ENERGY STORAGE AND SERVICES AGREEMENT

COVER SHEET

**Seller**: [***Seller*** ***na******me***], [***Entity Type***]

**Buyer**: Peninsula Clean Energy Authority, a California joint powers authority

**Description of Facility**: A [\_\_] MW AC energy storage facility with at least [four (4)] hours of continuous discharging at the maximum rate of discharge, located in [\_\_] County, California (as further defined herein, the **“Facility”**).

**Guaranteed Commercial Operation Date: [*Date*]**

**Milestones:**

| **Milestone** | **Expected Completion Date** |
| --- | --- |
| **Site Control** | **[*Month, Year*]** |
| **Conditional Use Permit** | **[*Month, Year*]** |
| **Phase II Interconnection Study Results** | **[*Month, Year*]** |
| **Executed Interconnection Agreement** | **[*Month, Year*]** |
| **Obtain Full Capacity Deliverability Status Allocation** | **[*Month, Year*]** |
| **Procure Major Equipment** | **[*Month, Year*]** |
| **Financial Close** | **[*Month, Year*]** |
| **Construction Start** | **[*Month, Year*]** |
| **Initial Synchronization** | **[*Month, Year*]** |
| **Deliverability Network Upgrades completed** | **[*Month, Year*]** |
| **CAISO Commercial Operation** | **[*Month, Year*]** |
| **Commercial Operation Date** | **[*Month, Year*]** |

**Delivery Term: [*Number of years*] Contract Years**

**Guaranteed Storage Capacity**: **[\_\_]** MW AC at [four (4)] hours of continuous discharging at the maximum rate of discharge (**[\_\_]** MWh).

**Guaranteed Interconnection Capacity:** **[**\_\_**]** MW

**Guaranteed Round-Trip Efficiency**:

|  |  |
| --- | --- |
| **Contract Year** | **Guaranteed Round-Trip Efficiency** |
| 1 | **[\_\_]**% |
| 2 | **[\_\_]**% |
| 3 | **[\_\_]**% |
| 4 | **[\_\_]**% |
| [***Through N***] | **[\_\_]**% |

The “**Storage Rate**” shall be as specified below:

| **Contract Years** | **Storage Rate ($/kW-month)** |
| --- | --- |
| All | $**[\_\_]**/kW-month |

**Product:**

x Charging Energy

x Discharging Energy

x Capacity Attributes

x Storage Capacity

x Ancillary Services

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

**Development Security: [*To equal $100/kW of Guaranteed Storage Capacity*.]**

**Performance Security: [*To equal five percent (5%) of the total term project revenues.*]**

**Damage Payment: [*To equal the Development Security Amount*]**

*[Signatures on following page.]*

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

|  |  |
| --- | --- |
| SELLER**[*Name of Seller*]**By: Name: Title:  | BUYERPeninsula Clean Energy AuthorityBy: PCE Executive Officer |

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**ENERGY STORAGE AND SERVICES AGREEMENT**

This Energy Storage and Services Agreement (“**Agreement**”) is entered into as of **[\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_]** (the “**Effective Date**”), between Seller and Buyer (each also referred to as a “**Party**” and collectively as the “**Parties**”).

**RECITALS**

WHEREAS, Seller intends to develop, design, construct, own or otherwise have control over, and operate the energy storage facility as described in Exhibit A (the “**Facility**”); and

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

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

# DEFINITIONS

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

“**AC**” means alternating current.

“**Accepted Compliance Costs**” has the meaning set forth in Section 3.8(c).

“**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.

“**Agreement**” has the meaning set forth in the Preamble and includes the Cover Sheet and any exhibits, schedules and any written supplements hereto.

“**Ancillary Services**” means ancillary services as defined in the CAISO Tariff that are associated with the Facility and any related services, and include Spinning Reserve, Non-Spinning Reserve, Frequency Regulation, Frequency Response, Voltage Control, VAR Dispatch, and Power Factor Correction (as each is defined in the CAISO Tariff).

“**Availability Incentive Payment**” has the meaning set forth in the CAISO Tariff.

“**Availability Notice**” means Seller’s availability forecasts issued pursuant to Section 4.4 with respect to the Available Effective Storage Capacity and Available Storage Capability

“**Available Generating Capacity**” means the capacity from the Generating Facility, expressed in whole MWs, that is available at a particular time to generate Energy.

**“Available Storage Capability”** has the meaning defined in Exhibit M.

**“Available Storage Capacity”** has the meaning defined in Exhibit M.

“**Bankrupt**” means with respect to any entity, such entity that (a) files a petition or otherwise commences, authorizes or acquiesces in the commencement of a proceeding or cause of action under any bankruptcy, insolvency, reorganization or similar Law, (b) has any such petition filed or commenced against it which remains unstayed or undismissed for a period of ninety (90) days, (c) makes an assignment or any general arrangement for the benefit of creditors, (d) otherwise becomes bankrupt or insolvent (however evidenced), (e) has a liquidator, administrator, receiver, trustee, conservator or similar official appointed with respect to it or any substantial portion of its property or assets, or (f) is generally unable to pay its debts as they fall due.

“**Business Day**” means any day except a Saturday, Sunday, or a Federal Reserve Bank holiday in California. A Business Day begins at 8:00 a.m. and ends at 5:00 p.m. local time for the Party sending a Notice, or payment, or performing a specified action.

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

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

“**CAISO Approved Meter**” means a CAISO approved revenue quality meter or meters, 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 Energy delivered by the Facility to the Delivery Point less Electrical Losses and Station Use, in accordance with the CAISO Tariff.

“**CAISO Charges Invoice**” has the meaning set forth in Section 4.3(d).

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

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

“**CAISO Operating Order**” means the “operating order” defined in Section 37.2.1.1 of the CAISO Tariff.

“**CAISO-Penalized Shortfall**” has the meaning set forth in Section 3.9(b)(ii).

“**CAISO Tariff**” means the California Independent System Operator Corporation Agreement and Tariff, Business Practice Manuals (BPMs), and Operating Procedures, including the rules, protocols, procedures and standards attached thereto, as the same may be amended or modified from time-to-time and approved by FERC.

“**Capacity Attribute**” means any current or future defined characteristic, certificate, tag, credit, or accounting construct associated with the amount of Energy that the Facility can store and/or deliver to the CAISO Grid at a particular moment and that can be purchased and sold under CAISO market rules, including Resource Adequacy Benefits. Capacity Attributes shall also include all rights to provide and all benefits related to the provision of Ancillary Services (as defined in the CAISO Tariff) and reactive power.

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

“**Change of Control**”, in the case of Seller, means any circumstance in which Seller’s Ultimate Parent ceases to be the Ultimate Parent or 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:

1. any ownership interest in Seller held by its Ultimate Parent indirectly through one or more intermediate entities shall not be counted towards the Ultimate Parent’s ownership interest in Seller unless the Ultimate Parent directly or indirectly owns more than fifty percent (50%) of the outstanding equity interests in each such intermediate entity; and
2. ownership interests in Seller owned directly or indirectly by any Lender (including any tax equity provider) shall be excluded from the total outstanding equity interests in Seller.

Notwithstanding the foregoing, (a) so long as the Ultimate Parent Controls Persons owning at least [\_\_\_] MW of operating renewable electricity generating projects, a change in the Control of the Ultimate Parent, or (b) a change in the Control of Seller resulting from the exercise by Lender of its remedies under its financing agreements for the Facility with Seller or an Affiliate of Seller shall not be a Change of Control hereunder; provided that the entity acquiring Control of the Ultimate Parent or of Seller, directly or indirectly, is a Qualified Transferee and Buyer is given written notice of the Change of Control within five (5) Business Days of its occurrence.

“**Charging Energy**” means all Energy, less Station Use and Electrical Losses, if any, delivered to the Facility pursuant to a Charging Notice, as measured by the Storage Facility Meter. All Charging Energy shall be used solely to charge the Facility.

“**Charging Notice**” means the operating instruction, and any subsequent updates, given by Buyer or the CAISO, directing the Facility to charge at a specific MW rate to a specified Stored Energy Level, provided that any such operating instruction shall be in accordance with Section 4.6 and the Operating Restrictions.

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

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

“**Commercial Operation Delay Damages**” means an amount equal to (a) the Development Security amount required hereunder, divided by (b) ninety (90).

“**Compliance Actions**” has the meaning set forth in Section 3.8(a).

“**Compliance Expenditure Cap**” has the meaning set forth in Section 3.8.

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

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

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

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

“**Contract Year**” means a period of twelve (12) consecutive months. The first Contract Year shall commence on the Commercial Operation Date, and each subsequent Contract Year shall commence on the anniversary of the Commercial Operation Date.

“**Control**” (including, with correlative meanings, the terms “Controlled by” and “under common Control with”), as used with respect to any Person, shall mean (a) the direct or indirect right to cast more than 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 more than 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.

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

“**Cover Sheet**” means the cover sheet to this Agreement.

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

“**CPUC**” means the California Public Utilities Commission, or successor entity.

“**CPUC-Penalized Shortfall**” has the meaning set forth in Section 3.6(b)(i).

“**CPUC System RA Penalty**” means the penalties for “System Procurement Deficiency” adopted by the CPUC in its Decision 10-06-036, as may be updated or supplemented from time to time.

“**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, in either case by S&P or Moody’s. If ratings by S&P and Moody’s are not equivalent, the lower rating shall apply.

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

1. CAISO orders, directs, alerts, or provides notice to a Party, including a CAISO Operating Order, to curtail Energy deliveries;
2. a curtailment ordered by the Participating Transmission Owner or distribution operator (if the Facility is interconnected to distribution or sub-transmission system) for reasons including, but not limited to, (i) any situation that affects normal function of the electric system including, but not limited to, any abnormal condition that requires action to prevent circumstances such as equipment damage, loss of load, or abnormal voltage conditions, or (ii) any warning, forecast or anticipation of conditions or situations that jeopardize the Participating Transmission Owner’s or distribution operator’s electric system integrity or the integrity of other systems to which the Participating Transmission Owner is connected;
3. a curtailment ordered by the Participating Transmission Owner due to scheduled or unscheduled maintenance on the Participating Transmission Owner’s transmission facilities that prevents (i) Buyer from receiving or (ii) Seller from delivering Energy to the Delivery Point; or
4. a curtailment in accordance with Seller’s obligations under its Interconnection Agreement with the Participating Transmission Owner or distribution operator.

For the avoidance of doubt, if Buyer or Buyer’s Scheduling Coordinator submitted a Self-Schedule and/or an Energy Supply Bid in its final CAISO market participation in respect of a given time period that clears, in full, the applicable CAISO market for the full amount of Energy forecasted to be produced by or delivered from the Facility for such time period, any notice from the CAISO having the effect of requiring a reduction during the same time period is a Curtailment Order.

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

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

“**Damage Payment**” means a liquidated damages payment to be paid by the Defaulting Party to the Non-Defaulting Party after a Terminated Transaction occurring prior to the Commercial Operation Date, in a dollar amount set forth in Section 11.3(a).

“**Day-Ahead Forecast**” has the meaning set forth in Section 4.4(b).

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

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

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

“**Delivery Point**” means the PNode designated by the CAISO for the Facility.

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

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

“**Development Security**” means (i) cash or (ii) a Letter of Credit in the amount specified on the Cover Sheet, deposited with Buyer in conformance with Section 8.7.

“**Discharging Energy**” means all Energy delivered to the Delivery Point from the Facility, net of Station Use and Electrical Losses, as measured by the Storage Facility Meter.

“**Discharging Notice**” means the operating instruction, and any subsequent updates, given by Buyer to Seller, directing the Facility to discharge Discharging Energy at a specific MWh rate to a specified Stored Energy Level, provided that any such operating instruction or updates shall be in accordance with Section 4.6 and the Operating Restrictions.

“**Diverse Business Enterprises**” means a women, minority, disabled veteran, lesbian, gay, bisexual and /or transgender business enterprise, as more particularly set forth in CPUC General Order 156.

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

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

“**Electrical Losses**” means all transmission or transformation losses between the Facility and the Delivery Point, including losses associated with (i) delivery of Discharging Energy to the Delivery Point and (ii) delivery of Charging Energy to the Facility.

“**Energy**” means metered electrical energy in MWh.

“**Energy Supply Bid**” has the meaning set forth in the CAISO Tariff.

“**Estimated Placed-In-Service Date**” has the meaning set forth in Section 2.1(b).

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

“**Excused Event**” has the meaning set forth in Exhibit M.

“**Facility**” means the energy storage facility described on the Cover Sheet and in Exhibit A (including the operational requirements of the energy storage facility), located at the Site and including mechanical equipment and associated facilities and equipment and Seller’s rights and interests in Shared Facilities required to deliver the Product, but excluding any portions of Shared Facilities other than Seller’s rights and interests thereto.

“**FCDS Deficiency Notice**” has the meaning set forth in Section 2.1(b).

“**FERC**” means the Federal Energy Regulatory Commission or any successor government agency.

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

“**Flexible Capacity Category**” has the definition in Appendix A of the CAISO Tariff.

“**Flexible Resource Adequacy Benefits**” means the attributes, however defined, of a resource that can be used to satisfy the flexible resource adequacy obligations of a load serving entity, including Flexible Capacity.

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

“**Force Majeure Event**” has the meaning set forth in Section 10.1.

“**Forced Facility Outage**” means an unexpected failure of one or more components of the Facility or any outage on the Transmission System that prevents Seller from providing Product and that is not the result of a Force Majeure Event.

“**Forced Labor**” has the meaning set forth in Section 13.4.

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

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

“**Future Environmental Attributes**” shall mean any and all emissions, air quality or other environmental attributes under any and all 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 Facility. Future Environmental Attributes do not include (i) any energy, capacity, reliability or other power attributes from the Facility, (ii) investment or production tax credits associated with the construction or operation of the Facility and other financial incentives in the form of credits, reductions, or allowances associated with the Facility that are applicable to a state or federal income taxation obligation, (iii) fuel-related subsidies or “tipping fees” that may be paid to Seller to accept certain fuels, or local subsidies received by the generator for the destruction of particular preexisting pollutants or the promotion of local environmental benefits, or (iv) emission reduction credits encumbered or used by the Facility for compliance with local, state, or federal operating and/or air quality permits.

“**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, without limitation, reference to information supplied by one or more third parties, which shall exclude Affiliates of the Non-Defaulting Party, including without limitation, quotations (either firm or indicative) of relevant rates, prices, yields, yield curves, volatilities, spreads or other relevant market data in the relevant markets, comparable transactions, forward price curves based on economic analysis of the relevant markets, settlement prices for comparable transactions at liquid trading hubs (e.g., NP-15), all of which should be calculated for the remaining Contract Term, and includes the value of Capacity Attributes.

“**GHG Regulations**” means Title 17, Division 3 (Air Resources), Chapter 1 (Air Resources Board), Subchapter 10 (Climate Change), Article 5 (Emissions Cap), Sections 95800 to 96023 of the California Code of Regulations, as amended or supplemented from time to time.

“**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.

“**Greenhouse Gas**” or “**GHG**” has the meaning set forth in the GHG Regulations or in any other applicable Laws.

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

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

“**Guaranteed Interconnection Capacity**” means the interconnection rights provided under the Interconnection Agreement in the amount set forth on the Cover Sheet.

“**Guaranteed RA Capacity**” means the sum of the Guaranteed PV Capacity and the Guaranteed Storage Capacity.

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

“**Guaranteed Storage Availability**” has the meaning set forth in Section 4.10(a).

“**Guaranteed Storage Capacity**” has the meaning set forth on the Cover Sheet, as may be adjusted pursuant to Exhibit B.

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

“**Indemnified Party**” has the meaning set forth in Section 17.1.

“**Indemnifying Party**” has the meaning set forth in Section 17.1.

“**Initial Synchronization**” means the initial delivery of Energy to the Facility from the interconnection point or from the Facility to the interconnection point, as specified in the Interconnection Agreement.

“**Installed Storage Capacity**” means the maximum dependable operating capability of the Facility to discharge electric energy for [four (4)] consecutive hours at the maximum discharge rate (up to but not in excess of the Guaranteed Storage Capacity), as measured in MW(ac) at the Delivery Point, that achieves Commercial Operation, as evidenced by a certificate substantially in the form attached as Exhibit G-2 hereto provided by Seller to Buyer.

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

“**Interconnection Delay Notice**” has the meaning set forth in Section 2.1(b).

“**Interconnection Agreement**” means the interconnection agreement entered into by Seller pursuant to which the Facility will be interconnected with the Transmission System, and pursuant to which Seller’s Interconnection Facilities and any other Interconnection Facilities will be constructed, operated and maintained during the Contract Term.

“**Interconnection Capacity Limit**” means the maximum instantaneous amount of Energy that is permitted to be delivered to the Delivery Point.

“**Interconnection Facilities**” means the interconnection facilities, control and protective devices and metering facilities required to connect the Facility with the Transmission System (or PTO’s distribution system, as applicable) in accordance with the Interconnection Agreement.

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

“**Internal Revenue Service Requirements**” means those requirements set forth in Section 48 of the Internal Revenue Code and associated regulations promulgated by the Internal Revenue Service that pertain to the eligibility of energy property to qualify for the federal investment tax credit.

“**Joint Powers Act**” means the Joint Exercise of Powers Act of the State of California (Government Code Section 6500 et seq.).

“**Joint Powers Agreement**” means that certain Joint Powers Agreement dated February 29, 2016 under which Buyer is organized as a Joint Powers Authority in accordance with the Joint Powers Act.

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

“**Lender**” means, collectively, (A) in the case of Seller, any Person (i) providing senior or subordinated construction, interim or long-term debt, equity or tax equity financing or refinancing for or in connection with the development, construction, purchase, installation or operation of the Facility, whether that financing or refinancing takes the form of private debt, equity, public debt or any other form (including financing or refinancing provided to a member or other direct or indirect owner of Seller), including any equity or tax equity investor directly or indirectly providing financing or refinancing for the Facility or purchasing equity ownership interests of Seller and/or its Affiliates, and any trustee or agent 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 and/or (iii) participating in a lease financing (including a sale leaseback or leveraged leasing structure) with respect to the Facility, and (B) in the case of Buyer, any Person (i) providing senior or subordinated short-term or long-term debt or equity financing or refinancing for or in connection with the business or operations of Buyer, whether that financing or refinancing takes the form of private debt, equity, public debt or any other form, and any trustee or agent acting on their behalf, and/or (ii) providing interest rate or commodity protection under an agreement hedging or otherwise mitigating the cost of any of the foregoing obligations.

“**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 an independent, professional engineer (a) reasonably acceptable to Buyer, (b) who has been retained by, or for the benefit of, the Lenders, as their “independent engineer” for the purpose of financing the Facility, or (c) who (i) is licensed to practice engineering in the State of California, (ii) has training and experience in the power industry specific to the technology of the Facility, (iii) is licensed in an appropriate engineering discipline for the required certification being made, and (iv) unless otherwise approved by Buyer, is not a representative of a consultant, engineer, contractor, designer or other individual involved in the development of the Facility or of a manufacturer or supplier of any equipment installed at the Facility.

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

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

**“Local Capacity Area Resource Adequacy Benefits**” means the attributes, however defined, of a Local Capacity Area Resource that can be used to satisfy the local resource adequacy obligations of a load serving entity.

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

“**Losses**” means, with respect to any Party, an amount equal to the present value of the economic loss to it, if any (exclusive of Costs), resulting from termination of this Agreement for the remaining Contract Term, determined in a commercially reasonable manner. Factors used in determining economic loss to a Party may include, without limitation, reference to information supplied by one or more third parties, which shall exclude Affiliates of the Non-Defaulting Party, including without limitation, quotations (either firm or indicative) of relevant rates, prices, yields, yield curves, volatilities, spreads or other relevant market data in the relevant markets, comparable transactions, forward price curves based on economic analysis of the relevant markets, settlement prices for comparable transactions at liquid trading hubs (e.g., NYMEX), all of which should be calculated for the remaining Contract Term and must include the value of Capacity Attributes.

“**Main Power Transformer**” means the Facility’s main step-up transformer as depicted on the one-line diagram set forth in Exhibit A.

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

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

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

“**MW**” means megawatts measured 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.

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

“**Non-Availability Charge**” has the meaning set forth in the CAISO Tariff.

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

“**Notice**” shall, unless otherwise specified in this Agreement, mean written communications by a Party to be delivered by hand delivery, United States mail, overnight courier service, facsimile or electronic messaging (e-mail).

“**Operating Restrictions**” means the requirements and limitations set forth on Exhibit O.

