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PITTSBURG | RICHMOND | SAN PABLO | SAN RAMON | WALNUT CREEK

## Agenda Page 1 of 1

### Technical Committee Meeting Thursday, December 5, 2019 8:30 A.M.

**Charles F. McGlashan Board Room**, 1125 Tamalpais Avenue, San Rafael, CA 94901  
**Mt. Diablo Room**, 2300 Clayton Road, Suite 1150, Concord, CA 94520  
**City of El Cerrito**, 10890 San Pablo Avenue, Hillside Conference Room, El Cerrito, CA 94530  
**City of San Ramon**, 7000 Bollinger Canyon Road, Room 256, San Ramon, CA 94583

1. Roll Call/Quorum
2. Board Announcements (Discussion)
3. Public Open Time (Discussion)
4. Report from Chief Executive Officer (Discussion)
5. Consent Calendar (Discussion/Action)
  - C.1 Approval of 10.3.19 Meeting Minutes
6. Renewable Power Purchase Agreement for Small Hydroelectric Energy with Kern and Tule Hydro, LLC (Discussion/Action)
7. Proposed Changes to MCE's Net Energy Metering Tariff and Cash-Out Program (Discussion/Action)
8. GHG-Free Allocation Opportunity (Discussion)
9. Committee Matters & Staff Matters (Discussion)
10. Adjourn



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**DRAFT**

**MCE TECHNICAL COMMITTEE MEETING MINUTES**  
**October 3, 2019**  
**8:30 A.M.**

**Mt. Diablo Room**  
**2300 Clayton Road, Suite 1150**  
**Concord, CA 94520**

**Charles F. McGlashan Board Room**  
**1125 Tamalpais Avenue**  
**San Rafael, CA 94901**

**City of El Cerrito**  
**10890 San Pablo Avenue, Hillside Conference Room,**  
**El Cerrito, CA 94530**

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**Present:** Greg Lyman, City of El Cerrito, *El Cerrito*  
Kevin Haroff, City of Larkspur, *San Rafael*  
Kate Sears, County of Marin, *San Rafael*  
Justin Wedel, City of Walnut Creek, *Concord*  
Ray Withy, City of Sausalito and City of Mill Valley, *San Rafael*

**Absent:** Scott Perkins, City of San Ramon  
Rob Schroder, City of Martinez

**Staff**

**& Others:** Jessica Brooks, Assistant Board Clerk  
Kirby Dusel, Resource Planning & Renewable Energy Programs (PEA)  
CB Hall, Power Supply Contracts Manager  
Darlene Jackson, Board Clerk  
Vicken Kasarjian, Chief Operating Officer  
Jay Marshall, IT Systems Manager  
Michelle Nochisaki, GHFI Marin Customer Programs Manager  
Lindsay Saxby, Manager of Power Resources  
Enyo Senyo-Mensah, Administrative Services Associate  
Taylor Sherman, Administrative Services Assistant  
Dawn Weisz, Chief Executive Officer

**1. Roll Call**

Chair Sears called the regular Technical Committee meeting to order at 8:33 a.m. with quorum established by roll call.

**2. Board Announcements (Discussion)**

There were none.

**3. Public Open Time (Discussion)**

**DRAFT**

There were none.

**4. Report from Chief Executive Officer (Discussion)**

CEO Dawn Weisz, reported the following:

- Announced her attendance at the Supplier Diversity En Banc in Fresno today. Thanked the Board and Staff for participating in the survey.
- The Risk Oversight Committee met on Thursday, September 26, 2019. There are no new developments to report.
- A new power supply hedge solicitation will be released soon to fill needs according to the Risk Management plan. Also, many transactions for Resource Adequacy will be completed in the next four weeks to secure supply for the “year ahead” compliance filings at the CPUC. Due to recent rule changes at the CPUC, many more transactions will be needed this year compared to previous RA cycles. An approved contracts report will be sent out to the Board reflective of these transactions.
- COO Vicken Kasarjian shared a few details about the MCE partnership with Marin Water District exploring a pump-hydroelectric supply project.

**5. Consent Calendar (Discussion/Action)**

C.1 Approval of 8.1.19 Meeting Minutes

Chair Sears opened the public comment period and there were no comments.

Action: It was M/S/C (Lyman/Withy) **to approve Consent Calendar**. Motion carried by unanimous vote. (Absent: Directors Perkins and Schroder).

**6. MCE 2020 Integrated Resource Plan (Discussion/Action)**

CB Hall, Power Supply Contracts Manager and Lindsay Saxby, Manager of Power Resources, presented this item and addressed questions from Committee members.

Chair Sears opened the public comment period and there were comments from Howdy Gowdy, Hari Lamba from El Cerrito and Dan Segedin, Robert Miller from Marin Conservation League.

Action: It was M/S/C (Haroff/Wedel) **to approve MCE’s 2020 Integrated Resource Plan** (Absent: Directors Perkins and Schroder).

**7. First Agreement with Bidgely, Inc. (Discussion/Action)**

Michelle Nochisaki, GHFI Marin Customer Programs Manager, presented this item and addressed questions from Committee members.

Chair Sears opened the public comment period and there were comments from members of the public, Howdy Gowdy and Hari Lamba from El Cerrito.

**DRAFT**

Action: It was M/S/C (Lyman/Withy) to **approve the proposed First Agreement with Bidgely, Inc.** (Absent: Directors Perkins Schroder, Perkins and Wedel).

**8. Information Security Overview and Planning (Discussion)**

Jay Marshall, IT Systems Manager, presented this item and addressed questions from Committee members.

Chair Sears opened the public comment period and there were no comments.

Action: No action required.

**9. Committee & Staff Matters (Discussion)**

Chair Sears opened the public comment period and there were no comments.

**10. Adjournment**

Chair Sears adjourned the meeting at 10:50 a.m. to the next scheduled Technical Committee Meeting on November 7, 2019.

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**Kate Sears, Chair**

**Attest:**

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**Dawn Weisz, Secretary**



December 5, 2019

TO: MCE Technical Committee

FROM: CB Hall, Power Supply Contracts Manager

RE: Renewable Power Purchase Agreement for Small Hydroelectric Energy with Kern and Tule Hydro, LLC (Agenda Item #06)

ATTACHMENT: Renewable Power Purchase Agreement between MCE and Kern and Tule Hydro, LLC

Dear Technical Committee Members:

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**Overview:**

As MCE ramps up its procurement of Power Content Label 1 (PCC 1) renewable energy (85% by 2029 for Light Green customers), MCE staff has been evaluating opportunities to procure small hydroelectric generation, a PCC 1 renewable energy resource. This particular opportunity presented to MCE by NLine Energy in the early summer of 2019.

The proposed Power Purchase Agreement (PPA) contained in this Technical Committee packet is for 18 MW of small hydroelectric electricity sourced from the foothills northeast of Bakersfield. More specifically, this opportunity is comprised of two distinct hydroelectric facilities: (1) Kern Canyon, a 11.5 MW run-of-the-river facility located on the Kern River downstream of Lake Isabella (owned and operated by the Army Corps of Engineers); (2) Tule River, a 6.4 MW run-of-the-river facility located upstream of Lake Success. Both hydroelectric facilities are owned by PG&E and are currently out of service: Kern Canyon was forced out of service in 2017 when a rock slide damaged the diversion dam and intake; Tule River was forced out of service in 2017 when a wildfire destroyed the penstock headworks.

Sorenson Engineering is in the final stages of purchasing the two facilities from PG&E. Once the transaction is complete, Sorenson will make repairs and upgrades to the facilities. Under the proposed PPA, Sorenson engineering has offered to sell the generation and capacity to MCE under a 15-year term, with an expected Commercial Operation Date of July 2021. MCE would be responsible for scheduling each of the units into the CAISO and would have full rights to the CAISO revenue, the PCC 1 renewable energy and the California Resource Adequacy benefits.

