day except a Saturday, Sunday, or a Federal Reserve Bank holiday in California. A Business Day begins at 8:00 AM and ends at 5:00 PM Pacific Prevailing Time (PPT) for the Party sending a Notice, or payment, or performing a specified action.

“**Buyer**” means City of San José, a municipal corporation.

“**Buyer’s Share**” means fifty percent (50%), as may be adjusted pursuant to Section 5 of Exhibit B.


“**CAISO Approved Meter**” means a CAISO approved revenue quality meter or meters, CAISO approved data processing gateway or remote intelligence gateway, telemetering equipment and data acquisition services sufficient for monitoring, recording and reporting, in real time, all Facility Energy delivered to the Delivery Point.

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

“**CAISO Tariff**” means the California Independent System Operator Corporation Operating Agreement, Tariff, Business Practice Manuals (BPMs), and Operating Procedures, including the rules, protocols, procedures and standards attached thereto, as the same may be amended or modified from time-to-time and approved by FERC; provided that if there is a conflict between the BPMs, the CAISO Operating Agreement or the Operating Procedures, on the one hand, and the Tariff, on the other hand, the Tariff will control.

“**Capacity Attribute**” means any and all of the following attributes that can reasonably be provided by the Facility:

(a) RA Attributes,
(b) Local RA Attributes,
(c) Flexible RA Attributes, and
(d) Other Capacity Attributes.

“Capacity Damages” has the meaning set forth in Section 5 of Exhibit B.

“CEC” means the California Energy Commission or its regulatory successor.

“CEQA” means the California Environmental Quality Act.

“Change in Law” means the occurrence, after the Effective Date, of any of the following: (a) the adoption or taking effect of any Law; (b) any change in any Law or in the administration, interpretation or application thereof by any Governmental Authority; or (c) the making or issuance of any request, guideline or directive (whether or not having the force of law) by any Governmental Authority. For greater clarity, a Change in Law shall include (i) any change to a Resource Adequacy Ruling, including any change in the CPUC’s resource counting rules, (ii) any order, decision, resolution, rule, regulation, guidance document, or other determination of the CPUC, and (iii) any change in the CAISO Tariff or any document included in the definition thereof whether or not approved by FERC, including any change in the CAISO’s resource counting rules or the CAISO’s deliverability assessment methodology for storage facilities that applies to all storage facilities as a resource class.

“Change of Control” means, except in connection with public market transactions of equity interests or capital stock of Seller’s Ultimate Parent, any circumstance in which Ultimate Parent ceases to own, directly or indirectly through one or more intermediate entities, more than fifty percent (50%) of the outstanding equity interests in Seller; provided that in calculating ownership percentages for all purposes of the foregoing:

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

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

“COD Certificate” has the meaning set forth in Section 2 of Exhibit B.

“Collateral Assignment Agreement” has the meaning set forth in Section 14.2(a).

“Commercial Operation” has the meaning set forth in Section 2 of Exhibit B.

“Commercial Operation Date” has the meaning set forth in Section 2 of Exhibit B.

“Commercial Operation Delay Damages” or “COD Delay Damages” means (a) for the
“Compliance Action” has the meaning set forth in Section 3.6(c).

“Compliance Expenditure Cap” has the meaning set forth in Section 3.6(c).

“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 Resource Adequacy Rulings, by the CAISO, by the WECC, or by any other Governmental Authority having jurisdiction.

“Compliance Showings” means (a) the Resource Adequacy Requirements compliance or advisory showings (or similar or successor showings), (b) if applicable, the Local RAR compliance or advisory showings (or similar or successor showings), and (c) if applicable, the Flexible RAR compliance or advisory showings (or similar successor showings), that Buyer is required to make to the CPUC (and, to the extent authorized by the CPUC, to the CAISO) pursuant to the Resource Adequacy Rulings, to the CAISO pursuant to the CAISO Tariff, or to any Governmental Authority having jurisdiction.

“Confidential Information” has the meaning set forth in Section 18.1.

“Construction Delay Damages” means an amount equal to (a) the Development Security amount required hereunder, divided by (b) one hundred twenty (120), per day.

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

“Construction Start Date” has the meaning set forth in Section 1 of Exhibit B.

“Contract Price” has the meaning set forth on the Cover Sheet.

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

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

“Costs” means, with respect to the Non-Defaulting Party, brokerage fees, commissions and other similar third-party transaction costs and expenses reasonably incurred by such Non-Defaulting Party either in terminating any arrangement pursuant to which it has hedged its obligations or entering into new arrangements which replace this Agreement, including, if Buyer is the Non-Defaulting Party, with respect to Buyer’s procurement requirements under CPUC Decision 21-06-035; and all reasonable attorneys’ fees and expenses incurred by the Non-Defaulting Party in connection with terminating this Agreement.
“Cover Sheet” means the cover sheet to this Agreement, which is incorporated into this Agreement.

“COVID-19” has the meaning set forth in Section 10.1(c).

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

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

“CPUC System RA Penalty” has the meaning set forth in the 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 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.

“Damage Payment” means the dollar amount that equals the amount of the Development Security.

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

“Dedicated Interconnection Capacity” has the meaning set forth in Exhibit A.

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

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

“Delivery Term” shall mean the period of Contract Years set forth on the Cover Sheet beginning on the Initial Delivery Date, unless terminated earlier in accordance with the terms and conditions of this Agreement.

“Development Cure Period” has the meaning set forth in Section 4 of Exhibit B.

“Development Security” means (i) cash, (ii) a Letter of Credit in the amount set forth on the Cover Sheet or (iii) a guaranty from a Guarantor in the form attached hereto as Exhibit J.

“Disclosing Party” has the meaning set forth in Section 18.2.

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

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

“Energy” means Alternating Current electrical energy measured in MWh.

“Energy Management Software” has the meaning set forth in Exhibit A.
“Event of Default” has the meaning set forth in Section 11.1.

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

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

“Expected Quantity” means, with respect to a Showing Month, the sum of (i) the Actual Monthly NQC multiplied by the CIL Adjustment Factor (if applicable) plus (ii) Replacement RA provided for such Showing Month; provided, the Expected Quantity shall not exceed the Guaranteed RA Amount.

“Facility” means the energy storage facility described on the Cover Sheet and in Exhibit A, located at the Site and including the Energy Management Software and related storage and mechanical equipment and associated facilities and equipment required to deliver Product (but excluding any Shared Facilities), and as such storage facility may be expanded or otherwise modified from time to time in accordance with the terms of this Agreement. This equipment includes transformers, batteries, fire suppression, thermal management, enclosures, and inverters.

“FERC” means the Federal Energy Regulatory Commission.

“Financial Close” means Seller or one of its Affiliates has satisfied conditions precedent to first funding under debt or equity financing commitments from one or more Lenders sufficient to construct the Facility, including such financing commitments from Seller's owner(s).

“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 by the CPUC pursuant to the Resource Adequacy Rulings, the CAISO pursuant to the CAISO Tariff, or by any other Governmental Authority having jurisdiction.

“Forced Labor” has the meaning set forth in Section 13.1(g).

“Force Majeure Event” has the meaning set forth in Section 10.1(a).

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

“Future Environmental Attributes” shall mean any and all storage attributes other than Capacity Attributes and Standalone Energy Storage Incentives under any and all other international, federal, regional, state or other law, rule, regulation, bylaw, treaty or other intergovernmental compact, decision, administrative decision, program (including any voluntary compliance or membership program), competitive market or business method (including all credits, certificates, benefits, and emission measurements, reductions, offsets and allowances related thereto) that are attributable, now, or in the future, to the storage or discharge of electrical
energy by the Facility. Future Environmental Attributes do not include investment tax credits or production tax credits associated with the construction or operation of the Facility, or other financial incentives in the form of credits, reductions, or allowances associated with the Facility that are applicable to a state or federal income taxation obligation, which also shall be retained by Seller for its sole benefit.

“Gains” means, with respect to any Party, an amount equal to the present value of the economic benefit to it, if any (exclusive of Costs), resulting from the termination of this Agreement for the remaining Contract Term, determined in a commercially reasonable manner. Factors used in determining the economic benefit to a Party may include reference to information supplied by one or more third parties, which shall exclude Affiliates of the Non-Defaulting Party, including quotations (either firm or indicative) of relevant rates, prices, yields, yield curves, volatilities, spreads or other relevant market data in the relevant markets, comparable transactions, forward price curves based on economic analysis of the relevant markets, settlement prices for comparable transactions at liquid trading hubs (e.g., SP-15), all of which should be calculated for the remaining Contract Term, and include the value of Capacity Attributes.

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

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

“Guaranteed Construction Start Date” means the Expected Construction Start Date, as such date may be extended by the Development Cure Period.

“Guaranteed RA Amount” means the amount set forth on the Cover Sheet as of the Effective Date, as may be adjusted pursuant to Section 5 of Exhibit B.

“Guarantor” means, with respect to Seller, (a) Energias de Portugal, Sociedade Anonima, Sucursal en España or (b) any Person that (i) 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, (ii) is an Affiliate of Seller, or other third party reasonably acceptable to Buyer, (iii) has a Credit Rating of BBB- or better from S&P or a Credit Rating of Baa3 or better from Moody’s, (iv) has a tangible net worth of at least $20,000,000,000 and (v) is incorporated or organized in a jurisdiction of the United States and is in good standing in such jurisdiction, and (vi) executes and delivers a Guaranty for the benefit of Buyer.

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

“Indemnifiable Losses” has the meaning set forth in Section 16.1.

“Indemnified Party” has the meaning set forth in Section 16.1.
“Indemnifying Party” has the meaning set forth in Section 16.1.

“Initial Delivery Date” means the first day of the first Showing Month for which Product is delivered. The Initial Delivery Date may not occur prior to the Commercial Operation Date.

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

“Installed Capacity” means Buyer’s Share of the maximum dependable operating capability of the Facility to discharge Energy at the Storage Facility Meter and adjusted for Electrical Losses to the Delivery Point, that achieves Commercial Operation (up to but not in excess of the Storage Contract Capacity), adjusted for ambient conditions on the date of the performance test, and as evidenced by a certificate substantially in the form attached as Exhibit G hereto.

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

“Interconnection Agreement” means the interconnection agreement or agreements entered into by Seller (or its Affiliate) pursuant to which the Facility will be interconnected with the Transmission System, providing for interconnection capacity available or allocable to the Facility on or before the Expected Commercial Operation Date that is no less than the Storage Contract Capacity, and pursuant to which Seller’s Interconnection Facilities and any other Interconnection Facilities will be constructed, operated and maintained during the Contract Term.

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

“Interest Rate” has the meaning set forth in Section 8.2.

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

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

“Lender” means, collectively, any Person (i) providing letter of credit, bond or other credit support, senior or subordinated development, construction, interim, back leverage or long-term debt, equity or tax equity financing, or refinancing of any of the foregoing for or in connection with the development, construction, purchase, installation, operation, maintenance, repair, replacement or improvement of the Facility, whether that financing or refinancing takes the form of private debt (including back-leverage debt or portfolio financing), equity (including cash equity or tax equity), public debt or any other form (including financing or refinancing provided to a member or other direct or indirect owner of Seller), including any Person directly or indirectly providing financing or refinancing for the Facility or purchasing equity ownership interests of Seller or its Affiliates, and any trustee or agent or similar representative acting on their behalf, (ii) providing Interest Rate or commodity protection under an agreement hedging or otherwise
mitigating the cost of any of the foregoing obligations, or (iii) participating in a lease financing (including a sale leaseback or leveraged leasing structure) with respect to the Facility.

“**Letter(s) of Credit**” means one or more irrevocable, standby letters of credit issued by a U.S. commercial bank or a foreign bank with a U.S. branch with such bank having 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, in a form substantially similar to the letter of credit set forth in Exhibit I.

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

“**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 by the CPUC pursuant to the Resource Adequacy Rulings, the CAISO pursuant to the CAISO Tariff, or by any other Governmental Authority having jurisdiction.

“**Losses**” means, with respect to the Non-Defaulting Party, an amount equal to the present value of the economic loss to it, if any (exclusive of Costs), resulting from termination of this Agreement for the remaining Contract Term, determined in a commercially reasonable manner, which economic loss (if any) shall be deemed to be the loss (if any) to such Non-Defaulting Party represented by the difference between the present value of the payments required to be made during the remaining Contract Term of this Agreement and the present value of the payments that would be required to be made under transaction(s) replacing this Agreement. Factors used in determining economic loss to a Party may include reference to information supplied by one or more third parties, which shall exclude Affiliates of the Non-Defaulting Party, including quotations (either firm or indicative) of relevant rates, prices, yields, yield curves, volatilities, spreads or other relevant market data in the relevant markets, comparable transactions, forward price curves based on economic analysis of the relevant markets, settlement prices for comparable transactions at liquid trading hubs (e.g., NP-15), all of which should be calculated for the remaining Contract Term and must include the value of Capacity Attributes.

“**Meter Service Agreement**” has the meaning set forth in the CAISO Tariff.

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

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

“**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.

“Net Qualifying Capacity” or “NQC” has the meaning set forth in the CAISO Tariff.

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

“Non-Defaulting Party” has the meaning set forth in Section 11.2.

“Notice” shall, unless otherwise specified in the Agreement, mean written communications by a Party to be delivered by electronic mail (email).

“Notice of Claim” has the meaning set forth in Section 16.2(a).

“Notification Deadline” has the meaning set forth in Section 3.5.

“NP-15” means the Existing Zone Generation Trading Hub for Existing Zone region NP15 as set forth in the CAISO Tariff.

“Other Capacity Attributes” means, exclusive of RA Attributes, Local RA Attributes, and Flexible RA Attributes, any of the following solely to the extent they may be counted towards any Compliance Obligation (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.

“Other Storage Facilities” has the meaning set forth in Section 6.4.

“Pacific Prevailing Time” means the prevailing standard time or daylight savings time, as applicable, in the Pacific time zone.

“Participating Transmission Owner” or “PTO” means an entity that owns, operates and maintains transmission or distribution lines and associated facilities or has entitlements to use certain transmission or distribution lines and associated facilities where the Facility is interconnected. For purposes of this Agreement, the Participating Transmission Owner is set forth in Exhibit A.

“Party” or “Parties” has the meaning set forth in the Preamble.