“**Other Facility(ies)**” means the electric generating or energy storage facility(ies), other than the Facility, utilizing any facilities shared with the Facility to enable delivery of energy from each such other generating or storage facility to the Delivery Point, together with all materials, equipment systems, structures, features and improvements necessary to produce electric energy at each such other generating or storage facility, but (i) with respect to the Shared Facilities, excluding Seller’s interests therein and (ii) excluding the real property on which each such other generating or storage facility is, or will be located, land rights and interests in land.

“**Participating Transmission Owner**” or “**PTO**” means an entity that owns, operates and maintains transmission or distribution lines and associated facilities and/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 **[\_\_\_\_\_\_\_\_\_]**.

“**Party**” has the meaning set forth in the Preamble.

“**Performance Security**” means (i) cash, or (ii) a Letter of Credit, in the amount specified on the Cover Sheet, deposited with Buyer in conformance with Section 8.8.

“**Performance Security End Date**” has the meaning set forth in Section 8.8.

“**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.

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

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

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

“**Primary Availability**” has the meaning set forth in Exhibit M.

“**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 the practices, methods and standards of professional care, skill and diligence engaged in or approved by a significant portion of the electric power industry in the Western United States for facilities of similar size, type, and design, that, in the exercise of reasonable judgment, in light of the facts known at the time, would have been expected to accomplish results consistent with Law, reliability, safety, environmental protection, applicable codes, and standards of economy and expedition. Prudent Operating Practices are not necessarily defined as the optimal standard practice method or act to the exclusion of others, but rather refer to a range of actions reasonable under the circumstances.

“**Qualified Transferee**” means an entity that (a) has a Tangible Net Worth of one hundred fifty million dollars ($150,000,000) or (b) has (i) a Tangible Net Worth of fifty million dollars ($50,000,000) and (ii) a Credit Rating of A2 or higher by Moody’s or A- or higher by S&P, if rated by only one such entity, or a Credit Rating of A2 or higher by Moody’s and A- or higher by S&P, if rated by both such entities, and, in any case, (c) is not a public utility regulated by the CPUC or an Affiliate thereof, and (d) has, or retains to operate the Facility a Person that has, at least three (3) years of experience operating at least two (2) or more storage facilities of the same technology and with at least as much Installed Storage Capacity as the Facility.

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

“**RA Deficiency Amount**” means the liquidated damages payment that Seller shall pay to Buyer for an applicable RA Shortfall Month as calculated in accordance with Section 3.6(b).

“**RA Guarantee Date**” means the Commercial Operation Date.

“**RA Plan**” has the meaning set forth for “Resource Adequacy Plan” in the CAISO Tariff.

“**RA Shortfall**” means the difference, expressed in kW, of (i) the Facility’s Qualifying Capacity minus (ii) the Resource Adequacy Benefits of the Facility for such month able to be shown on Buyer’s monthly or annual RA Plan to the CAISO and CPUC and counted as Resource Adequacy Benefits.

“**RA Shortfall Month**” means the applicable calendar month following the RA Guarantee Date during which Seller fails to provide Resource Adequacy Benefits in an amount equal to the Facility’s Qualifying Capacity as required hereunder for purposes of calculating an RA Deficiency Amount under Section 3.6(b).

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

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

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

“**Replacement RA**” means Resource Adequacy Benefits equivalent to those that would have been provided by the Facility with respect to the applicable month for which the Replacement RA is being provided. Replacement RA shall (a) include, if applicable, Flexible Resource Adequacy Benefits that are of the same system or local designation, Flexible Capacity Category, and Resource Category as the Facility; (b) be from a resource located in the same Transmission Access Charge Area (as described in the CAISO Tariff) as the Facility and, (c) to the extent that the Facility would have qualified as a Local Capacity Area Resource for such month, be located in the same Local Capacity Area as the Facility, and (d) provides Resource Adequacy Benefits in the same hourly periods as the Facility. Replacement RA shall not be provided from any generating facility or unit that utilizes coal or coal materials as a source of fuel.

“**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 CPUC Decisions 04-01-050, 04-10-035, 05-10-042, 06-06-064, 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, 19-10-021, and any subsequent CPUC ruling or decision or by any other entity including CAISO, and shall include System Resource Adequacy Benefits, Flexible Resource Adequacy Benefits and Local Capacity Area Resource Adequacy Benefits associated with the Facility.

“**Resource Category**” means the maximum cumulative capacity and resource categories (commonly known as "MCC buckets") for system and local resource adequacy as well as categories of must-offer for flexible resource adequacy described in the most recent filing guide for system, local, and flexible resource adequacy compliance filings issued or published on the CPUC’s website by the CPUC or its staff specifying the guidelines, requirements, and instructions for load serving entities to demonstrate compliance with the CPUC’s resource adequacy program.

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

“**Round-Trip Efficiency**” has the meaning set forth in Exhibit Q.

“**Round-Trip Efficiency Factor**” has the meaning set forth in Exhibit Q.

“**RTE Shortfall Payment**” has the meaning set forth in Exhibit Q.

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

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

“**Scheduled Energy**” means the Energy reflected in a final Day-Ahead Schedule, FMM Schedule, and/or any other financially binding Schedule, market instruction or dispatch for the Facility for a given period of time.

“**Scheduled Maintenance**” has the meaning set forth in Section 6.1(a).

“**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.

“**Secondary Availability**” has the meaning set forth in Exhibit M.

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

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

“**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).

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

“**Settlement Period**” has the meaning set forth in the CAISO Tariff, which as of the Effective Date is the period beginning at the start of the hour and ending at the end of the hour.

“**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 to the Delivery Point, including the Interconnection Facilities and the Interconnection Agreement itself, if applicable, that are used in common with third parties or by Seller for electric generation or storage facilities owned by Seller other than the Facility.

**“Showing Deadline”** means the initial deadline that a Scheduling Coordinator must meet to submit its RA Plan, as established by CAISO or any other Governmental Authority. For illustrative purposes only, the CAISO monthly Showing Deadline is approximately 45 days prior to the RA delivery month.

“**Site**” means the real property on which the Facility is or will be located, as further described in Exhibit A, and as shall be updated by Seller at the time Seller provides an executed Construction Start Date Certificate to Buyer, in substantially the form of the Form of Construction Start Date Certificate in Exhibit H.

“**Site Control**” means that Seller: (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.

“**Station Use**” has the meaning given in the tariff of the retail provider of energy for the Facility and reflects:

1. the electric energy that is used within the Facility (including to power the lights, motors, control systems, thermal regulation equipment and other electrical loads) and that is necessary for operation of the Facility; and
2. the electric energy that is consumed within the Facility’s electric energy distribution system as losses (other than any losses that are Electrical Losses).

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

“**Storage Capacity**” means the maximum dependable operating capability of the Facility (expressed in MW AC) to discharge electric energy at the maximum discharge rate that can be sustained for [four (4)] consecutive hours, as the same is to be established as of the Commercial Operation Date and adjusted from time to time pursuant to Exhibit N to reflect the results of the most recently performed Storage Capacity Test; provided that the Storage Capacity shall not at any time exceed the lesser of (a) the Guaranteed Storage Capacity, and (b) the Facility’s then current PMax in the Facility’s CAISO’s Master Data File and Resource Data Template (or successor data systems).

“**Storage Capacity Payment**” has the meaning set forth in Section 3.2.

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

“**Storage Facility Meter**” means the CAISO Approved Meter (with a 0.3 accuracy class), sufficient for monitoring, recording and reporting, in real time, the amount of (i) Charging Energy, (ii) Discharging Energy and (iii) Energy that serves Station Use. For clarity, the Facility may include multiple measurement devices and calculations 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 calculations and the aggregated data of all such measurement devices and calculations, taken together.

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

“**Stored Energy**” means the electric energy in the Facility available to be discharged as Discharging Energy.

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

“**Subsequent Purchasers**” means the purchaser or recipient of Product from Buyer in any conveyance, re-sale or remarketing of Product by Buyer.

“**Supplementary Storage Capacity Test Protocol**” has the meaning set forth in Exhibit N.

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

“**System Emergency**” means any condition that: (a) requires, as determined and declared by CAISO or the PTO, automatic or immediate action to (i) prevent or limit harm to or loss of life or property, (ii) prevent loss of transmission facilities or generation supply in the immediate vicinity of the Facility, or (iii) preserve Transmission System reliability, and (b) directly affects the ability of any Party to perform under any term or condition in this Agreement, in whole or in part.

**“System Resource Adequacy Benefits”** means the attributes, however defined, of a resource that can be used to satisfy the resource adequacy obligations of a load serving entity, other than Flexible Resource Adequacy Benefits and Local Capacity Area Resource Adequacy Benefits.

“**Tangible Net Worth**” means the tangible assets (for example, not including intangibles such as goodwill and rights to patents or royalties) that remain after deducting liabilities as determined in accordance with generally accepted accounting principles.

“**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.

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

“**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 the entity that Controls, directly or indirectly, Seller and that is not Controlled by any other entity. As of the Effective Date, the Ultimate Parent is \_\_\_\_\_\_\_\_\_.

“**WECC**” means the Western Electricity Coordinating Council or its successor.

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

### 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;

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

### 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;

### 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;

### a reference to a document or agreement, including this Agreement shall mean such document, agreement or this Agreement including any amendment or supplement to, or replacement, novation or modification of this Agreement, but disregarding any amendment, supplement, replacement, novation or modification made in breach of such document, agreement or this Agreement;

### a reference to a Person includes that Person’s successors and permitted assigns;

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

### 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;

### 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;

### references to any amount of money shall mean a reference to the amount in United States Dollars, and references to a LMP shall mean the LMP at the Delivery Point unless expressly provided otherwise;

### the expression “and/or” when used as a conjunction shall connote “any or all of;

### 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

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

# TERM; CONDITIONS PRECEDENT

## Contract Term.

### The term of this Agreement shall commence on the Effective Date and shall remain in full force and effect until the conclusion of the Delivery Term, subject to any early termination provisions set forth herein (“**Contract Term**”).

* + 1. ***[NTD: This Section 2.1(b) is only applicable to Facilities that are part of CAISO interconnection queue cluster 14.]*** Seller shall provide Notice to Buyer within ten (10) Business Days of Seller’s receipt of (x) any interconnection study results or tendered Interconnection Agreement that includes an estimated placed-in-service date (“**Estimated Placed-In-Service Date**”) for Seller’s interconnection facilities that is later than the date of Initial Synchronization as set forth in the Milestone schedule on the Cover Sheet (“**Interconnection Delay Notice**”), or (y) any notice from the CAISO of the results of any Deliverability Allocation Process in 2025 informing Seller of the results of Seller’s application for Full Capacity Deliverability Status that awards Seller FCDS for less than one hundred percent (100%) of the Guaranteed RA Capacity (“**FCDS Deficiency Notice**”).

#### If, despite Seller’s commercially reasonable efforts to have the Estimated Placed-In-Service Date be on or before the estimated date of Initial Synchronization as set forth in the Milestone schedule on the Cover Sheet, such Estimated Placed-In-Service Date is not more than ninety (90) days after the date of Initial Synchronization as set forth in the Milestone schedule on the Cover Sheet, the Initial Synchronization Milestone date and all subsequent Milestone dates shall be extended by the number of days by which the Estimated Placed-In-Service Date is later than the Initial Synchronization Milestone date.

#### If, despite Seller’s commercially reasonable efforts to have the Estimated Placed-In-Service Date be on or before the estimated date of Initial Synchronization as set forth in the Milestone schedule on the Cover Sheet, such Estimated Placed-In-Service Date is more than ninety (90) days after the date of Initial Synchronization as set forth in the Milestone schedule on the Cover Sheet, then Buyer shall have the right to terminate this Agreement by providing Notice to Seller within ninety (90) days after Buyer’s receipt of the Interconnection Delay Notice, and retain fifty percent (50%) of the Development Security as liquidated damages.

#### If, despite Seller’s commercially reasonable efforts to obtain FCDS for one hundred percent (100%) of the Guaranteed RA Capacity, Seller receives FCDS for less than one hundred percent (100%) but for ninety percent (90%) or more of the Guaranteed RA Capacity, then the Parties shall negotiate in good faith to reduce the Guaranteed PV Capacity and/or the Guaranteed Storage Capacity (and the Guaranteed RA Capacity accordingly) in a way that maximizes the amount of Resource Adequacy Benefits the Facility is qualified to provide, with no liability or cost to Seller (including no Capacity Damages).

#### If, despite Seller’s commercially reasonable efforts to obtain FCDS for one hundred percent (100%) of the Guaranteed RA Capacity, Seller receives FCDS for less than ninety percent (90%) of the Guaranteed RA Capacity, then Buyer shall have the right to terminate this Agreement by providing Notice to Seller within ninety (90) days after Buyer’s receipt of the FCDS Deficiency Notice, and retain fifty percent (50%) of the Development Security as liquidated damages.

### Applicable provisions of this Agreement shall continue in effect after termination, including early termination, to the extent necessary to enforce or complete the duties, obligations or responsibilities of the Parties arising prior to termination. The confidentiality obligations of the Parties under Article 19 shall remain in full force and effect for three (3) years following the termination of this Agreement, and all indemnity and audit rights shall remain in full force and effect for two (2) years following the termination of this Agreement.

## Conditions Precedent. The Delivery Term shall not commence until Seller completes each of the following conditions:

### Seller shall have installed and commissioned storage equipment with a capacity of no less than ninety-five percent (95%) of the Guaranteed Storage Capacity;

### Seller shall have delivered to Buyer certificates from a Licensed Professional Engineer substantially in the form of Exhibits G-1 and G-2;

### A Participating Generator Agreement and a Meter Service Agreement between Seller and CAISO shall have been executed and delivered and be in full force and effect, and a copy of each such agreement delivered to Buyer;

### An Interconnection Agreement between Seller and the PTO shall have been executed and delivered and be in full force and effect and a copy of the Interconnection Agreement, including all modifications and amendments thereto, delivered to Buyer;

### Authorization to parallel the Facility was obtained by the Participating Transmission Owner prior to the Delivery Commencement Date.

### The Transmission Provider has provided documentation supporting full unrestricted release for Commercial Operation by the Delivery Commencement Date.

### The CAISO has provided notification supporting Commercial Operation.

### Buyer, or its designee, is the Scheduling Coordinator for the Facility; provided that if this requirement is not met because of Buyer’s (or its designee’s) actions or failure to take actions, and this is the only requirement for Delivery Commencement that has not been met, Seller shall be entitled to a day for day extension of the Guaranteed Commercial Operation Date for such Buyer (or its designee) actions or failure to act.

### Seller shall have delivered to Buyer a copy of all environmental impact reports, studies or assessments prepared by or obtained by Seller or its Affiliates, the conditional use permit or other principal land use approval for the Facility, and a certificate signed by an authorized representative of Seller stating that Seller is in compliance with the requirements of the conditional use permit or other principal land use approval;

### Seller shall have caused the Facility to be included in the Full Network Model and has ability to offer Bids into CAISO Day-Ahead Markets and Real-Time Markets.

### Seller shall have completed all necessary steps to provide Ancillary Services from the Facility, including completing the certification and testing requirements in Section 8 and Appendix K of the CAISO Tariff;

### The Facility is providing Resource Adequacy Benefits to Buyer for the month in which Delivery Term commences;

### Seller has delivered the Performance Security to Buyer;

### Seller has paid Buyer for all Daily Delay Damages and Commercial Operation Delay Damages owing under this Agreement, if any; and

### Seller has delivered to Buyer a plan that is reasonably acceptable to Buyer for the proper recycling and disposal of all project components, equipment, and materials at the end of the useful life of the Facility.

## 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 reports and discuss Seller’s construction progress. The form of the Progress Report is set forth in Exhibit E. Seller shall also provide Buyer with any reasonably requested documentation directly related to the achievement of Milestones within ten (10) Business Days of receipt of such request by Seller.

## Remedial Action Plan. If Seller misses two (2) or more Milestones, or misses any one (1) by more than thirty (30) days, Seller shall submit to Buyer, within ten (10) Business Days of such missed Milestone completion date (or the ninetieth (90th) day after the missed Milestone completion date, as applicable), a remedial action plan (“**Remedial Action Plan**”), which will describe in detail any delays (actual or anticipated) beyond the scheduled Milestone dates, including the cause of the delay (e.g., governmental approvals, financing, property acquisition, design activities, equipment procurement, project construction, interconnection, or any other factor), 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; 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. If the missed Milestone(s) is not the Guaranteed Construction Start Date or the Guaranteed Commercial Operation Date, and so long as Seller complies with its obligations under this Section 2.4, then Seller shall not be considered in default of its obligations under this Agreement as a result of missing such Milestone(s).

# PURCHASE AND SALE

## Sale of Product.

Subject to the terms and conditions of this Agreement, during the Delivery Term, Seller shall sell and deliver to Buyer, and Buyer shall purchase and receive from Seller all of the Product. In no event shall Seller have the right to procure any element of the Product from sources other than the Facility for sale or delivery to Buyer under this Agreement, except with respect to Replacement RA.

## Compensation.

Buyer shall compensate Seller for the Product in accordance with this Section 3.2. For each month of the Delivery Term, Buyer shall pay Seller an amount equal to [(A x B x C) – D], (such amount, the “**Storage Capacity Payment**”), where:

### A = the Storage Rate

### B = the current Storage Capacity (in kW)

### C = the applicable Storage Availability Adjustment determined in accordance with Exhibit M

### D = the applicable RTE Shortfall Payment determined in accordance with Exhibit Q (if applicable).

## The Storage Capacity Payment constitutes the entirety of the amount due to Seller from Buyer for the Storage Product.

## Imbalance Energy.

### Buyer and Seller recognize that from time to time the amount of delivered Energy will deviate from the amount of Scheduled Energy. Buyer and Seller shall cooperate to minimize charges and imbalances associated with Imbalance Energy to the extent possible. Subject to Section 3.3(b), to the extent there are such deviations, any CAISO costs or revenues assessed as a result of such Imbalance Energy shall be solely for the account of Buyer.

### If Seller is not in compliance with any applicable provisions of this Agreement, or if Imbalance Energy results from any outage or reduction in the availability of the Facility that is not communicated to Buyer at least one hour prior to the deadline to submit Schedules to CAISO, then Seller will be responsible for and shall pay directly or promptly reimburse Buyer (and Buyer may offset amounts owed to Seller) for the aggregate Imbalance Energy charges assessed, net of the aggregate Imbalance Energy revenues earned, during such period of noncompliance and reasonably attributable to such noncompliance within the applicable Contract Year. At Buyer’s request, Seller will cooperate with Buyer to develop a written administrative protocol to effectuate the Parties’ agreement with respect to Imbalance Energy and scheduling.

## Future Environmental Attributes.

### The Parties acknowledge and agree that as of the Effective Date, Future Environmental Attributes may be created by a Governmental Authority through Laws enacted after the Effective Date. Buyer shall have the right to obtain such Future Environmental Attributes without any adjustment to the Storage Rate paid by Buyer under this Agreement. Seller shall take all reasonable actions necessary to realize the full value of such Future Environmental Attributes for the benefit of Buyer, and shall cooperate with Buyer in Buyer’s efforts to do the same.

### If Buyer elects to receive Future Environmental Attributes pursuant to Section 3.4(a), the Parties agree to negotiate in good faith with respect to the development of further agreements and documentation necessary to effectuate the transfer of such Future Environmental Attributes, including agreement with respect to (i) appropriate transfer, delivery and risk of loss mechanisms, and (ii) appropriate allocation of any incremental expenses incurred by Seller (not including Seller’s overhead costs for administrative tasks) associated with providing such Future Environmental Attributes; *provided*, that the Parties acknowledge and agree that such terms are not intended to alter the other material terms of this Agreement.

## Capacity Attributes. Seller shall request Full Capacity Deliverability Status in connection with the Facility 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.

### Seller grants, pledges, assigns and otherwise commits to Buyer all of the Capacity Attributes from the Storage Facility throughout the Delivery Term.

### Seller shall use commercially reasonable efforts to maintain eligibility for Full Capacity Deliverability Status for the Facility from the CAISO and shall perform all actions necessary to ensure that the Facility qualifies to provide Resource Adequacy Benefits to Seller. Throughout the Delivery Term, Seller hereby covenants and agrees to transfer all Resource Adequacy Benefits to Buyer.

### Seller shall take all commercially reasonable actions, including complying with all applicable registration and reporting requirements, and execute any and all documents or instruments necessary to enable Buyer to use all of the Capacity Attributes committed by Seller to Buyer pursuant to this Agreement.

### For the duration of the Delivery Term, Seller shall maintain an interconnection capacity under its Interconnection Agreement of at least the amount of the Guaranteed Interconnection Capacity.