Sorenson Engineering, headquartered in Ivins, Utah, was founded in 1980 by Ted and Gayle Sorenson and has specialized in small hydroelectric energy since 1984 – developing, permitting, designing, constructing, owning, and operating small hydroelectric facilities throughout the Western US (and one in Belize). Sorenson Engineering sells power to major utilities and co-ops, including PacifiCorp, Idaho Power,

Northwestern Energy, Delta-Montrose Electric Co-Op, the Municipal Energy Agency of Nebraska, and Belize Electricity Limited.

**Fiscal Impact:** The cost of this contract will be included in MCE's Fiscal Year (FY) budgets starting in FY 2020/2021 through FY 2035/2036 and 2036/2037.

**Recommendation:** Authorize execution of Renewable Power Purchase Agreement with Kern and Tule Hydro, LLC

**CONFIDENTIAL**  
**MCE DRAFT**  
**25 NOVEMBER 2019**

**RENEWABLE POWER PURCHASE AGREEMENT**  
**COVER SHEET**

**Seller:** Kern and Tule Hydro LLC

**Buyer:** Marin Clean Energy, a California joint powers authority (“MCE”)

**Description of Facility:** The Kern Canyon and Tule River hydro projects located in Kern County and Tulare County, respectively, in the State of California with a combined generating capacity of approximately 17.9MW, subject to adjustment as described in Section 5 of Exhibit B. [*Drafting note – once in final form the parties intend to split this into a separate PPA for each Facility.*]

**Milestones:**

<b>Milestone</b>	<b>Date for Completion</b>
<b>Evidence of Site Control</b>	[_____]
<b>CEC Pre-Certification Obtained</b>	Complete
<b>Documentation of Conditional Use Permit if required: CEQA [X] Cat Ex, [ ] Neg Dec, [ ] Mitigated Neg Dec, [ ] EIR</b>	[_____]
<b>Seller’s receipt of Phase I and Phase II Interconnection study results for Seller’s Interconnection Facilities</b>	[_____]
<b>Executed Interconnection Agreement</b>	3/1/2020
<b>Expected Construction Start Date</b>	[Seven months from the Effective Date] <sup>1</sup>
<b>Full Capacity Deliverability Status</b>	Commercial Operation Date
<b>Initial Synchronization</b>	[_____]
<b>Network Upgrades completed</b>	[_____]
<b>Expected Commercial Operation Date</b>	[Nineteen months from the Effective Date] <sup>2</sup>

<sup>1</sup> Note to draft (NTD)- prior to execution, let’s determine the exact date and include it here.

<sup>2</sup> Note to draft (NTD)- prior to execution, let’s determine the exact date and include it here.

**Delivery Term:** Fifteen (15) Contract Years.

**Expected Energy:**

Contract Year	Expected Energy (MWh)
1-15	

**Contract Capacity:** 17.9

**Contract Price:** The Contract Price of the Product shall be:

Contract Year	Contract Price
1-15	

**Product:**

- ☒ Delivered Energy
- ☒ Green Attributes (Portfolio Content Category 1) associated with Delivered Energy
- ☒ Capacity Attributes
- ☒ Ancillary Services

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

**Security, Damage Payment, and Guarantor**

**Development Security** of Contract Capacity

**Performance Security** of Contract Capacity

**Damage Payment:** See definition of "Damage Payment"

**Guarantor:** N/A



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**Exhibits:**

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Exhibit D	Scheduling Coordinator Responsibilities
Exhibit E	Progress Reporting Form
Exhibit F-1	Form of Average Expected Energy Report
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Exhibit H	Form of Commercial Operation Date Certificate
Exhibit I	Form of Installed Capacity Certificate
Exhibit J	Form of Construction Start Date Certificate
Exhibit K	Form of Letter of Credit
Exhibit L	Form of Guaranty
Exhibit M	Reserved
Exhibit N	Notices
Exhibit O	Operating Restrictions
Exhibit P	Metering Diagram
Exhibit Q	Reserved

## RENEWABLE POWER PURCHASE AGREEMENT

This Renewable Power Purchase Agreement (“**Agreement**”) is entered into as of \_\_\_\_\_, 2019 (the “**Effective Date**”), between Buyer and Seller. Buyer and Seller are sometimes referred to herein individually as a “**Party**” and jointly as the “**Parties**.” All capitalized terms used in this Agreement are used with the meanings ascribed to them in Article 1 to this Agreement.

### RECITALS

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

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

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

### ARTICLE 1 DEFINITIONS

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

“**AC**” means alternating current.

“**Accepted Compliance Costs**” has the meaning set forth in Section 3.13.

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

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

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

“**Availability Guarantee**” has the meaning set forth in Section 3.14.

**“Available Generating Capacity”** means the capacity of the Facility, expressed in whole MWs, that is mechanically available to generate Energy.

**“Available Hours”** means the total hours during the measurement period less the hours the Facility was unable to generate energy due to a Force Majeure Event, System Emergency, Buyer Default, Curtailment Periods, or Buyer Curtailment Period.

**“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. Pacific Standard Time (PST) for the Party sending a Notice, or payment, or performing a specified action.

**“Buyer”** means Marin Clean Energy, a California joint powers authority.

**“Buyer Curtailment Order”** means the instruction from Buyer to Seller to reduce Delivered Energy from the Facility by the amount, and for the period of time set forth in such instruction, which instruction shall be consistent with the Operating Restrictions, for reasons unrelated to a Planned Outage, Forced Facility Outage, Force Majeure Event or Curtailment Order. A Buyer Curtailment Order shall include a curtailment of a Self-Scheduled energy award from the CAISO.

**“Buyer Curtailment Period”** means the period of time, as measured using current Settlement Intervals, during which Seller reduces Delivered Energy from the Facility pursuant to or as a result of a Buyer Curtailment Order; provided, that the duration of any Buyer Curtailment Period shall be inclusive of the time required for the Facility to ramp down and ramp up.

**“Buyer Default”** means a failure by Buyer (or its agents) to perform Buyer’s obligations hereunder, and includes an Event of Default of Buyer.

**“Buyer’s WREGIS Account”** has the meaning set forth in Section 4.8(a).

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

**“CAISO Approved Meter”** means a CAISO approved revenue quality meter or meters, 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 Delivered Energy delivered to the Delivery Point.

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

**“CAISO Operating Instructions”** means the “operating instructions” defined in Section 37.2.1.1 of the CAISO Tariff, as required.

**“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.

**“Calculated Energy”** means the amount the Facility would have produced but for a Buyer Curtailment Order calculated by using available stream gauge data for water flow, the number of hours of the Buyer Curtailment, the net head for the Facility using the amount of water flow, and the following formula for power generation:

*Kwh*

$$= \frac{[62.4 (\text{specific weight of water}) \times \text{water flow (in cfs)} \times \text{net head (in feet)}]}{550} \times .746 \times .895 \times \text{no. of h}$$

**“California Renewables Portfolio Standard”** or **“RPS”** means the renewable energy program and policies established by California State Senate Bills 1038 (2002), 1078 (2002), 107 (2008), X-1 2 (2011), 350 (2015), and 100 (2018) as codified in, *inter alia*, California Public Utilities Code Sections 399.11 through 399.31 and California Public Resources Code Sections 25740 through 25751, as such provisions are amended or supplemented from time to time.

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

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

**“CEC Certification and Verification”** means that the CEC has certified (or, with respect to periods before the date that is one hundred eighty (180) days following the Commercial Operation Date, that the CEC has pre-certified, as such date may be extended pursuant to Section 3.9) that the Facility is an Eligible Renewable Energy Resource for purposes of the California Renewables Portfolio Standard and that all Delivered Energy delivered to the Delivery Point qualifies as generation from an Eligible Renewable Energy Resource.

**“CEC Precertification”** means that the CEC has issued a precertification for the Facility indicating that the planned operations of the Facility would comply with applicable CEC requirements for CEC Certification and Verification.

**“CEQA”** means the California Environmental Quality Act.

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

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

(b) ownership interests in Seller owned directly or indirectly by any Lender (including any equity or tax equity investor directly or indirectly providing financing or refinancing for the Facility or purchasing equity ownership interests of Seller or its Affiliates, and any trustee or agent or similar representative acting on their behalf) or assignee or transferee thereof shall be excluded from the total outstanding equity interests in Seller.