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

“Permitted Transferee” means:
(a) any Affiliate of Seller; or

(b) any entity that has, or is controlled by another Person that has:

(i) A tangible net worth of not less than [redacted] and

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

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

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

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

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

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

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

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

“RA 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 3.5(b).
“RA Deficiency Amount” has the meaning set forth in Section 3.5(b).

“RA Guarantee Date” means the date that is sixty (60) days after the Commercial Operation Date.

“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.

“RA Shortfall” has the meaning set forth in Section 3.5(b).

“RA Shortfall Month” means, for purposes of calculating an RA Deficiency Amount under Section 3.5(b), any Showing Month during which there is an RA Shortfall.

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

“Receiving Party” has the meaning set forth in Section 18.2.

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

“Replacement RA” means Resource Adequacy Benefits, if any, equivalent to those that would have been provided by the Facility with respect to the applicable Showing Month in which a RA Deficiency Amount is due to Buyer, provided such Resource Adequacy Benefits comply with all applicable requirements of CPUC Decision 21-06-035, and provided further that any such Replacement RA does not need to include Local RA Attributes from the same Local Capacity Area as the Facility.

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

“Resource Adequacy Requirements” or “RAR” means the resource adequacy requirements established for Buyer pursuant to the Resource Adequacy Rulings, the CAISO pursuant to the CAISO Tariff, or by any other Governmental Authority having jurisdiction.

“Resource Adequacy Rulings” means CPUC Decisions 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, 14-06-050, 15-06-063, 16-06-045, 17-06-027, 19-02-022, 19-06-026, 19-10-021, 20-06-002, 20-06-028, 20-06-31, 20-12-006, 21-06-035, including the annual document issued by the CPUC which sets forth the guidelines, requirements and instructions for load-serving entities to demonstrate compliance with the CPUC’s resource adequacy program, and any other existing or subsequent decisions, resolutions, or rulings related to resource adequacy, including the CPUC Filing Guide, in each case as may be amended from time to time by the CPUC, and any other existing or subsequent ruling or decision, or any other resource adequacy Law, however described, as such decisions, rulings, Laws, rules or regulations may be amended or modified from time-to-time throughout the Delivery Term.
“San José Clean Energy” is the City of San Jose’s community choice aggregation program. The San Jose Community Energy Department administers and manages San José Clean Energy.

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

“Schedule” has the meaning set forth in the CAISO Tariff, and “Scheduled” has a corollary meaning.

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

“Security Interest” has the meaning set forth in Section 8.9.

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

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

“Settlement Interval” has the meaning set forth in the CAISO Tariff.

“Settlement Period” has the meaning set forth in the CAISO Tariff.

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

“Shared Facilities Agreements” has the meaning set forth in Section 6.3.

“Showing Month” means the calendar month of the Delivery Term that is the subject of the Compliance Showing, as set forth in the Resource Adequacy Rulings and outlined in the CAISO Tariff. For illustrative purposes only, pursuant to the CAISO Tariff and Resource Adequacy Rulings in effect as of the Effective Date, the monthly Compliance Showing made in June is for the Showing Month of August.

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

“Site Control” means that, commencing on the date specified in the Cover Sheet and continuing for the Contract Term, Seller (or its Affiliate pursuant to a sharing arrangement allowed
by this Agreement): (a) owns or has the option to purchase the Site; (b) is the lessee or has the
option to lease the Site; or (c) is the holder of an easement or an option for an easement, right-of-
way grant, or similar instrument with respect to the Site.

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

“Storage Capacity” means Buyer’s Share of (a) the maximum dependable operating
capability of the Facility to discharge Energy that can be sustained for four (4) consecutive hours,
as the same may be adjusted from time to time pursuant to Section 4.3 and Exhibit M to reflect the
results of the most recently performed Storage Capacity Test, and (b) any other products that may
be developed or evolve from time to time during the Contract Term that the Facility is able to
provide as the Facility is configured on the Commercial Operation Date and that relate to the
maximum dependable operating capability of the Facility to discharge Energy. It is acknowledged
that Seller shall have the right and option in its sole discretion to install Storage Capacity in excess
of the Storage Contract Capacity; provided, for all purposes of this Agreement the amount of
Storage Capacity shall never be deemed to exceed the Storage Contract Capacity, and Buyer shall
have no obligation to pay for such excess capacity.

“Storage Contract Capacity” or “Contract Capacity” means the amount equal to
Buyer’s Share of the total capacity (in MW) of the Facility, which is initially equal to the amount
set forth on the Cover Sheet, as may be adjusted pursuant to Section 5 of Exhibit B.

“Storage Capacity Test” means any test or retest of the capacity of the Facility conducted
in accordance with the testing procedures, requirements and protocols set forth in Section 4.3 and
Exhibit M.

“Storage Facility Meter” means the bi-directional revenue quality meter or meters (with
a 0.3 accuracy class), along with a compatible data processing gateway or remote intelligence
gateway, telemetering equipment and data acquisition services. For clarity, the Facility will
contain multiple measurement devices, including the CAISO Approved Meter, that will make up
the Storage Facility Meter, and, unless otherwise indicated, references to the Storage Facility
Meter shall mean all such measurement devices and the aggregated data of all such measurement
devices, taken together.

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

“Terminated Transaction” has the meaning set forth in Section 11.2(a).
“Termination Payment” has the meaning set forth in Section 11.3.

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

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

“Ultimate Parent” means EDP Renewables North America LLC, a Delaware limited liability company.

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

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

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

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

(d) a reference to an Article, Section, paragraph, clause, Party, or Exhibit is a reference to that Section, paragraph, clause of, or that Party or Exhibit to, this Agreement unless otherwise specified;

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

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

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

(h) references to any statute, code or statutory provision are to be construed as a reference to the same as it may have been, or may from time to time be, amended, modified or reenacted, and include references to all bylaws, instruments, orders and regulations for the time being made thereunder or deriving validity therefrom unless the context otherwise requires;
(i) in the event of a conflict, a mathematical formula or other precise description of a concept or a term shall prevail over words providing a more general description of a concept or a term;

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

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

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

ARTICLE 2
TERM; CONDITIONS PRECEDENT

2.1 Contract Term.

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

(b) Applicable provisions of this Agreement shall continue in effect after termination, including early termination, to the extent necessary to enforce or complete the duties, obligations or responsibilities of the Parties arising prior to termination. The confidentiality obligations of the Parties under Article 18 and all indemnity and audit rights shall remain in full force and effect for two (2) years following the termination of this Agreement.

2.2 Conditions Precedent. Commercial Operation shall not occur until Seller completes each of the following conditions:

(a) Seller has delivered to Buyer (i) a certificate from a Licensed Professional Engineer substantially in the form of Exhibit F and (ii) a certificate from a Licensed Professional Engineer substantially in the form of Exhibit G setting forth the Installed Capacity on the Commercial Operation Date;

(b) A Participating Generator Agreement and/or a Participating Load Agreement and a Meter Service Agreement between Seller and CAISO shall have been executed and delivered and be in full force and effect, and a copy of each such agreement delivered to Buyer;
(c) An Interconnection Agreement between Seller (or its Affiliate or a third party transmission entity, if a sharing arrangement permitted by this Agreement is in effect) and the PTO shall have been executed and delivered and be in full force and effect and a copy of the Interconnection Agreement delivered to Buyer;

(d) All applicable regulatory authorizations, approvals and permits required for operation of the Facility have been obtained (or if not obtained, applied for and reasonably expected to be received within ninety (90) days) and all conditions thereof that are capable of being satisfied on the Commercial Operation Date have been satisfied and shall be in full force and effect, and Seller has delivered to Buyer an attestation certificate from an officer of Seller certifying to the satisfaction of this condition;

(e) Seller (or its Affiliate, if a sharing arrangement permitted by this Agreement is in effect) has obtained all real property rights, including Site Control, required for the operation of the Facility during the Delivery Term, and Seller has provided evidence of such rights to Buyer;

(f) Insurance requirements for the Facility pursuant to Article 17 have been met, with evidence provided in writing to Buyer;

(g) Seller has delivered the Performance Security to Buyer in accordance with Section 8.8; and

(h) Seller has paid Buyer for all undisputed amounts then owing under this Agreement, if any, including Construction Delay Damages, and COD Delay Damages.

2.3 Development; Construction; Progress Reports. Within fifteen (15) days after the close of (i) each calendar quarter from the first calendar quarter following the Effective Date until the Construction Start Date, and (ii) each calendar month from the first calendar month following the Construction Start Date until the Commercial Operation Date, Seller shall provide to Buyer a Progress Report and agree to regularly scheduled meetings between representatives of Buyer and Seller to review such monthly reports and discuss Seller’s construction progress. Details regarding the form and content of the Progress Report are set forth in Exhibit E. Seller shall also provide Buyer with any reasonable requested documentation (subject to confidentiality restrictions) directly related to the achievement of Milestones, which Seller shall use commercially reasonable efforts to provide 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 Facility, including the location of the Site, obtaining all permits and approvals to build the Facility, the Facility layout, and the selection and procurement of the equipment comprising the Facility.

2.4 Remedial Action Plan. If Seller misses three (3) or more Milestones, or misses any one (1) by more than ninety (90) days, except as the result of Force Majeure Event, Seller shall submit to Buyer, within ten (10) Business Days of such missed Milestone completion date, a remedial action plan (“Remedial Action Plan”), which will describe in detail any delays (actual or anticipated) beyond the scheduled Milestone dates, including the cause of the delay, if known (e.g., governmental approvals, financing, property acquisition, design activities, equipment procurement, project construction, interconnection, or any other factor), and Seller’s detailed description of its proposed course of action to achieve the missed Milestones and all subsequent
Milestones by the Guaranteed Commercial Operation Date (to the extent possible); provided, that delivery of any Remedial Action Plan shall not relieve Seller of its obligation to provide Remedial Action Plans with respect to any subsequent Milestones and to achieve the Guaranteed Commercial Operation Date in accordance with the terms of this Agreement. Subject to the provisions of Article 11 and Exhibit B, so long as Seller complies with its obligations under this Section 2.4, Seller shall not be considered in default of its obligations under this Agreement solely as a result of missing any Milestone.

**ARTICLE 3**

**PURCHASE AND SALE**

3.1 **Purchase and Sale of Product.** Subject to the terms and conditions of this Agreement, including Section 3.6, during the Delivery Term, Buyer will purchase all the Product associated with the Storage Contract Capacity at the Contract Price and in accordance with Exhibit C, and Seller shall supply and deliver to Buyer all the Product associated with the Storage Contract Capacity in accordance with this Agreement. Buyer will have exclusive rights, at its sole cost and expense, to offer, bid, or otherwise submit such Product, or any component thereof, for resale in the market or to any third party, and retain and receive any and all related revenues from such resale of such Product; provided, that any such resale shall not modify any of Seller’s rights or obligations under this Agreement and Seller shall not owe any liability or obligation to any third party.

3.2 **Ownership of Standalone Energy Storage Incentives.** Seller will own and retain exclusive rights to any and all Tax benefits, credits and incentives, including all Standalone Energy Storage Incentives.

3.3 **Future Environmental Attributes.** Seller will own and retain exclusive rights to any and all Future Environmental Attributes.

3.4 **Capacity Attributes.** Seller shall request Full Capacity Deliverability Status in the CAISO generator interconnection process. As between Buyer and Seller, Seller shall be responsible for the cost and installation of any Network Upgrades associated with obtaining such Full Capacity Deliverability Status.

(a) Throughout the Delivery Term, Seller grants, pledges, assigns and otherwise commits to Buyer all the Capacity Attributes associated with the Storage Contract Capacity.

(b) Subject to Section 3.6, commencing on the RA Guarantee Date and continuing throughout the Delivery Term, Seller shall use commercially reasonable efforts to obtain and maintain eligibility for Full Capacity Deliverability Status, and if Full Capacity Deliverability Status is not available, then Seller shall use commercially reasonable efforts to obtain and maintain Interim Deliverability to ensure that the Facility qualifies to provide Resource Adequacy Benefits associated with the Storage Contract Capacity. Notwithstanding anything to the contrary herein, if Seller is unable to obtain Full Capacity Deliverability Status, Seller will be responsible for the RA Deficiency Amount, if any, associated with Seller’s delivery of Product under Interim Deliverability Status. Throughout the Delivery Term, Seller hereby covenants and
agrees to transfer all available Resource Adequacy Benefits associated with the Storage Contract Capacity to Buyer.

(c) Subject to Section 3.6, for the duration of the Delivery Term, Seller shall take all reasonable actions, including complying with all applicable registration and reporting requirements, and execute all documents or instruments necessary to enable Buyer to use all of the Capacity Attributes associated with the Storage Contract Capacity and committed by Seller to Buyer pursuant to this Agreement.

3.5 Resource Adequacy Failure.

(a) RA Deficiency Determination. For each RA Shortfall Month occurring after the RA Guarantee Date, Seller shall pay to Buyer the RA Deficiency Amount as liquidated damages or provide Replacement RA, in each case, as the sole remedy for the Capacity Attributes Seller failed to convey to Buyer.

(b) RA Deficiency Amount Calculation. Subject to Section 3.6, for each RA Shortfall Month occurring after the RA Guarantee Date, Seller shall pay to Buyer an amount (the “RA Deficiency Amount”) equal to the product of (i) the difference, expressed in kW, of (A) the Guaranteed RA Amount, and (B) Buyer’s Share of the Net Qualifying Capacity of the Facility for such Showing Month able to be shown on Buyer’s monthly or annual Resource Adequacy Plan (as defined in the CAISO Tariff) to the CAISO and CPUC and counted as Resource Adequacy Capacity (as defined in the CAISO Tariff) (the “Actual Monthly NQC”) (such difference, the “RA Shortfall”), multiplied by  provided that Seller may, as an alternative to paying RA Deficiency Amounts, provide Replacement RA in amounts up to the RA Shortfall, provided that any Replacement RA capacity is communicated by Seller to Buyer with Replacement RA product information in a written notice to Buyers at least fifteen (15) Business Days before the deadline (as established by CAISO or any other Governmental Authority) that a load serving entity must meet to submit its resource adequacy plan for the applicable CPUC operating month for the purpose of monthly RA reporting (“Notification Deadline”).