### If, as a result of Scheduled Maintenance or otherwise, CAISO requires RA Substitute Capacity in connection with Seller’s provision of Resource Adequacy Benefits to Buyer from the Facility, Seller shall provide such RA Substitute Capacity in accordance with applicable CAISO requirements. Seller acknowledges and agrees that any failure by Seller to provide such RA Substitute Capacity may result in CAISO rejecting or cancelling Scheduled Maintenance or other outage of the Facility. Buyer shall notify Seller within three (3) Business Days after becoming aware of an obligation by Seller to provide RA Substitute Capacity. Upon request by Seller, Buyer shall use commercially reasonable efforts to secure, on Seller’s behalf, RA Substitute Capacity; provided that Seller shall reimburse Buyer for all out-of-pocket costs, including broker and outside counsel costs, associated with such RA Substitute Capacity. If Seller declines to provide RA Substitute Capacity, and notifies Buyer to that effect no less than five (5) Business Days before the applicable Showing Deadline, then Buyer will not include the Facility (or, if applicable, the portion of the Facility) in its Supply Plan for the Facility and Seller’s sole liability will be payment of the RA Deficiency Amount for such RA Shortfall pursuant to Section 3.6.

### If Seller anticipates it will have an RA Shortfall in any month of the Delivery Term, Seller may provide Replacement RA up to the anticipated RA Shortfall, provided (i) Seller provides Buyer with Replacement RA product information in a written notice substantially in the form of Exhibit K at least seventy-five (75) days before the applicable Showing Month, and (ii) Replacement RA shall not exceed twenty-five percent (25%) of the Resource Adequacy Benefits provided during any Contract Year.

## Resource Adequacy Failure.

### RA Deficiency Determination. Notwithstanding Seller’s obligations set forth in Section 4.3 or anything to the contrary herein, the Parties acknowledge and agree that if Seller has failed to obtain Full Capacity Deliverability Status for the Facility by the RA Guarantee Date, or if Seller otherwise fails to provide Resource Adequacy Benefits in an amount equal to the Facility’s Qualifying Capacity as required hereunder, then Seller shall pay to Buyer the RA Deficiency Amount for each RA Shortfall Month as liquidated damages due to Buyer for the Capacity Attributes that Seller failed to convey to Buyer. Notwithstanding the foregoing, in lieu of any RA Deficiency Amount payable to Buyer, for the first and/or second month of the Delivery Term, to the extent that Seller fails to provide Resource Adequacy Benefits (or Replacement RA in lieu thereof) solely due to the CAISO and/or CPUC registration process for new resources, the Storage Rate during such months for such RA Shortfall shall be fifty percent (50%) of the otherwise applicable Storage Rate.

### RA Deficiency Amount Calculation. For each RA Shortfall Month, Seller shall pay to Buyer an amount (the “**RA Deficiency Amount**”) equal to the sum of:

#### For any portion of the RA Shortfall for which Buyer incurs a CPUC System RA Penalty (“**CPUC-Penalized Shortfall**”), Seller’s pro rata share of the amount of such CPUC System RA Penalty for such month actually incurred by Buyer (which, for the avoidance of doubt, shall be zero (0) if Buyer does not incur any CPUC System RA Penalty), plus,

#### For any portion of the RA Shortfall for which Buyer incurs CAISO costs, charges or penalties associated with such shortfall (“**CAISO-Penalized Shortfall**”) Seller’s pro rata share of the amount of such CAISO costs, charges or penalties associated with the RA Shortfall for such month actually incurred by Buyer (which, for the avoidance of doubt, shall be zero (0) if Buyer does not incur any CAISO costs, charges or penalties associated with the RA Shortfall), plus

#### For any RA Shortfall which is not CPUC-Penalized Shortfall and/or CAISO-Penalized Shortfall, and for which Buyer purchased replacement Resource Adequacy Benefits, the amount of Buyer’s cost of such replacement Resource Adequacy Benefits, plus

#### For any RA Shortfall which is not CPUC-Penalized Shortfall and/or CAISO-Penalized Shortfall, and for which Buyer did not purchase replacement Resource Adequacy Benefits, the greater of (A) the product of (1) such portion of the RA Shortfall multiplied by (y) the CPM Soft Offer Cap, and (B) the prevailing market value of such RA Shortfall, as reasonably determined by Buyer.

## Buyer’s Re-Sale of Product. Buyer shall have the exclusive right in its sole discretion to convey, use, market, or sell the Product, or any part of the Product, to any Subsequent Purchaser; and Buyer shall have the right to all revenues generated from the conveyance, use, re-sale or remarketing of the Product, or any part of the Product. If the CAISO or CPUC develops a centralized capacity market, Buyer shall have the exclusive right to offer, bid, or otherwise submit the Capacity Attributes for re-sale into such market, and Buyer shall retain and receive all revenues from such re-sale. Seller shall take all commercially reasonable actions and execute all documents or instruments reasonably necessary to allow Subsequent Purchasers to use such resold Product, but without increasing Seller’s obligations or liabilities under this Agreement. If Buyer incurs any liability to a Subsequent Purchaser due to the failure of Seller to comply with this Section 3.7, Seller shall be liable to Buyer for the amounts Seller would have owed Buyer under this Agreement if Buyer had not resold the Product.

## **Compliance Expenditure Cap**. If a change in Law occurring after the Effective Date has increased Seller’s cost to comply with Seller’s obligations under this Agreement with respect to obtaining, maintaining, conveying or effectuating Buyer’s use of Capacity Attributes, then the Parties agree that the maximum aggregate amount of costs and expenses Seller shall be required to bear during the Delivery Term to comply with all of such obligations shall be capped at Twenty-Five Thousand Dollars ($25,000) per MW of Installed Capacity (“**Compliance Expenditure Cap**”).

* + 1. Any actions required for Seller to comply with its obligations set forth in the first paragraph above, the cost of which will be included in the Compliance Expenditure Cap, shall be referred to collectively as the “**Compliance Actions**.”
		2. 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.
		3. Buyer will have sixty (60) days to evaluate such Notice (during which time period Seller is not obligated to take any Compliance Actions described in the Notice) and shall, within such time, either (1) agree to reimburse Seller for all or some portion of the costs that exceed the Compliance Expenditure Cap (such Buyer-agreed upon costs, the “**Accepted Compliance Costs**”), or (2) waive Seller’s obligation to take such Compliance Actions, or any part thereof for which Buyer has not agreed to reimburse Seller. If Buyer does not respond to a Notice given by Seller under this Section 3.6(c) within sixty (60) days after Buyer’s receipt of same, Buyer shall be deemed to have waived its rights to require Seller to take the Compliance Actions that are the subject of the Notice, and Seller shall have no further obligation to take, and no liability for any failure to take, such Compliance Actions until such time as Buyer agrees to pay such Accepted Compliance Costs.
		4. If Buyer agrees to reimburse Seller for the Accepted Compliance Costs, then Seller shall take such Compliance Actions covered by the Accepted Compliance Costs as agreed upon by the Parties and Buyer shall reimburse Seller for Seller’s actual costs to effect the Compliance Actions, not to exceed the Accepted Compliance Costs, within sixty (60) days from the time that Buyer receives an invoice and documentation of such costs from Seller.
		5. The Compliance Expenditure Cap shall apply to any change of Law that lowers the Facility’s Qualifying Capacity (including a change of Law that modifies the methodology for calculating the Qualifying Capacity), and no RA Deficiency Amount shall be owed to Buyer in the event Seller’s actions to address such change in Law are either (i) impossible or (ii) would cost more than the Compliance Expenditure Cap for Compliance Actions and Buyer does not agree to fund such excess. For the avoidance of doubt, any failure by Seller to operate the Facility in accordance with Prudent Operating Practice, or to meet availability or other operational metrics or requirements established by CAISO or the CPUC (including as part of a change of Law) that apply generally to the Facility and facilities similar to the Facility, shall not be treated as a Compliance Action subject to the Compliance Expenditure Cap for all purposes of this Agreement.

# OBLIGATIONS AND DELIVERIES

## Delivery. Subject to the terms and conditions of this Agreement, Seller shall make available and Buyer shall accept at the Delivery Point all Product. Each Party shall perform all obligations under this Agreement, including all generation, scheduling, and transmission services in compliance with (i) the CAISO Tariff, (ii) WECC scheduling practices, and (iii) Prudent Operating Practice.

## Title and Risk of Loss. Title to and risk of loss related to the Discharging Energy shall pass and transfer from Seller to Buyer at the Delivery Point. Title to and risk of loss related to the Charging Energy, if any, shall pass and transfer from Buyer to Seller at the Delivery Point.

## Scheduling Coordinator Responsibilities.

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

### Notices. Buyer (as Seller’s SC) shall provide Seller with access to a web based system through which Seller shall submit to Buyer and the CAISO all notices and updates required under the CAISO Tariff regarding the Facility’s status, including, but not limited to, all outage requests, Forced Facility Outages, Forced Facility Outage reports, clearance requests, or must offer waiver forms. Seller will cooperate with Buyer to provide such notices and updates. If the web-based system is not available, Seller shall promptly submit such information to Buyer and the CAISO (in order of preference) telephonically, by electronic mail, or facsimile transmission to the personnel designated to receive such information.

### CAISO Costs and Revenues. Except as otherwise set forth below and in Sections 3.3(b), Buyer (as Scheduling Coordinator for the Facility) shall be responsible for CAISO costs (including penalties, Imbalance Energy costs or revenues, and other charges) and shall be entitled to all CAISO revenues (including credits, Imbalance Energy revenues or costs, and other payments), including revenues associated with CAISO dispatches, bid cost recovery, Inter-SC Trade credits, or other credits in respect of the Product Scheduled or delivered from the Facility. Seller shall be responsible for all CAISO penalties or fees resulting from any failure by Seller to abide by the CAISO Tariff or this Agreement (except to the extent such non-compliance is caused by Buyer’s failure to perform its duties as Scheduling Coordinator for the Facility). The Parties agree that any Availability Incentive Payments are for the benefit of the Seller and for Seller’s account and that any Non-Availability Charges are the responsibility of the Seller and for Seller’s account. In addition, if during the Delivery Term, the CAISO implements or has implemented any sanction or penalty related to scheduling, outage reporting, or generator operation, and any such sanctions or penalties are imposed upon the Facility or to Buyer as Scheduling Coordinator due to the actions or inactions of Seller, the cost of the sanctions or penalties shall be the Seller’s responsibility.

### CAISO Settlements. Buyer (as Seller’s SC) shall be responsible for all settlement functions with the CAISO related to the Facility. Buyer shall render a separate invoice to Seller for any CAISO charges or penalties (“**CAISO Charges Invoice**”) for which Seller is responsible under this Agreement, including Section 3.3(b). CAISO Charges Invoices shall be rendered after settlement information becomes available from the CAISO that identifies any CAISO charges. Notwithstanding the foregoing, Seller acknowledges that the CAISO will issue additional invoices reflecting CAISO adjustments to such CAISO charges. Buyer will review, validate, and if requested by Seller under Section 4.3(e) below, dispute any charges that are the responsibility of Seller in a timely manner and consistent with Buyer’s existing settlement processes for charges that are Buyer’s responsibilities. Subject to Seller’s right to dispute and to have Buyer pursue the dispute of any such invoices, Seller shall pay the amount of CAISO Charges Invoices within ten (10) Business Days of Seller’s receipt of the CAISO Charges Invoice. If Seller fails to pay such CAISO Charges Invoice within that period, Buyer may net or offset any amounts owing to it for these CAISO Charges Invoices against any future amounts it may owe to Seller under this Agreement. The obligations under this section with respect to payment of CAISO Charges Invoices shall survive the expiration or termination of this Agreement.

### Dispute Costs. Buyer (as Seller’s SC) may be required by Seller to dispute CAISO settlements in respect of the Facility. Seller agrees to pay Buyer’s costs and expenses (including reasonable attorneys’ fees) associated with its involvement with such CAISO disputes to the extent they relate to CAISO charges payable by Seller with respect to the Facility that Seller has directed Buyer to dispute.

### Terminating Buyer’s Designation as Scheduling Coordinator. At least thirty (30) days prior to expiration of this Agreement or as soon as reasonably practicable upon an earlier termination of this Agreement, the Parties will take all actions necessary to terminate the designation of Buyer as Scheduling Coordinator for the Facility as of 11:59 p.m. on such expiration date.

### Master Data File and Resource Data Template. Seller shall provide the data to the CAISO (and to Buyer) that is required for the CAISO’s Master Data File and Resource Data Template (or successor data systems) for this Facility consistent with this Agreement. Neither Party shall change such data without the other Party’s prior written consent, not to be unreasonably withheld.

### NERC Reliability Standards.Buyer (as Scheduling Coordinator) shall cooperate reasonably with Seller to the extent necessary to enable Seller to comply, and for Seller to demonstrate Seller’s compliance with, NERC reliability standards. This cooperation shall include the provision of information in Buyer’s possession that Buyer (as Scheduling Coordinator) has provided to the CAISO related to the Facility or actions taken by Buyer (as Scheduling Coordinator) related to Seller’s compliance with NERC reliability standards.

## Forecasting.

## Seller shall provide the forecasts described below. Seller’s (i) Available Storage Capacity and (ii) Availability Storage Capability forecasts (items (i) and (ii) collectively referred to as the “**Forecasted Product**”) shall include availability and updated status of key equipment for the Facility. Seller shall use commercially reasonable efforts to forecast the Forecasted Product accurately and to transmit such information in a format reasonably acceptable to Buyer (or Buyer’s designee).

### Monthly Forecast of Available Storage Capacity and Capability. No less than thirty (30) days before the beginning of Commercial Operation, and thereafter ten (10) Business Days before the beginning of each month during the Delivery Term, Seller shall provide to Buyer and Buyer’s designee (if applicable) a non-binding forecast of the hourly Forecasted Product for each day of the following month in the form attached hereto as Exhibit L-1 and L-2, or as reasonably requested by Buyer.

### Daily Forecast. By 5:30 AM Pacific Prevailing Time on the Business Day immediately preceding the date of delivery, Seller shall provide Buyer with a non-binding forecast of the Forecasted Product for each hour of the immediately succeeding day (“**Day-Ahead Forecast**”). A Day-Ahead Forecast provided in a day prior to any non-Business Day(s) shall include non-binding forecasts for the immediate day, each succeeding non-Business Day and the next Business Day. Each Day-Ahead Forecast shall clearly identify, for each hour, Seller’s best estimate of the Available Storage Capacity and Available Storage Capability.

### Real-Time Forecast. During the Delivery Term, Seller shall notify Buyer of any changes in Forecast Product of one (1) MW or more, whether due to Forced Facility Outage, Force Majeure or other cause, as soon as reasonably possible, but no later than one (1) hour prior to the deadline for submitting Schedules to the CAISO in accordance with the rules for participation in the Real-Time Market. If the Forecasted Product changes by at least one (1) MW as of a time that is less than one (1) hour prior to the Real-Time Market deadline, but before such deadline, then Seller must notify Buyer as soon as reasonably possible. Such Notices shall contain information regarding the beginning date and time of the event resulting in the change in Available Storage Capacity or Available Storage Capability, as applicable, the expected end date and time of such event, the expected Available Storage Capacity in MW or the expected Available Storage Capability in MWh, and any other information required by the CAISO or reasonably requested by Buyer. With respect to any Forced Facility Outage, Seller shall use commercially reasonable efforts to notify Buyer of such outage within ten (10) minutes of the commencement of the Forced Facility Outage. Seller shall inform Buyer of any developments that are reasonably likely to affect either the duration of such outage or the availability of the Facility during or after the end of such outage. These notices and changes to Available Storage Capacity and Available Storage Capability shall be communicated in a method acceptable to Buyer; provided that Buyer specifies the method no later than sixty (60) days prior to the effective date of such requirement. In the event Buyer fails to provide Notice of an acceptable method for communications under this Section 4.4(c), then Seller shall send such communications by telephone and e-mail to Buyer.

## Curtailment.

### General. Seller agrees to reduce its consumption of Charging Energy and its delivery of Discharging Energy by the amount and for the period set forth in any Curtailment Order. Buyer has no obligation to purchase or pay for any Product delivered in violation of any Curtailment Order or for any Product that could not be delivered to the Delivery Point due to a Force Majeure Event.

### Failure to Comply. If Seller fails to comply with a Curtailment Order, then (i) for each MWh of Charging Energy that is consumed by Seller in contradiction to the Curtailment Order, Seller shall pay Buyer for each MWh an amount equal to the sum of (A) + (B), where: (A) is an amount equal to the absolute value of LMP, if any, for the Curtailment Period, times the amount of MWh of Energy consumed by Seller in contradiction to the Curtailment Order, and (B) is any penalties or other charges resulting from Seller’s failure to comply with the Curtailment Order; and (ii) for each MWh of Discharging Energy that is delivered to the Delivery Point in contradiction to the Curtailment Order, Seller shall pay Buyer for each such MWh at an amount equal to the sum of (A) + (B), where: (A) is an amount equal to the absolute value of the LMP, if any, for the Curtailment Period, times the amount of MWh of Energy delivered to the Delivery Point in contradiction to the Curtailment Order, and (B) is any penalties or other charges resulting from Seller’s failure to comply with the Curtailment Order.

### Seller Equipment Required for Operating Instruction Communications. Seller shall acquire, install, and maintain such facilities, communications links and other equipment, and implement such protocols and practices, as necessary to respond to and follow operating instructions from the CAISO and Buyer's SC, including an electronic signal conveying real time and intra-day instructions, to operate the Facility as directed by Buyer from time to time in accordance with this Agreement and/or a Governmental Authority, including to implement a Curtailment Order in accordance with the methodologies applicable to the Facility and used to transmit such instructions. If at any time during the Delivery Term, Seller’s facilities, communications links or other equipment, protocols or practices are not in compliance with methodologies applicable to the Facility and directed by Buyer, Seller shall take the steps necessary to become compliant as soon as commercially reasonably possible. Seller shall promptly repair and replace as necessary such facilities, communication links or other equipment, and shall notify Buyer as soon as Seller discovers any defect. If Buyer notifies Seller of the need for maintenance, repair, or replacement of any such facilities, communication links or other equipment, Seller shall repair or replace such equipment as necessary within five (5) days of receipt of such Notice; provided that if Seller is unable to do so, then Seller shall make such repair or replacement as soon as reasonably practical. Seller shall be liable pursuant to Section 4.5(c) for failure to comply with a Curtailment Order, during the time that Seller’s facilities, communications links or other equipment, protocols or practices are not in compliance with applicable methodologies. A Curtailment Order communication via such systems and facilities shall have the same force and effect on Seller as any other form of communication.

## Charging and Discharging Energy.

### Buyer will be the Scheduling Coordinator for the Facility and will have sole and exclusive rights to charge and discharge the Facility and to bid and schedule the Facility in CAISO markets, subject to the terms of this Agreement, including the Operating Restrictions.

### Seller shall comply with Charging Notices and Discharging Notices that comply with the terms of this Agreement. Upon receipt of a valid Charging Notice, Seller shall accept the Charging Energy at the Facility in accordance with the terms of this Agreement (including the Operating Restrictions), at the times and in the quantities specified in such Charging Notice. Upon receipt of a valid Discharging Notice, Seller shall deliver the Discharging Energy to the Delivery Point in accordance with the terms of this Agreement (including the Operating Restrictions), at the times and in the quantities specified in such Discharging Notice.

### Buyer will have the right to charge the Facility seven (7) days per week and twenty-four (24) hours per day (including holidays), by providing Charging Notices to Seller electronically, provided that Buyer’s right to issue Charging Notices is subject to the requirements and limitations set forth in this Agreement, including the Operating Restrictions. Each Charging Notice issued in accordance with this Agreement will be effective unless and until Buyer modifies such Charging Notice by providing Seller with an updated Charging Notice.

### Seller shall not charge the Facility during the Contract Term other than pursuant to a valid Charging Notice or in connection with a Storage Capacity Test (for which Seller may request a Charging Notice from Buyer), or pursuant to a notice from CAISO, the PTO, or any other Governmental Authority. If, during the Contract Term, Seller (i) charges the Facility to a Stored Energy Level greater than the Stored Energy Level provided for in the Charging Notice (except as permitted in the first sentence of this Section 4.6(d)), or (ii) charges the Facility in violation of the first or second sentence of Section 4.6(b), then, in addition to any other costs and charges for which Seller is responsible, including Imbalance Energy costs and other amounts specified in Section 3.3(c), and without limiting any of Buyer’s other rights under this Agreement:

#### Seller shall be responsible for all Energy costs associated with such charging of the Facility;

#### Buyer shall not be required to pay for the charging of such Energy (i.e., Charging Energy);

#### the Monthly Storage Availability calculation shall be affected to the extent specified in Exhibit M.

### Subject to compliance with the CAISO Tariff, other applicable Laws and the Operating Restrictions, Buyer will have the right to discharge the Facility seven (7) days per week and twenty-four (24) hours per day (including holidays), by providing Discharging Notices to Seller electronically and subject to the requirements and limitations set forth in this Agreement, including the Operating Restrictions. Each Discharging Notice issued in accordance with this Agreement will be effective unless and until Buyer modifies such Discharging Notice by providing Seller with an updated Discharging Notice.