**“Claim”** has the meaning set forth in Section 16.2.

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

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

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

**“Commercial Operation Delay Damages”** or **“COD Delay Damages”** means an amount equal to [REDACTED]

**“Compliance Actions”** has the meaning set forth in Section 3.13.

**“Compliance Expenditure Cap”** has the meaning set forth in Section 3.13.

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

**“Construction Delay Damages”** means an amount equal [REDACTED].

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

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

**“Contract Capacity”** means the amount of generating capacity of the Facility, as measured in MW at the Delivery Point, set forth on the Cover Sheet, as the same may be adjusted pursuant to Section 5 of Exhibit B.

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

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



**“Contract Year”** means a period of twelve (12) consecutive months. 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.

**“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 the 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, which is incorporated into this Agreement.

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

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

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

(a) CAISO orders, directs, alerts, or provides notice to a Party, including a CAISO Operating Instruction, that such Party is required to curtail deliveries of Delivered Energy for the following reasons: (i) any System Emergency, or (ii) any warning of an anticipated System Emergency, or warning of an imminent condition or situation, which jeopardizes CAISO’s electric system integrity or the integrity of other systems to which CAISO is connected;

(b) a curtailment ordered by the Participating Transmission Owner for reasons including, but not limited to, (i) any situation that affects normal function of the electric system including, but not limited to, any abnormal condition that requires action to prevent circumstances such as equipment damage, loss of load, or abnormal voltage conditions, or (ii) any warning, forecast or anticipation of conditions or situations that jeopardize the Participating Transmission Owner’s electric system integrity or the integrity of other systems to which the Participating Transmission Owner is connected;

(c) a curtailment ordered by CAISO or 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 Delivered Energy to the Delivery Point; or

(d) a curtailment in accordance with Seller’s obligations under its Interconnection Agreement with the Participating Transmission Owner or distribution operator.

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

Order; provided that the Curtailment Period shall be inclusive of the time required for the Facility to ramp down and ramp up.

**“Construction Delay Damages”**

**“Damage Payment”**

**“Deemed Delivered Energy”** means the amount of Delivered Energy expressed in MWh that the Facility would have produced and delivered to the Delivery Point, but that is not produced by the Facility during a Buyer Curtailment Period, which amount shall be calculated as follows: (a) for Buyer Curtailment Periods of one (1) week or less, the difference between a simple average of Delivered Energy from the prior seven (7) day period and the following seven (7) day period, applicable to the Buyer Curtailment Period, less the amount of Delivered Energy delivered to the Delivery Point during the Buyer Curtailment Period, if any, or (b) for Buyer Curtailment Periods of one (1) week or longer, the difference between the Calculated Energy applicable to the Buyer Curtailment Period, less the amount of Delivered Energy delivered to the Delivery Point during the Buyer Curtailment Period, if any; provided that, if the applicable difference in either (a) or (b) is negative, the Deemed Delivered Energy shall be zero (0).

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

**“Deficient Month”** has the meaning set forth in Section 4.8(e).

**“Delay Damages”** means Construction Delay Damages and COD Delay Damages.

**“Delivered Energy”** means for each hour, the as-available electric energy generated by the Facility, which is net of Electrical Losses and Station Use and delivered to the Delivery Point, as measured by the Facility Meter.

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

**“Delivery Term”** shall mean the period of Contract Years set forth on the Cover Sheet beginning on the 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 set forth on the Cover Sheet.

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

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

**“Electrical Losses”** means all transmission or transformation losses or gains between the Facility and the Delivery Point, including losses or gains associated with delivery of Delivered Energy to the Delivery Point.

**“Eligible Renewable Energy Resource”** has the meaning set forth in California Public Utilities Code Section 399.12(e) and California Public Resources Code Section 25741(a), as either code provision is amended or supplemented from time to time.

**“Energy”** means electrical energy generated by the Facility.

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

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

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

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

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

**“Expected Energy”** means the quantity of Energy attributable to the Contract Capacity that Seller expects to be able to deliver from the Facility during each Contract Year in the quantity specified on the Cover Sheet.

**“Facility”** means the hydro generating facilities described on the Cover Sheet and in Exhibit A, located at the Site and including mechanical equipment and associated facilities and equipment required to deliver Energy to the Delivery Point.

**“Facility Meter”** means the CAISO Approved Meter that will measure all electric energy generated by the Facility, including Delivered Energy. Without limiting Seller’s obligation to deliver Delivered Energy to the Delivery Point, the Facility Meter may be located at the low voltage or the high voltage side of the main step up transformer, and Delivered Energy will be subject to adjustment in accordance with CAISO meter requirements and Prudent Operating Practices to account for Electrical Losses and Station Use.

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

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

**“Forced Facility Outage”** means an unexpected failure of one or more components of the Facility that prevents Seller from generating Energy or making Delivered Energy available at the Delivery Point and that is not the result of a Force Majeure Event.

**“Forward Certificate Transfers”** has the meaning set forth in Section 4.8(a).

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

**“Future Environmental Attributes”** shall mean any and all emissions, air quality or other environmental attributes other than Green Attributes or Renewable Energy Incentives under the RPS regulations or under any and all other international, federal, regional, state or other law, rule, regulation, bylaw, treaty or other intergovernmental compact, decision, administrative decision, program (including any voluntary compliance or membership program), competitive market or business method (including all credits, certificates, benefits, and emission measurements, reductions, offsets and allowances related thereto) that are attributable, now, or in the future, to the generation of electrical energy by the Facility and its displacement of conventional energy generation. Future Environmental Attributes do not include (i) any energy, capacity, reliability or other power attributes from the Facility, (ii) Renewable Energy Incentives, or (iii) investment tax credits or production tax credits associated with the construction or operation of the Facility, or other financial incentives in the form of credits, reductions, or allowances associated with the Facility that are applicable to a state or federal income taxation obligation.

**“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., SP-15), all of which should be calculated for the remaining Contract Term, and include the value of Green Attributes and Capacity Attributes.

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

**“Green Attributes”** means any and all credits, benefits, emissions reductions, offsets, and allowances, howsoever entitled, attributable to the generation from the Facility and its displacement of conventional energy generation. Green Attributes include but are not limited to Renewable Energy Credits, as well as: (1) any avoided emissions of pollutants to the air, soil or water such as sulfur oxides (SOx), nitrogen oxides (NOx), carbon monoxide (CO) and other

pollutants; (2) any avoided emissions of carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride and other greenhouse gases (GHGs) that have been determined by the United Nations Intergovernmental Panel on Climate Change, or otherwise by law, to contribute to the actual or potential threat of altering the Earth's climate by trapping heat in the atmosphere; (3) the reporting rights to these avoided emissions, such as Green Tag Reporting Rights. Green Tags are accumulated on a MWh basis and one Green Tag represents the Green Attributes associated with one (1) MWh of Energy. Green Attributes do not include (i) any energy, capacity, reliability or other power attributes from the Facility, (ii) Renewable Energy Incentives, (iii) 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, (iv) 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 (v) emission reduction credits encumbered or used by the Facility for compliance with local, state, or federal operating or air quality permits. If the Facility is a biomass or landfill gas facility and Seller receives any tradable Green Attributes based on the greenhouse gas reduction benefits or other emission offsets attributed to its fuel usage, it shall provide Buyer with sufficient Green Attributes to ensure that there are zero net emissions associated with the production of electricity from the Facility.

**"Green Tag Reporting Rights"** means the right of a purchaser of renewable energy to report ownership of accumulated "green tags" in compliance with and to the extent permitted by applicable Law and include, without limitation, rights under Section 1605(b) of the Energy Policy Act of 1992, and any present or future federal, state or local certification program or emissions trading program, including pursuant to the WREGIS Operating Rules.

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

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

**"Guarantor"** means, with respect to Seller, a Person that is reasonably acceptable to Buyer or any Person

[REDACTED], (e) is incorporated or organized in a jurisdiction of the United States and is in good standing in such jurisdiction, and (f) executes and delivers a Guaranty for the benefit of Buyer.