3.6 Change in Law.

(a) The Parties acknowledge that this Agreement is being used by Buyer to comply with mandatory procurement obligations of the CPUC and that Governmental Authorities, including the CEC, CPUC, and CAISO, may undertake actions from time to time to implement a Change in Law. Subject to Section 3.6(c), 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 a Change in Law as requested by Buyer, including: (i) updating this Agreement to reflect any mandatory contractual language required by Governmental Authorities; (ii) submission of any reports, data, or other information required by Governmental Authorities; (iii) providing additional documentation or information to respond to data requests from the CPUC or other Governmental Authorities; or (iv) satisfying new compliance requirements of Governmental Authorities; provided that Seller shall have no
obligation to (x) amend or update this Agreement, satisfy new compliance requirements, or take other actions not required under this Agreement, if such amendments, updates, compliance requirements, 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, compliance and administration costs, risks and/or obligations under this Agreement, including causing a reduction in Buyer’s payments to Seller hereunder, or (y) modify, improve or expand the Facility.

(b) Notwithstanding anything in this Agreement to the contrary, if, in any given month, following the Effective Date, a Change in Law occurs that reduces the maximum achievable Resource Adequacy Benefits that resources of the same type and operational characteristics as the Facility are eligible to provide, thereby reducing the maximum achievable Capacity Attributes or Resource Adequacy Benefits (including Net Qualifying Capacity or any other factor used to describe Capacity Attributes or Resource Adequacy Benefits) associated with the Storage Contract Capacity below the Guaranteed RA Amount (“RA Change in Law”), then the RA Shortfall Amount for such month shall be equal to the difference in the Guaranteed RA Amount and the product of the Actual Monthly NQC and the CIL Adjustment Factor. For the purposes of this subsection (c), (i) the “CIL Adjustment Factor” means the Guaranteed RA Amount divided by the Reduced MNQC, and (ii) the “Reduced MNQC” means Buyer’s Share of the new maximum achievable Net Qualifying Capacity of the Facility (or such other factor as may be used to describe Capacity Attributes or Resource Adequacy Benefits), where such Reduced MNQC shall be calculated by disregarding any Planned Outages that are otherwise permitted by the terms of this Agreement to the extent such Planned Outages reduce Buyer’s Share of the maximum achievable Net Qualifying Capacity of the Facility. For the avoidance of doubt, the Reduced MNQC shall take into account any CAISO or CPUC adjustments to the Net Qualifying Capacity of the Facility, including any ELCC adjustments or the implementation of an unforced capacity (UCAP) methodology, that are generally applicable to resources of the same type as the Facility (excluding any RA Change in Law). Notwithstanding the foregoing, (i) to the extent an RA Change in Law or Change in Law occurs after the Effective Date which results in the elimination by CAISO or the CPUC of Net Qualifying Capacity as the value utilized to measure the qualifying capacity of the Facility with a successor value or which has the effect of reducing the Net Qualifying Capacity to zero (0), the Parties agree that the RA Shortfall Amount shall equal zero (0), and (ii) Seller’s obligation to deliver the Product associated with Storage Contract Capacity following such RA Change in Law or Change in Law will be solely to provide and deliver to Buyer Buyer’s Share of any such successor value available from the Facility for each Showing Month.

(c) If a Change in Law (excluding an RA Change in Law) occurring after the Effective Date has increased Seller’s known or reasonably expected costs and expenses 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, including pursuant to Sections then the Parties agree that the maximum aggregate amount of costs and expenses Seller shall be required to bear during the Contract Term to comply with all of such obligations shall be capped at per MW of Storage Contract Capacity in the aggregate over the Contract Term (the “Compliance Expenditure Cap”).
(i) 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.

(ii) 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 not be liable to Buyer for any failure to deliver any Product as a result thereof) and shall, within such time, either (1) agree to reimburse Seller for all of the costs that exceed the Compliance Expenditure Cap (such Buyer-agreed upon costs (including lost production and lost payments under this Agreement, if any), the “Accepted Compliance Costs”), or (2) waive Seller’s obligation to take such Compliance Actions, in which case Seller shall be excused from taking the Compliance Actions and shall be excused from all affected compliance and delivery obligations hereunder to the extent arising from the failure to take such Compliance Actions (including, if applicable, the obligation to pay RA Deficiency Amounts with respect to RA Shortfalls arising from the failure to take such Compliance Actions) and there shall be no decrease in Buyer’s payments to Seller hereunder and no Event of Default shall result from any such failure by Seller to comply with such obligations hereunder. If Buyer does not respond to a Notice given by Seller under this Section 3.6 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 for the Compliance Action(s) described in the Notice.

(iii) If Buyer agrees to reimburse Seller for the Accepted Compliance Costs, then Seller shall take such Compliance Actions covered by the Accepted Compliance Costs as agreed upon by the Parties and Buyer shall pay Seller in advance to effect the Compliance Actions. Under no circumstances shall Seller be obligated to expend more than the Accepted Compliance Costs. When the Compliance Actions are completed, if the Seller’s actual costs are less than the Accepted Compliance Costs, Seller shall refund the excess to Buyer.

(iv) If a Change in Law (excluding an RA Change in Law) occurring after the Effective Date prevents Seller from complying with its obligations under this Agreement with respect to obtaining, maintaining, conveying or effectuating Buyer’s use of (as applicable) any Product, including pursuant to Sections 3.1, 3.4 (including any such Change in Law that results in an RA Shortfall), 3.6(a), 3.7(c) or 4.4, and it is not possible to overcome the Change in Law through Compliance Actions or the expenditure of money, then (i) Seller shall provide Notice to Buyer of such Change in Law and the consequences for Seller’s performance hereunder, (ii) Seller shall be excused from the affected compliance and delivery obligations hereunder to the extent arising from the Change in Law (including, if applicable, the obligation to pay RA Deficiency Amounts with respect to RA Shortfalls arising from the Change in Law) and (iii) there shall be no decrease in Buyer’s payments to Seller hereunder and no Event of Default shall result from any such failure by Seller to comply with such obligations hereunder.

(v) Any change in the value of any attributes provided by Seller to Buyer resulting from any Change in Law shall not affect the Contract Price or Buyer’s obligation to pay Seller for any attributes delivered or for reduced delivery obligations as set forth above.

3.7 **CPUC Mid-Term Reliability Requirements.** Seller acknowledges that Buyer intends to use this Agreement to comply with mandatory procurement obligations for incremental
capacity pursuant to CPUC Decision 21-06-035. Seller represents and warrants to Buyer that:

(a) The Product associated with the Storage Contract Capacity includes the exclusive right to claim the Capacity Attributes associated with the Storage Contract Capacity as an incremental resource for purposes of CPUC Decision 21-06-035;

(b) Seller has not and will not sell, assign or transfer the right to claim procurement of the Capacity Attributes associated with the Storage Contract Capacity as an incremental resource for purposes of CPUC Decision 21-06-035 to any other person or entity; and

(c) Subject to Section 3.6, throughout the Delivery Term, upon Buyer’s request, Seller agrees to share such information with Buyer as is necessary to demonstrate compliance with such obligations as may arise from the mandatory procurement obligations for incremental capacity pursuant to CPUC Decision 21-06-035. Should the sharing of certain data with Buyer require disclosure of information in Seller’s possession or control that is subject to confidentiality obligations to third parties, or would result in sharing commercially sensitive information that may negatively impact Seller’s ability to achieve the full value of the Facility or associated resource, then Seller reserves the right to share such required information directly with the relevant Governmental Authority and provide confirmation to Buyer that information sharing has occurred.

ARTICLE 4
OBLIGATIONS AND DELIVERIES

4.1 Delivery. Subject to the provisions of this Agreement, commencing on the Initial Delivery Date through the end of the Contract Term, Seller shall supply and deliver the Product associated with the Storage Contract Capacity to Buyer, and Buyer shall accept and pay for the Product associated with the Storage Contract Capacity, in accordance with the terms of this Agreement.

4.2 Title and Risk of Loss. Title and risk of loss related to (a) Energy, including charging Energy, discharging Energy, and Energy stored in the battery, (b) Storage Capacity (but not Capacity Attributes), (c) Ancillary Services, (d) Standalone Energy Storage Incentives, and (e) Future Environmental Benefits shall remain with Seller at all times. Seller shall at all times have the right to sell to any third party, or into the CAISO markets all Energy, Storage Capacity, and Ancillary Services (but, not any Capacity Attributes associated with the Storage Contract Capacity during the Delivery Period, which shall be sold and delivered exclusively to Buyer as Product hereunder), and to retain all revenues and proceeds from such sales for Seller’s own account. Without limiting the foregoing, as between the Parties, Seller shall (i) be liable for all CAISO costs and charges for associated charging Energy, and (ii) be entitled to any CAISO revenues associated with discharging Energy.

4.3 Storage Capacity Tests.

(a) Prior to the Commercial Operation Date, Seller shall schedule and complete a Storage Capacity Test in accordance with Exhibit M. Thereafter, Seller and Buyer shall have the right to run retests of the Storage Capacity Test in accordance with Exhibit M.
(b) Buyer shall have the right to send one or more representative(s) to witness all Storage Capacity Tests. Alternatively, to the extent that any Storage Capacity Tests are done remotely, and no representatives are needed on Site, Seller shall arrange for both Parties to have access to all data and other information arising out of such tests. Buyer shall be responsible for all costs, expenses and fees payable or reimbursable to its representative(s) witnessing any Storage Capacity Test.

(c) Following each Storage Capacity Test, Seller shall submit a testing report in accordance with Exhibit M. If the actual capacity determined pursuant to a Storage Capacity Test varies from the then current Storage Capacity, then the actual capacity determined pursuant to a Storage Capacity Test (not to exceed the original Storage Contract Capacity set forth on the Cover Sheet, as such original Storage Contract Capacity on the Cover Sheet may have been adjusted (if at all) pursuant to Exhibit B) shall become the new Storage Capacity at the beginning of the day following the completion of the test for all purposes under this Agreement.

4.4 Interconnection Capacity. Subject to Section 3.6, Seller shall ensure throughout the Delivery Term that (a) the Facility will have an interconnection agreement providing for interconnection capacity available or allocable to the Facility that is no less than the Dedicated Interconnection Capacity and (b) Seller shall have sufficient interconnection capacity and rights under such interconnection agreement to interconnect the Facility with the CAISO Grid, and to fulfill Seller’s obligations under the Agreement, including with respect to Resource Adequacy Benefits.

ARTICLE 5
TAXES

5.1 Allocation of Taxes and Charges. Seller shall pay or cause to be paid all Taxes on or with respect to the Facility or on or with respect to the sale and making available of Product associated with the Storage Contract Capacity to Buyer, that are imposed on such 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 associated with the Storage Contract Capacity that are imposed on such 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 associated with the Storage Contract Capacity hereunder is exempt from or not subject to any particular Tax, Buyer shall provide Seller with all necessary documentation within thirty (30) days after the Effective Date to evidence such exemption or exclusion. If Buyer does not provide such documentation, then Buyer shall indemnify, defend, and hold Seller harmless from any liability with respect to Taxes from which Buyer claims it is exempt.

5.2 Cooperation. Each Party shall use reasonable efforts to implement the provisions of and administer this Agreement in accordance with the intent of the Parties to minimize all Taxes, so long as no Party is materially adversely affected by such efforts. The Parties shall cooperate to minimize Tax exposure; provided, however, that neither Party shall be obligated to incur any financial or operational burden to reduce Taxes for which the other Party is responsible hereunder.
without receiving due compensation therefor from the other Party. All Product delivered by Seller to Buyer hereunder shall be a sale made at wholesale, with Buyer reselling such Product.

ARTICLE 6
MAINTENANCE OF THE FACILITY

6.1 **Maintenance of the Facility.** Seller shall comply with Law and Prudent Operating Practice relating to the operation and maintenance of the Facility, and shall comply with Law regarding the disposal and recycling of any equipment associated with the Facility, including batteries.

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

6.3 **Shared Facilities.** The Parties acknowledge and agree that certain of the Interconnection Facilities, land rights, permits, rights and obligations under the Interconnection Agreement, and rights and obligations under transmission service agreements with a Transmission Provider, may be subject to certain shared facilities and/or co-tenancy agreements and other common ownership arrangements to be entered into among two or more of Seller, the Participating Transmission Owner, Seller’s Affiliates, a transmission owning entity, and/or third parties pursuant to which certain Interconnection Facilities, land rights, permits, the Interconnection Agreement, interconnection service, and/or transmission service may be subject to joint ownership, common ownership of equity interests in the entity that is the interconnection customer or the holder of land rights or permits, shared use, and/or shared maintenance and operation arrangements ("Shared Facilities Agreements"); provided that such Shared Facilities Agreements shall permit Seller to perform or satisfy, and shall not purport to limit, its obligations hereunder.

6.4 **Other Storage Facilities.** Seller may, at its sole cost and expense, construct and integrate or co-locate additional energy storage facilities with or into, but not constituting part of the Facility (the “Other Storage Facilities”). For avoidance of doubt, such Other Storage Facilities shall not be considered part of the Facility, and 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 Other Storage Facilities (all of which shall not be considered part of the Facility), 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 7
METERING

Seller shall be responsible for installing and maintaining the Storage Facility Meter and
measuring charging Energy and discharging Energy in accordance with requirements of the CAISO Tariff and applicable Laws.

**ARTICLE 8**

**INVOICING AND PAYMENT; CREDIT**

8.1 **Invoicing.** Seller shall deliver an invoice to Buyer within fifteen (15) days after the monthly Compliance Showing. Each invoice shall (a) include all supporting documentation and calculations reasonably necessary to evidence all amounts charged thereunder, and (b) be in a format reasonably specified by Buyer. The invoice shall be delivered by electronic mail in accordance with Exhibit N.

8.2 **Payment.**

(a) Buyer shall make payment to Seller for Product associated with the Storage Contract Capacity by wire transfer or ACH payment to the bank account designated by Seller in Exhibit N, which may be updated by Seller by Notice hereunder. Buyer shall make a monthly payment to Seller by the later of (a) ten (10) calendar days after Buyer’s receipt of Seller’s invoice (which may be given upon first day of the Showing Month) and (b) the twentieth (20th) of the Showing Month, or if the twentieth (20th) is not a Business Day the next following Business Day (“Monthly RA Capacity Payment”).