### Seller shall not discharge the Facility during the Delivery Term other than pursuant to a valid Discharging Notice or in connection with a Storage Capacity Test (for which Seller may request a Charging Notice from Buyer), or pursuant to a notice from CAISO, the PTO, or any other Governmental Authority. Discharging for Station Use may occur only as specified in Section 6.4. In the case of a Storage Capacity Test, Buyer shall pay for costs associated with the Charging Energy and may retain any revenue from the discharge of such Energy (adjusted for efficiency losses) pursuant to a valid Discharging Notice; provided that Seller shall pay the costs associated with the Charging Energy if (i) Seller initiates the tests in accordance with Exhibit N or (ii) a Buyer-initiated test indicates that the Storage Capacity is two percent (2%) or more lower than the then-current Storage Capacity. If, during the Contract Term, Seller (i) discharges the Facility to a Stored Energy Level less than the Stored Energy Level provided for in the Discharging Notice (except as permitted in the first or second sentence of this Section 4.6(f)), or (ii) discharges the Facility in violation of the first or second sentence of this Section 4.6(f), then, in addition to any other costs and charges for which Seller is responsible, including Imbalance Energy costs and other amounts specified in Section 4.3(c), and without limiting any of Buyer’s other rights under this Agreement:

#### Buyer shall retain any positive revenues received from CAISO or otherwise associated with such discharge;

#### Seller shall be responsible for and reimburse Buyer for all Energy costs associated with charging the Facility to the Stored Energy Level specified by Buyer before the discharge; and

#### the Monthly Storage Availability calculation shall be affected to the extent specified in Exhibit M.

### Notwithstanding anything in this Agreement to the contrary, during any Settlement Interval, Curtailment Orders applicable to such Settlement Interval shall have priority over any Discharging Notices applicable to such Settlement Interval (but not over Charging Notices which are consistent with such Curtailment Orders), and Seller shall have no liability for violation of this Section 4.6 or any Discharging Notice if and to the extent such violation is caused by Seller’s compliance with any Curtailment Order or other instruction or direction from a Governmental Authority or the PTO unless caused by Seller’s fault or negligence. Buyer shall have the right, but not the obligation, to provide Seller with updated Charging Notices and Discharging Notices during any Curtailment Order consistent with the Operating Restrictions.

### Prior to CAISO Commercial Operation, (i) Buyer shall have no rights to issue or cause to be issued Charging Notices or Discharging Notices, (ii) Seller shall have exclusive rights to charge and discharge the Storage Facility (provided, Seller shall only charge and discharge the Storage Facility in connection with installation, commissioning and testing of the Storage Facility), (iii) Buyer and Buyer’s SC shall reasonably coordinate and cooperate with Seller with respect to Facility testing (including for Test Energy), and (iv) all CAISO costs, revenues, penalties and other amounts owing to or paid by CAISO in respect of the Storage Facility testing shall be for Seller’s account. Upon CAISO Commercial Operation, Buyer shall have exclusive rights to issue or cause to be issued Charging Notices or Discharging Notices and all CAISO costs, revenues, penalties and other amounts owing to or paid by CAISO in respect of the Storage Facility operations shall be for Buyer’s account. For the period from CAISO Commercial Operation until the Commercial Operation Date, Buyer shall pay to Seller fifty percent (50%) of the Monthly Capacity Payment, pro-rated on a daily basis.

## Reduction in Delivery Obligation.

For the avoidance of doubt, and in no way limiting Sections 3.1, 3.2, or 11.1(b):

### Facility Maintenance. Seller shall be permitted to reduce deliveries of Product during any period of and to the extent required by Scheduled Maintenance on the Facility previously agreed to between Buyer and Seller.

### Forced Facility Outage. Seller shall be permitted to reduce deliveries of Product during and to the extent required by any Forced Facility Outage. Seller shall provide Buyer with Notice and expected duration and extent (if known) of any Forced Facility Outage.

### System Emergencies and other Interconnection Events. Seller shall be permitted to reduce deliveries of Product during any period of and to the extent required by System Emergency or upon Notice of a Curtailment Order, or pursuant to the terms of the Interconnection Agreement or applicable tariff. In the event of a System Emergency, anticipated System Emergency, or other event or circumstance in which CAISO determines that there is or may be an imminent need for Energy supplies on the CAISO Grid, Seller shall use reasonable efforts to make the Product fully available, including by cancelling or deferring any Facility maintenance.

### Force Majeure Event. Seller shall be permitted to reduce deliveries of Product during and to the extent required by any Force Majeure Event.

### Health and Safety. Seller shall be permitted to reduce deliveries of Product as necessary to maintain health and safety pursuant to Section 6.2.

## Financial Statements. Seller shall provide to Buyer, within 60 days of the end of Seller’s first, second, and third fiscal quarters, and within 120 days of the end of the Seller’s fiscal year, as applicable, unaudited quarterly and annual audited financial statements of the Seller (including a balance sheet and statements of income and cash flows), all prepared in accordance with generally accepted accounting principles in the United States, consistently applied.

## Access to Data and Installation and Maintenance of Weather Station

### Commencing on the Commercial Operation Date, and continuing throughout the Delivery Term, Seller shall provide to Buyer, in a form reasonably acceptable to Buyer, the data set forth below on a real-time basis; provided that Seller shall agree to make and bear the cost of changes to any of the data delivery provisions below, as requested by Buyer, throughout the Delivery Term, which changes Buyer determines are necessary to forecast output from the Facility, and comply with Law:

#### real time, read-only access to transformer availability, any other facility availability information;

#### real time, read-only access to Charging Energy, Discharging Energy, Facility state-of-charge, and battery rack and inverter status (online or offline) information collected by the supervisory control and data acquisition (SCADA) system for the Facility; provided that if Buyer is unable to access the Facility’s SCADA system, then upon written request from Buyer, Seller shall provide such information to Buyer in 1 minute intervals in the form of a flat file to Buyer through a secure file transport protocol (FTP) system with an e-mail back up for each flat file submittal;

#### read-only access to the Storage Facility Meter and all Facility meter data at the Site; and

#### full, real time access to the Facility’s Scheduling and Logging for the CAISO (OMS) client application, or its successor system.

For any month in which the above information and access was not available to Buyer for longer than twenty-four (24) continuous hours, Seller shall prepare and provide to Buyer upon Buyer’s request a report with the Facility’s monthly actual Available Storage Capacity in a form reasonably acceptable to Buyer.

### Seller shall maintain at least a minimum of one hundred twenty (120) days’ historical data for all data required pursuant to Section 4.9, which shall be available on a minimum time interval of one hour basis or an hourly average basis. Seller shall provide such data to Buyer within five (5) Business Days of Buyer’s request.

### Installation, Maintenance and Repair.

#### Seller, at its own expense, shall install and maintain a secure communication link in order to provide Buyer with access to the data required in Section 4.9(a) of this Agreement.

#### Seller shall maintain the telecommunications path, hardware, and software necessary to provide accurate data to Buyer or Buyer’s designee to enable Buyer to meet current CAISO scheduling requirements. Seller shall promptly repair and replace as necessary such telecommunications path, hardware and software and shall notify Buyer as soon as Seller learns that any such telecommunications paths, hardware and software are providing faulty or incorrect data.

#### If Buyer notifies Seller of the need for maintenance, repair or replacement of the telecommunications path, hardware or software, Seller shall maintain, repair or replace such equipment as necessary within five (5) days of receipt of such Notice; provided that if Seller is unable to repair or replace such equipment within five (5) days, then Seller shall make such repair or replacement as soon as reasonably practical; provided further that Seller shall not be relieved from liability for any Imbalance Energy costs incurred under Section 3.3(b) during this additional period for repair or replacement.

#### For any occurrence in which Seller’s telecommunications system is not available or does not provide quality data and Buyer notifies Seller of the deficiency or Seller becomes aware of the occurrence, Seller shall transmit data to Buyer through any alternate means of verbal or written communication, including cellular communications from onsite personnel, facsimile, or equivalent mobile e-mail, or other method mutually agreed upon by the Parties, until the telecommunications link is re-established.

### Seller agrees and acknowledges that Buyer may seek and obtain from third parties any information relevant to its duties as Scheduling Coordinator for Seller, including from the Participating Transmission Operator. Seller shall execute within a commercially reasonable timeframe upon request such instruments as are reasonable and necessary to enable Buyer to obtain from the Participating Transmission Operator information concerning Seller and the Facility that may be necessary or useful to Buyer in furtherance of Buyer’s duties as Scheduling Coordinator for the Facility.

## Storage Availability and Efficiency**.** The provisions of this Section 4.10 apply during the Delivery Term.

### Storage Availability. During the Delivery Term, the Facility shall maintain a Monthly Storage Availability (calculated in accordance with Exhibit M) during each month of no less than ninety-eight percent (98%)(the **“Guaranteed Storage Availability”**). If, in any month after the Commercial Operation Date, the Monthly Storage Availability is less than the Guaranteed Storage Availability, then, except as provided in Section 11.1(b)(iii), Buyer’s sole and exclusive remedy for such shortfall shall be the application of the Storage Availability Adjustment to reduce the Storage Capacity Payment due for the Product as provided in Section 3.2.

### Round-Trip Efficiency. During the Delivery Term, the Facility shall maintain a Round-Trip Efficiency during each month of no less than the Guaranteed Round-Trip Efficiency. If, in any month during the Delivery Term, the Round-Trip Efficiency is less than the Guaranteed Round-Trip Efficiency, then, except as provided in Section 11.1(b)(iv), Buyer’s sole and exclusive remedy (and Seller’s sole and exclusive liability) for such shortfall shall be the RTE Shortfall Payment calculated in accordance with Exhibit Q.

## Storage Capacity Tests.

### Prior to the Commercial Operation Date, Seller shall schedule and complete a Storage Capacity Test in accordance with Exhibit N. Thereafter, Seller and Buyer shall have the right to conduct additional Storage Capacity Tests in accordance with Exhibit N.

### Buyer shall have the right to send one or more representatives to witness all Storage Capacity Tests. Buyer shall be responsible for all costs, expenses and fees payable or reimbursable to its representatives witnessing any Storage Capacity Test.

### Following each Storage Capacity Test, Seller shall submit a testing report in accordance with Exhibit N. If the actual capacity determined pursuant to a Storage Capacity Test deviates from the then current Storage Capacity, then the actual capacity determined pursuant to a Storage Capacity Test (up to, but not in excess of, the Guaranteed Storage Capacity) shall become the new Storage Capacity, effective as of the first day of the month following the completion of the Storage Capacity Test, for all purposes under this Agreement, including compensation under Section 3.2 until the next such Storage Capacity Test.

## Facility Modifications. Seller shall not modify or supplement all or any part of the Facility without Buyer’s prior written consent, which consent shall be not be unreasonably withheld, conditioned or delayed.

## Ancillary Services. Buyer shall have the exclusive rights to all Ancillary Services that the Facility is capable of providing consistent with the Operating Restrictions, with characteristics and quantities determined in accordance with the CAISO Tariff. Seller shall operate and maintain the Facility throughout the Contract Term so as to be able to provide such Ancillary Services in accordance with the specifications set forth in the Facility’s initial CAISO Certification associated with the Installed Storage Capacity. Upon Buyer’s reasonable request, Seller shall submit the Facility for additional CAISO Certification so that the Facility may provide additional Ancillary Services that the Facility is, at the relevant time, actually physically capable of providing consistent with the definition of Ancillary Services herein and without modification of the Facility, provided that Buyer has agreed to reimburse Seller for any costs Seller incurs in connection with conducting such additional CAISO Certification.

## Workforce Agreement. The Parties acknowledge that in connection with Buyer’s energy procurement efforts, including entering into this Agreement, Buyer is committed to creating community benefits, which includes engaging a skilled and trained workforce and targeted hires. Accordingly, prior to the Guaranteed Construction Start Date, Seller shall ensure that work performed in connection with construction of the Facility will be conducted using a project labor agreement, or similar agreement, providing for terms and conditions of employment with applicable labor organizations, and shall remain compliant with such agreement in accordance with the terms thereof. Seller shall provide documentation reasonably satisfactory to Buyer demonstrating Seller’s compliance with the requirements of this Section 4.14.

## Diverse Business Enterprises. During the Delivery Term, no later than twenty (20) days after each semi-annual period ending on June 30th or December 31st, Seller shall provide to Buyer a report listing all Diverse Business Enterprises that supplied goods or services to Seller during such period, including any certifications or other documentation of such Diverse Business Enterprises status as such and the aggregate amount paid to Diverse Business Enterprises during such period.

### Buyer has the right to disclose to the CPUC all such information provided by Seller pursuant to this Section 4.17.

### Seller shall make reasonable efforts to accommodate requests by the CPUC (or by Buyer in response to a request by the CPUC) to audit Seller in order to verify data provided by Seller pursuant to this Section 4.17.

## Shared Facilities. The Parties acknowledge and agree that certain of the Shared Facilities may be subject to shared facilities and/or co-tenancy agreements entered into among Seller, the Transmission Provider, Seller’s Affiliates, and/or third parties. If applicable, Seller agrees that any agreements regarding Shared Facilities (i) shall permit Seller to perform or satisfy, and shall not purport to limit, Seller’s obligations hereunder, (ii) shall provide for separate metering of the Facility; (iii) shall not limit Buyer’s ability to charge or discharge the Facility; (iv) shall provide that any other generating or energy storage facilities not included in the Facility but using Shared Facilities shall not be included within the Facility’s CAISO Resource ID; and (iv) shall provide that any curtailment or restriction of Shared Facility capacity not attributable to a specific project or projects shall be allocated to all generating or storage facilities utilizing the Shared Facilities based on their pro rata allocation of the Shared Facility capacity prior to such curtailment or reduction. Seller shall not, and shall not permit any Affiliate to, allocate to other Persons a share of the total interconnection capacity under the Interconnection Agreements in excess of an amount equal to the total interconnection capacity under the Interconnection Agreements, minus the Guaranteed Interconnection Capacity.

# TAXES

## Allocation of Taxes and Charges. Seller shall pay or cause to be paid all Taxes on or with respect to the Facility or on or with respect to the sale and making available of Product to Buyer, that are imposed on Product prior to delivery or making available to Buyer, including on Energy prior to the Delivery Point. Buyer shall pay or cause to be paid all Taxes on or with respect to the delivery to and purchase by Buyer of Product that are imposed on Product at and from the Delivery Point (other than withholding or other Taxes imposed on Seller’s income, revenue, receipts or employees). Seller shall be solely responsible for all taxes, charges or fees imposed on the Facility or Seller by a Governmental Authority for Greenhouse Gas emitted by or attributable to the Facility during the Contract Term, but expressly excluding any taxes, charges or fees related to Greenhouse Gases imposed on Charging Energy or Discharging Energy. 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 Energy or other Product hereunder is exempt from or not subject to any particular Tax, Buyer shall provide Seller with all necessary documentation within thirty (30) days after the Effective Date to evidence such exemption or exclusion. If Buyer does not provide such documentation, then Buyer shall indemnify, defend, and hold Seller harmless from any liability with respect to Taxes from which Buyer claims it is exempt.

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

## Ownership. Seller shall be the owner of the Facility for federal income tax purposes and, as such, Seller (or its Affiliates or Lenders) shall be entitled to all depreciation deductions associated with the Facility and to any and all tax benefits associated with the Facility, including any such tax credits or tax benefits under the Internal Revenue Code of 1986, as amended. The Parties intend this Agreement to be a “service contract” within the meaning of Section 7701(e)(3) of the Internal Revenue Code of 1986, as amended. The Parties will not take the position on any tax return or in any other filings suggesting that it is anything other than a purchase of the Product from the Seller or that this agreement is anything other than a “service contract” within the meaning of Section 7701(e)(3) of the Internal Revenue Code of 1986, as amended.

# MAINTENANCE OF THE FACILITY

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

### Seller shall provide to Buyer no later than ninety (90) days prior to the Commercial Operation Date for the period from the Commercial Operation Date through the end of the then-current calendar year, and no later than September 1 of each calendar year thereafter for the following calendar year, a schedule of all planned outages or derates of the Facility for maintenance purposes (“**Scheduled Maintenance**”). Seller may perform no more than fifty (50) hours of Scheduled Maintenance that involves a reduction in the Available Storage Capacity per Contract Year. Seller shall not conduct Scheduled Maintenance between June 1 and October 31 of each year. Seller shall use commercially reasonable efforts to accommodate reasonable requests of Buyer with respect to adjusting the timing of Scheduled Maintenance. Seller may modify its schedule of Scheduled Maintenance upon reasonable advance notice to Buyer, subject to reasonable requests of Buyer and consistent with Section 4.4 and this Section 6.1.

### Seller shall use commercially reasonable efforts to perform during periods of Scheduled Maintenance all maintenance that will reduce the Facility’s output or availability. Seller shall arrange for any necessary non-emergency maintenance that is not Scheduled Maintenance and that reduces the Available Storage Capacity of the Facility by more than ten percent (10%) to occur only between November 1 and May 31 of each year, unless (i) such outage is required to avoid damage to the Facility, (ii) such maintenance is necessary to maintain equipment warranties and cannot be scheduled outside the months of June through September, or (iii) the Parties agree otherwise in writing.

### Seller shall use commercially reasonable efforts to schedule all maintenance outages, including those associated with Scheduled Maintenance (i) within a single month, rather than across multiple months, (ii) during periods in which CAISO does not require resource substitution or replacement, and (iii) otherwise in a manner to avoid reductions in the Resource Adequacy Benefits available from the Facility to Buyer, provided that Seller shall not be required to consolidate preventative maintenance activities into a single month where such consolidation is inconsistent with vendor-recommended maintenance schedules.

## 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 Buyer’s emergency contact identified on Exhibit R Notice of such condition. Such action may include disconnecting and removing all or a portion of the Facility, or suspending the supply of Energy to Buyer.

## Permits and Approvals. As between Buyer and Seller, Seller shall obtain any required permits and approvals in connection with the development, construction, and operation of the Facility, including without limitation, environmental clearance under the California Environmental Quality Act or other environmental law, from the local jurisdiction where the Facility will be constructed.

## Energy to Serve Station Use. Notwithstanding anything to the contrary in this Agreement, the Parties acknowledge (i) Seller is responsible for providing all Energy to serve Station Use (including paying the cost of any Energy used to serve Station Use and the cost of energy provided by third parties used to serve Station Use); and (ii) Seller may utilize Energy to serve Station Use to the extent permissible in accordance with the CAISO Tariff and subject to the following requirements and restrictions:

#### Seller shall not bill Buyer and Buyer will not pay Seller for any Energy that serves Station Use, and Seller shall bear all costs associated with Energy that serves Station Use, including any Stored Energy or Energy discharged from the Facility that serves Station Use during periods when such service is permissible in accordance with the CAISO Tariff and/or any CAISO costs or Imbalance Energy costs incurred to serve Station Use;

#### Seller shall be responsible for the accurate metering and accounting for Energy used to serve Station Use to ensure that records and invoices to Buyer are accurate and do not improperly bill Buyer for Energy that serves Station Use;

#### Seller shall ensure that any use of Stored Energy or Energy discharged from the Facility to serve Station Use complies with and does not interfere with or impair Buyer’s or the CAISO’s dispatch of or schedule for the Facility, and if Seller fails to comply with such requirements, then, without prejudice to Buyer’s other rights and remedies hereunder, Seller shall reimburse Buyer for (A) any charges, costs, and penalties imposed by the CAISO for the Facility’s failure to comply with dispatch instructions, the CAISO schedule, or any CAISO requirements; and (B) any loss of revenue if the CAISO adjusts dispatch instructions due to the use of Stored Energy or Energy discharged from the Facility to serve Station Use, in each case only to the extent imposed or incurred as a direct result of Seller’s use of Stored Energy or Energy discharged from the Facility to serve Station Use;

#### Any use of Energy discharged from the Facility or Stored Energy for Station Use shall not (A) reduce Seller’s obligations to achieve the Guaranteed Storage Availability and Guaranteed Round-Trip Efficiency, or (B) count toward limits specified in the Operating Restrictions; and

* + - 1. Seller shall provide to Buyer upon Buyer’s request all records and data, including detailed meter, charging, discharging, and state of charge data, that may be necessary or useful for Buyer to verify that service of Station Use occurred in compliance with this Section 6.4, and to calculate and verify the accuracy of invoices and amounts required to be reimbursed hereunder.