**"Guaranty"** means a guaranty from a Guarantor provided for the benefit of Buyer substantially in the form attached as Exhibit L.

**"Hazardous Substance"** means, collectively, (a) any chemical, material or substance that is listed or regulated under applicable Laws as a "hazardous" or "toxic" substance or waste, or as a "contaminant" or "pollutant" or words of similar import, (b) any petroleum or petroleum products, flammable materials, explosives, radioactive materials, asbestos, urea formaldehyde

foam insulation, and transformers or other equipment that contain polychlorinated biphenyls, and (c) any other chemical or other material or substance, exposure to which is prohibited, limited or regulated by any Laws.

**“Imbalance Energy”** means the amount of Instructed Energy or Uninstructed Energy in MWh, in any given Settlement Period or Settlement Interval, by which the amount of Delivered Energy deviates from the amount of Scheduled Energy.

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

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

**“Installed Capacity”** means the actual generating capacity of the Facility, as measured in MW(AC) at the Delivery Point, that achieves Commercial Operation, adjusted for ambient conditions on the date of the performance test, and as evidenced by a certificate substantially in the form attached as Exhibit I hereto.

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

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

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

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

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

**“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 December 19, 2008, as amended from time to time, under which Buyer is organized as a Joint Powers Authority in accordance with the Joint Powers Act.

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

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

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

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

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

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

**“Losses”** means, with respect to any 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., SP-15), all of which should be calculated for the remaining Contract Term and must include the value of Green Attributes, Capacity Attributes, and Renewable Energy Incentives.

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

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

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

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

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

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

“**Negative LMP**” means, in any Settlement Period or Settlement Interval, whether in the Day-Ahead Market or Real-Time Market, the LMP at the Delivery Point is less than Zero dollars (\$0).

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

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

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

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

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

“**Notice of Claim**” has the meaning set forth in Section 16.2.

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

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

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

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

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

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

“**Permitted Transferee**” means (i) any Affiliate of Seller or (ii) any entity that satisfies, or is controlled by another Person that satisfies, the following requirements:

- (a) A tangible net worth of not less than sixty million dollars (\$60,000,000); and



(b) At least two (2) years of experience in the ownership and operations of power generation facilities similar to the Facility with a combined generating capacity of at least twenty (20) MW, or has retained a third-party with such experience to operate the Generating Facility.

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

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

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

**“Portfolio Content Category”** means PCC1, PCC2 or PCC3, as applicable.

**“Portfolio Content Category 1”** or **“PCC1”** means any Renewable Energy Credit associated with the generation of electricity from an Eligible Renewable Energy Resource consisting of the portfolio content set forth in California Public Utilities Code Section 399.16(b)(1), as may be amended from time to time or as further defined or supplemented by Law.

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

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

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

**“PTC”** means the production tax credit established pursuant to Section 45 of the United States Internal Revenue Code of 1986.

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

**“RA 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 3.8(b).

**“RA Shortfall”** means the amount of RA Capacity (in kW), if any, by which the NQC of the Facility was less than the QC of the Facility due to (a) Seller’s failure to meet the Availability Guarantee, Seller’s failure to provide notice of any Forced Facility Outage, or Seller’s failure to otherwise perform under this Agreement or (b) the CAISO’s reduction in Facility NQC due to the Facility’s actual rate of the foregoing during the Delivery Term (e.g., unforced capacity or “UCAP”-type adjustments to NQC).

**“RA Shortfall Month”** means, for purposes of calculating an RA Deficiency Amount under Section 3.9(b), any month commencing after the Commercial Operation Date during which there was an RA Shortfall.

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

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

**“Real-Time Price”** means the Resource-Specific Settlement Interval LMP as defined in the CAISO Tariff. If there is more than one applicable Real-Time Price for the same period of time, Real-Time Price shall mean the price associated with the smallest time interval.

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

**“Renewable Energy Credit”** has the meaning set forth in California Public Utilities Code Section 399.12(h), as may be amended from time to time or as further defined or supplemented by Law.

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

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

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

“**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, and “**Scheduled**” has a corollary meaning.

“**Scheduled Energy**” means the Delivered Energy that clears under the applicable CAISO market based on the final Day-Ahead Schedule, FMM Schedule, or Five-Minute Schedule (as defined in the CAISO Tariff), or any other financially binding Schedule, market instruction or dispatch for the Facility for a given period of time implemented in accordance with the CAISO Tariff.

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

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

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

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

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

“**Seller’s WREGIS Account**” has the meaning set forth in Section 4.8(a).

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

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

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

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

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

**“Site Control”** means that Seller (or, prior to the Delivery Term, its Affiliate): (a) owns, has executed a binding purchase contract for, 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”** means:

(a) The Energy produced by the Facility that is used within the Facility to power the lights, motors, control systems and other electrical loads that are necessary for operation of the Facility; and

(b) The Energy produced by the Facility that is consumed within the Facility’s electric energy distribution system as losses.

**“Substitute Product”** has the meaning set forth in Exhibit B.

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

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

**“Tax Credits”** means the PTC, ITC and any other state, local or federal production tax credit, depreciation benefit, tax deduction or investment tax credit specific to the production of renewable energy or investments in renewable energy facilities.

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

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

**“Test Energy”** means Delivered Energy delivered (a) commencing on the later of (i) the first date that the CAISO informs Seller in writing that Seller may deliver Delivered Energy to the CAISO and (ii) the first date that the PTO informs Seller in writing that Seller has conditional or temporary permission to parallel and (b) ending upon the occurrence of the Commercial Operation Date.

**“Test Energy Rate”** has the meaning set forth in Section 3.7.

**“Total Facility Capacity”** means seventeen and nine-tenths (17.9) MW.

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

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

**“Ultimate Parent”** means K and T Sorenson, LLC.

**“Variable Energy Resource”** or **“VER”** has the meaning set forth in the CAISO Tariff.

**“WREGIS”** means the Western Renewable Energy Generation Information System or any successor renewable energy tracking program.

**“WREGIS Certificate Deficit”** has the meaning set forth in Section 4.8(e).

**“WREGIS Certificates”** has the same meaning as “Certificate” as defined by WREGIS in the WREGIS Operating Rules and are designated as eligible for complying with the California Renewables Portfolio Standard.

**“WREGIS Operating Rules”** means those operating rules and requirements adopted by WREGIS as of May 1, 2018, as subsequently amended, supplemented or replaced (in whole or in part) from time to time.

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

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

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

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

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

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

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

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

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

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

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

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

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

## ARTICLE 2 TERM; CONDITIONS PRECEDENT

### 2.1 **Contract Term.**

(a) The term of this Agreement shall commence on the Effective Date and shall remain in full force and effect until the conclusion of the Delivery Term, subject to any early termination provisions set forth herein (“**Contract Term**”); provided, however, that subject to Buyer’s obligations in Section 3.7, Buyer’s obligations to pay for or accept any Product are subject to Seller’s completion of the conditions precedent pursuant to Section 2.2.

(b) Applicable provisions of this Agreement shall continue in effect after termination, including early termination, to the extent necessary to enforce or complete the duties, obligations or responsibilities of the Parties arising prior to termination. The confidentiality obligations of the Parties under Article 18 and all indemnity and audit rights shall remain in full force and effect for three (3) years following the termination of this Agreement.

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

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

(b) 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;

(c) 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 delivered to Buyer;

(d) All required regulatory authorizations, approvals and permits for the operation of the Facility have been obtained and shall be in full force and effect, and all conditions thereof that are capable of being satisfied on the Commercial Operation Date have been satisfied, provided, that, Seller may demonstrate satisfaction of this subsection 2.2(d) by delivery to Buyer of a copy of a temporary or final certificate of occupancy (or equivalent) for the Facility;

(e) Seller has received CEC Precertification of the Facility (and reasonably expects to receive final CEC Certification and Verification for the Facility in no more than one hundred eighty (180) days from the Commercial Operation Date);

(f) Seller (with the reasonable participation of Buyer) shall have completed all applicable WREGIS registration requirements that are reasonably capable of being complete prior to the Commercial Operation Date under WREGIS rules, including (as applicable) the completion and submittal of all applicable registration forms and supporting documentation, which may include applicable interconnection agreements, informational surveys related to the Facility, QRE service agreements, and other appropriate documentation required to effect Facility registration with WREGIS and to enable Renewable Energy Credit transfers related to the Facility within the WREGIS system;

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

(h) Seller has paid Buyer for all amounts owing under this Agreement as of the Commercial Operation Date, if any, including Construction Delay Damages, and COD Delay Damages.