(b) The Monthly RA Capacity Payment shall equal the product of (i) the Contract Price, (ii) the Expected Quantity for the Showing Month and (iii) 1,000, rounded to the nearest penny (i.e., two decimal places).

(c) If the amount due is not paid on or before the due date or if any other payment that is due and owing from one Party to another is not paid on or before its applicable due date, a late payment charge shall be applied to the unpaid balance and shall be added to the next billing statement. Such late payment charge shall be calculated based on the 3-Month prime rate (or any equivalent successor rate accepted by a majority of major financial institutions) published on the date of the invoice in The Wall Street Journal (or, if The Wall Street Journal is not published on that day, the next succeeding date of publication), plus two percent (2%) (the “Interest Rate”). If the due date occurs on a day that is not a Business Day, the late payment charge shall begin to accrue on the next succeeding Business Day.

8.3 **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 three (3) years or as otherwise required by Law. Upon five (5) Business Days’ Notice to the other Party, either Party shall be granted reasonable access to the accounting books and records within the possession or control of the other Party pertaining to all invoices generated pursuant to this Agreement. Seller acknowledges that in accordance with California Government Code Section 8546.7, Seller may be subject to audit by the California State Auditor with regard to Seller’s performance of this Agreement because the compensation under this Agreement exceeds Ten Thousand Dollars ($10,000).

8.4 **Invoice Adjustments.** Invoice adjustments shall be made if (a) there have been good faith inaccuracies in invoicing or payment that are not otherwise disputed under Section 8.5,
(b) if applicable, an adjustment to an amount previously invoiced or paid is required due to a correction of data by the CAISO, or (c) if applicable, there have been meter inaccuracies; provided, however, that there shall be no adjustments to prior invoices based upon meter inaccuracies except to the extent that such meter adjustments are accepted by CAISO for revenue purposes. If the required adjustment is in favor of Buyer, Buyer’s next monthly payment shall be credited in an amount equal to the adjustment. If the required adjustment is in favor of Seller, Seller shall add the adjustment amount to Buyer’s next monthly invoice. Adjustments in favor of either Buyer or Seller shall bear interest, until settled in full, in accordance with Section 8.2, accruing from the date on which the adjusted amount should have been due. Unless otherwise agreed by the Parties, no adjustment of invoices shall be permitted after twenty-four (24) months from the date of the invoice.

8.5 Billing Disputes. A Party may, in good faith, dispute the correctness of any invoice or any adjustment to an invoice rendered under this Agreement or adjust any invoice for any arithmetic or computational error within twelve (12) months of the date the invoice, or adjustment to an invoice, was rendered. In the event an invoice or portion thereof, or any other claim or adjustment arising hereunder, is disputed, payment of the undisputed portion of the invoice shall be required to be made when due. Any invoice dispute or invoice adjustment shall be in writing and shall state the basis for the dispute or adjustment. Payment of the disputed amount shall not be required until the dispute is resolved. Upon resolution of the dispute, any required payment shall be made within five (5) Business Days of such resolution along with interest accrued at the Interest Rate from and including the original due date to but excluding the date paid. Inadvertent overpayments shall be returned via adjustments in accordance with Section 8.4. Any dispute with respect to an invoice is waived if the other Party is not notified in accordance with this Section 8.5 within twelve (12) months after the invoice is rendered or subsequently adjusted, except to the extent any misinformation was from a third party not affiliated with any Party and such third party corrects its information after the twelve-month period. If an invoice is not rendered within twelve (12) months after the close of the month during which performance occurred, the right to payment for such performance is waived.

8.6 Netting of Payments. The Parties hereby agree that they shall discharge mutual debts and payment obligations due and owing to each other 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 associated with the Storage Contract Capacity during the monthly billing period under this Agreement or otherwise arising out of this Agreement, including any related damages calculated pursuant to Exhibit B, interest, and payments or credits, shall be netted so that only the excess amount remaining due shall be paid by the Party who owes it.

8.7 Seller’s Development Security. To secure its obligations under this Agreement, Seller shall deliver the Development Security to Buyer within thirty (30) days after the Effective Date. Seller shall maintain the Development Security in full force and effect. Upon the earlier of (i) Seller’s delivery of the Performance Security, or (ii) sixty (60) days after termination of this Agreement, Buyer shall return the Development Security to Seller, less the amounts drawn in accordance with this Agreement. If the Development Security is a Letter of Credit and the issuer of such Letter of Credit (x) fails to maintain the minimum Credit Rating specified in the definition of Letter of Credit, (y) indicates its intent not to renew such Letter of Credit and such Letter of Credit expires prior to the Commercial Operation Date, or (z) 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.

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

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

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

(a) Exercise any of its rights and remedies with respect to the Development Security and Performance Security, including any such rights and remedies under Law then in effect;
(b) After ten (10) days following notice to Seller and opportunity to cure, draw on any outstanding Letter of Credit issued for its benefit and retain any cash held by Buyer as Development Security or Performance Security; and

(c) Liquidate all Development Security or Performance Security (as applicable) then held by or for the benefit of Buyer free from any claim or right of any nature whatsoever of Seller, including any equity or right of purchase or redemption by Seller.

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

8.10

ARTICLE 9
NOTICES

9.1 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 Exhibit N or at such other address or addresses as a Party may designate for itself from time to time by Notice hereunder.

9.2 Acceptable Means of Delivering Notice. Each Notice required, permitted, or contemplated hereunder shall be deemed to have been validly served, given or delivered if sent by electronic mail at the time indicated by the time stamp upon delivery, except that if received after 5 PM Pacific Prevailing Time, it shall be deemed received on the next Business Day. Notwithstanding the foregoing, Notices of outages or other scheduling or dispatch information or requests, or other notices except those addressed in the next sentence, may be sent by electronic mail, or any other mutually-acceptable form of electronic communication, and shall be considered delivered upon successful completion of such transmission. Notices of claimed breach of this Agreement or an Event of Default must concurrently be sent by hand delivery or overnight carrier with delivery fees either prepaid or an arrangement with such carrier made for the payment of such fees.

ARTICLE 10
FORCE MAJEURE

10.1 Definition.

(a) “Force Majeure Event” means any act or event that delays or prevents a Party from timely performing all or a portion of its obligations under this Agreement or from complying with all or a portion of the conditions under this Agreement if such act or event, despite the exercise of reasonable efforts, cannot be avoided by and is beyond the reasonable control
(whether direct or indirect) of and without the fault or negligence of the Party relying thereon as justification for such delay, nonperformance, or noncompliance.

(b) Without limiting the generality of the foregoing, so long as the following events, despite the exercise of reasonable efforts, cannot be avoided by, and are beyond the reasonable control (whether direct or indirect) of and without the fault or negligence of the Party relying thereon as justification for such delay, nonperformance or noncompliance, a Force Majeure Event may include: an act of God or the elements, such as flooding, lightning, hurricanes, tornadoes, or ice storms; explosion; fire; volcanic eruption; flood; epidemic; pandemic; landslide; mudslide; sabotage; terrorism; earthquake; or other cataclysmic events; an act of public enemy; war; blockade; civil insurrection; riot; civil disturbance; strikes or other labor difficulties caused or suffered by a Party or any third party except as set forth in Section 10.1(d) below; and newly issued orders and directives of Governmental Authorities and other foreign and domestic government entities and authorities affecting a Party, its vendors or contractors, or the Party’s ability to perform its obligations hereunder, and that were not reasonably anticipated prior to the Effective Date, or if anticipated, could not have been avoided or overcome through the use of commercially reasonable efforts.

(c) For the avoidance of doubt, so long as the event, despite the use of reasonable efforts, cannot be avoided by, and is beyond the reasonable control of (whether direct or indirect) and without the fault or negligence of the Party relying thereon as justification for such delay, nonperformance, or noncompliance, Force Majeure Event may include: (i) an epidemic or pandemic, including in connection with the impacts of and efforts to combat or mitigate the epidemic disease designated COVID-19 and the related virus designated SARS-CoV-2 and any mutations and variants thereof (“COVID-19”); and (ii) newly issued orders and directives of Governmental Authorities and other foreign and domestic government entities and authorities affecting the purchase, import, deployment, or use of equipment, components, or materials intended to be used in the Facility, or construction thereof, and that were not reasonably anticipated prior to the Effective Date, or if anticipated, could not have been avoided or overcome through the use of commercially reasonable efforts.

(d) Notwithstanding the foregoing, the term “Force Majeure Event” does not include: (i) economic conditions that render a Party’s performance of this Agreement at the Contract Price unprofitable or otherwise uneconomic (including an increase in component costs for any reason, including foreign or domestic tariffs, Buyer’s ability to buy storage capacity at a lower price, or Seller’s ability to sell the Product, or any component thereof, at a higher price, than under this Agreement); (ii) Seller’s inability to obtain permits or approvals of any type for the construction, operation, or maintenance of the Facility, except to the extent such inability is caused by a Force Majeure Event; (iii) the inability of a Party to make payments when due under this Agreement, unless the cause of such inability is an event that would otherwise constitute a Force Majeure Event as described above; (iv) Seller’s inability to obtain sufficient labor, equipment, materials, or other resources to build or operate the Facility, except to the extent such inability is caused by a Force Majeure Event; or (v) any equipment failure, except if such equipment failure is caused by a Force Majeure Event.

(e) Notwithstanding any provision to the contrary, a Force Majeure Event does not excuse Seller’s inability to achieve Construction Start of the Facility following the Guaranteed
Construction Start Date, or to achieve Commercial Operation following the Guaranteed Commercial Operation Date, except to the extent such dates may be extended for a Force Majeure Event pursuant to a Development Cure Period.

10.2 **Termination Following Force Majeure Event.** If a Force Majeure Event has occurred after the Commercial Operation Date that has caused either Party to be wholly or partially unable to perform its obligations hereunder, and the impacted Party has claimed and received relief from performance of its obligations for a consecutive twelve (12) month period, then the non-claiming Party may terminate this Agreement upon written Notice to the other Party. Upon any such termination, neither Party shall have any liability to the other Party, save and except for those obligations specified in Section 2.1(b), and Buyer shall promptly return to Seller any Performance Security then held by Buyer, less any amounts drawn in accordance with this Agreement. Notwithstanding the foregoing, the occurrence and continuation of a Force Majeure Event shall not (a) suspend or excuse the obligation of a Party to make any payments due hereunder, (b) suspend or excuse the obligation of Seller to achieve the Guaranteed Construction Start Date or the Guaranteed Commercial Operation Date beyond the extensions provided in Exhibit B, or (c) limit Buyer’s right to declare an Event of Default pursuant to Section 11.1(b)(i) and receive a Damage Payment upon exercise of Buyer’s default right pursuant to Section 11.2.

10.3 **Notice for Force Majeure.** The claiming Party shall make reasonable efforts to provide the other Party with oral notice of the Force Majeure Event within five (5) Business Days of the date the claiming Party becomes aware of being impacted by such Force Majeure Event, and within two (2) weeks of the date the claiming Party becomes aware of being impacted by such Force Majeure Event the claiming Party shall provide the other Party with notice in the form of a letter describing in detail the occurrence giving rise to the Force Majeure Event, including the nature, cause, estimated date of commencement thereof, and the anticipated extent of any delay or interruption in performance. Failure to provide written notice within such two (2)-week period constitutes a waiver of the Force Majeure Event with respect to the period starting on the date such notice is due, and continuing until the date that the notice is 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.

**ARTICLE 11**

**DEFAULTS; REMEDIES; TERMINATION**

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

(a) with respect to a Party (the **Defaulting Party**”) that is subject to the Event of Default the occurrence of any of the following:
(i) the failure by such Party to make, when due, any payment required pursuant to this Agreement and such failure is not remedied within ten (10) Business Days after Notice thereof;

(ii) any representation or warranty made by such Party herein is false or misleading in any material respect when made or when deemed made or repeated, and such default is not remedied within thirty (30) days after Notice thereof (or such longer additional period, not to exceed an additional sixty (60) days, if the Defaulting Party is unable to remedy such default within such initial thirty (30)-day period despite exercising commercially reasonable efforts);

(iii) the failure by such Party to perform any material covenant or obligation set forth in this Agreement (except to the extent constituting a separate Event of Default set forth in this Section 11.1; and except for failure to achieve Interim Deliverability Status by the RA Guarantee Date or to provide the Guaranteed RA Amount, the exclusive remedies for which are set forth in Section 3.5) and such failure is not remedied within thirty (30) days after Notice thereof (or such longer additional period, not to exceed an additional ninety (90) days, if the Defaulting Party is unable to remedy such default within such initial thirty (30)-day period despite exercising commercially reasonable efforts);

(iv) such Party becomes Bankrupt;

(v) such Party assigns this Agreement or any of its rights hereunder other than in compliance with Section 14.1 or 14.2, as appropriate; or

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

(b) with respect to Seller as the Defaulting Party, the occurrence of any of the following:

(i) the failure by Seller to achieve Commercial Operation within one hundred and fifty (150) days after the Guaranteed Commercial Operation Date;

(ii) Seller sells, assigns, or otherwise transfers, or commits to sell, assign, or otherwise transfer, the Product associated with the Storage Contract Capacity, or any portion thereof, during the Delivery Term to any party other than Buyer except as expressly permitted under this Agreement;

(iii) if Seller fails to maintain an average Storage Capacity equal to at least [REDACTED] of the Installed Capacity for more than two (2) consecutive Contract Years;

(iv) [REDACTED]
(vii) with respect to any outstanding Letter of Credit provided for the benefit of Buyer that is not then required under this Agreement to be canceled or returned, the failure by Seller to provide for the benefit of Buyer either (1) cash, or (2) a substitute Letter of Credit from a different issuer meeting the criteria set forth in the definition of Letter of Credit, in each case, in the amount required hereunder within ten (10) Business Days after Seller receives Notice of the occurrence of any of the following events:

(A) the issuer of the outstanding Letter of Credit shall fail to maintain a Credit Rating of at least A- by S&P or A3 by Moody’s;

(B) the issuer of such Letter of Credit becomes Bankrupt;
(C) the issuer of the outstanding Letter of Credit shall fail to comply with or perform its obligations under such Letter of Credit and such failure shall be continuing after the lapse of any applicable grace period permitted under such Letter of Credit;

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

(E) the issuer of the outstanding Letter of Credit shall disaffirm, disclaim, repudiate or reject, in whole or in part, or challenge the validity of, such Letter of Credit;

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

(G) Seller shall fail to renew or cause the renewal of each outstanding Letter of Credit on a timely basis as provided in the relevant Letter of Credit and as provided in accordance with this Agreement, and in no event less than thirty (30) days prior to the expiration of the outstanding Letter of Credit.