# METERING

## Metering. Subject to Section 7.1(b) (with respect to the entirety of the following Section 7.1(a)), the Facility shall have its own CAISO Resource ID. Seller shall measure the Charging Energy, Discharging Energy and Station Use using the Storage Facility Meter and CAISO approved methodologies. The Storage Facility Meter shall be installed and maintained at Seller’s cost. Metering will be consistent with the Metering Diagram set forth in Exhibit P. The meter(s) shall be kept under seal, such seals to be broken only when the meters are to be tested, adjusted, modified or relocated. In the event that Seller breaks a seal, Seller shall notify Buyer as soon as practicable. In addition, Seller hereby agrees to provide all meter data to Buyer in a form reasonably acceptable to Buyer, and consents to Buyer obtaining from CAISO the CAISO meter data applicable to the Facility and all inspection, testing and calibration data and reports. Seller and Buyer shall cooperate to allow both Parties to retrieve the meter reads from the CAISO Operational Meter Analysis and Reporting (OMAR) web and/or directly from the CAISO meter at the Facility.

## Meter Verification. If Buyer or Seller has reason to believe there may be a meter malfunction, Seller shall test the meter. Annually, upon Buyer’s reasonable request, Seller shall test the meter. The tests shall be conducted by independent third parties qualified to conduct such tests. Buyer shall be notified seven (7) days in advance of such tests and have a right to be present during such tests. If a meter is inaccurate it shall be promptly repaired or replaced. If a meter is inaccurate by more than one percent (1%) and it is not known when the meter inaccuracy commenced (if such evidence exists such date will be used to adjust prior invoices), then the invoices covering the period of time since the last meter test shall be adjusted for the amount of the inaccuracy on the assumption that the inaccuracy persisted during one-half of such period so long as such adjustments are accepted by CAISO; *provided*, such period may not exceed twelve (12) months.

# INVOICING AND PAYMENT; CREDIT

## Invoicing.Seller shall deliver an invoice to Buyer for Product no later than ten (10) days after the end of the prior monthly billing period. Each invoice shall provide Buyer (a) records of metered data, including CAISO metering and transaction data sufficient to document and verify the amount of Charging Energy, Discharging Energy and Station Use for any Settlement Period during the preceding month, (b) the amount of Product and Replacement RA, if any, delivered to Buyer during the preceding month, and the Storage Rate applicable to such Product and Replacement RA, and (c) access to any records, including invoices or settlement data from the CAISO, necessary to verify the accuracy of any amount. Invoices shall be in a format specified by Buyer, covering the services provided in the preceding month determined in accordance with the applicable provisions of this Agreement. Buyer shall, and shall cause its Scheduling Coordinator to, provide Seller with all reasonable access (including, in real time, to the maximum extent reasonably possible) to any records, including invoices or settlement data from the CAISO, forecast data and other information, all as may be necessary from time to time for Seller to prepare and verify the accuracy of all invoices.

## Payment. Buyer shall make payment to Seller for Product by wire transfer or ACH payment to the bank account provided on each monthly invoice. Buyer shall pay undisputed invoice amounts within forty-five (45) days after receipt of the invoice. If such due date falls on a weekend or legal holiday, such due date shall be the next Business Day. Payments made after the due date will be considered late and will bear interest on the unpaid balance. If the amount due is not paid on or before the due date or if any other payment that is due and owing from one Party to another is not paid on or before its applicable due date, a late payment charge shall be applied to the unpaid balance and shall be added to the next billing statement. Such late payment charge shall be calculated based on an annual interest rate equal to the prime rate published on the date of the invoice in The Wall Street Journal (or, if The Wall Street Journal is not published on that day, the next succeeding date of publication), plus two percent (2%) (the “**Interest Rate**”). If the due date occurs on a day that is not a Business Day, the late payment charge shall begin to accrue on the next succeeding Business Day.

## Books and Records. To facilitate payment and verification, each Party shall maintain all books and records necessary for billing and payments, including copies of all invoices under this Agreement, for a period of at least two (2) years or as otherwise required by Law. Either Party, upon fifteen (15) days written Notice to the other 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.

## Payment Adjustments; Billing Errors. Payment adjustments shall be made if Buyer or Seller discovers there have been good faith inaccuracies in invoicing that are not otherwise disputed under Section 8.5, an adjustment to an amount previously invoiced or paid is required due to a correction of data by the CAISO, or there is determined to have been a meter inaccuracy sufficient to require a payment adjustment. 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. Except for adjustments required due to a correction of data by the CAISO, any adjustment described in this Section 8.4 is waived if Notice of the adjustment is not provided within twelve (12) months after the invoice is rendered or subsequently adjusted.

## 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 upon request or deducted by the Party receiving such overpayment from subsequent payments, with interest accrued at the Interest Rate from and including the date of such overpayment to but excluding the date repaid or deducted by the Party receiving such overpayment. Any dispute with respect to an invoice is waived 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 party other than the Party seeking the adjustment and such party corrects its information after the twelve-month period. If an invoice is not rendered within twelve (12) months after the close of the month during which performance occurred, the right to payment for such performance is waived.

## Netting of Payments. The Parties hereby agree that they shall discharge mutual debts and payment obligations due and owing to each other on the same date through netting, in which case all amounts owed by each Party to the other Party for the purchase and sale of Product during the monthly billing period under this Agreement, including any related damages calculated pursuant to 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.

## Seller’s Development Security. To secure Seller’s obligations under this Agreement, including the obligations of Seller to pay liquidated damages to Buyer as provided in this Agreement, Seller shall deliver Development Security to Buyer within five (5) Business Days after the Effective Date. Buyer will have the right to draw upon the Development Security if Seller fails to pay liquidated damages owed to Buyer pursuant to Exhibit B to this Agreement, or if Seller fails to pay a Damage Payment or Termination Payment owed to Buyer pursuant to Section 11.2. Seller shall maintain the Development Security in full force and effect and Seller shall replenish the Development Security in the event Buyer collects or draws down any portion of the Development Security for any reason permitted under this Agreement other than to satisfy a Damage Payment or a Termination Payment. Following the earlier of (i) Seller’s delivery of the Performance Security, or (ii) sixty (60) days after termination of this Agreement, Buyer shall promptly return the Development Security to Seller, less the amounts drawn in accordance with this Agreement.

## 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. Seller shall maintain the Performance Security in full force and effect and Seller shall replenish the Performance Security in the event Buyer collects or draws down any portion of the Performance Security for any reason permitted under this Agreement within five (5) Business Days after such draw, other than to satisfy a Termination Payment. Seller shall maintain the Performance Security in full force and effect until the date on which the following have occurred (“**Performance Security End Date**”): (A) the Delivery Term has expired or terminated early; and (B) all payment obligations of the Seller arising 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 the Performance Security End Date, Buyer shall promptly return to Seller the unused portion of the Performance Security. Provided that no Event of Default has occurred and is continuing with respect to Seller, Seller may replace or change the form of Performance Security to another form of Performance Security from time to time upon reasonable prior written notice to Buyer.

## 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 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):

### 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;

### 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

### 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.

# NOTICES

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

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

# FORCE MAJEURE

## Definition.

### “**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.

### 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; landslide; mudslide; sabotage; terrorism; earthquake; or other cataclysmic events; an act of public enemy; war; blockade; civil insurrection; riot; civil disturbance; or strikes or other labor difficulties caused or suffered by a Party or any third party except as set forth below.

### 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 Storage Rate unprofitable or otherwise uneconomic (including an increase in component or compliance costs for any reason, including foreign or domestic tariffs, Buyer’s ability to buy Product at a lower price or Seller’s ability to sell Product at a higher price); (ii) Seller’s inability to obtain permits or approvals of any type for the construction, operation, or maintenance of the Facility; (iii) the inability of a Party to make payments when due under this Agreement, unless the cause of such inability is an event that would otherwise constitute a Force Majeure Event as described above that disables physical or electronic facilities necessary to transfer funds to the payee Party; (iv) a Curtailment Period, except to the extent such Curtailment Period is caused by a Force Majeure Event; (v) Seller’s inability to obtain sufficient labor, equipment, materials, or other resources to build or operate the Facility except to the extent such inability is caused by a Force Majeure Event; (vi) a strike, work stoppage or labor dispute limited only to any one or more of Seller, Seller’s Affiliates, Seller’s contractors, their subcontractors thereof or any other third party employed by Seller to work on the Facility; (vii) any equipment failure except if such equipment failure is caused by a Force Majeure Event; (viii) variations in weather, including wind, rain and insolation, within one in fifty (1 in 50) year occurrence; or (ix) failure to complete the interconnection facilities or network upgrades required to connect the Facility and to deliver Product to the Delivery Point by the Guaranteed Commercial Operation Date except to the extent such inability is caused by a Force Majeure Event; or (x) Seller’s inability to achieve Construction Start of the Facility following the Guaranteed Construction Start Date or achieve Commercial Operation following the Guaranteed Commercial Operation Date; it being understood and agreed, for the avoidance of doubt, that the occurrence of a Force Majeure Event may give rise to a Development Cure Period.

## No Liability If a Force Majeure Event Occurs. Neither Seller nor Buyer shall be liable to the other Party in the event it is prevented from performing its obligations hereunder in whole or in part due to a Force Majeure Event. Buyer shall not be obligated to pay for any Product that Seller was not able to deliver as a result of a Force Majeure Event. The Party rendered unable to fulfill any obligation by reason of a Force Majeure Event shall take reasonable actions necessary to remove such inability with due speed and diligence. Nothing herein shall be construed as permitting that Party to continue to fail to perform after said cause has been removed. The obligation to use due speed and diligence shall not be interpreted to require resolution of labor disputes by acceding to demands of the opposition when such course is inadvisable in the discretion of the Party having such difficulty. Neither Party shall be considered in breach or default of this Agreement if and to the extent that any failure or delay in the Party’s performance of one or more of its obligations hereunder is caused by a Force Majeure Event. The occurrence and continuation of a Force Majeure Event shall not suspend or excuse the obligation of a Party to make any payments due hereunder.

## Notice. In the event of any delay or nonperformance resulting from a Force Majeure Event, the Party suffering the Force Majeure Event shall (a) as soon as practicable, notify the other Party in writing of the nature, cause, estimated date of commencement thereof, and the anticipated extent of any delay or interruption in performance, and (b) 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; *provided*, *however*, that a Party’s failure to give timely Notice shall not affect such Party’s ability to assert that a Force Majeure Event has occurred unless the delay in giving Notice materially prejudices the other Party.

## Termination Following Force Majeure Event. If a Force Majeure Event has occurred that has caused either Party to be wholly or partially unable to perform its obligations hereunder, and has continued for a consecutive twelve (12) month period, then the non-claiming Party may terminate this Agreement upon written Notice to the other Party with respect to the Facility experiencing the Force Majeure Event. Upon any such termination, neither Party shall have any liability to the other, save and except for those obligations specified in Section 2.1(b), and Buyer shall promptly return to Seller any Development Security or Performance Security then held by Buyer.

# DEFAULTS; REMEDIES; TERMINATION

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

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

#### the failure by such Party to make, when due, any payment required pursuant to this Agreement and such failure is not remedied within five (5) Business Days after Notice thereof;

#### any representation or warranty made by such Party herein is false or misleading in any material respect when made or when deemed made or repeated, and such default is not remedied within thirty (30) days after Notice thereof;

#### 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) and such failure is not remedied within thirty (30) days after Notice thereof;

#### such Party becomes Bankrupt;

#### such Party assigns this Agreement or any of its rights hereunder other than in compliance with Sections 14.2 or 14.3, as applicable; or

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

### with respect to Seller as the Defaulting Party, the occurrence of any of the following:

#### if at any time, Seller delivers or attempts to deliver to the Delivery Point for sale under this Agreement Product that was not produced by the Facility, except with respect to Replacement RA;

#### the failure by Seller to achieve the Construction Start Date within one hundred twenty (120) days after the Guaranteed Construction Start Date, or the failure by Seller to achieve Commercial Operation withinninety (90) days after the Guaranteed Commercial Operation Date;

#### if, in the first Contract Year during the Delivery Term, the average Monthly Storage Availability multiplied by the Storage Capacity is not at least fifty percent (50%) multiplied by the Installed Capacity, or for any Contract Year thereafter, the average Monthly Storage Availability multiplied by the Storage Capacity is not at least seventy percent (70%) by the Installed Capacity; provided, it will not be an Event of Default under this Section 11.1(b)(iii) if (a) the failure to meet the respective standard results from a failure of the Facility’s Main Power Transformer, (b) during the one hundred eighty (180) day period following the date of such Main Power Transformer failure Seller diligently pursues a cure to such Main Power Transformer failure and delivers to Buyer a certificate from a Licensed Professional Engineer within thirty (30) days following the date of the Main Power Transformer failure that cure can be made within such one hundred eighty (180) day period, and (c) Seller completes the cure of such Main Power Transformer failure within such one hundred eighty (180) day period;

#### if, for any two (2) consecutive Contract Years, the annual average Round-Trip Efficiency is not at least seventy-five percent (75%);

#### if Seller fails to maintain a Storage Capacity determined pursuant to a Storage Capacity Test equal to at least seventy-five percent (75%) of the Guaranteed Storage Capacity for longer than three hundred sixty (360) days; provided, it will not be an Event of Default under this Section 11.1(b)(viii) if (a) the failure to meet such standard results from a failure of the Facility’s Main Power Transformer, (b) during the one hundred eighty (180) day period following the date of such Main Power Transformer failure Seller diligently pursues a cure to such Main Power Transformer failure and delivers to Buyer a certificate from a Licensed Professional Engineer within thirty (30) days following the date of the Main Power Transformer failure that cure can be made within such one hundred eighty (180) day period, and (c) Seller completes the cure of such Main Power Transformer failure within such one hundred eighty (180) day period;

#### failure by Seller to satisfy the collateral requirements pursuant to Sections 8.7 or 8.8, including the failure to replenish the Development Security or Performance Security amount in accordance with this Agreement in the event Buyer draws against either for any reason other than to satisfy a Damage Payment or a Termination Payment, if such failure is not remedied within five (5) Business Days after Notice thereof;

#### if at any time Seller owns, operates or manages any equipment, facility, property or other asset, other than the Facility or engages in any business or activity other than the development, financing, ownership or operation of the Facility;

#### 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 five (5) Business Days after Seller receives Notice of the occurrence of any of the following events:

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

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

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

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

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

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

##### Seller shall fail to renew or cause the renewal of each outstanding Letter of Credit on a timely basis as provided in the relevant Letter of Credit and as provided in accordance with this Agreement, and in no event less than sixty (60) days prior to the expiration of the outstanding Letter of Credit.

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

### 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;

### to accelerate all amounts owing between the Parties, and to collect as liquidated damages the Damage Payment or the Termination Payment in accordance with Section 11.3;

### to withhold any payments due to the Defaulting Party under this Agreement;

### to suspend performance; and/or

### 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.

## Termination Payment. The Termination Payment (“**Termination Payment**”) for a Terminated Transaction shall be the Settlement Amount plus any or all other amounts due to or from the Non-Defaulting Party netted into a single amount. If the Non-Defaulting Party’s aggregate Gains exceed its aggregate Losses and Costs, if any, resulting from the termination of this Agreement, the net Settlement Amount shall be zero. The Non-Defaulting Party shall calculate, in a commercially reasonable manner, a Settlement Amount for the Terminated Transaction as of the Early Termination Date. Third parties supplying information for purposes of the calculation of Gains or Losses may include, without limitation, dealers in the relevant markets, end-users of the relevant product, information vendors and other sources of market information. The Settlement Amount shall not include consequential, incidental, punitive, exemplary, indirect or business interruption damages; provided, however, that any lost Capacity Attributes and Green Attributes shall be deemed direct damages covered by this Agreement. 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 Termination Payment described in this section is a reasonable and appropriate approximation of such damages, and (c) the Termination Payment described in this section 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.

## 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 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.

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

## Limitation on Seller’s Ability to Make or Agree to Third-Party Sales from the Facility after Early Termination Date. If the Agreement is terminated prior to the Commercial Operation Date for any reason other than a Buyer Event of Default, neither Seller nor Seller’s Affiliates may sell, market or deliver any Product associated with or attributable to the Facility to a party other than Buyer for a period of two (2) years following the early termination date, unless prior to selling, marketing or delivering such Product, or entering into the agreement to sell, market or deliver such Product to a party other than Buyer, Seller or Seller’s Affiliates provide Buyer with a written offer to sell the Product on terms and conditions materially similar to the terms and conditions contained in this Agreement (including price) and Buyer fails to accept such offer within forty-five (45) days of Buyer’s receipt thereof.

Neither Seller nor Seller’s Affiliates may sell or transfer the Facility, or any part thereof, or land rights or interests in the Site (including the interconnection queue position of the Facility) so long as the limitations contained in this Section 11.6 apply, unless the transferee agrees to be bound by the terms set forth in this Section 11.6 pursuant to a written agreement approved by Buyer.

Seller shall indemnify and hold Buyer harmless from all benefits lost and other damages sustained by Buyer as a result of any breach by Seller of its covenants contained within this Section 11.6.

## Rights And Remedies Are Cumulative. Except where liquidated damages are provided as the exclusive remedy, 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.

## Mitigation. Any Non-Defaulting Party shall be obligated to mitigate its Costs, Losses and damages resulting from any Event of Default of the other Party under this Agreement.

# LIMITATION OF LIABILITY AND EXCLUSION OF WARRANTIES.

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

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

FOR BREACH OF ANY PROVISION FOR WHICH AN EXPRESS AND EXCLUSIVE REMEDY OR MEASURE OF DAMAGES IS PROVIDED, SUCH EXPRESS REMEDY OR MEASURE OF DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY, THE OBLIGOR’S LIABILITY SHALL BE LIMITED AS SET FORTH IN SUCH PROVISION, AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED.

IF NO REMEDY OR MEASURE OF DAMAGES IS EXPRESSLY PROVIDED HEREIN, THE OBLIGOR’S LIABILITY SHALL BE LIMITED TO DIRECT DAMAGES ONLY. THE VALUE OF ANY TAX BENEFITS, DETERMINED ON AN AFTER-TAX BASIS, LOST DUE TO BUYER’S DEFAULT (WHICH SELLER HAS NOT BEEN ABLE TO MITIGATE AFTER USE OF REASONABLE EFFORTS) SHALL BE DEEMED TO BE DIRECT DAMAGES.

TO THE EXTENT ANY DAMAGES REQUIRED TO BE PAID HEREUNDER ARE LIQUIDATED, INCLUDING THE DAMAGE PAYMENT UNDER SECTION 11.2 AND THE TERMINATION PAYMENT UNDER SECTION 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, AND (UNLESS EXPRESSLY STATED TO THE CONTRARY) AN EXCLUSIVE REMEDY. 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.

# REPRESENTATIONS AND WARRANTIES; AUTHORITY

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

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

### 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 corporate 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.

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

### 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.

### The Facility is located in the State of **[\_\_\_\_\_\_\_\_\_\_]**.

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

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

### 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.

### The execution and delivery of this Agreement, consummation of the transactions contemplated herein, and fulfillment of and compliance by Buyer with the provisions of this Agreement will not conflict with or constitute a breach of or a default under any Law presently in effect having applicability to Buyer, including but not limited to community choice aggregation, the Joint Powers Act, competitive bidding, public notice, open meetings, election, referendum, or prior appropriation requirements, the documents of formation of Buyer or any outstanding trust indenture, deed of trust, mortgage, loan agreement or other evidence of indebtedness or any other agreement or instrument to which Buyer is a party or by which any of its property is bound.

### 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.

### 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.

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

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

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

### 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

### It shall perform its obligations under this Agreement in compliance with all terms and conditions in its governing documents and any contracts to which it is a party and in material compliance with any Law.

## Prohibition Against Forced Labor. Seller represents and warrants that it has not and will not knowingly utilize 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**”). Consistent with the business advisory jointly issued by the U.S. Departments of State, Treasury, Commerce and Homeland Security on July 1, 2020, equipment or resources sourced from the Xinjiang region of China are presumed to involve Forced Labor. Seller shall certify that it will not utilize such equipment or resources in connection with the construction, operation or maintenance of the Facility.