**2.3 Development; Construction; Progress Reports.** Within fifteen (15) days after the close of (i) each calendar quarter from the first calendar quarter following the Effective Date until the Construction Start Date, and (ii) each calendar month from the first calendar month following the Construction Start Date until the Commercial Operation Date, Seller shall provide to Buyer a Progress Report and agree to regularly scheduled meetings between representatives of Buyer and Seller to review such monthly reports and discuss Seller's construction progress. The form of the Progress Report is set forth in Exhibit E. Seller shall also provide Buyer with any reasonable requested documentation (subject to confidentiality restrictions) directly related to the achievement of Milestones within ten (10) Business Days of receipt of such request by Seller. For

the avoidance of doubt, as between Seller and Buyer, Seller is solely responsible for the design and construction of the Facility, including the location of the Site, obtaining all permits and approvals to build the Facility, the Facility layout, and the selection and procurement of the equipment comprising the Facility.

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

### ARTICLE 3 PURCHASE AND SALE

3.1 **Purchase and Sale of Product.** Subject to the terms and conditions of this Agreement, during the Delivery Term, Buyer will purchase and receive all the Product produced by or associated with the Facility at the Contract Price, and Seller shall supply and deliver to Buyer all the Product produced by or associated with the Facility (net of applicable losses). At its sole discretion, Buyer may during the Delivery Term re-sell or use for another purpose all or a portion of the Product, provided that no such re-sale or use shall relieve Buyer of any obligations hereunder. During the Delivery Term, Buyer will have exclusive rights to offer, bid, or otherwise submit the Product, or any component thereof, purchased hereunder from the Facility after the Delivery Point for resale into the market or to any third party, and retain and receive any and all related revenues. Subject to Buyer’s obligation to pay for Deemed Delivered Energy, Buyer has no obligation to purchase from Seller any Product for which the associated Delivered Energy is not or cannot be delivered to the Delivery Point as a result of an outage of the Facility, a Force Majeure Event, or a Curtailment Order.

3.2 **Sale of Green Attributes.** During the Delivery Term, Seller shall sell and deliver to Buyer, and Buyer shall purchase and receive from Seller, all Green Attributes attributable to the Delivered Energy generated by the Facility.

3.3 **Compensation.** During the Delivery Term, Buyer shall pay Seller the Contract Price for each MWh of Delivered Energy and Deemed Delivered Energy.

3.4 **Imbalance Energy.** Buyer and Seller recognize that in any given Settlement Period there may be Imbalance Energy. To the extent there is any Imbalance Energy, any payments or charges related to such Imbalance Energy, shall be for the account of Buyer, provided that Seller



shall reimburse Buyer for any Imbalance Energy charges due to Seller's failure to perform its obligations under the CAISO Tariff or this Agreement. Notwithstanding the foregoing, Seller shall have no obligations under the CAISO Tariff or under this Agreement related to being the Scheduling Coordinator or related to Buyer's role as Buyer or re-seller of the Product hereunder.

**3.5 Ownership of Renewable Energy Incentives.** Seller shall have all right, title and interest in and to all Renewable Energy Incentives. Buyer acknowledges that any Renewable Energy Incentives belong to Seller. If any Renewable Energy Incentives, or values representing the same, are initially credited or paid to Buyer, Buyer shall cause such Renewable Energy Incentives or values relating to same to be assigned or transferred to Seller without delay. Buyer shall reasonably cooperate with Seller, at Seller's sole expense, in Seller's efforts to meet the requirements for any certification, registration, or reporting program relating to Renewable Energy Incentives.

**3.6 Future Environmental Attributes.**

(a) The Parties acknowledge and agree that as of the Effective Date, environmental attributes sold under this Agreement are restricted to Green Attributes; however, Future Environmental Attributes may be created by a Governmental Authority through Laws enacted after the Effective Date. Subject to the final sentence of this Section 3.6(a), and Sections 3.6(b) and 3.13, in such event, Buyer shall bear all costs and risks associated with the transfer, qualification, verification, registration and ongoing compliance for such Future Environmental Attributes, but there shall be no increase in the Contract Price. Upon Seller's receipt of Notice from Buyer of Buyer's intent to claim such Future Environmental Attributes, the Parties shall determine the necessary actions and additional costs associated with such Future Environmental Attributes. Seller shall have no obligation to alter the Facility or the operation of the Facility unless the Parties have agreed on all necessary terms and conditions relating to such alteration or change in operation and Buyer has agreed to reimburse Seller for all costs, losses, and liabilities associated with such alteration or change in operation.

(b) If Buyer elects to receive Future Environmental Attributes pursuant to Section 3.6(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 additional costs to Buyer, as set forth above (in any event subject to Section 3.12); *provided*, that the Parties acknowledge and agree that such terms are not intended to alter the other material terms of this Agreement.

**3.7 Test Energy.** No less than fourteen (14) days prior to the first day on which Test Energy is expected to be available from the Facility, Seller shall notify Buyer of the availability of the Test Energy. If and to the extent the Facility generates Test Energy, Seller shall sell and Buyer shall purchase from Seller all Test Energy and any associated Products on an as-available basis for up to ninety (90) days from the first delivery of Test Energy. As compensation for such Test Energy and associated Product, Buyer shall pay Seller an amount equal to [REDACTED] (the "**Test Energy Rate**"). For the avoidance of doubt, the conditions precedent in Section 2.2 are not applicable to the Parties' obligations under this Section 3.7.

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

(a) Throughout the Delivery Term, subject to Section 3.8 and Section 3.13, Seller grants, pledges, assigns and otherwise commits to Buyer all of the Capacity Attributes from the Facility associated with the Contract Capacity.

(b) Throughout the Delivery Term, Seller shall use commercially reasonable efforts to maintain eligibility for Full Capacity Deliverability Status or Interim Deliverability Status for the Facility from the CAISO and shall perform all commercially reasonable actions necessary to ensure that the Facility qualifies to provide Resource Adequacy Benefits to Buyer.

(c) Throughout the Delivery Term, subject to Section 3.8, Seller hereby covenants and agrees to transfer all of the Resource Adequacy Benefits and other Capacity Attributes associated with the Contract Capacity of the Facility to Buyer.

For the duration of the Delivery Term, subject to Section 3.8, Seller shall take all reasonable actions, including complying with all applicable registration and reporting requirements, and execute all documents or instruments necessary to enable Buyer to use all of the Capacity Attributes committed by Seller to Buyer pursuant to this Agreement.

**3.9 Resource Adequacy Failure.**

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

(b) RA Deficiency Amount Calculation. For each RA Shortfall Month Seller shall pay to Buyer an amount (the “**RA Deficiency Amount**”) equal to the product of the RA Shortfall, if any, multiplied

Except as provided above, Seller does not warrant the amount or type of Resource Adequacy Benefits available from the Facility and shall not be responsible for any loss in value of such Resource Adequacy Benefits due to any policy changes related to such Resource Adequacy Benefits.

**3.10 CEC Certification and Verification.** Subject to Section 3.12, Seller shall take all necessary steps including, but not limited to, making or supporting timely filings with the CEC to obtain and maintain CEC Certification and Verification for the Facility throughout the Delivery Term, including compliance with all applicable requirements for certified facilities set forth in the current version of the *RPS Eligibility Guidebook* (or its successor). Seller shall obtain CEC Precertification by the Commercial Operation Date. Within thirty (30) days after the Commercial Operation Date, Seller shall apply with the CEC for final CEC Certification and Verification. Subject to Section 3.12, Within one hundred eighty (180) days after the Commercial Operation Date, which deadline will be extended on a day-for-day basis if there is a delay in CEC Certification and Verification and that delay is caused by any reason other than an act or omission of Seller, Seller shall obtain and maintain throughout the remainder of the Delivery Term

the final CEC Certification and Verification. Seller must promptly notify Buyer and the CEC of any changes to the information included in Seller's application for CEC Certification and Verification for the Facility.