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

(a) to send Notice, designating a day, no earlier than the day such Notice is deemed to be received and no later than twenty (20) days after such Notice is deemed to be received, as an early termination date of this Agreement ("**Early Termination Date**") that terminates this Agreement (the "**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 Commercial Operation Date, including an Event of Default under Section 11.1(b)(i)), or (ii) the Termination Payment calculated in accordance with Section 11.3 below (in the case of any other Event of Default by either Party);

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

(d) to suspend performance for not more than thirty (30) days pending delivery of an Early Termination Notice; or

(e) to exercise any other right or remedy available at law or in equity, including specific performance or injunctive relief, except to the extent such remedies are expressly limited under this Agreement;
provided, 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.

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

11.4 **Notice of Payment of Termination Payment.** As soon as practicable after a Terminated Transaction, Notice shall be given by the Non-Defaulting Party to the Defaulting Party of the amount of the Damage Payment or Termination Payment and whether the Termination Payment is due to or from the Non-Defaulting Party. The Notice shall include a written statement explaining in reasonable detail the calculation of such amount and the sources for such calculation. The Termination Payment shall be made to or from the Non-Defaulting Party, as applicable, within ten (10) Business Days after such Notice is effective.

11.5 **Disputes With Respect to Termination Payment.** If the Defaulting Party disputes the Non-Defaulting Party’s calculation of the Termination Payment, in whole or in part, the Defaulting Party shall, within five (5) Business Days of receipt of the Non-Defaulting Party’s calculation of the Termination Payment, provide to the Non-Defaulting Party a detailed written explanation of the basis for such dispute. Disputes regarding the Termination Payment shall be determined in accordance with Article 15.

11.6 **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 11 shall be cumulative and in addition to the rights of the Parties otherwise provided in this Agreement. Any Non-Defaulting Party shall be obligated to mitigate its Costs, Losses and damages resulting from or arising out of any Event of Default of the other Party under this Agreement.
ARTICLE 12
LIMITATION OF LIABILITY AND EXCLUSION OF WARRANTIES.

12.1 No Consequential Damages; Limitation of Liability.

(a) EXCEPT TO THE EXTENT PART OF AN EXPRESS REMEDY OR MEASURE OF DAMAGES HEREIN, OR PART OF AN ARTICLE 16 INDEMNITY CLAIM, OR INCLUDED IN A LIQUIDATED DAMAGES CALCULATION, OR ARISING FROM FRAUD OR INTENTIONAL MISREPRESENTATION, NEITHER PARTY SHALL BE LIABLE TO THE OTHER OR ITS INDEMNIFIED PERSONS FOR ANY SPECIAL, PUNITIVE, EXEMPLARY, INDIRECT, OR CONSEQUENTIAL DAMAGES, OR LOSSES OR DAMAGES FOR LOST REVENUE OR LOST PROFITS, WHETHER FORESEEABLE OR NOT, ARISING OUT OF, OR IN CONNECTION WITH THIS AGREEMENT, BY STATUTE, IN TORT OR CONTRACT.

(b) NOTWITHSTANDING ANY OTHER PROVISION OF THIS AGREEMENT, IN NO EVENT SHALL SELLER’S LIABILITY UNDER OR ARISING OUT OF THIS AGREEMENT PRIOR TO THE COMMERCIAL OPERATION DATE (INCLUDING LIABILITY FOR ANY COD DELAY DAMAGES, CONSTRUCTION DELAY DAMAGES, AND TERMINATION PAYMENT OWED BY SELLER HEREUNDER), EXCEED TWO AND A HALF (2.5) TIMES THE AMOUNT OF DEVELOPMENT SECURITY REQUIRED TO BE POSTED HEREUNDER.

12.2 Waiver and Exclusion of Other Damages. EXCEPT AS EXPRESSLY SET FORTH HEREIN, THERE IS NO WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND ANY AND ALL IMPLIED WARRANTIES ARE DISCLAIMED. THE PARTIES CONFIRM THAT THE EXPRESS REMEDIES AND MEASURES OF DAMAGES PROVIDED IN THIS AGREEMENT SATISFY THE ESSENTIAL PURPOSES HEREOF. ALL LIMITATIONS OF LIABILITY CONTAINED IN THIS AGREEMENT, INCLUDING THOSE PERTAINING TO SELLER’S LIMITATION OF LIABILITY AND THE PARTIES’ WAIVER OF CONSEQUENTIAL DAMAGES, SHALL APPLY EVEN IF THE REMEDIES FOR BREACH OF WARRANTY PROVIDED IN THIS AGREEMENT ARE DEEMED TO “FAIL OF THEIR ESSENTIAL PURPOSE” OR ARE OTHERWISE HELD TO BE INVALID OR UNENFORCEABLE.

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

TO THE EXTENT ANY DAMAGES REQUIRED TO BE PAID HEREUNDER ARE LIQUIDATED, INCLUDING UNDER SECTIONS 3.5, 11.2, 11.3, AND AS PROVIDED IN EXHIBIT B THE PARTIES ACKNOWLEDGE THAT THE DAMAGES ARE DIFFICULT OR IMPOSSIBLE TO DETERMINE, THAT OTHERWISE OBTAINING AN ADEQUATE
REMEDY IS INCONVENIENT, AND THAT THE LIQUIDATED DAMAGES CONSTITUTE A REASONABLE APPROXIMATION OF THE ANTICIPATED HARM OR LOSS. IT IS THE INTENT OF THE PARTIES THAT THE LIMITATIONS HEREIN IMPOSED ON REMEDIES AND THE MEASURE OF DAMAGES BE WITHOUT REGARD TO THE CAUSE OR CAUSES RELATED THERETO, INCLUDING THE NEGLIGENCE OF ANY PARTY, WHETHER SUCH NEGLIGENCE BE SOLE, JOINT OR CONCURRENT, OR ACTIVE OR PASSIVE. THE PARTIES HEREBY WAIVE ANY RIGHT TO CONTEST SUCH PAYMENTS AS AN UNREASONABLE PENALTY.

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

ARTICLE 13
REPRESENTATIONS AND WARRANTIES; AUTHORITY

13.1 Seller’s Representations and Warranties. As of the Effective Date, Seller represents and warrants as follows:

(a) Seller is a limited liability company, duly organized, validly existing and in good standing under the laws of the jurisdiction of its formation, and is qualified to conduct business in the state of California and each jurisdiction where the failure to so qualify would have a material adverse effect on the business or financial condition of Seller.

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

(c) The execution and delivery of this Agreement, consummation of the transactions contemplated herein, and fulfillment of and compliance by Seller with the provisions of this Agreement will not conflict with or constitute a breach of or a default under any Law presently in effect having applicability to Seller, subject to Seller obtaining any permits and other governmental approvals that have not yet been obtained by Seller, the documents of formation of Seller or any outstanding trust indenture, deed of trust, mortgage, loan agreement or other evidence of indebtedness or any other agreement or instrument to which Seller is a party or by which any of its property is bound, in each case except as would not have any material adverse effect on Seller’s ability to perform its obligations hereunder.

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

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

(f) As between Buyer and Seller, Seller will be responsible for obtaining all permits necessary to construct and operate the Facility and Seller or its Affiliate will be the applicant on any CEQA documents. Seller acknowledges that Buyer is purchasing the Product associated with the Storage Contract Capacity under this Agreement and does not intend to be the lead agency for the Facility.

(g) Seller represents and warrants that it has not and will not knowingly (at the time of purchase) procure equipment or resources for the construction, operation or maintenance of the Facility that rely on work or services exacted from any person under the threat of a penalty and for which the person has not offered himself or herself voluntarily (“Forced Labor”).

13.2 Buyer’s Representations and Warranties. As of the Effective Date, Buyer represents and warrants as follows:

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

(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) Subject to Section 19.10, Buyer warrants and covenants that with respect to its contractual obligations under this Agreement, it will not claim immunity on the grounds of sovereignty or similar grounds with respect to itself or its revenues or assets from (1) suit, (2) jurisdiction of court, (3) relief by way of injunction, order for specific performance or recovery of property, (4) attachment of assets or (5) execution or enforcement of any judgment; provided, however that nothing in this Agreement shall waive the obligations or rights set forth in the California Tort Claims Act (Government Code Section 810 et seq.).

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

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

(a) It shall continue to be duly organized, validly existing and in good standing under the Laws of the jurisdiction of its formation and to be qualified to conduct business in California and each jurisdiction where the failure to so qualify would have a material adverse effect on its business or financial condition;

(b) It shall maintain (or obtain from time to time as required) all regulatory authorizations 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.

13.4 **Prevailing Wage.** Seller shall use reasonable efforts to ensure that all employees hired by Seller, and its contractors and subcontractors, that will perform construction work or provide services at the Site related to construction of the Facility are paid wages at rates not less than those prevailing for workers performing similar work in the locality as provided by applicable California law, if any (“**Prevailing Wage Requirement**”). Nothing herein shall require Seller, its contractors and subcontractors to comply with, or assume liability created by other inapplicable provisions of any California labor laws. Buyer agrees that Seller’s obligations under this Section 13.4 will be satisfied upon the execution of a project labor agreement related to construction of the Facility.

13.5 **Additional Seller Covenants.**

(a) **Nondiscrimination/Non-Preference.** 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) the City’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 the City’s Compliance
Officer designates. They shall contain such information, data and/or records as the City’s Compliance Officer determines is needed to show compliance with this provision.

(b) Conflict of Interest. Seller represents that it is familiar with the local and state conflict of interest laws, and agrees to comply with those laws in performing this Agreement. Seller certifies that, as of the Effective Date, it was unaware of any facts constituting a conflict of interest 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 the 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 13.5(b) is a material breach.

(c) Environmentally Preferable Procurement Policy. 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 Preferably 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 13.5(c) be a material breach of this Agreement or otherwise give rise to an Event of Default or entitle Buyer to terminate this Agreement.

(d) Gifts Prohibited. Seller represents that it is familiar with Chapter 12.08 of the San José Municipal Code, which generally prohibits a City of San José officer or designated employee from accepting any gift. Seller shall not offer any City of San José officer or designated employee any gift prohibited by Chapter 12.08 of the San José Municipal Code. Seller’s violation of this Section 13.5(d) is a material breach.

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

ARTICLE 14
ASSIGNMENT

14.1 General Prohibition on Assignments. Except as provided in Section 14.2 or Section 14.3, neither Party may voluntarily assign this Agreement or its rights or obligations under this Agreement, without the prior written consent of the other Party, which consent shall not be unreasonably withheld. Any assignment made without required written consent, or in violation of the conditions to assignment set out below, shall be null and void. Any purported assignment made without required written consent, or in violation of the conditions to assignment set out below, shall be null and void. 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 this 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.

14.2 **Collateral Assignment.** Subject to the provisions of this Section 14.2, Seller has the right to assign this Agreement as collateral for any financing or refinancing of the Facility.

In connection with any financing or refinancing of the Facility by Seller, upon request of Seller, Buyer shall in good faith work with Seller and Lender to agree upon a consent to collateral assignment of this Agreement ("**Collateral Assignment Agreement**"). The Collateral Assignment Agreement shall include the following provisions, with such changes as may be reasonably requested by a Lender or its agent:

(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 additional cure period of Lender agreed to in the Collateral Assignment Agreement shall not commence until Lender has received notice of such Event of Default;

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

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

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

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

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

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

(c) Lender will have the right to cure an Event of Default on behalf of Seller, only if Lender sends a written notice to Buyer before the later of (i) the expiration of any cure period under this Agreement, and (ii) 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 ninety (90) days (or one hundred eighty (180) days in the event of a bankruptcy of Seller, or any foreclosure or similar proceeding if required by Lender to cure any Event of Default);
(d) Lender will have the right to consent before any termination of this Agreement which does not arise out of an Event of Default which was not cured in accordance with the Collateral Assignment Agreement;

(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 or its assignee or transferee, takes possession of, or title to the Facility (including possession by a receiver or title by foreclosure or deed in lieu of foreclosure), Lender or its assignee or transferee 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 (other than any Events of Default which are personal to Seller and are not reasonable capable of cure, including Seller’s bankruptcy or similar insolvency proceedings), or

(ii) Not assume this Agreement;

(g) If Lender or its assignee or transferee elects to sell or transfer the Facility (after Lender or its assignee or transferee directly or indirectly, takes possession of, or title to the Facility), or sale of the Facility occurs through the actions of Lender (for example, a foreclosure sale where a third party is the buyer, or otherwise), then Lender shall cause the transferee or buyer to assume all of Seller’s remaining 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

(h) Subject to Lender’s cure of any Events of Defaults under the Agreement in accordance with Section 14.2(f), if this Agreement is rejected in Seller’s bankruptcy proceeding or is otherwise terminated in connection therewith Lender shall have the right to elect within forty-five (45) days after such rejection or termination, to cause Buyer to enter into a replacement agreement with Seller having substantially the same terms as this Agreement for the remaining term thereof.

14.3 **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, Cal. Government Code section 1090, Buyer’s Conflict of Interest Code/Policy or any other conflict of interest Law, Seller may, without the prior written consent of Buyer, transfer or assign this Agreement, including through a Change of Control, to an Affiliate of Seller. In addition, Buyer’s written consent will not be unreasonably withheld 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:

(a) the assignee is a Permitted Transferee;

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

(c) Seller has provided Buyer a written agreement signed by the Person to which Seller wishes to assign its interests that (x) provides that such Person will assume all of Seller’s obligations and liabilities under this Agreement upon such transfer or assignment and (y) certifies that such Person meets the definition of a Permitted Transferee.

Except as provided in the first sentence of this Section 14.3, any assignment or Change of Control by Seller, its successors or assigns under this Section 14.3 shall be of no force and effect.