# ASSIGNMENT

## General Prohibition on Assignments. Except as provided below and in Article 15, neither Seller nor Buyer may voluntarily assign its rights nor delegate its duties under this Agreement, or any part of such rights or duties, without the written consent of the other Party. Neither Seller nor Buyer shall unreasonably withhold, condition or delay any requested consent to an assignment that is allowed by the terms of this Agreement. Any such assignment or delegation made without such written consent or in violation of the conditions to assignment set out below shall be null and void.

## Permitted Assignment; Change of Control of Seller. Seller may, without the prior written consent of Buyer, transfer or assign this Agreement to: (a) an Affiliate of Seller; or (b) subject to Section 15.1, a Lender as collateral. Any direct or indirect Change of Control of Seller (whether voluntary or by operation of Law) shall be deemed an assignment under this Article 14 and will require the prior written consent of Buyer, which consent shall not be unreasonably withheld.

## Permitted Assignment; Change of Control of Buyer. Buyer may assign its interests in this Agreement to an Affiliate of Buyer or to any entity that has acquired all or substantially all of Buyer’s assets or business, whether by merger, acquisition or otherwise without Seller’s prior written consent, *provided*, that in each of the foregoing situations, the assignee (a) has a Credit Rating of Baa2 or higher by Moody’s or BBB or higher by S&P, and (b) is a community choice aggregator or publicly-owned electric utility with retail customers located in the state of California; *provided*, *further*, that in each such case, no fewer than fifteen (15) Business Days before such assignment Buyer (x) notifies Seller of such assignment and (y) provides to Seller a written agreement signed by the Person to which Buyer wishes to assign its interests stating that such Person agrees to assume all of Buyer’s obligations and liabilities under this Agreement and under any consent to assignment and other documents previously entered into by Seller as described in Section 15.2(b). Any assignment by Buyer, its successors or assigns under this Section 14.3 shall be of no force and effect unless and until such Notice and agreement by the assignee have been received and accepted by Seller.

# LENDER ACCOMMODATIONS

## Granting of Lender Interest. Notwithstanding Section 14.2 or Section 14.3, either Party may, without the consent of the other Party, grant an interest (by way of collateral assignment, or as security, beneficially or otherwise) in its rights and/or obligations under this Agreement to any Lender. Each Party’s obligations under this Agreement shall continue in their entirety in full force and effect. Promptly after granting such interest, the granting Party shall notify the other Party in writing of the name, address, and telephone and facsimile numbers of any Lender to which the granting Party’s interest under this Agreement has been assigned. Such Notice shall include the names of the Lenders to whom all written and telephonic communications may be addressed. After giving the other Party such initial Notice, the granting Party shall promptly give the other Party Notice of any change in the information provided in the initial Notice or any revised Notice.

## Rights of Lender. If a Party grants an interest under this Agreement as permitted by Section 15.1, the following provisions shall apply:

### Lender shall have the right, but not the obligation, to perform any act required to be performed by the granting Party under this Agreement to prevent or cure a default by the granting Party in accordance with Section 11.2 and such act performed by Lender shall be as effective to prevent or cure a default as if done by the granting Party.

### The other Party shall cooperate with the granting Party or any Lender, to execute or arrange for the delivery of certificates, consents, opinions, estoppels, direct agreements, amendments and other documents reasonably requested by the granting Party or Lender in order to consummate any financing or refinancing and shall enter into reasonable agreements with such Lender that provide that the non-granting Party recognizes the Lender’s security interest and such other provisions as may be reasonably requested by the granting Party or any such Lender; *provided*, however, that all costs and expenses (including reasonable attorney’s fees) incurred by the non-granting Party in connection therewith shall be borne by the granting Party, and that the non-granting Party shall have no obligation to modify this Agreement or to reduce its benefits or increase its risks or burdens under this Agreement.

### Each Party agrees that no Lender shall be obligated to perform any obligation or be deemed to incur any liability or obligation provided in this Agreement on the part of the granting Party or shall have any obligation or liability to the other Party with respect to this Agreement except to the extent any Lender has expressly assumed the obligations of the granting Party hereunder; *provided* that the non-granting Party shall nevertheless be entitled to exercise all of its rights hereunder in the event that the granting Party or Lender fails to perform the granting Party’s obligations under this Agreement.

## Cure Rights of Lender. The non-granting Party shall provide Notice of the occurrence of any Event of Default described in Sections 11.1 or 11.2 hereof to any Lender, and such Party shall accept a cure performed by any Lender and shall negotiate in good faith with any Lender as to the cure period(s) that will be allowed for any Lender to cure any granting Party Event of Default hereunder. The non-granting Party shall accept a cure performed by any Lender so long as the cure is accomplished within the applicable cure period so agreed to between the non-granting Party and any Lender. Notwithstanding any such action by any Lender, the granting Party shall not be released and discharged from and shall remain liable for any and all obligations to the non-granting Party arising or accruing hereunder. The cure rights of Lender may be documented in the certificates, consents, opinions, estoppels, direct agreements, amendments and other documents reasonably requested by the granting Party pursuant to Section 15.2(b).

# DISPUTE RESOLUTION

## Governing Law**.** This agreement and the rights and duties of the parties hereunder shall be governed by and construed, enforced and performed in accordance with the laws of the state of California, without regard to principles of conflicts of law. To the extent enforceable at such time, each party waives its respective right to any jury trial with respect to any litigation arising under or in connection with this agreement.

## 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, 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.

## Attorneys’ Fees. In any proceeding brought to enforce this Agreement or because of the breach by any Party of any covenant or condition herein contained, the prevailing Party shall be entitled to reasonable attorneys’ fees (including reasonably allocated fees of in-house counsel) in addition to court costs and any and all other costs recoverable in said action.

## Venue. The Parties agree that any litigation arising with respect to this Agreement is to be venued in the Superior Court for the county of San Mateo, California.

# INDEMNIFICATION

## Indemnification.

### Each Party (the “**Indemnifying Party**”) agrees to indemnify, defend and hold harmless the other Party and its Affiliates, directors, officers, employees and agents (collectively, the “**Indemnified Party**”) from and against all third-party claims, demands, losses, liabilities, penalties, and expenses (including reasonable attorneys’ fees) for personal injury or death to Persons and damage to the property of any third party to the extent arising out of, resulting from, or caused by the violation of Law or the negligent or willful misconduct of the Indemnifying Party, its Affiliates, its directors, officers, employees, or agents.

### Nothing in this Section 17.1 shall enlarge or relieve Seller or Buyer of any liability to the other for any breach of this Agreement. Neither Party shall be indemnified for its damages resulting from its sole negligence, intentional acts or willful misconduct. These indemnity provisions shall not be construed to relieve any insurer of its obligation to pay claims consistent with the provisions of a valid insurance policy.

## Claims. Promptly after receipt by a Party of any claim or Notice of the commencement of any action, administrative, or legal proceeding, or investigation as to which the indemnity provided for in this Article 17 may apply, the Indemnified Party shall notify the Indemnifying Party in writing of such fact. The Indemnifying Party shall assume the defense thereof with counsel designated by such Party and satisfactory to the Indemnified Party, *provided*, *however*, that if the defendants in any such action include both the Indemnified Party and the Indemnifying Party and the Indemnified Party shall have reasonably concluded that there may be legal defenses available to it which are different from or additional to, or inconsistent with, those available to the Indemnifying Party, the Indemnified Party shall have the right to select and be represented by separate counsel, at the Indemnifying Party’s expense, unless a liability insurer is willing to pay such costs.

If the Indemnifying Party fails to assume the defense of a claim meriting indemnification, the Indemnified Party may at the expense of the Indemnifying Party contest, settle, or pay such claim, *provided* that settlement or full payment of any such claim may be made only following consent of the Indemnifying Party or, absent such consent, written opinion of the Indemnified Party’s counsel that such claim is meritorious or warrants settlement. Except as otherwise provided in this Article 17, in the event that a Party is obligated to indemnify and hold the other Party and its successors and assigns harmless under this Article 17, the amount owing to the Indemnified Party will be the amount of the Indemnified Party’s damages net of any insurance proceeds received by the Indemnified Party following a reasonable effort by the Indemnified Party to obtain such insurance proceeds.

# INSURANCE

## Insurance.

### General. Seller shall comply at all times during the Contract Term with the requirements of Exhibit J.

### Subcontractor Insurance. Seller shall require all of its subcontractors to carry: (i) comprehensive general liability insurance in amounts equal to those set forth for Seller in Exhibit J; (ii) workers’ compensation insurance and employers’ liability coverage in accordance with applicable requirements of Law; and (iii) business auto insurance for bodily injury and property damage, in each case, in amounts equal to those set forth for Seller in Exhibit J. All subcontractors shall name Seller as an additional insured to insurance carried pursuant to clauses (f)(i) and (f)(iii). All subcontractors shall provide a primary endorsement and a waiver of subrogation to Seller for the required coverage pursuant to this Section 18.1(b).

### 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. 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. Seller shall also comply with all insurance requirements by any renewable energy or other incentive program administrator or any other applicable authority.

### Failure to Comply with Insurance Requirements. If Seller fails to comply with any of the provisions of this Article 18, Seller, among other things and without restricting Buyer’s remedies under the Law or otherwise, shall, at its own cost and expense, act as an insurer and provide insurance in accordance with the terms and conditions above. With respect to the required general liability, umbrella liability and commercial automobile liability insurance, Seller shall provide a current, full and complete defense to Buyer, its subsidiaries and Affiliates, and their respective officers, directors, shareholders, agents, employees, assigns, and successors in interest, in response to a third-party claim in the same manner that an insurer would have, had the insurance been maintained in accordance with the terms and conditions set forth above. In addition, alleged violations of the provisions of this Article 18 means that Seller has the initial burden of proof regarding any legal justification for refusing or withholding coverage and Seller shall face the same liability and damages as an insurer for wrongfully refusing or withholding coverage in accordance with the laws of California.

# CONFIDENTIAL INFORMATION

## Definition of Confidential Information. The following constitutes “**Confidential Information**,” whether oral or written, and whether delivered by Seller to Buyer or by Buyer to Seller: (a) proposals and negotiations of the Parties in the negotiation of this Agreement; (b) the terms and conditions of this Agreement; and (c) information that either Seller or Buyer stamps or otherwise identifies as “confidential” or “proprietary” or words of similar import 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; (iii) information that was rightfully in the possession of the recipient (without confidential or proprietary restriction) at the time of delivery or that becomes available to the recipient from a source not subject to any restriction against disclosing such information to the recipient; and (iv) information that the recipient independently developed without a violation of this Agreement.

## Duty to Maintain Confidentiality. The Party receiving Confidential Information shall treat it as confidential, and shall adopt reasonable information security measures to maintain its confidentiality, employing the higher of (a) the standard of care that the receiving Party uses to preserve its own confidential information, or (b) a standard of care reasonably tailored to prevent unauthorized use or disclosure of such Confidential Information. Confidential Information may be disclosed by the recipient if and to the extent such disclosure is required (a) by Law, (b) pursuant to an order of a court or (c) in order to enforce this Agreement. The Party that originally discloses Confidential Information may use such information for its own purposes, and may publicly disclose such information at its own discretion. **Notwithstanding the foregoing, Seller acknowledges that Buyer is required to make portions of this Agreement available to the public in connection with the process of seeking approval from its board of directors for execution of this Agreement. Buyer may, in its discretion, redact certain terms of this Agreement as part of any such public disclosure, and will use reasonable efforts to consult with Seller prior to any such public disclosure.** Seller further acknowledges that Buyer is a public agency subject to the requirements of the California Public Records Act (Cal. Gov. Code section 6250 et seq.). Upon request or demand from any third person not a Party to this Agreement for production, inspection and/or copying of this Agreement or other Confidential Information provided by Seller to Buyer, Buyer shall, to the extent permissible, notify Seller in writing in advance of any disclosure that the request or demand has been made; provided that, upon the advice of its counsel that disclosure is required, Buyer may disclose this Agreement or any other requested Confidential Information, whether or not advance written notice to Seller has been provided. Seller shall be solely responsible for taking whatever steps it deems necessary to protect Confidential Information that is the subject of any Public Records Act request submitted by a third person to Buyer.

## Irreparable Injury; Remedies. Buyer and Seller each agree that disclosing Confidential Information of the other in violation of the terms of this Article 19 may cause irreparable harm, and that the harmed Party may seek any and all remedies available to it at Law or in equity, including injunctive relief and/or notwithstanding Section 12.2, consequential damages.

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

## Disclosure to Credit Rating Agency**.** Notwithstanding anything to the contrary in this Article 19, Confidential Information may be disclosed by either Party to any nationally recognized credit rating agency (e.g., Moody’s Investors Service, Standard & Poor’s, or Fitch Ratings) in connection with the issuance of a credit rating for that Party or its Affiliates, provided that any such credit rating agency agrees in writing to maintain the confidentiality of such Confidential Information.

## Public Statements. 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 press release.

# MISCELLANEOUS

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

## Amendments. This Agreement may only be amended, modified or supplemented by an instrument in writing executed by duly authorized representatives of Seller and Buyer; *provided*, that, for the avoidance of doubt, this Agreement may not be amended by electronic mail communications.

## Time is of the Essence. The Parties agree that time is of the essence with respect each Party’s performance of its obligations under the Agreement.

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

## No Agency, Partnership, Joint Venture or Lease. Seller and the agents and employees of Seller shall, in the performance of this Agreement, act in an independent capacity and not as officers or employees or agents of Buyer. Under this Agreement, Seller and Buyer intend to act as energy seller and energy purchaser, respectively, and do not intend to be treated as, and shall not act as, partners in, co-venturers in or lessor/lessee with respect to the Facility or any business related to the Facility. This Agreement shall not impart any rights enforceable by any third party (other than a permitted successor or assignee bound to this Agreement).

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

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

## 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.

## Facsimile or Electronic Delivery. This Agreement may be duly executed and delivered by a Party by execution and facsimile or 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 facsimile or other 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.

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

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

## Change in Electric Market Design. If a change in the CAISO Tariff renders this Agreement or any provisions hereof incapable of being performed or administered, then any Party may request that Buyer and Seller enter into negotiations to make the minimum changes to this Agreement necessary to make this Agreement capable of being performed and administered, while attempting to preserve to the maximum extent possible the benefits, burdens, and obligations set forth in this Agreement as of the Effective Date. If a change to any Law occurs after the Effective Date that impacts the number or quality of Resource Adequacy Benefits available to Buyer from the Facility, then Buyer may request that Buyer and Seller enter into negotiations to make the minimum changes to this Agreement necessary to preserve to the maximum extent possible the benefits, burdens, and obligations set forth in this Agreement as of the Effective Date, it being understood that Buyer is to receive the maximum amount of Resource Adequacy Benefits available from the Facility. Upon delivery of such a request, Buyer and Seller shall engage in such negotiations in good faith. If Buyer and Seller are unable, within sixty (60) days after delivery of such request, to agree upon changes to this Agreement or to resolve issues relating to changes to this Agreement, then any Party may submit issues pertaining to changes to this Agreement to the dispute resolution process set forth in Article 16. Notwithstanding the foregoing, (i) a change in cost shall not in and of itself be deemed to render this Agreement or any of the provisions hereof incapable of being performed or administered, or constitute, or form the basis of, a Force Majeure Event, and (ii) this Agreement shall remain in full force and effect, subject to any necessary changes, if any, agreed to by the Parties or determined through dispute resolution.

**EXHIBIT A**

**DESCRIPTION OF THE FACILITY**

**Facility Name:**

**Site Name:**

**Site Description: [*Insert assessor parcel numbers upon which Site is located.*]**

**Site Address:**

**GPS Coordinates:**

**Site Map: [*Insert map of Site*]**

**APNs:**

**County: [\_\_\_\_\_\_\_\_\_\_]** County

**CEQA Lead Agency:**

**Storage Technology:** **[Lithium-ion battery]**

**P-node/Delivery Point:** The PNode designated by CAISO for the Facility at the **[\_\_\_\_\_\_\_\_\_\_\_\_]** Substation

**Point of Interconnection:**

**Description of Interconnection Facilities and Metering:** The Facility will use the following Interconnection Facilities and metering configuration, as depicted in the attached one-line diagram: **[*Insert description of metering, Interconnection Facilities, and other control equipment.*]**

**CAISO Queue Number:**

**One-Line Diagram: [*Insert one-line diagram showing electrical configuration of generation equipment, control equipment, and Interconnection Facilities.*]**

**Additional Information:**

**EXHIBIT B**

**FACILITY CONSTRUCTION AND COMMERCIAL OPERATION**

1. **Construction of the Facility**.
	1. Seller shall cause construction to begin on the Facility by **[\_\_\_\_\_\_\_\_\_\_\_\_\_]**, (as such date may be extended by the Development Cure Period, the “**Guaranteed Construction Start Date**”). Seller shall demonstrate the beginning of construction through execution of Seller’s engineering, procurement and construction contract, Seller’s issuance of a notice to proceed under such contract, mobilization to site by Seller and/or its designees, and includes the physical movement of soil at the Site (“**Construction Start**”). On the date of the beginning of construction (the “**Construction Start Date**”), Seller shall deliver to Buyer a certificate substantially in the form attached as Exhibit H hereto.
	2. If Construction Start is not achieved by the Guaranteed Construction Start Date, Seller shall pay Daily Delay Damages to Buyer on account of such delay. Daily Delay Damages shall be payable for each day for which Construction Start has not begun by the Guaranteed Construction Start Date. Daily Delay Damages shall be payable to Buyer by Seller until the earlier of one hundred twenty (120) days after the Guaranteed Construction Start Date, or the date on which Seller reaches Construction Start of the Facility. On or before the tenth (10th) day of each month, Buyer shall invoice Seller for Daily 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 Daily Delay Damages set forth in such invoice. Daily Delay Damages shall be refundable to Seller pursuant to Section 3(b) of this Exhibit B. The Parties agree that Buyer’s receipt of Daily Delay Damages shall be Buyer’s sole and exclusive remedy for the first one hundred twenty (120) days of the 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)(ii) and receive a Damage Payment upon exercise of Buyer’s rights 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 (ii) Seller has provided Notice to Buyer that Commercial Operation has been achieved and specifying the “placed in service” date per Internal Revenue Service Requirements of the Facility. The “**Commercial Operation Date**” shall be the later of (x) **[\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_]** or (y) the date on which Commercial Operation is achieved.
	1. Seller shall cause Commercial Operation for the Facility to occur by **[\_\_\_\_\_\_\_\_\_]** (as such date may be extended by the Development Cure Period (defined below), the “**Guaranteed Commercial Operation Date**”). Seller shall notify Buyer that it intends to achieve Commercial Operation at least sixty (60) days before the anticipated Commercial Operation Date.
	2. If Seller achieves Commercial Operation by the Guaranteed Commercial Operation Date, all Daily Delay Damages paid by Seller shall be refunded to Seller. Seller shall include the request for refund of the Daily Delay Damages with the first invoice to Buyer after the Commercial Operation Date.
	3. If Seller does not achieve Commercial Operation by the Guaranteed Commercial Operation Date, Buyer shall retain Daily Delay Damages, as applicable, and Seller shall pay Commercial Operation Delay Damages to Buyer for each day after the Guaranteed Commercial Operation Date until the Commercial Operation Date. Commercial Operation Delay Damages shall be payable to Buyer by Seller until the Commercial Operation Date. On or before the tenth (10th) day of each month, Buyer shall invoice Seller for Commercial Operation Delay Damages, if any, accrued during the prior month. The Parties agree that Buyer’s retention of Daily Delay Damages and receipt of Commercial Operation Delay Damages shall be Buyer’s sole and exclusive remedy for the first ninety (90) days of delay in achieving the Commercial Operation Date on or before the Guaranteed Commercial Operation Date, but shall (x) not be construed as Buyer’s declaration that an Event of Default has occurred under any provision of Section 11.1 and (y) not limit Buyer’s right to declare an Event of Default under Section 11.1(b)(ii) and receive a Damage Payment upon exercise of Buyer’s default right pursuant to Section 11.2.
3. **Termination for Failure to Timely Achieve Construction Start or Commercial Operation**. If the Facility has not achieved Construction Start within one hundred twenty (120) days after the Guaranteed Construction Start Date, or Commercial Operation withinninety (90) days after the Guaranteed Commercial Operation Date, Buyer may elect to terminate this Agreement pursuant to Sections 11.1(b)(ii) and 11.2(a), which termination shall become effective as provided in Section 11.2(a).
4. **Extension of the Guaranteed Dates**. The Guaranteed Construction Start Date and the Guaranteed Commercial Operation Date shall be extended on a day-for-day basis (the “**Development Cure Period**”) for the duration of each of the following delays:
	1. a Force Majeure Event occurs; or
	2. Buyer has not made all necessary arrangements to receive the Discharging Energy at the Delivery Point by the Guaranteed Commercial Operation Date.