3.11 **Reserved.**

3.12 **RPS Standard Terms and Conditions.**

(a) Seller warrants that all necessary steps to allow the Renewable Energy Credits transferred to Buyer to be tracked in WREGIS will be taken prior to the first delivery under this Agreement.

(b) Seller, and, if applicable, its successors, represents and warrants that throughout the Delivery Term of this Agreement that: (i) the Facility qualifies and is certified by the CEC as an Eligible Renewable Energy Resource as such term is defined in Public Utilities Code Section 399.12 or Section 399.16; and (ii) the Facility's electrical energy output delivered to Buyer qualifies under the requirements of the California Renewables Portfolio Standard. To the extent a change in law occurs after execution of this Agreement that causes this representation and warranty to be materially false or misleading, it shall not be an Event of Default if Seller has used commercially reasonable efforts to comply with such change in law. The term "commercially reasonable efforts" as used in this Section 3.10 means efforts consistent with and subject to Section 3.13.

(c) Seller and, if applicable, its successors, represents and warrants that throughout the Delivery Period of this Agreement the renewable energy credits transferred to Buyer conform to the definition and attributes required for compliance with the California Renewables Portfolio Standard, as set forth in California Public Utilities Commission Decision 08-08-028, and as may be modified by subsequent decision of the California Public Utilities Commission or by subsequent legislation. To the extent a change in law occurs after execution of this Agreement that causes this representation and warranty to be materially false or misleading, it shall not be an Event of Default if Seller has used commercially reasonable efforts to comply with such change in law.

(d) Seller warrants that all necessary steps to allow the Renewable Energy Credits transferred to Buyer to be tracked in WREGIS will be taken prior to the first delivery under this Agreement.

(e) 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.

3.13 **Compliance Expenditure Cap.** If a change in Laws occurring after the Effective Date has increased Seller's known or reasonably expected costs to comply with Seller's obligations under this Agreement with respect to obtaining, maintaining, conveying or effectuating Buyer's use of (as applicable) any Product, then the Parties agree that the maximum aggregate amount of out-of-pocket costs and expenses ("**Compliance Costs**") Seller shall be required to bear during

the Delivery Term to comply with all of such obligations shall be capped [REDACTED] (“**Compliance Expenditure Cap**”). Seller’s internal administrative costs associated with obtaining, maintaining, conveying or effectuating Buyer’s use of (as applicable) any Product are excluded from the Compliance Expenditure Cap.

Any actions required for Seller to comply with its obligations set forth in the first paragraph above, the Compliance Costs of which will be included in the Compliance Expenditure Cap, shall be referred to collectively as the “**Compliance Actions**.”

If Seller reasonably anticipates the need to incur Compliance Costs in excess of the Compliance Expenditure Cap in order to take any Compliance Action Seller shall provide Notice to Buyer of such anticipated Compliance Costs.

Buyer will have sixty (60) days to evaluate such Notice (during which time period Seller is not obligated to take any Compliance Actions described in the Notice) and shall, within such time, either (1) agree to reimburse Seller for all or some portion of the Compliance Costs that exceed the Compliance Expenditure Cap, as applicable (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 3.12 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, the Compliance Actions that are the subject of the Notice for the remainder of the Term.

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.

3.14 **Availability Guarantee.** Seller agrees and warrants that [REDACTED]

## ARTICLE 4 OBLIGATIONS AND DELIVERIES

### 4.1 **Delivery.**

(a) **Energy.** Subject to the provisions of this Agreement, commencing on the Commercial Operation Date and through the end of the Contract Term, Seller shall supply and deliver the Product to Buyer at the Delivery Point, and Buyer shall take delivery of the Product at the Delivery Point in accordance with the terms of this Agreement. Seller will be responsible for paying or satisfying when due any costs or charges imposed in connection with the delivery of Delivered Energy to the Delivery Point, including without limitation, Station Use, Electrical Losses, and any operation and maintenance charges imposed on Seller by the Transmission Provider directly relating to the Facility’s operations. The Delivered Energy will be scheduled to

the CAISO by Buyer (or Buyer's designated Scheduling Coordinator) in accordance with Exhibit D.

(b) Green Attributes. All Green Attributes associated with the Delivered Energy during the Delivery Term are exclusively dedicated to and will be conveyed to Buyer. Seller represents and warrants that Seller holds the rights to all Green Attributes associated with the Delivered Energy, and Seller agrees to convey and hereby conveys all such Green Attributes to Buyer as included in the delivery of the Product from the Facility.

#### 4.2 Title and Risk of Loss.

(a) Energy. Title to and risk of loss related to the Delivered Energy, shall pass and transfer from Seller to Buyer at the Delivery Point. Seller warrants that all Product delivered to Buyer is free and clear of all liens, security interests, claims and encumbrances of any kind.

(b) Green Attributes. Title to and risk of loss related to the Green Attributes shall pass and transfer from Seller to Buyer upon the transfer of such Green Attributes in accordance with WREGIS.

4.3 Forecasting. Seller shall provide the forecasts described below at its sole expense and in a format reasonably acceptable to Buyer (or Buyer's designee). Seller shall use reasonable efforts to provide forecasts that are accurate and, to the extent not inconsistent with the requirements of this Agreement, shall prepare such forecasts, or cause such forecasts to be prepared, in accordance with Prudent Operating Practices.

(a) Annual Forecast of Energy. No less than forty-five (45) days before (i) the first day of the first Contract Year of the Delivery Term and (ii) at the beginning of each calendar year for every subsequent Contract Year during the Delivery Term, Seller shall provide to Buyer and the SC (if applicable) a non-binding forecast of each month's average-day expected Delivered Energy, by hour, for the following calendar year in a form substantially similar to the table found in Exhibit F-1, or as reasonably requested by Buyer.

(b) Monthly Forecast of Energy and Available Generating Capacity. 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 the SC (if applicable) a non-binding forecast of the hourly expected Delivered Energy, Available Generating Capacity for each day of the following month in a form substantially similar to the table found in Exhibit F-2 ("Monthly Delivery Forecast").

(c) Weekly Forecast. By 5:30 AM Pacific Prevailing Time on the Sunday before each week during the Delivery Term, or as otherwise specified by Buyer consistent with Prudent Operating Practice, Seller shall provide Buyer with a non-binding forecast of (i) Available Generating Capacity and (ii) hourly expected Delivered Energy, in each case, for each hour of the immediately succeeding week (Monday through Sunday) ("Week-Ahead Forecast"). Each Week-Ahead Forecast shall clearly identify, for each hour, Seller's non-binding best estimate of (i) the Available Generating Capacity and (ii) the hourly expected Delivered Energy. Seller shall provide the Day-Ahead Forecast in a form reasonably acceptable to Buyer.

(d) Updates to Week-Ahead Forecast. Seller agrees that if it becomes aware that the actual Available Generating Capacity or hourly expected Delivered Energy for any hour will be materially different than its Week-Ahead Forecast, Seller will notify Buyer as soon as reasonably practicable. The Parties acknowledge that Seller will use reasonable efforts where possible to provide such updates to Buyer by 9am (PST) the day before the date of such materially different Available Generating Capacity or Delivered Energy. The Parties agree that changes of 1 MW for Available Generating Capacity and 1 MWh for Delivered Energy shall be material for purposes of the Week-Ahead Forecast. Seller shall provide information regarding the beginning date and time of the event resulting in the change in Available Generating Capacity or hourly expected Delivered Energy, as applicable, the expected end date and time of such event, and any other information required by the CAISO or reasonably requested by Buyer. In addition to the foregoing, Seller shall ensure that Buyer and the Scheduling Coordinator have access to a dedicated telephone dialer wherein the Buyer and the Scheduling Coordinator can call in for real-time generation data. If internet service becomes available for a reasonable cost at the Facility, as determined by Seller in its reasonable discretion, or Buyer agrees to reimburse Seller for the installation cost of such service, Seller will arrange for Buyer and the Scheduling Coordinator to have further access to real time data via such internet connection.