ARTICLE 15
DISPUTE RESOLUTION

15.1 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 or the courts of the State of California sitting in the County of Santa Clara, California.

15.2 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, the Parties shall submit the dispute to mediation prior to seeking any and all remedies available to it at Law in or equity. The Parties will cooperate in selecting a qualified neutral mediator selected from a panel of neutrals and in scheduling the time and place of the mediation as soon as reasonably possible, but in no event later than thirty (30) days after the request for mediation is made. The Parties agree to participate in the mediation in good faith and to share the costs of the mediation, including the mediator’s fee, equally, but such shared costs shall not include each Party’s own attorneys’ fees and costs, which shall be borne solely by such Party. If the mediation is unsuccessful, then either Party may seek any and all remedies available to it at law or in equity, subject to the limitations set forth in this Agreement.

ARTICLE 16
INDEMNIFICATION

16.1 Indemnity. Each Party (the “Indemnifying Party”) agrees to defend, indemnify and hold harmless the other Party (the “Indemnified Party”), its directors, officers, agents,
attorneys, employees and representatives from and against all third party claims, demands, losses, liabilities, penalties, and expenses, including reasonable attorneys’ and expert witness fees collectively ("**Indemnifiable Event**"), to the extent such Indemnifiable Event arises out of, pertains to, or relates to any of the following: (a) the negligent act or omission, recklessness or willful misconduct of the Indemnifying Party, its Affiliates, or their directors, officers, employees, agents, subcontractors, and anyone directly or indirectly employed by either the Indemnifying Party or any of its subcontractors or anyone that they control; or (b) any violation of applicable Law by the Indemnifying Party. Seller’s indemnity obligations apply to the maximum extent allowed by law and includes defending the Buyer, its officers, employees and agents as set forth in Section 2778 and 2782.8 of the California Civil Code, if applicable. Upon the Indemnified Party’s written request, the Indemnifying Party, at its own expense, must defend any suit or action that is subject to the Indemnifying Party’s indemnity obligations. The Parties’ indemnification obligations survive the expiration or termination of this Agreement.

16.2 **Rights and Remedies are Cumulative.** Except for express remedies already provided in this Agreement, the rights and remedies of a Party pursuant to this Article 16 are cumulative and in addition to the rights of the Parties otherwise provided in this Agreement.

**ARTICLE 17**

**INSURANCE**

17.1 **Insurance.**

(a) **General Liability.** Seller shall maintain, or cause to be maintained at its sole expense, (i) commercial general liability insurance, 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.

(b) **Employer’s Liability Insurance.** Seller 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 shall also maintain at all times during the Contract 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 Contract Term business auto insurance for bodily injury and property damage with limits of One Million Dollars ($1,000,000) per occurrence. Such insurance shall cover liability arising out of Seller’s use of all owned (if any), non-owned and hired vehicles, including trailers or semi-trailers in the performance of 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 Facility prior to the Commercial Operation Date, construction all-risk form property insurance covering the Facility during such construction periods, and naming the Seller (and Lender if any) as the loss payee.

(g) **Contractor’s Pollution Liability.** Seller shall maintain or cause to be maintained during the construction of the Facility prior to the Commercial Operation Date, Pollution Legal Liability Insurance in the amount of Two Million Dollars ($2,000,000) per occurrence and in the aggregate, naming the Seller (and Lender if any) as additional named insured.

(h) **Property Insurance.** On and after the Commercial Operation Date, Seller shall maintain or cause to be maintained insurance against loss or damage from all causes under standard “all risk” property insurance coverage in amounts that are not less than the actual replacement value of the Facility, provided, however, with respect to property insurance for natural catastrophes, Seller shall maintain limits equivalent to a Probable Maximum Loss amount determined by a firm with experience providing such determinations.

(i) **Subcontractor Insurance.** Seller shall require all of its subcontractors to carry the same levels of insurance as Seller, with the exception of the insurance required pursuant to Section 17.1(e) and Section 17.1(g); provided, that, Buyer may permit any such subcontractor to obtain and maintain insurance coverages with lower limits to the extent that such lower limits are customary for contractors providing work of the type and scope to be provided and are consistent with Prudent Operating Practices. Seller shall endeavor for subcontractors to include Buyer as an additional insured to (i) commercial general liability insurance; (ii) employers’ liability coverage; and (iii) business auto insurance for bodily injury and property damage. All subcontractors shall provide a primary endorsement and a waiver of subrogation to Buyer for the required coverage pursuant to this Section 17.1(i).

(j) **Evidence of Insurance.** Within ten (10) days after execution of the Agreement and upon annual renewal thereafter, Seller shall deliver to Buyer certificates of insurance evidencing such coverage. These certificates shall specify that Buyer shall be given at least thirty (30) days’ prior Notice by Seller in the event of 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.
ARTICLE 18
CONFIDENTIAL INFORMATION

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

18.2 Duty to Maintain Confidentiality. Confidential Information will retain its character as Confidential Information but may be disclosed by the recipient (the “Receiving Party”) if and to the extent such disclosure is required (a) to be made by any requirements of Law, (b) pursuant to an order of a court or (c) in order to enforce this Agreement. If the Receiving Party becomes legally compelled (by interrogatories, requests for information or documents, subpoenas, summons, civil investigative demands, or similar processes or otherwise in connection with any litigation or to comply with any Law, order, regulation, ruling, regulatory request, accounting disclosure rule or standard or any exchange, control area or independent system operator rule) to disclose any Confidential Information of the disclosing Party (the “Disclosing Party”), Receiving Party shall provide Disclosing Party with prompt notice so that Disclosing Party, at its sole expense, may seek an appropriate protective order or other appropriate remedy. If the Disclosing Party takes no such action after receiving the foregoing notice from the Receiving Party, the Receiving Party is not required to defend against such request and shall be permitted to disclose such Confidential Information of the Disclosing Party, with no liability for any damages that arise from such disclosure. Each Party hereto acknowledges and agrees that information and documentation provided in connection with this Agreement may be subject to the California Public Records Act (Government Code Section 6250 et seq.).

18.3 Irreparable Injury; Remedies. Receiving Party acknowledges that its obligations hereunder are necessary and reasonable in order to protect Disclosing Party and the business of Disclosing Party, and expressly acknowledges that monetary damages would be inadequate to compensate Disclosing Party for any breach or threatened breach by Receiving Party of any covenants and agreements set forth herein. Accordingly, Receiving Party acknowledges that any such breach or threatened breach will cause irreparable injury to Disclosing Party and that, in addition to any other remedies that may be available, in law, in equity or otherwise, Disclosing Party will be entitled to obtain injunctive relief against the threatened breach of this Agreement or the continuation of any such breach, without the necessity of proving actual damages.

18.4 Disclosure to Lenders, Etc. Notwithstanding anything to the contrary in this Article 18, 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 18 (subject to customary survival terms).

18.5 **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 19**
**MISCELLANEOUS**

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

19.2 **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.

19.3 **No Waiver.** Waiver by a Party of any default by the other Party shall not be construed as a waiver of any other default.

19.4 **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 Facility or any business related to the Facility. This Agreement shall not impart any rights enforceable by any third party (other than a permitted successor or assignee bound to this Agreement) or, to the extent set forth herein, any Lender or Indemnified Party.

19.5 **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.
19.6 **Mobile-Sierra.** Notwithstanding any other provision of this Agreement, neither Party shall seek, nor shall they support any third party seeking, to prospectively or retroactively revise the rates, terms or conditions of service of this Agreement through application or complaint to FERC pursuant to the provisions of Section 205, 206 or 306 of the Federal Power Act, or any other provisions of the Federal Power Act, absent prior written agreement of the Parties. Further, absent the prior written agreement in writing by both Parties, the standard of review for changes to the rates, terms or conditions of service of this Agreement proposed by a Party shall be the “public interest” standard of review set forth in United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956) and Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348 (1956). Changes proposed by a non-Party or FERC acting *sua sponte* shall be subject to the most stringent standard permissible under applicable Law.

19.7 **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.

19.8 **Electronic Delivery.** This Agreement may be duly executed and delivered by a Party by execution and electronic format (including portable document format (.pdf)) delivery of the signature page of a counterpart to the other Party, and, if delivery is made by electronic format, the executing Party shall promptly deliver, via overnight delivery, a complete original counterpart that it has executed to the other Party, but this Agreement shall be binding on and enforceable against the executing Party whether or not it delivers such original counterpart.

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

19.10 **Designated Fund; Limited Obligations.**

(a) **Designated Fund.** Buyer is a municipal corporation and is precluded under the California State Constitution and applicable law from entering into obligations that financially bind future governing bodies without an appropriation for such obligation, and, therefore, nothing in this Agreement shall constitute an obligation of future legislative bodies of the City to appropriate funds for purposes of the Agreement; provided, however, that (i) Buyer has created and set aside a designated operating 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 operation of San José Clean Energy, including revenues from sale of electricity, payments from other entities, and any financing proceeds associated with San José Clean Energy 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 for San José Clean Energy. Buyer shall provide Seller with reasonable access to account balance information with respect to the San José Clean Energy Designated Fund during the Term.
(b) **Limited Obligations.** Buyer’s payment obligations under this Agreement are special limited obligations of the Buyer payable solely from the Designated Fund and are not a charge upon the revenues or general fund of the City of San José or upon any non-San José Clean Energy moneys or other property of the City of San José.

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

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

[Signatures on following page]
IN WITNESS WHEREOF, the Parties have caused this Agreement to be duly executed as of the Effective Date.

EDPR SCARLET I LLC

CITY OF SAN JOSÉ, a California municipality

Sign: ____________________________ Sign: ____________________________
Print: Sandhya Ganapahty Print: Lori Mitchell
Title: Chief Executive Officer Title: Director Community Energy Department
Date: Dec 22, 2022 Date: Dec 22, 2022

Approved as to form:

Sign: ____________________________ Sign: ____________________________
Print: Kris Cheney Print: Enrique Fernandez
Title: Executive Vice President Title: Deputy City Attorney II
Date: Dec 22, 2022 Date: Dec 22, 2022

Approved as to form:

Sign: ____________________________
Print: Randy Sawyer
Title: Associate General Counsel
Date: Dec 22, 2022
EXHIBIT A

FACILITY DESCRIPTION

Site Name: EDPR Scarlet II LLC

Site includes all or some of the following APNs: [redacted]

City: Tranquility

County: Fresno

Longitude/Latitude: [redacted]

CEQA Lead Agency (if review under CEQA is required): County of Fresno Department of Public Works and Planning

Type of Facility: A co-located energy storage facility

Energy Management Software: Flexgen

Dedicated Interconnection Capacity: [redacted]

Delivery Point: Facility [redacted]

RA Capacity Area: System

Point of Interconnection: PG&E Tranquility Substation or Tranquility Switching Station 230kV

PNode: To be provided by CAISO (California Independent System Operator)

Participating Transmission Owner: Pacific Gas and Electric Company
EXHIBIT B

FACILITY CONSTRUCTION AND COMMERCIAL OPERATION

1. **Construction Start.**

   (a) **“Construction Start”** will occur upon Seller’s (i) acquisition of all applicable regulatory authorizations, approvals and permits for the commencement of construction of the Facility, and (ii) execution of one or more engineering, procurement, and construction contracts and issuance of one or more notices to proceed (or reasonable equivalent) thereunder, all in a manner that can reasonably be considered necessary to fully authorize all engineering, procurement and physical construction of the Facility to begin and proceed to completion without foreseeable interruption of material duration. The date of Construction Start will be evidenced by and subject to Seller’s delivery to Buyer of a certificate substantially in the form attached as Exhibit H hereto, and the date certified therein shall be the **“Construction Start Date.”** The Seller shall cause Construction Start to occur no later than the Guaranteed Construction Start Date.

   (b) Subject to Section 12.1, if Construction Start is not achieved by the Guaranteed Construction Start Date, Seller shall pay Construction Delay Damages to Buyer on account of such delay. Construction Delay Damages shall be payable for each day for which Construction Start has not begun by the Guaranteed Construction Start Date. Construction Delay Damages shall be payable to Buyer by Seller until Seller reaches Construction Start of the Facility; provided, that the maximum amount of Construction Delay Damages payable by Seller under this Exhibit B shall not exceed fifty percent (50%) of the amount of Development Security. 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. Construction Delay Damages shall be refundable to Seller pursuant to Section 2(b) of this Exhibit B. The Parties agree that Buyer’s receipt of Construction Delay Damages shall be Buyer’s sole and exclusive remedy for Seller’s unexcused delay in achieving the Construction Start Date on or before the Guaranteed Construction Start Date, but shall (x) not be construed as Buyer’s declaration that an Event of Default has occurred under any provision of Section 11.1 and (y) not limit Buyer’s right to declare an Event of Default pursuant to Section 11.1(b)(i) and receive a Damage Payment upon exercise of Buyer’s default right pursuant to Section 11.2.

2. **Commercial Operation of the Facility.** **“Commercial Operation”** means the condition existing when (i) Seller has fulfilled all of the conditions precedent in Section 2.2 of the Agreement and provided Notice to Buyer substantially in the form of Exhibit F (the **“COD Certificate”**), (ii) Seller has notified Buyer in writing that it has provided the required documentation to Buyer and met the conditions for achieving Commercial Operation, and (iii) Buyer has acknowledged to Seller in writing that Commercial Operation has been achieved. The Parties agree and acknowledge that (i) the Facility’s aggregate installed

Exhibit B - 1
capacity may exceed the Storage Contract Capacity, and (ii) Seller may in its sole discretion elect to declare Commercial Operation, and deliver the COD Certificate, upon the installation of equipment for the Facility with any level of nameplate capacity equal to or exceeding ninety-five percent (95%) of the Storage Contract Capacity, including any level of nameplate capacity exceeding the Storage Contract Capacity.

3. Subject to Buyer’s confirmation in Section 2(iii) of this Exhibit B, the “Commercial Operation Date” shall be the later of (x) the Expected Commercial Operation Date or (y) the date in the COD Certificate on which Seller confirmed to Buyer that Commercial Operation was achieved.

(a) Seller shall cause Commercial Operation for the Facility to occur by the Guaranteed Commercial Operation Date. Seller shall notify Buyer that it intends to achieve Commercial Operation at least sixty (60) days before the anticipated Commercial Operation Date.