Notwithstanding anything in this Agreement to the contrary, the cumulative extensions granted under the Development Cure Period (other than the extensions granted pursuant to clause 4(b) above) shall not exceed one hundred eighty (180) days, for any reason, and, without limiting the provisions of Section 10.3, no extension shall be given to the extent that (i) the delay was the result of Seller’s failure to take all commercially reasonable actions to meet its requirements and deadlines; (ii) Seller failed to provide prompt written notice to Buyer of a delay due to a Force Majeure Event, but in no case more than thirty (30) days after Seller became aware of an actual delay (not including Seller’s receipt of generic notices of potential delays due to a Force Majeure Event) affecting the Facility, except that in the case of a delay occurring within sixty (60) days of the Guaranteed Commercial Operation Date, or after such date, Seller must provide written notice within seven (7) Business Days of Seller becoming aware of such delay; or (iii) Seller failed, upon written request from Buyer, to provide documentation demonstrating to Buyer’s reasonable satisfaction that the delay was a result of a Force Majeure Event and did not result from Seller’s actions or failure to take commercially reasonable actions.

1. **Failure to Reach Guaranteed Storage Capacity**. If, at Commercial Operation, the Installed Storage Capacity is at least ninety-five percent (95%) of the Guaranteed Storage Capacity but less than the Guaranteed Storage Capacity, Seller shall have ninety (90) days after the Commercial Operation Date to install additional storage capacity such that the Installed Storage Capacity is increased, but not to exceed the Guaranteed Storage Capacity. If Seller installs additional storage capacity pursuant to the immediately preceding sentence, Seller shall provide to Buyer a new certificate substantially in the form attached as Exhibit G-2 hereto specifying the new Installed Storage Capacity. In the event that the Installed Storage Capacity is still less than the Guaranteed Storage Capacity as of such date, Seller shall pay “**Capacity Damages**” to Buyer, in an amount equal to Two Hundred Fifty Thousand Dollars ($250,000) for each MW that the Guaranteed Storage Capacity exceeds the Installed Storage Capacity, and the Guaranteed Storage Capacity and other applicable portions of the Agreement shall be reduced based on the ratio of the Installed Storage Capacity as of such date to the original Guaranteed Storage Capacity.
2. **Buyer’s Right to Draw on Development Security**. If Seller fails to timely pay any Daily Delay Damages or Commercial Operation Delay Damages, Buyer may draw upon the Development Security to satisfy Seller’s payment obligation thereof, and Seller shall replenish the Development Security to its full amount within five (5) Business Days after such draw.

**EXHIBIT C**

**[Intentionally Omitted]**

**EXHIBIT D**

Reserved.

**EXHIBIT E**

**PROGRESS REPORTING FORM**

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 written Progress Report in the form specified below.

Each Progress Report must include the following items:

Executive summary.

Facility description.

Site plan of the Facility.

Description of any planned changes to the Facility or the Site.

Gantt chart schedule showing progress on achieving each of the Milestones.

Summary of activities during the previous calendar quarter or month, as applicable, including any OSHA labor hour reports.

Forecast of activities scheduled for the current calendar quarter.

Written description about the progress relative to Seller’s Milestones, including whether Seller has met or is on target to meet the Milestones.

List of issues that could potentially affect Seller’s Milestones.

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.

Progress and schedule of all agreements, contracts, permits, approvals, technical studies, financing agreements and major equipment purchase orders showing the start dates, completion dates, and completion percentages.

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.

Workforce Development or Supplier Diversity Reporting (if applicable). Format to be provided by Buyer.

Any other documentation reasonably requested by Buyer.

**EXHIBIT F**

**BUYOUT OPTION**

(1) Buyout Option. No later than ninety (90) days prior to the last day of each of (i) the tenth (10th) Contract Year of the Contract Term, (ii) the fifteenth (15th) Contract Year of the Contract Term and (iii) the twentieth (20th) Contract Year of the Contract Term, Buyer may deliver Notice to Seller indicating whether it elects to purchase the Facility. If Buyer elects to make a purchase, Buyer shall pay to Seller a “**Buyout Payment**” within thirty (30) days prior to the last day of such Contract Year equal to the Fair Market Value of the Facility as of such date, as determined pursuant to clause (2) below.

(2) Calculation of Fair Market Value. If Buyer provides Notice to Seller that it is contemplating exercising its rights under this Exhibit F, the Parties shall mutually agree upon an independent appraiser on or before the date that is sixty (60) days prior to the last day of (i) the tenth (10th) Contract Year of the Contract Term, (ii) the fifteenth (15th) Contract Year of the Contract Term, or (iii) the twentieth (20th) Contract Year of the Contract Term, if applicable. Such appraiser shall determine, at equally shared expense of Buyer and Seller, the fair market value of the Facility as of the date on which the Buyout Payment is to be paid, taking into account such items as deemed appropriate by the appraiser, which may include the resale value of the Facility, and the price of the Product (the “**Fair Market Value**”). In the event that Buyer and Seller cannot agree upon a single independent appraiser, each Party shall contract for an independent appraiser at its own expense, and the Fair Market Value shall be the simple average of the determinations of the two independent appraisers. On or prior to the date that is thirty (30) days prior to the last day of such Contract Year, the appraiser shall deliver its determination of Fair Market Value to each of Buyer and Seller. After the appraiser provides the Parties with its appraisal of Fair Market Value of the Facility, Buyer shall have thirty (30) days to decide whether to consummate its option to purchase the Facility. If Buyer does not provide Notice to Seller that Buyer intends to exercise its option to purchase the Facility within thirty (30) days of receipt of the Fair Market Value appraisal, Buyer shall be deemed to have not exercised its option to purchase the Facility.

(3) Passage of Title. Upon receipt of the Buyout Payment, the Parties shall execute all documents necessary to cause title to the Facility to pass to Buyer on an as-is, where-is, with-all-faults basis; *provided*, *however*, that Seller shall remove any encumbrances held by Seller with respect to the Facility.

**EXHIBIT G-1**

**FORM OF COMMERCIAL OPERATION date certifIcate**

This certification (“**Certification**”) of Commercial Operation is delivered by \_\_\_\_\_\_\_[*Licensed Professional Engineer*] (“**Engineer**”) to Peninsula Clean Energy Authority **(**“**Buyer**”) in accordance with the terms of that certain Energy Storage and Services Agreement dated \_\_\_\_\_\_\_ (“**Agreement**”) by and between [*Seller*] and Buyer. All capitalized terms used in this Certification but not otherwise defined herein shall have the respective meanings assigned to such terms in the Agreement.

Engineer hereby certifies and represents to Buyer the following:

(1) Seller has installed and commissioned storage equipment with a capacity of at least ninety-five percent (95%) of the Guaranteed Storage Capacity in accordance with Exhibit M of the Agreement.

(2) The Facility is capable of receiving Charging Energy and delivering Discharging Energy to the Delivery Point and commissioning of equipment at the Facility has been completed in accordance with the manufacturer’s specifications.

(3) Authorization to parallel the Facility was obtained by the Participating Transmission Owner, [Name of Participating Transmission Owner as appropriate] on\_\_\_[DATE]\_\_\_\_

(4) The Participating Transmission Owner or Distribution Provider has provided documentation supporting full unrestricted release for Commercial Operation by [Name of Participating Transmission Owner as appropriate] on \_\_\_\_\_\_\_[DATE]\_\_\_\_\_.

(5) The CAISO has provided notification supporting the Facility’s Commercial Operation, inclusion in the Full Network Model and authorization to provide Ancillary Services, all in accordance with the CAISO tariff on \_\_\_\_\_\_\_[DATE]\_\_\_\_\_.

EXECUTED by **[**licensed professional engineer**]**

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

[LICENSED PROFESSIONAL ENGINEER]

By:

Its:

Date:

**EXHIBIT G-2**

**FORM OF installed Capacity certifIcate**

This certification (“**Certification**”) of Installed Capacity is delivered by [Licensed Professional Engineer] (“**Engineer**”) to PENINSULA CLEAN ENERGY AUTHORITY (“**Buyer**”) in accordance with the terms of that certain Energy Storage and Services Agreement dated \_\_\_\_\_\_\_\_\_\_ (“**Agreement**”) by and between [*SELLER ENTITY*] 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.

The initial Facility performance test under Seller’s engineering, procurement and construction contract or primary energy storage system supply agreement for the Facility demonstrated peak Facility electrical output of \_\_MW AC at the Delivery Point (“**Installed Storage Capacity**”).

EXECUTED by **[**licensed professional engineer**]**

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

[LICENSED PROFESSIONAL ENGINEER]

By:

Its:

Date:

**EXHIBIT H**

FORM OF CONSTRUCTION START date certifIcate

This certification (“**Certification**”) of the Construction Start Date is delivered by [SELLER ENTITY] (“**Seller**”) to PENINSULA CLEAN ENERGY AUTHORITY (“**Buyer**”) in accordance with the terms of that certain Energy Storage and Services Agreement dated \_\_\_\_\_\_\_\_\_\_ (“**Agreement**”) by and between Seller and Buyer. All capitalized terms used in this Certification but not otherwise defined herein shall have the respective meanings assigned to such terms in the Agreement.

Seller hereby certifies and represents to Buyer the following:

1. the engineering, procurement and construction contract related to the Facility was executed on \_\_\_\_\_\_\_\_\_\_;
2. the limited notice to proceed with the construction of the Facility was issued on \_\_\_\_\_\_\_\_\_\_\_\_\_\_ (attached);
3. the Construction Start Date has occurred;
4. the precise Site on which the Facility is located is, which must be within the boundaries of the previously identified Site:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (such description shall amend the description of the Site in Exhibit A).

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

[SELLER ENTITY]

By:

Its:

Date:

**EXHIBIT I**

**FORM OF LETTER OF CREDIT**

***[Issuing Bank Letterhead and Address]***

IRREVOCABLE STANDBY LETTER OF CREDIT NO. [XXXXXXX]

Date:

Bank Ref.:

Amount: US$**[XXXXXXX]**

Expiry Date:

Beneficiary:

Peninsula Clean Energy Authority

**[Address]**

Ladies and Gentlemen:

On behalf of **[XXXXXXX]** (“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 Peninsula Clean Energy Authority, Address\_\_\_\_\_\_\_\_\_\_, for an amount not to exceed the aggregate sum of U.S. $**[XXXXXXX**] (United States Dollars **[XXXXXXX]** and 00/100), pursuant to that certain **[Agreement]** dated as of \_\_\_\_\_\_\_\_\_\_\_\_ (the “Agreement”) between Applicant and Beneficiary. This Letter of Credit shall become effective immediately and shall have an initial expiry date of \_\_\_\_\_\_\_\_\_\_ \_\_, 201\_ subject to the automatic extension provisions herein.

Funds under this Letter of Credit are available to you against your draft(s) drawn on us at sight, mentioning thereon our Letter of Credit No. **[XXXXXXX]** accompanied by your 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.

We hereby agree with the Beneficiary that all drafts drawn under and in compliance with the terms of this Letter of Credit will be duly honored upon presentation to the Issuer in person, by courier or by fax at **[insert bank address]**. Payment shall be made by Issuer in U.S. dollars with Issuer’s own immediately available funds.

The document(s) required may also be presented by fax at facsimile no. (xxx) xxx-xxx on or before the expiry date (as may be extended below) on this Letter of Credit in accordance with the terms and conditions of this Letter of Credit. No mail confirmation is necessary and the facsimile transmission will constitute the operative drawing documents without the need of originally signed documents.

Partial draws are permitted under this Letter of Credit.

It is a condition of this Letter of Credit that it shall be deemed automatically extended without an amendment for a one year period beginning on the present expiry date hereof and upon each anniversary for such date, unless at least ninety (90) days prior to any such expiry date we have sent to you written notice by overnight courier service that we elect not to permit this Letter of Credit to be so extended, in which case it will expire on its then current expiry date. No presentation made under this Letter of Credit after such expiry date will be honored.

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

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

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

**[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 Peninsula Clean Energy Authority, Address\_\_\_\_\_\_\_\_\_\_\_ as beneficiary (the “Beneficiary”) of the Irrevocable Letter of Credit No. **[XXXXXXX]** (the “Letter of Credit”) issued by **[insert bank name]** (the “Bank”) by order of **[XXXXXXX]** (the “Applicant”), hereby certifies to the Bank as follows:

* 1. Applicant and Beneficiary are party to that certain Agreement dated as of **[XXXXXXX]** (the “Agreement”).
	2. Beneficiary is making a drawing under this Letter of Credit in the amount of U.S. $\_\_\_\_\_\_\_\_\_\_\_.

or

* 1. 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 the Bank has provided notice of its intent to not extend the expiry date of the Letter of Credit and Applicant failed to provide acceptable replacement security to Beneficiary at least thirty (30) days prior to the expiry date of the Letter of Credit.
	2. The undersigned is a duly authorized representative of Peninsula Clean Energy 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 Peninsula Clean Energy Authority by wire transfer in immediately available funds to the following account:

[Specify account information]

Peninsula Clean Energy Authority

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

Name and Title of Authorized Representative

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

**EXHIBIT J**

**INSURANCE**

**Liability Insurance**

To the fullest extent allowable by law, Seller shall purchase and maintain such insurance as will protect it from the claims set forth below which may arise out of or result from Seller’s operations under this Agreement whether such operations be by itself or by anyone directly or indirectly employed by them, or by anyone for whose acts any of them may be liable. Limits shall be all the Insurance Coverage and/or limits carried by or available to the Seller, the minimum limits as required herein.

**General Conditions**

Seller shall maintain completed operations liability insurance for the entire Contract Term plus the period of time Seller may be held legally liable for.

Seller shall maintain policies of insurance in full force and effect, at all times during the performance of the Agreement, plus any statute of repose or statute of limitations applicable to the jurisdiction where any work is performed.

All insurance companies shall have a Best’s rating of A-VII or better.

In addition, Seller shall provide Buyer with 45 days’ notice in case of cancellation or non- renewal, except 10 days for non-payment of premium.

Certificates of Insurance Acord Form 25 and all required Endorsements shall be filed with Buyer within (5) working days of execution of the contract and/or prior to commencement of any work performed.

If requested by the Buyer, Seller shall provide a certified and true copy of any or all policies.

Acceptance of the certificates or endorsements by the Buyer shall not constitute a waiver of Seller’s obligations hereunder.

If Seller fails to secure and/or pay the premiums for any of the policies of insurance required herein, or fails to maintain such insurance, Buyer may, in addition to any other rights it may have under this Agreement or at law or in equity, terminate this Agreement or secure such policies or policies of insurance for the account of Seller and charge Seller for the premiums paid therefore, or withhold the amount thereof from sums otherwise due from Buyer to Seller. Neither the Buyer’s rights to secure such policy or policies nor the securing thereof by Buyer shall constitute an undertaking by Buyer on behalf of or for the benefit of Seller or others to determine or warrant that such policies are in effect.

Seller shall be fully and financially responsible for all deductibles or self-insured retentions.

**Coverage Forms & Limits**

 **Seller’s Commercial General Liability** insurance shall be written on an industry standard Commercial General Liability Occurrence from (CG 00 01, 12/07) or its equivalent and shall include but not be limited to products/completed operations; premises and operations; blanket contractual; advertising/personal injury; independent Buyers.

Coverage shall be on an occurrence form with policy limits of not less than:

* $1,000,000 Each Occurrence Bodily Injury & Property Damage
* $1,000,000 Personal & Advertising Injury
* $2,000,000 General Aggregate to apply on a Per Project basis
* $2,000,000 Products/Completed Operations Aggregate

**Business Auto Liability** – Coverage shall be no less than that provided by Insurance Services Office, Inc. (ISO) form CA 00 01, written on an occurrence basis to apply to “any auto” or at a minimum “all owned, hired and non-owned autos”, with policy limits of not less than $1,000,000 per accident for bodily injury and property damage.

If applicable, Broadened Pollution for Covered Autos shall apply. This requirement may also be satisfied by providing proof of separate Pollution Liability that includes coverage for transportation exposures.

**Workers’ Compensation and (b) employers’ liability** – Sellers shall provide coverage for industrial injury to their employees (or leased employees as applicable) in strict accordance with the provisions of the State or States in which project work is performed or where jurisdiction is deemed to be applicable. Workers’ Compensation shall be provided in a statutory form on either a state or, where applicable, federal (U.S. Longshore & Harbor Workers Act, Maritime- Jones Act, etc.) basis as required in the applicable jurisdiction.

Such insurance shall be in an amount of not less than:

* Workers Compensation: Statutory
* Employers Liability
	+ $1,000,000 Bodily Injury by Accident – Each Accident
	+ $1,000,000 Bodily Injury by Disease – Total Limit
	+ $1,000,000 Bodily Injury by Disease – Each Employee

**Commercial Umbrella or Excess Liability Insurance** over Seller’s primary Commercial General Liability, Business Auto Liability and Employers Liability. All coverage terms required under the Commercial General Liability, Business Auto Liability and Employers Liability above must be included on the Umbrella or Excess Liability Insurance.

Coverage shall be written on an occurrence form with policy limits not less than:

* $5,000,000 Each Occurrence
* $5,000,000 Personal & Advertising Injury
* $5,000,000 Aggregate (where applicable, following the terms of the underlying)

**Pollution liability** – Seller shall provide evidence prior to the Construction Start Date of Pollution Liability; covering all operations necessary or incidental to the fulfillment of all contract obligations hereunder. Such insurance shall provide coverage for bodily injury, property damage (including loss of use of damaged property or of property that has not been physically injured), clean- up costs and remediation expenses (including costs for investigation, sampling, characterization, and monitoring), legal costs, defense costs, natural resource damage, transportation of pollutants on and off the project site, and non-owned disposal site liability if Seller’s scope of work (or Seller’s consultants) includes the responsibility of manifesting and disposing of contaminated material or waste from its activities. Coverage shall also extend to pollution conditions arising out of the Seller’s operations including coverage for sudden as well as gradual release arising from Seller’s operations including operations of any of its Seller’s or consultants. Such insurance shall provide coverage for wrongful acts, which may arise from all activities from the first point of Seller engagement and shall continue on a practice basis for not less than 36 months after completion, or the period of time Seller may be held legally liable for its work, whichever is longer. The retro date if any such coverage shall be prior to the commencement of Seller’s work.

Such insurance shall be in an amount of not less than $5,000,000 per claim or occurrence and $5,000,000 annual aggregate.

If Seller maintains Pollution Liability limits greater than what is required herein, such limits carried become what we require under this contract.

**Professional Liability and/or Errors & Omissions –** Seller shall provide evidence of Professional Liability insurance covering claims that arise from the actual or alleged errors, omissions or acts of the Seller or any entity for which the Seller is legally responsible, for the provision of all professional services necessary or incidental to the fulfillment of all contract obligations hereunder.

Such insurance shall be in an amount of not less than $2,000,000 each claim / $4,000,000 aggregate.

If Seller maintains Professional Liability limits greater than what is required herein, such limits carried become what we require under this Agreement.

The policy shall be effective from the date of commencement of all professional services in connection with the fulfillment of all contract obligations hereunder. The retroactive date in the current and future policies shall be prior to the commencement of all professional services. Coverage shall be maintained for a period not less than 36 months or the period of time Seller may be held legally liable for its work, (whichever is longer) following the completion of the work; or an extended reporting period of 36 months following completion of the work shall be purchased.

Coverages shall not include any exclusion or other limitations related to scopes of services or project type or construction type, or delays in project completion and cost overruns.

**Additional Insured / Primary-Noncontributory / Waiver of Subrogation Requirements** To the fullest extent of coverage allowed under applicable law, Buyer shall be named as additional insured on a primary and non-contributory basis for all required lines of coverage except Statutory Workers Compensation and Professional Liability, arising out of all operations performed by or for the Seller under this Agreement. Buyer shall accept General Liability Additional Insured forms CG 20 10 11/85, CG 20 10 10/01 & CG 20 37 10/01 or their equivalent.

Additional Insured status shall be for all limits carried, not limited to the minimum acceptable as required herein. Seller’s insurance shall be Primary as respects to Buyer and Owner, and any other insurance maintained by Buyer and Owner shall be excess and not contributing insurance with Seller’s insurance until such time as all limits available under the Seller’s insurance policies have been exhausted.

Additional Insured endorsements that contain comparative fault, vicarious liability or sole negligence limitations of the Buyer / Owner or any other party required by the contract, will not be accepted.

In the event that any policy provided in compliance with this Agreement states that the coverage provided to an additional insured shall be no broader than that required by contract, or words of similar meaning, the Parties agree that nothing in this Agreement is intended to restrict or limit the breadth of coverage or limits available.