#### 4.4 **Curtailment.**

(a) General. Seller agrees to reduce the amount of Delivered Energy produced by the Facility, by the amount and for the period set forth in any Curtailment Order or Buyer Curtailment Order, provided that Seller is not required to reduce such amount to the extent such Curtailment Order, Buyer Curtailment Order or notice is inconsistent with the limitations of the Facility set out in the Operating Restrictions.

(b) Buyer Curtailment. Buyer shall have the right to order Seller to curtail deliveries of Delivered Energy through Buyer Curtailment Orders, provided that Buyer shall pay Seller for all Deemed Delivered Energy associated with a Buyer Curtailment Period at the Contract Price.

(c) Failure to Comply. If Seller fails to comply with a Buyer Curtailment Order, then, for each MWh of Delivered Energy that is delivered by the Facility to the Delivery Point in contradiction to the Buyer Curtailment Order, Seller shall receive no compensation.

4.5 **Seller Equipment Required for Curtailment Instruction Communications.** Seller shall acquire, install, and maintain such facilities, communications links and other equipment, and implement such protocols and practices, as necessary to respond and follow instructions, including email, text messages, or other electronic signal conveying real time and intra-day instructions, to allow Seller to operate the Facility as directed by Buyer in accordance with this Agreement or a Governmental Authority, including to implement a Buyer Curtailment Order or Curtailment Order in accordance with the then-current methodology used to transmit such instructions as it may change from time to time. If at any time during the Delivery Term Seller's facilities, communications links or other equipment, protocols or practices are not in compliance with then-current methodologies, Seller shall take the steps necessary to become compliant as soon

as reasonably possible. Seller shall be liable pursuant to Section 4.4(c) for failure to comply with a Buyer Curtailment Order or Curtailment Order, during the time that Seller's facilities, communications links or other equipment, protocols or practices are not in compliance with then-current methodologies. For the avoidance of doubt, a Buyer Curtailment Order or Curtailment Order communication via such systems and facilities shall have the same force and effect on Seller as any other form of communication. Buyer and Seller agree that as of the Effective Date, telephone communication, text messaging and email communication between (a) Buyer and Buyer's Scheduling Coordinator and (b) Seller and Seller's Emergency Contact or Back-up Emergency Contact, with such Emergency Contact or Back-Up Emergency Contact having remote shut-down capability, shall be sufficient for compliance with this Section 4.5.

4.6 **Reduction in Delivery Obligation.** For the avoidance of doubt, and in no way limiting Section 3.1 or Exhibit G:

(a) **Facility Maintenance.** Seller shall provide to Buyer written schedules for scheduled maintenance for the Facility for each Contract Year no later than thirty (30) days prior to the first day of the applicable Contract Year. Buyer may provide comments no later than ten (10) Business Days after receiving any such schedule, and Seller will in good faith take into account any such comments. Seller will deliver to Buyer the final updated schedule of schedule maintenance no later than ten (10) Business Days after receiving Buyer's comments. Seller shall be permitted to reduce deliveries of Product during any such period of scheduled maintenance on the Facility, provided that, between June 1<sup>st</sup> and September 30<sup>th</sup>, Seller shall not schedule non-emergency maintenance that reduces the Energy generation of the Facility by more than ten percent (10%), unless (i) such outage is required to avoid damage to the Facility, (ii) such maintenance is necessary to maintain equipment warranties and cannot be scheduled outside the period of June 1<sup>st</sup> to September 30<sup>th</sup>, (iii) such outage is required in accordance with Prudent Operating Practice, or (iv) the Parties agree otherwise in writing (each of the foregoing, a "**Planned Outage**").

(b) **Forced Facility Outage.** Seller shall be permitted to reduce deliveries of Product during any Forced Facility Outage. Seller shall provide Buyer with Notice and expected duration (if known) of any Forced Facility Outage.

(c) **System Emergencies and other Interconnection Events.** Seller shall be permitted to reduce deliveries of Product during any period of System Emergency, Buyer Curtailment Period, or upon Notice of a Curtailment Order pursuant to the terms of this Agreement, the Interconnection Agreement or applicable tariff.

(d) **Force Majeure Event.** Seller shall be permitted to reduce deliveries of Product during any Force Majeure Event.

(e) **Buyer Default.** Seller shall be permitted to reduce deliveries of Product during any period in which there is Buyer Default.

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

4.7 **Reserved.**

4.8 **WREGIS.** Seller shall, subject to Section 3.12, take all actions and execute all documents or instruments necessary to ensure that all WREGIS Certificates associated with all Renewable Energy Credits corresponding to all Delivered Energy are issued and tracked for purposes of satisfying the requirements of the California Renewables Portfolio Standard and transferred in a timely manner to Buyer for Buyer's sole benefit. Seller shall transfer the Renewable Energy Credits to Buyer. Seller shall comply with all Laws, including the WREGIS Operating Rules, regarding the certification and transfer of such WREGIS Certificates to Buyer and Buyer shall be given sole title to all such WREGIS Certificates. Seller shall be deemed to have satisfied the warranty in Section 4.8(g), provided that Seller fulfills its obligations under Sections 4.8(a) through 4.8(g) below. In addition:

(a) Prior to the Commercial Operation Date, Seller shall register the Facility with WREGIS and establish an account with WREGIS ("**Seller's WREGIS Account**"), which Seller shall maintain until the end of the Delivery Term. Seller shall transfer the WREGIS Certificates using "**Forward Certificate Transfers**" (as described in the WREGIS Operating Rules) from Seller's WREGIS Account to the WREGIS account(s) of Buyer or the account(s) of a designee that Buyer identifies by Notice to Seller ("**Buyer's WREGIS Account**"). Seller shall be responsible for all expenses associated with registering the Facility with WREGIS, establishing and maintaining Seller's WREGIS Account, paying WREGIS Certificate issuance and transfer fees, and transferring WREGIS Certificates from Seller's WREGIS Account to Buyer's WREGIS Account.

(b) Seller shall cause Forward Certificate Transfers to occur on a monthly basis in accordance with the certification procedure established by the WREGIS Operating Rules. Since WREGIS Certificates will only be created for whole MWh amounts of Delivered Energy generated, any fractional MWh amounts (i.e., kWh) will be carried forward until sufficient generation is accumulated for the creation of a WREGIS Certificate.

(c) Seller shall, at its sole expense, ensure that the WREGIS Certificates for a given calendar month correspond with the Delivered Energy for such calendar month as evidenced by the Facility's metered data.

(d) Due to the ninety (90) day delay in the creation of WREGIS Certificates relative to the timing of invoice payment under Section 8.2, Buyer shall make an invoice payment for a given month in accordance with Section 8.2 before the WREGIS Certificates for such month are formally transferred to Buyer in accordance with the WREGIS Operating Rules and this Section 4.8. Notwithstanding this delay, Buyer shall have all right and title to all such WREGIS Certificates upon payment to Seller in accordance with Section 8.2.

(e) A "**WREGIS Certificate Deficit**" means any deficit or shortfall in WREGIS Certificates delivered to Buyer for a calendar month as compared to the Delivered Energy for the same calendar month ("**Deficient Month**") caused by an error or omission of Seller. If any WREGIS Certificate Deficit is caused, or the result of any action or inaction by Seller, then the amount of Energy in the Deficient Month shall be reduced by the amount of the WREGIS Certificate Deficit for purposes of calculating Buyer's payment to Seller under Article 8.



(f) If WREGIS changes the WREGIS Operating Rules after the Effective Date or applies the WREGIS Operating Rules in a manner inconsistent with this Section 4.8 after the Effective Date, the Parties promptly shall modify this Section 4.8 as reasonably required to cause and enable Seller to transfer to Buyer's WREGIS Account a quantity of WREGIS Certificates for each given calendar month that corresponds to the Delivered Energy in the same calendar month.

(g) Seller warrants that all necessary steps to allow the Renewable Energy Credits transferred to Buyer to be tracked in WREGIS will be taken prior to the first delivery under this Agreement.