(b) If Seller achieves Commercial Operation for the Facility not later than the Guaranteed Commercial Operation Date, Buyer shall refund to Seller all Construction Delay Damages paid by Seller. Seller shall include the amount of the refund of the Construction Delay Damages with the first invoice to Buyer after Commercial Operation, and Buyer shall include payment of such refund in its payment of such invoice.

(c) Subject to Section 12.1, if Seller does not achieve Commercial Operation by the Guaranteed Commercial Operation Date, Seller shall pay COD Delay Damages to Buyer for each day after the Guaranteed Commercial Operation Date until the Commercial Operation Date. Seller shall pay COD Delay Damages in advance on a monthly basis. If Commercial Operation is achieved during a month for which Seller has paid COD Delay Damages, Buyer shall repay to Seller the amount of COD Delay Damages not owed by Seller for such month. Seller may include such amounts owed by Buyer in its invoices to Buyer hereunder. The Parties agree that Buyer’s receipt of COD Delay Damages shall be Buyer’s sole and exclusive remedy for Seller’s failure to achieve the Commercial Operation Date on or before the Guaranteed Commercial Operation Date, but (x) shall not be construed as Buyer’s declaration that an Event of Default has occurred under any provision of Section 11.1 and (y) shall not limit Buyer’s right to receive a Damage Payment upon exercise of Buyer’s default right pursuant to Section 11.2.

4. Termination for Failure to Achieve Commercial Operation.

Exhibit B - 2
5. **Extension of the Guaranteed Date.** The Guaranteed Construction Start Date and the Guaranteed Commercial Operation Date shall, subject to notice and documentation requirements set forth below, be automatically extended on a day-for-day basis due to:

(a) [Blacked out text]

(b) [Blacked out text]

6. **Failure to Reach Storage Contract Capacity.** If, at Commercial Operation, the Installed Capacity is less than one hundred percent (100%) of the Storage Contract Capacity, Seller shall have one hundred twenty (120) days after the Commercial Operation Date to install additional capacity or Network Upgrades such that the Installed Capacity is equal to (but not greater than) one hundred percent (100%) of the Storage Contract Capacity, and Seller shall provide to Buyer a new certificate substantially in the form attached as Exhibit G hereto specifying the new Installed Capacity. If Seller fails to construct the Storage Contract Capacity by such date, Seller shall, at its sole discretion and by written notice of its election to Buyer provided within ten (10) Business Days of such date, to either (a) pay “Capacity Damages” to Buyer, in an amount equal to [Blacked out text] for each MW that the Storage Contract Capacity exceeds the Installed Capacity, and the Storage Contract Capacity amount, the Guaranteed RA Amount, and other applicable portions of the Agreement shall be adjusted accordingly, or (b) increase the Buyer’s Share to an amount equal to the percentage resulting from dividing the Guaranteed RA Amount by the Installed Capacity, in which case the definition of Buyer’s Share shall be adjusted accordingly.
EXHIBIT C

COMPENSATION

Buyer shall compensate Seller for the Product associated with the Storage Contract Capacity in accordance with Section 8.2.
EXHIBIT D

SCHEDULING COORDINATOR RESPONSIBILITIES

(a) Seller to be Scheduling Coordinator. Upon Initial Synchronization of the Facility to the CAISO Grid, and during the Delivery Term, Seller shall be the Scheduling Coordinator or designate a qualified third party to provide Scheduling Coordinator services with the CAISO for the Facility. Seller shall perform or ensure that its third party Scheduling Coordinator performs all scheduling and transmission activities in compliance with (i) the CAISO Tariff, (ii) WECC scheduling practices, and (iii) Prudent Operating Practice.

(b) CAISO Costs and Revenues. Seller shall be responsible for CAISO costs (including penalties and other charges) and shall be entitled to all CAISO revenues (including credits and other payments), including revenues associated with CAISO dispatches, bid cost recovery, Inter-SC Trade credits, or other credits in respect of the charging Energy, discharging Energy, Ancillary Services, and Storage Capacity delivered from the Facility. The Parties agree that any Availability Incentive Payments (as defined in the CAISO Tariff) are for the benefit of Seller and for Seller’s account and that any Non-Availability Charges are the responsibility of Seller and for Seller’s account.

(c) CAISO Settlements. Seller or its third party Scheduling Coordinator shall be responsible for all settlement functions with the CAISO related to the Facility.
EXHIBIT E

PROGRESS REPORTING FORM

Each Progress Report must include the following items:

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

FORM OF COMMERCIAL OPERATION DATE CERTIFICATE

This certification ("Certification") of Commercial Operation is delivered by [LICENSED PROFESSIONAL ENGINEER] ("Engineer") to City of San José, a municipal corporation ("Buyer") in accordance with the terms of that certain Energy Storage Resource Adequacy Agreement dated [DATE] ("Agreement") by and between [SELLER] and Buyer. All capitalized terms used in this Certification but not otherwise defined herein shall have the respective meanings assigned to such terms in the Agreement.

As of [DATE], Engineer hereby certifies and represents to Buyer the following:

1. The Facility is fully operational, reliable and interconnected, fully integrated and synchronized with the Transmission System.

2. Seller has installed equipment for the Facility with a nameplate capacity of no less than [______]% of the Storage Contract Capacity.

3. Seller has commissioned all equipment in accordance with its respective manufacturer’s specifications.

4. The Facility is fully capable of charging, storing and discharging energy up to no less than ninety-five percent (95%) of the Storage Contract Capacity and receiving instructions to charge, store and discharge Energy, all within the operational constraints.

5. Authorization to parallel the Facility was obtained from the Participating Transmission Owner.

6. The Transmission Provider has provided documentation supporting full unrestricted release for Commercial Operation.

7. The CAISO has provided notification supporting Commercial Operation, in accordance with the CAISO Tariff.

8. Seller shall have caused the Facility to be included in the Full Network Model and has the ability to offer Energy Supply Bids into the CAISO Day-Ahead Market and Real-Time Market in respect to the Facility.

EXECUTED by [LICENSED PROFESSIONAL ENGINEER]

this ______ day of ______________, 20__.
[LICENSED PROFESSIONAL ENGINEER]

By: ____________________________

Printed Name: __________________

Title: __________________________
EXHIBIT G

FORM OF INSTALLED CAPACITY CERTIFICATE

This certification ("Certification") of Installed Capacity is delivered by [LICENSED PROFESSIONAL ENGINEER] ("Engineer") to City of San José, a municipal corporation ("Buyer") in accordance with the terms of that certain Energy Storage Resource Adequacy Agreement dated [DATE] ("Agreement") by and between [SELLER] and Buyer. All capitalized terms used in this Certification but not otherwise defined herein shall have the respective meanings assigned to such terms in the Agreement.

I hereby certify the following:

The [Storage Capacity Test] maximum dependable operating capability that can be sustained for four (4) consecutive hours to discharge electric energy is __ MW AC to the Delivery Point[, in accordance with the testing procedures, requirements and protocols set forth in Section 4.3 and Exhibit M] (the “Installed Capacity”).

EXECUTED by [LICENSED PROFESSIONAL ENGINEER]
this ________ day of _____________, 20__.

[LICENSED PROFESSIONAL ENGINEER]

By: ________________________________

Printed Name: ________________________________

Title: ________________________________
EXHIBIT H

FORM OF CONSTRUCTION START DATE CERTIFICATE

This certification of Construction Start Date (“Certification”) is delivered by [SELLER ENTITY] (“Seller”) to City of San José, a municipal corporation (“Buyer”) in accordance with the terms of that certain Energy Storage Resource Adequacy Agreement dated [DATE] (“Agreement”) by and between Seller and Buyer. All capitalized terms used in this Certification but not otherwise defined herein shall have the respective meanings assigned to such terms in the Agreement.

Seller hereby certifies and represents to Buyer the following:

1 Construction Start (as defined in Exhibit B of the Agreement) has occurred, and a copy of the notice to proceed that Seller issued to its contractor as part of Construction Start is attached hereto;

2 the Construction Start Date occurred on _____________ (the “Construction Start Date”); and

3 the precise Site on which the Facility is located is, which must be within the boundaries of the previously identified Site:

______________________________________________________________________.

IN WITNESS WHEREOF, the undersigned has executed this Certification on behalf of Seller as this ________ day of _____________, 20__.

[SELLER ENTITY]

By: ______________________________

Printed Name: ____________________

Title: ______________________________
EXHIBIT I

FORM OF LETTER OF CREDIT

[Issuing Bank Letterhead and Address]

IRREVOCABLE STANDBY LETTER OF CREDIT NO. [XXXXXXX]

Date:
Bank Ref.:
Amount: US$[XXXXXXXX]
Expiration Date:

Beneficiary:
City of San José
88 South 4th Street, Suite 130
San Jose, CA 95112
Attn: Deputy Director, Power Resources

Ladies and Gentlemen:

By the order of _________ (“Applicant”), we, [insert bank name and address] (“Issuer”) hereby issue our Irrevocable Standby Letter of Credit No. [XXXXXXX] (the “Letter of Credit”) in favor of City of San José, a municipal corporation (“Beneficiary”), for an amount not to exceed the aggregate sum of U.S. $[XXXXXXX] (United States Dollars [XXXXX] and 00/100), pursuant to that certain Energy Storage Resource Adequacy Agreement dated as of ______ and as amended (the “Agreement”) between Applicant and Beneficiary. This Letter of Credit shall become effective immediately and shall expire on [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 email to [bank email address] or (c) facsimile to [bank fax number] confirmed by [email to [bank email address]]. Transmittal by facsimile or email shall be deemed delivered when received.

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

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

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

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

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

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

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, Attn: Deputy Director, Power
Resources, 88 South 4th Street, Suite 130, San Jose, 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, as beneficiary (the “Beneficiary”) of the Irrevocable Letter of Credit No. [XXXXXXX] (the “Letter of Credit”) issued by [insert bank name] (the “Bank”) by order of __________ (the “Applicant”), hereby certifies to the Bank as follows:

1. Applicant and Beneficiary are party to that certain Energy Storage Resource Adequacy 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___________________________

Exhibit I - 3
EXHIBIT J

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 municipal corporation (together with its successors and permitted assigns, “Buyer”).

Recitals

A. Buyer and [SELLER ENTITY], a _____________________ (“Seller”), entered into that certain Energy Storage Resource Adequacy 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 Performance Security to secure Seller’s obligations under the ESA, as required by Section 8.8 of the ESA.

C. It is in the 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 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, liquidated damages, compensation for penalties, the Termination Payment, indemnification payments or other damages, as and when required pursuant to the terms of the ESA (the “Obligations”), provided, that Guarantor’s aggregate liability under or arising out of this Guaranty for payment of the Obligations shall not exceed ________ Dollars ($___________) (the “Guaranteed Amount”). The Parties understand and agree that any payment by Guarantor or Seller of any portion of the Obligations shall thereafter reduce the Guaranteed Amount hereunder on a dollar-for-dollar basis. This Guaranty is an irrevocable, absolute, unconditional and continuing guaranty of the full and punctual payment, and not of collection, of the Obligations 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 Obligations from Seller, any other guarantor of the Obligations or any other Person or entity or resort to any other means of obtaining payment of the Obligations. In the event Seller shall fail to duly, completely or punctually pay any Obligations 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 ESA. If Seller fails to pay any Obligations as required pursuant to the ESA within 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 Obligations. 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 pay such amount within five (5) Business Days following its receipt of the Payment Demand from Buyer.

3. Scope and Duration of Guaranty. This Guaranty applies only to the Guaranteed Amount. This Guaranty shall continue in full force and effect from the Effective Date until the earlier of the following: (x) all Obligations have been paid in full (whether directly or indirectly through set-off or netting of amounts owed by Buyer to Seller), or (y) replacement Performance Security is provided in an amount and form required by the terms of the 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. 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 any of the following reasons:

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

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

(iii) any indemnity agreement Seller may have from any party,

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

(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,

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

(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,

(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

Exhibit J - 2
any other event or circumstance that may now or hereafter constitute a defense to payment of the Guaranteed Amount, including, without limitation, statute of frauds and accord and satisfaction;

provided that Guarantor reserves the right to assert for itself any defenses, setoffs or counterclaims that Seller is or may be entitled to assert against Buyer (Except for such defenses, setoffs or counterclaims that may be asserted by Seller with respect to the ESA, but that are expressly waived under any provision of this Guaranty).

4. **Waivers by Guarantor.** Guarantor hereby unconditionally waives as a condition precedent to the performance of its obligations hereunder, with the exception of the requirements in Paragraph 2, (a) notice of acceptance, presentment or protest with respect to the Obligations 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 Obligations shall be extended, or such performance or compliance shall be waived,

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

(iii) subject to Paragraph 9, any (a) sale, transfer or consolidation of Seller into or with any other entity, (b) sale of substantial assets by, or restructuring of the corporate existence of, Seller or (c) change in ownership of any membership interests of, or other ownership interests in, Seller,

(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 Obligations 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 Obligations 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 as of the Effective Date that:

a. it has all necessary and appropriate corporate powers and authority and the legal right to execute and deliver, and perform its obligations under, this Guaranty,
b. this Guaranty constitutes its legal, valid and binding obligations enforceable against it in accordance with its terms, except as enforceability may be limited by bankruptcy, insolvency, moratorium and other similar laws affecting enforcement of creditors’ rights or general principles of equity,

c. the execution, delivery and performance of this Guaranty does not and will not contravene Guarantor’s organizational documents, any applicable Law or any contractual provisions binding on or affecting Guarantor,

d. there are no actions, suits or proceedings pending before any court, governmental agency or arbitrator, or, to the knowledge of the Guarantor, threatened, against or affecting Guarantor or any of its properties or revenues which may, in any one case or in the aggregate, adversely affect the ability of Guarantor to enter into or perform its obligations under this Guaranty, and

e. no consent or authorization of, filing with, or other act by or in respect of, any arbitrator or Governmental Authority, and no consent of any other Person (including, any stockholder or creditor of the Guarantor), that has not heretofore been obtained is required in connection with the execution, delivery, performance, validity or enforceability of this Guaranty by Guarantor.