The additional insured status shall remain in full force and effect for the Contract Term plus the applicable statute of repose, or the amount of time you are legally liable, whichever is longer.

It is further agreed that the additional insured coverage required under this Agreement shall not be subject to any Defense Costs Endorsements such as Form IL 01 23 11 13, allowing for the recovery of defense costs by the insurer if the insurer initially pays defense costs but later determines the claims are not covered.

Buyer reserves the right, in its sole and subjective discretion, to reject any Additional Insured forms that are deemed not equivalent to what is required herein.

**Waiver of Subrogation** – Seller shall provide a Waiver of Subrogation Endorsement naming Buyer for all lines of coverage.

**Additional Requirements**

**Property Insurance**

Seller shall procure and maintain, at the Seller’s own expense, Builder’s Risk, property and equipment insurance, including for any property stored off the Site, in transit or any of the Buyer’s property in the care, custody or control of Seller. Seller and Seller’s insurance carrier(s) hereby waive all rights of subrogation against Buyer for damage including loss of use.

Buyer neither represents nor assumes responsibility for the adequacy of the Builders Risk Insurance to protect the interests of the Seller. It shall be the obligation of the Seller to purchase and maintain any supplementary property insurance that it deems necessary to protect its interest in the Work, including without limitation off site stored materials and materials in transit.

Seller is solely responsible for loss or damage to its personal property.

**EXHIBIT K**

**FORM OF REPLACEMENT RA NOTICE**

This Replacement RA Notice (this “**Notice**”) is delivered by [ ], a [ ] (“**Seller**”) to Peninsula Clean Energy Authority, a California joint powers authority (“**Buyer**”) in accordance with the terms of that certain Energy Storage and Services 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 3.6(b) of the Agreement, Seller hereby provides the below Replacement RA product information (to be repeated for each unit if more than one):

|  |  |
| --- | --- |
| Name |  |
| Location |  |
| CAISO Resource ID |  |
| Unit SCID |  |
| Resource Type |  |
| Point of Interconnection with the CAISO Controlled Grid (“substation or transmission line”) |  |
| Path 26 (North or South) |  |
| LCR Area (if any) |  |
| Deliverability restrictions, if any, as described in most recent CAISO deliverability assessment |  |
| Run Hour Restrictions |  |
| Deliverability Period |  |
| Prorated Percentage of Unit Factor |  |
| Prorated Percentage of Unit Flexible Factor |  |
| Resource Category (MCC Bucket e.g., 1, 2, 3, or 4) |  |
| Flexible Capacity Category (e.g., 1, 2, 3, or N/A) |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Month** | **Unit CAISO NQC (MW)** | **Unit CAISO EFC (MW)** | **Unit Contract Quantity (MW)** | **Unit EFC Contract Quantity (MW)** |
| January |  |  |  |  |
| February |  |  |  |  |
| March |  |  |  |  |
| April |  |  |  |  |
| May |  |  |  |  |
| June |  |  |  |  |
| July |  |  |  |  |
| August |  |  |  |  |
| September |  |  |  |  |
| October |  |  |  |  |
| November |  |  |  |  |
| December |  |  |  |  |

[SELLER]

By:

Its:

Date:

Whereas, the following definitions apply to the terms in the above Replacement RA product information:

“**CPUC RA Filing Guide**” means the Filing Guide for System, Local and Flexible Resource Adequacy (RA) Compliance Filings published annually by the CPUC.

“**Deliverability Period**” means the period in which the unit has rights to deliver energy to the CAISO Grid.

“**Flexible Capacity Category**” means the category of Effective Flexible Capacity, as described in the CPUC RA Filing Guide, applicable to the unit.

“**LCR Area (if any)**” means the Local Capacity Requirement area, as used in the CPUC RA Filing Guide, applicable to the unit, if any.

“**Prorated Percentage of Unit Factor**” means the percentage of the Unit CAISO NQC that is designated as Unit Contract Quantity.

“**Prorated Percentage of Unit Flexible Factor**” means the percentage of Unit CAISO EFC that is designated as Unit EFC Contract Quantity.

“**Resource Category**” means the Maximum Cumulative Capacity category, as described in the CPUC RA Filing Guide, applicable to the unit.

“**Resource Type**” means the type of storage resource.

“**Run Hour Restrictions**” means any restrictions on the ability of the unit to run during any hours of the day.

“**Unit CAISO EFC**” means the unit’s Effective Flexible Capacity, as described in the CPUC RA Filing Guide, as determined by CPUC and CAISO.

“**Unit CAISO NQC**” means the NQC (as defined in the CAISO Tariff) for the unit, as determined by CPUC and CAISO.

“**Unit Contract Quantity**” means the amount of Resource Adequacy Benefits to be provided to Buyer from the unit in the form of Replacement RA, not to exceed the Guaranteed RA Capacity.

“**Unit EFC Contract Quantity**” means the amount of Flexible Resource Adequacy Benefits to be provided to Buyer from the unit in the form of Replacement RA, not to exceed the Guaranteed RA Capacity.

“**Unit SCID**” means the unit’s “Scheduling Coordinator ID Code”, as defined in the CAISO Tariff.

**EXHIBIT L1**

**Monthly Expected Available Storage Capacity**

The following table is provided for informational purposes only.

Please adjust the table for the appropriate number of days in the month for each month of the year.

Monthly Expected Available Storage Capacity (MW) per hour – [Insert Month]

|  | 1:00\* | 2:00 | 3:00 | 4:00 | 5:00 | 6:00 | 7:00 | 8:00 | 9:00 | 10:00 | 11:00 | 12:00 | 13:00 | 14:00 | 15:00 | 16:00 | 17:00 | 18:00 | 19:00 | 20:00 | 21:00 | 22:00 | 23:00 | 24:00 |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| Day 1 |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Day 2 |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Day 3 |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Day 4 |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Day 5 |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| [insert additional rows for each day of the month] |
| Day 26 |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Day 27 |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Day 28 |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Day 29\*\* |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Day 30\*\* |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Day 31\*\* |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |

\*All times are designated as “Hour-Ending [\_\_]”.
\*\*Include these rows if needed for each month.

**EXHIBIT L2**

**Monthly Expected Available Storage Capability**

The following table is provided for informational purposes only.

Please adjust the table for the appropriate number of days in the month for each month of the year.

Monthly Expected Available Storage Capability (MWh) per hour – [Insert Month]

|  | 1:00\* | 2:00 | 3:00 | 4:00 | 5:00 | 6:00 | 7:00 | 8:00 | 9:00 | 10:00 | 11:00 | 12:00 | 13:00 | 14:00 | 15:00 | 16:00 | 17:00 | 18:00 | 19:00 | 20:00 | 21:00 | 22:00 | 23:00 | 24:00 |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| Day 1 |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Day 2 |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Day 3 |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Day 4 |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Day 5 |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| [insert additional rows for each day of the month] |
| Day 26 |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Day 27 |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Day 28 |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Day 29\*\* |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Day 30\*\* |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Day 31\*\* |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |

\*All times are designated as “Hour-Ending [\_\_]”.
\*\*Include these rows if needed for each month.

 **EXHIBIT M**

**MONTHLY STORAGE AVAILABILITY**

**1. Monthly Storage Availability.**

(a) For each monthly period after the Commercial Operation Date, Seller shall calculate the “**Monthly Storage Availability**” using the formula set forth below:

where:

**CALCULATION INTERVAL or “C.I.” =** each successive five-minute interval, but excluding all such intervals which are Scheduled Maintenance, not to exceed 50 hours in each contract year

**MONTHLY UNAVAILABLE CALCULATION INTERVALS =** the sum of all Unavailable Calculation Intervals for the applicable Month

**UNAVAILABLE CALCULATION INTERVAL** = For each Calculation Interval, the Unavailable Calculation Interval is defined using the formula set forth below. Except as otherwise expressly provided in this Agreement, the calculations of Available Storage Capacity and Available Storage Capability in the foregoing sentence shall be based solely on the availability of the Storage Facility to receive Charging Energy from or deliver Discharging Energy to the Delivery Point, as applicable (excluding for reasons at the high-voltage side of the Delivery Point or beyond). Any Calculation Interval in which the Storage Facility fails to maintain connectivity to the CAISO such that it cannot receive ADS or AGC signals shall result in an Unavailable Calculation Interval of one (1) for that Calculation Interval.

where:

**“A”** is the “**AVAILABLE STORAGE CAPACITY**”, which shall be calculated as the sum of the available capacity of each of the system inverters, in MW AC, from all system inverters expected to receive Charging Energy from or deliver Discharging Energy to the Delivery Point, in such Calculation Interval (based on normal operating conditions pursuant to the manufacturer’s guidelines), provided that the Available Storage Capacity shall be the lower of (i) such amounts reported by Seller’s real-time EMS data feed to Buyer for the Storage Facility for such Calculation Interval, and (ii) Seller’s most recent Availability Notice (as updated pursuant to Section 4.4), and further provided that “A” shall never exceed the Storage Capacity.

“**AVAILABLE STORAGE CAPABILITY**” = the sum of the following (taking into account the SOC at the time of calculation):

1. The battery capability (in MWh) available to receive Charging Energy from the Delivery Point in the applicable Calculation Interval
2. The battery capability (in MWh) available to deliver Discharging Energy to the Delivery Point in the applicable Calculation Interval

In calculating Available Storage Capability, the “battery capability available to receive Charging Energy” and “battery capability available to receive Discharging Energy” are calculated as the product of (1) the count of available system cells in such Calculation Interval, multiplied by (2) the capability, in Wh, expected from each such system cell (based on normal operating conditions pursuant to the manufacturer’s guidelines), that are able (considering the conditions of the Facility in total) to receive Charging Energy from or deliver Discharging Energy to the Delivery Point, provided that the Available Storage Capability shall be the lower of (i) such amounts reported by Seller’s real-time EMS data feed to Buyer for the Storage Facility for such Calculation Interval, and (ii) Seller’s most recent Availability Notice (as updated pursuant to Section 4.4), and further provided that Storage Capability shall never exceed the Storage Capacity x four (4) hours.

“**FAILURE TO COMPLY CAPACITY**” = Any portion of the facility, in MW, which failed to comply with a valid Charging Notice or Discharging Notice that complies with this Agreement, including (i) any such failure to charge or discharge at the times, in the quantities, and at the levels specified in such Charging Notice or Discharging Notice; and (ii) any charge or discharge of the Facility other than pursuant to a valid Charging Notice or Discharging Notice that complies with this Agreement, or pursuant to a notice from the CAISO, any PTO, or any other Governmental Authority. Failure to comply capacity will be measured as the absolute value of the difference, in MW, between the average DOT communicated to the Facility by the CAISO for the Calculation Interval and the average metered energy flow for the Calculation Interval.

“**TOTAL CALCULATION INTERVALS**” = the total number of Calculation Intervals in the applicable month.

(b) If the total rated power of the Storage Facility inverters associated with the Installed Storage Capacity as measured to the Delivery Point is less than the Guaranteed Storage Capacity when charging and the Guaranteed Storage Capacity when discharging, in each case at 45°C, then Buyer shall have the right, in its reasonable discretion, to apply an ambient temperature derate to the applicable Calculation Interval.

**2. Storage Availability Adjustment.** The “**Storage Availability Adjustment**” shall be calculated as follows and applied to the Storage Capacity Payment due for the next month after the end of the monthly period for which the Monthly Storage Availability is calculated.

(a) If the Monthly Storage Availability is greater than or equal to the Guaranteed Storage Availability, then:

**Storage Availability Adjustment = 100% (expressed as a decimal)**

(b) If the Monthly Storage Availability is less than the Guaranteed Storage Availability but greater than or equal to seventy percent (70%), then:

**Storage Availability Adjustment = 100% - [(Guaranteed Storage Availability - Monthly Storage Availability) x 2] + (Secondary Unavailability) (expressed as a decimal)**

where:

**Secondary Unavailability** = the sum of all Unavailable Calculation Intervals in the applicable month that resulted from either (i) a Force Majeure Event for which Seller is the claiming party, or (ii) a Curtailment order, divided by the Total Calculation Intervals for the month

(c) If (i) the Monthly Storage Availability is less than seventy percent (70%), then:

**Storage Availability Adjustment = 0**

**EXHIBIT N**

**STORAGE CAPACITY TESTS**

**Storage Capacity Test Notice and Frequency**

A. Commercial Operation Date Storage Capacity Test. Upon no less than ten (10) Business Days’ 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 N and shall establish the initial Storage Capacity hereunder based on the actual capacity of the 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, upon no less than ten (10) Business Days’ Notice to Seller, Buyer shall have the right to require Seller to schedule and complete a Storage Capacity Test and to update the Facility’s PMax and other relevant information and values in the CAISO’s Master Data File and Resource Data Template (or successor data systems). In addition, Buyer shall have the right to require a retest of the most recent Storage Capacity Test (and to update the Facility’s PMax and other relevant information and values as specified above) 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 or any other guaranteed operational characteristics are not being met. 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).

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 Facility. In accordance with Section 4.13(c) of this Agreement and Part II(I) below, the actual capacity determined pursuant to a Storage Capacity Test (up to, but not in excess of, the Guaranteed Storage Capacity, as such Guaranteed Storage Capacity may have been adjusted (if at all) pursuant to Exhibit B) shall become the new Storage Capacity, effective as of the first day of the month following completion of the Storage Capacity Test for calculating the payment for the Product 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 N. For ease of reference, a Storage Capacity Test is sometimes referred to in this Exhibit N 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. Test Elements. Each SCT shall include the following test elements:

* Electrical output at Maximum Discharging Capacity at the Storage Facility Meter (MW);
* Electrical input at Maximum Charging Capacity at the Storage Facility Meter (MW);
* Amount of time between the Facility’s electrical output going from 0 to Maximum Discharging Capacity;
* Amount of time between the Facility’s electrical input going from 0 to Maximum Charging Capacity;
* Amount of energy required to go from 0% Stored Energy Level to 100% Stored Energy Level charging at a rate equal to the Maximum Charging Capacity.

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

(1) Time;

(2) Charging Energy;

(3) Discharging Energy;

(4) Stored Energy Level (MWh);

(5) Station Use.

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 Facility; and

(3) Ambient air temperature (°F).

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

(1) successfully started;

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

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

(4) is able to ramp upward and downward at the contract Ramp Rate;

(5) has a Storage Capacity of an amount that is, at least, equal to the Maximum Stored Energy Level (as defined in Exhibit A); and

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

E. Test Conditions.

1. General. At all times during a SCT, the Facility shall be operated in compliance with Prudent Operating Practices and all operating protocols recommended, required or established by the manufacturer for operation at Maximum Discharging Capacity and Maximum Charging Capacity.
2. Abnormal Conditions. If abnormal operating conditions that prevent the recordation of any required parameter occur during a SCT, Seller may postpone or reschedule all or part of such SCT in accordance with Part II.F below.
3. 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.
4. Ambient Temperature. For tests requested by Buyer (and not for any CAISO‑initiated test, which shall occur when directed by CAISO), the average ambient temperature, based on an aggregate of 1-minute resolution data collected throughout the SCT, must be within the range of 8 – 33 degrees Celsius.

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, 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 C, including copies of the raw data taken during the test;

(3) the level of Installed Storage Capacity, charging capacity, discharging capacity, charging ramp rate, discharging ramp rate, and Stored Energy Level determined by the SCT, including supporting calculations; and

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

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

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

H. Supplementary Storage Capacity Test Protocol. No later than sixty (60) days prior to commencing 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 N 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 N.

I. Adjustment to Storage Capacity. The total amount of Discharging 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 Guaranteed Storage Capacity, as such Guaranteed Storage Capacity 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 Capacity, which shall be expressed in MW AC, and shall be the new Storage Capacity in accordance with Section 4.13(c) of this Agreement.

J. Following the initial Storage Capacity Test conducted prior to the Commercial Operation Date, upon request of Seller, Buyer shall consider in good faith an alternate methodology for conducting a Storage Capacity Test by reference to the operational data reflecting the net output of the Facility from the point of interconnection. Upon Seller’s request, Seller and Buyer shall work in good faith to establish a mutually acceptable methodology for demonstrating the Storage Capacity through such operational data. If Buyer and Seller mutually agree in writing on an alternate methodology, such alternate methodology shall become the Storage Capacity Test used to establish the Storage Capacity for all purposes of this Agreement, including compensation under Section 3.3.

**EXHIBIT O**

**OPERATING RESTRICTIONS**

Maximum Cycle Limits: Number of times Buyer may fully charge and discharge the Facility. A full charge will be deemed to have occurred when the cumulative amount of energy added to the Facility over the course of a calendar year equals the Maximum Stored Energy Level (as defined in Exhibit A). This could occur in one continuous charge or over multiple charges, even if some energy is discharged in between. The inverse is true for a full discharge.

Annual: 365 cycles

Ramp Rates: Dmin to Dmax: up to 100%/s

Cmin to Cmax: up to 100%/s

Dmax to Dmin: up to 100%/s

Cmax to Cmin: up to 100%/s

Frequency ramp rate: 100% MW/Hz

Regulation ramp rate: [\_\_] MW/min

System Response Time: Idle to Dmax: <1s

Idle to Cmax: <1s

Dmax to Cmax: <1s

Cmax to Dmax: <1s

Dmin to Cmin: <1s

Cmin to Dmin: <1s

|  |  |
| --- | --- |
| **Maximum Stored Energy Level:** | [\_\_] MWh, number in MWh representing maximum amount of energy that may be charged to the Facility |
| **Minimum Stored Energy Level:** | 0 MWh, number in MWh representing the lowest level to which the Facility may be discharged |
| **Maximum Charging Capacity:** | [\_\_] MW, number in MW representing the highest level to which the Facility may be charged |
| **Minimum Charging Capacity:** | 0.1 MW, number in MW representing the lowest level at which the Facility may be charged |
| **Maximum Discharging Capacity:** | [\_\_] MW, number in MW representing the highest level at which the Facility may be discharged |
| **Minimum Discharging Capacity:** | 0.1 MW, number in MW representing the lowest level at which the Facility may be discharged |
| **Maximum State of Charge (SOC) during Charging:** | 100% |
| **Minimum State of Charge (SOC) during Discharging:** | 0% |
| **Ramp Rate:** | Between [\_\_] and [\_\_] MW/minute |

**EXHIBIT P**

**METERING DIAGRAM**

**EXHIBIT Q**

**RTE SHORTFALL PAYMENTS**

In the event that the RTEM is less than the GRTE, the monthly Storage Capacity Payment under Section 3.2 shall be reduced by the “**RTE Shortfall Payment**”, calculated as follows:

(GRTE – RTEM) x Average Monthly T4B5 Price x RTEFM x TCE*M*

where:

*GRTE =* the Guaranteed Round-Trip Efficiency

*RTEM* = the “**Round-Trip Efficiency**”, as calculated by dividing (a) the total Discharging Energy for the applicable month by (b) the total Charging Energy for the applicable month.

The “**Average Monthly T4B5 Price**” means the average of the four (4) highest hourly average Day-Ahead Market LMPs and the five (5) lowest hourly average Day-Ahead Market LMPs, in each case in the applicable month.

The “**Round-Trip Efficiency Factor**” or “*RTEFM*” for each month is determined as follows:

If RTEM > GRTE, then *RTEFM =* 0

If RTEM < GRTE and RTEM > 70%, then *RTEFM =* 1.2

If RTEM *<* 70%, then *RTEFM =* 1.5

*TCEM =* the total Charging Energy charged to the Storage Facility in the applicable month.

**EXHIBIT R**

**NOTICES**

| ***[SELLER’S NAME]***(“Seller”) | **PENINSULA CLEAN ENERGY, a California joint powers authority** (“Buyer”) |
| --- | --- |
| **All Notices:** Street: City: Attn: Phone: Email: | **All Notices:** Street: City: Attn: Phone: Email: |
| **Emergency Contact:**Attn: Phone:E-mail: | **Emergency Contact:**Attn: Phone:E-mail: |
| **Reference Numbers:**Duns:Federal Tax ID Number:  | **Reference Numbers:**Duns:Federal Tax ID Number:  |
| **Invoices:**Attn: Phone:E-mail: | **Invoices:**Attn: Phone:E-mail: |
| **Scheduling:**Attn:Phone:Email: | **Scheduling:**Attn:Phone:Email: |
| **Confirmations:**Attn:Phone:Email: | **Confirmations:**Attn:Phone:Email: |
| **Payments:** Attn:Phone:E-mail: | **Payments:** Attn:Phone:E-mail: |
| **Wire Transfer:**BNK: ABA: ACCT:  | **Wire Transfer:**BNK: ABA: ACCT:  |