7. Notices. Notices under this Guaranty shall be deemed received if sent to the address specified below: (i) on the day received if served by overnight express delivery, and (ii) four (4) Business Days after mailing if sent by certified, first class mail, return receipt requested. If transmitted by email, such notice shall be effective upon actual receipt if received during the recipient’s normal business hours, or at the beginning of the recipient’s next business day after receipt if not received during the recipient’s normal business hours. Any party may change its address or email address to which notice is given hereunder by providing notice of the same in accordance with this Paragraph 7.

If delivered to Buyer, to it at: City of San José
88 South 4th Street, Suite 130
San Jose, CA 95112

If delivered to Guarantor, to it at: [____]
[____]
Attn: [____]
Email: [____]

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 County of Santa Clara, California.

9. **Waiver of Jury Trial.** TO THE EXTENT PERMITTED UNDER APPLICABLE LAW, EACH OF THE PARTIES IRREVOCABLY WAIVES ALL RIGHT TO TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM (WHETHER BASED ON CONTRACT, TORT OR OTHERWISE) ARISING OUT OF OR RELATING TO THIS GUARANTY, THE TRANSACTIONS CONTEMPLATED BY THIS GUARANTY OR THE ACTIONS OF THE PARTIES IN THE NEGOTIATION, ADMINISTRATION, PERFORMANCE OR ENFORCEMENT HEREOF.

10. **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. 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:____________________________
EXHIBIT K

FORM OF REPLACEMENT RA NOTICE

This Replacement RA Notice (this “Notice”) is delivered by [SELLER ENTITY] (“Seller”) to City of San José, a 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 3.5 of the Agreement, Seller hereby provides the below Replacement RA product information:

**Unit Information**

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<thead>
<tr>
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<tbody>
<tr>
<td>Location</td>
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<tr>
<td>CAISO Resource ID</td>
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<td>Unit SCID</td>
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<tr>
<td>Prorated Percentage of Unit Factor</td>
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<td>Resource Type</td>
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<tr>
<td>Point of Interconnection with the CAISO Controlled Grid (“substation or transmission line”)</td>
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<td>Path 25 (North or South)</td>
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<tr>
<td>LCR Area (if any)</td>
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<tr>
<td>Deliverability restrictions, if any, as described in most recent CAISO deliverability assessment</td>
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<tr>
<td>Run Hour Restrictions</td>
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<td>Delivery Period</td>
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<tr>
<th>Month</th>
<th>Unit CAISO NOC (MW)</th>
<th>Unit Contract Quantity (MW)</th>
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<td>December</td>
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1 To be repeated for each unit if more than one.
[SELLER ENTITY]

By: ____________________________

Printed Name: ___________________

Title: ___________________________
EXHIBIT M

STORAGE CAPACITY TESTS

Storage Capacity Test Notice and Frequency

A. Commercial Operation Date Storage Capacity Test. Upon no less than ten (10) Business Days prior Notice to Buyer, Seller shall schedule and complete a Storage Capacity Test prior to the Commercial Operation Date. Such initial Storage Capacity Test shall be performed in accordance with this Exhibit M and shall establish the initial Storage Contract Capacity hereunder based on the actual capacity of the Storage Facility determined by such Storage Capacity Test.

B. Subsequent Storage Capacity Tests. Following the Commercial Operation Date, but not more than once per Contract Year within the first quarter of each Contract Year, upon no less than ten (10) Business Days prior Notice to Seller, Buyer shall have the right to require Seller to schedule and complete a Storage Capacity Test. In addition, Buyer shall have the right to require a retest of the most recent Storage Capacity Test at any time upon no less than five (5) Business Days prior written Notice to Seller if Buyer provides data with such Notice reasonably indicating that the Storage Capacity has varied materially from the results of the most recent Storage Capacity Test. Seller shall have the right to perform a Storage Capacity Test or run a retest of any Storage Capacity Test at any time during any Contract Year upon five (5) Business Days’ prior written Notice to Buyer (or any shorter period reasonably acceptable to Buyer consistent with Prudent Operating Practice). Notwithstanding anything herein to the contrary, any revenues associated with a Storage Capacity Test that is initiated by Seller shall accrue to Buyer.

C. Test Results and Re-Setting of Storage Capacity. No later than five (5) days following any Storage Capacity Test, Seller shall submit a testing report detailing results and findings of the test. The report shall include meter readings and plant log sheets verifying the operating conditions and output of the Storage Facility. In accordance with Section 4.3(c) of the Agreement and Part II(I) below, the actual capacity determined pursuant to a Storage Capacity Test (up to, but not in excess of, the original Storage Contract Capacity set forth on the Cover Sheet, as such original Storage Contract Capacity on the Cover Sheet may have been adjusted (if at all) pursuant to Exhibit B) shall become the new Storage Contract Capacity at the beginning of the day following the completion of the test for calculating the Storage Rate and all other purposes under this Agreement.

Storage Capacity Test Procedures

PART I. GENERAL.

Each Storage Capacity Test (including the initial Storage Capacity Test, each subsequent Storage Capacity Test, and all re-tests thereof permitted under paragraph B above) shall be conducted in accordance with Prudent Operating Practices and the provisions of this Exhibit M. For ease of reference, a Storage Capacity Test is sometimes referred to in this Exhibit M as a “SCT”. Buyer or its representative may be present for the SCT and may, for informational purposes only, use its own metering equipment (at Buyer’s sole cost).
PART II. REQUIREMENTS APPLICABLE TO ALL STORAGE CAPACITY TESTS.

A. Purpose of Test. Each SCT shall:

(1) Determine an updated Storage Contract Capacity;

(2) Determine the amount of Energy required to fully charge the Storage Facility;

(3) Determine the Storage Facility charge ramp rate;

(4) Determine the Storage Facility discharge ramp rate.

B. Parameters. During each SCT, the following parameters shall be measured and recorded simultaneously for the Storage Facility, at a minimum of ten (10) minute intervals:

(1) time (minutes);

(2) charging energy (MWh);

(3) discharging energy (MWh);

(4) Stored Energy Level (MWh).

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

(1) Relative humidity (%);

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

(3) Ambient air Temperature (°F).

D. Test Elements. Each SCT Shall include the following test elements:

(1) The discharging of the Storage Facility to 0% Stored Energy Level;

(2) The charging of the Storage Facility at a constant power charge rate equal to the Storage Contract Capacity as of the commencement of the Storage Capacity Test;

(3) The measurement of the time from when the charge signal is sent until the constant power charge rate is achieved (dividing the constant power charge rate by this measurement will determine the updated charging ramp rate);
The measurement of Energy, as measured by the Storage Facility Meter, that is required to charge the Storage Facility until a 100% Stored Energy Level is achieved;

The discharging of the Storage Facility at a constant power discharge rate equal to the Storage Contract Capacity as of the commencement of the Storage Capacity Test;

The measurement of the time from when the discharge signal is sent until the constant power discharge rate is achieved (dividing the constant power charge rate by this measurement will determine the updated discharging ramp rate);

The measurement of Energy, as measured by the Storage Facility Meter, that is discharged from the Storage Facility to the Delivery Point until either a 0% Stored Energy Level is achieved or the constant power charge rate starts to de-rate (the Energy discharged divided by four (4) will determine the new Storage Contract Capacity).

E. Test Conditions.

(i) General. At all times during a SCT, the Storage Facility shall be operated in compliance with Prudent Operating Practices and all operating protocols recommended, required or established by the manufacturer for operation.

(ii) Abnormal Conditions. If abnormal operating conditions that prevent the recordation of any required parameter occur during a SCT (including a level of irradiance that does not permit the Generating Facility to produce sufficient Charging Energy), Seller may postpone or reschedule all or part of such SCT in accordance with Part II.F below.

(iii) Instrumentation and Metering. Seller shall provide all instrumentation, metering and data collection equipment required to perform the SCT. The instrumentation, metering and data collection equipment electrical meters shall be calibrated in accordance with Prudent Operating Practice.

F. Incomplete Test. If any SCT is not completed in accordance herewith, Buyer may in its sole discretion: (i) accept the results up to the time the SCT stopped; (ii) require that the portion of the SCT not completed, be completed within a reasonable specified time period; or (iii) require that the SCT be entirely repeated. Notwithstanding the above, if Seller is unable to complete a SCT due to a Force Majeure Event or the actions or inactions of Buyer or the CAISO or the PTO or the Transmission Provider, Seller shall be permitted to reconduct such SCT on dates and at times reasonably acceptable to the Parties.

G. Final Report. Within fifteen (15) Business Days after the completion of any SCT, Seller shall prepare and submit to Buyer a written report of the results of the SCT, which report shall include:
(1) a record of the personnel present during the SCT that served in an operating, testing, monitoring or other such participatory role;

(2) the measured data for each parameter set forth in Part II.A through D, as applicable, including copies of the raw data taken during the test;

(3) the current level of storage contract capacity, the amount of Energy required to fully charge the battery, the current charge and discharge ramp rate, and the Maximum Stored Energy Level, each determined by the SCT, including supporting calculations; and

(4) Seller’s statement of either Seller’s acceptance of the SCT or Seller’s rejection of the SCT results and reason(s) therefor.

Within ten (10) Business Days after receipt of such report, Buyer shall notify Seller in writing of either Buyer’s acceptance of the SCT results or Buyer’s rejection of the SCT and reason(s) therefor.

If either Party reasonably rejects the results of any SCT, such SCT shall be repeated in accordance with Part II.F.

H. Supplementary Storage Capacity Test Protocol. No later than sixty (60) days prior to commencing Facility construction, Seller shall deliver to Buyer for its review and approval (such approval not to be unreasonably delayed or withheld) a supplement to this Exhibit M with additional and supplementary details, procedures and requirements applicable to Storage Capacity Tests based on the then current design of the Facility (“Supplementary Storage Capacity Test Protocol”). Thereafter, from time to time, Seller may deliver to Buyer for its review and approval (such approval not to be unreasonably delayed or withheld) any Seller recommended updates to the then current Supplementary Storage Capacity Test Protocol. The initial Supplementary Storage Capacity Test Protocol (and each update thereto), once approved by Buyer, shall be deemed an amendment to this Exhibit M.

I. Adjustment to Storage Contract Capacity. The total amount of discharged Energy delivered to the Delivery Point (expressed in MWh AC) during each of the first four hours of discharge (up to, but not in excess of, the product of (i) the original Storage Contract Capacity set forth on the Cover Sheet, as such original Storage Contract Capacity on the Cover Sheet may have been adjusted (if at all) under this Agreement, multiplied by (ii) 4 hours) shall be divided by four hours to determine the Storage Contract Capacity, which shall be expressed in MW AC, and shall be the new Storage Contract Capacity in accordance with Section 4.3(c) of the Agreement.
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<th>EDPR Scarlet II LLC</th>
<th>City of San José, a municipal corporation</th>
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<tr>
<td><strong>All Notices:</strong></td>
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<tr>
<td>Street: 1501 Mckinney Street, Suite 1300</td>
<td><strong>Standard Mail</strong></td>
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<tr>
<td>City: Houston, Texas 77010</td>
<td>200 East Santa Clara Street</td>
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<tr>
<td>Attn: Executive Vice President – Asset Operations</td>
<td>San Jose, CA 95113</td>
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<tr>
<td>EDP Renewables North America LLC</td>
<td><strong>Shipping/courier</strong></td>
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<tr>
<td>Phone: [redacted]</td>
<td>88 South 4th Street, Suite 130</td>
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<tr>
<td>Facsimile: [redacted]</td>
<td>San Jose, CA 95112</td>
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<tr>
<td>Email: [redacted]</td>
<td><strong>Attn:</strong> Deputy Director, Power Resources</td>
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<tr>
<td>With a copy to (at the same address):</td>
<td>Phone: [redacted]</td>
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<tr>
<td>General Counsel 1501 McKinney Street, Suite 1300 Houston, TX</td>
<td>Email: [redacted]</td>
</tr>
<tr>
<td>77010 E-mail: <a href="mailto:legalnotice@edpr.com">legalnotice@edpr.com</a></td>
<td><strong>Email:</strong> <a href="mailto:procurement@sanjosecleanenergy.org">procurement@sanjosecleanenergy.org</a></td>
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<td>Office of the City Attorney</td>
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<tr>
<td></td>
<td>Attn. Deputy City Attorney, Community Energy</td>
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<tr>
<td></td>
<td>200 East Santa Clara Street, 16th Floor Tower San Jose, CA</td>
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<tr>
<td></td>
<td><strong>Direct:</strong> (408) 535-1900</td>
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<td></td>
<td>Email: <a href="mailto:cao.main@sanjoseca.gov">cao.main@sanjoseca.gov</a></td>
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<td><strong>Attn:</strong> Division Manager, Risk Management, Contracts, &amp;</td>
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<td>Administration</td>
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<td><strong>With additional Notice of an Event of Default to:</strong></td>
<td><strong>With additional Notice of an Event of Default to:</strong></td>
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<tr>
<td>Attn: General Counsel</td>
<td>Attn: Director of Finance</td>
</tr>
<tr>
<td>1501 McKinney Street, Suite 1300</td>
<td>200 East Santa Clara Street</td>
</tr>
<tr>
<td>Houston, TX 77010</td>
<td>San Jose, CA 95113</td>
</tr>
<tr>
<td>Facsimile: (713) 265-2500</td>
<td>Phone: (408) 535-7011</td>
</tr>
<tr>
<td>E-mail: <a href="mailto:legalnotice@edpr.com">legalnotice@edpr.com</a></td>
<td>Email: [REDACTED]</td>
</tr>
<tr>
<td>With a copy to (at the same address):</td>
<td>and</td>
</tr>
<tr>
<td>Attn: Executive Vice President — Asset Operations</td>
<td>Attn: Deputy City Attorney, Community Energy</td>
</tr>
<tr>
<td>EDP Renewables North America LLC</td>
<td>200 East Santa Clara Street, 16th Floor Tower</td>
</tr>
<tr>
<td>[REDACTED]</td>
<td>San Jose, CA 95113-1905</td>
</tr>
<tr>
<td>[REDACTED]</td>
<td>Direct: (408) 535-1900</td>
</tr>
<tr>
<td>[REDACTED]</td>
<td>Email: <a href="mailto:cao.main@sanjoseca.gov">cao.main@sanjoseca.gov</a></td>
</tr>
</tbody>
</table>