## ARTICLE 5 TAXES

5.1 **Allocation of Taxes and Charges.** Seller shall pay or cause to be paid all Taxes on or with respect to the Facility or on or with respect to the sale and making available of Product to Buyer, that are imposed on Product prior to its delivery to Buyer at the time and place contemplated under this Agreement. Buyer shall pay or cause to be paid all Taxes on or with respect to the delivery to and purchase by Buyer of Product that are imposed on Product at and after its delivery to Buyer at the time and place contemplated under this Agreement (other than withholding or other Taxes imposed on Seller's income, revenue, receipts or employees), if any. If a Party is required to remit or pay Taxes that are the other Party's responsibility hereunder, such Party shall promptly pay the Taxes due and then seek and receive reimbursement from the other for such Taxes. In the event any sale of Product hereunder is exempt from or not subject to any particular Tax, Buyer shall provide Seller with all necessary documentation within thirty (30) days after the Effective Date to evidence such exemption or exclusion. If Buyer does not provide such documentation, then Buyer shall indemnify, defend, and hold Seller harmless from any liability with respect to Taxes from which Buyer claims it is exempt.

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

## ARTICLE 6 MAINTENANCE OF THE FACILITY

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

6.2 **Maintenance of Health and Safety.** Seller shall take reasonable safety precautions with respect to the operation, maintenance, repair and replacement of the Facility. If Seller becomes aware of any circumstances relating to the Facility that create an imminent risk of damage or injury to any Person or any Person's property, Seller shall take prompt, reasonable action to

prevent such damage or injury and shall give Notice to Buyer's emergency contact identified on Exhibit N of such condition. Such action may include, to the extent reasonably necessary, disconnecting and removing all or a portion of the Facility, or suspending the supply of Delivered Energy to Buyer.

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

## ARTICLE 7 METERING

7.1 **Metering.** Seller shall measure the amount of Delivered Energy using the Facility Meter. All meters will be operated pursuant to applicable CAISO-approved calculation methodologies and maintained at Seller's cost. Subject to meeting any applicable CAISO requirements, the Facility Meter shall be programmed to adjust for Electrical Losses and Station Use from the Facility to the Delivery Point in a manner subject to Buyer's prior written approval, not to be unreasonably withheld. Metering will be consistent with the Metering Diagram to be set forth as Exhibit P, which shall be provided by Seller to Buyer at least thirty (30) days prior to Commercial Operation. Each meter shall be kept under seal, such seals to be broken only when the meters are to be tested, adjusted, modified or relocated. In the event Seller breaks a seal, Seller shall notify Buyer as soon as practicable. In addition, Seller hereby agrees to provide all meter data to Buyer in a form reasonably acceptable to Buyer, and consents to Buyer obtaining from CAISO the CAISO meter data directly relating to the Facility and all inspection, testing and calibration data and reports. Seller shall cooperate to allow Buyer to retrieve the meter reads from the CAISO Operational Meter Analysis and Reporting (OMAR) web or directly from the CAISO meter(s) at the Facility.

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

## ARTICLE 8 INVOICING AND PAYMENT; CREDIT

8.1 **Invoicing.** Seller shall make good faith efforts to deliver an invoice to Buyer for product within fifteen (15) Business Days after the end of the prior monthly billing period. Each invoice shall reflect records of metered data, including CAISO metering and transaction data sufficient to document and verify the amount of Product delivered by the Facility for any Settlement Period during the preceding month, including the amount of Delivered Energy

produced by the Facility as read by the Facility Meter, the amount of Substitute Product delivered to Buyer (if any), the calculation of Delivered Energy, and Deemed Delivered Energy, the Contract Price applicable to such Product. Invoices shall be in a format reasonably specified by Buyer, covering the services provided in the preceding month determined in accordance with the applicable provisions of this Agreement. Seller shall provide Buyer with reasonable access (including, in real time, to the maximum extent reasonably possible) to any records, forecast data and other information, including invoices or settlement data that Seller has from the CAISO not already reasonably available to Buyer or Buyer's Scheduling Coordinator, all as may be necessary from time to time for Buyer to verify the accuracy of all invoices.

8.2 **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 [REDACTED]

[REDACTED]. If such due date falls on a weekend or legal holiday, such due date shall be the next Business Day. Payments made after the due date will be considered late and will bear interest on the unpaid balance. If the amount due is not paid on or before the due date or if any other payment that is due and owing from one Party to another is not paid on or before its applicable due date, a late payment charge shall be applied to the unpaid balance and shall be added to the next billing statement. Such late payment charge shall be calculated based on the 3-Month LIBOR 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 three percent (3%) per annum (the "**Interest Rate**"). If the due date occurs on a day that is not a Business Day, the late payment charge shall begin to accrue on the next succeeding Business Day.

8.3 **Books and Records.** To facilitate payment and verification, each Party shall maintain all books and records necessary for billing and payments, including copies of all invoices under this Agreement, for a period of at least two (2) years or as otherwise required by Law. Upon ten (10) Business Days' Notice to the other Party, either Party shall be granted reasonable access to the accounting books and records within the possession or control of the other Party pertaining to all invoices generated pursuant to this Agreement. Seller acknowledges that in accordance with California Government Code Section 8546.7, Seller may be subject to audit by the California State Auditor with regard to Seller's performance of this Agreement because the compensation under this Agreement exceeds \$10,000.

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

8.5 **Billing Disputes.** A Party may, in good faith, dispute the correctness of any invoice or any adjustment to an invoice rendered under this Agreement or adjust any invoice for any

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

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

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

**8.8 Seller's Performance Security.** To secure its obligations under this Agreement, Seller shall deliver Performance Security to Buyer on or before the Commercial Operation Date. If the Performance Security is not in the form of cash or Letter of Credit, it shall be substantially in the form set forth in Exhibit L. Seller shall maintain the Performance Security in full force and effect, subject to any draws made by Buyer in accordance with this Agreement, until the following have occurred: (A) the Delivery Term has expired or terminated early; and (B) all payment obligations of the Seller then due and payable under this Agreement, including compensation for

penalties, Termination Payment, indemnification payments or other damages are paid in full (whether directly or indirectly such as through set-off or netting). Following the occurrence of both events, Buyer shall promptly return to Seller the unused portion of the Performance Security. If the Performance Security is a Letter of Credit and the issuer of such Letter of Credit (i) fails to maintain the minimum Credit Rating set forth in the definition of Letter of Credit, (ii) indicates its intent not to renew such Letter of Credit and such Letter of Credit expires prior to the Commercial Operation Date, or (iii) fails to honor Buyer's properly documented request to draw on such Letter of Credit by such issuer, Seller shall have ten (10) Business Days to either post cash or deliver a substitute Letter of Credit that meets the requirements set forth in the definition of Performance Security. Seller may at its option exchange one permitted form of Development Security or Performance Security for another permitted form of Development Security or Performance Security, as applicable.

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

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

(a) Exercise any of its rights and remedies with respect to the Development Security and Performance Security, including any such rights and remedies under Law then in effect;

(b) Draw on any outstanding Letter of Credit issued for its benefit and retain any cash held by Buyer as Development Security or Performance Security; and

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

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

8.10 **Financial Statements.** In the event a Guaranty is provided as Performance Security

in lieu of cash or a Letter of Credit, Seller shall provide to Buyer, or cause the Guarantor to provide to Buyer, unaudited quarterly and annual audited financial statements of the Guarantor (including a balance sheet and statements of income and cash flows), all prepared in accordance with generally accepted accounting principles in the United States, consistently applied.

## ARTICLE 9 NOTICES

9.1 **Addresses for the Delivery of Notices** Except as provided in Exhibit D, any Notice required, permitted, or contemplated hereunder shall be in writing, shall be addressed to the Party to be notified at the address set forth on Exhibit N or at such other address or addresses as a Party may designate for itself from time to time by Notice hereunder.

9.2 **Acceptable Means of Delivering Notice**. Each Notice required, permitted, or contemplated hereunder shall be deemed to have been validly served, given or delivered as follows: (a) if sent by United States mail with proper first class postage prepaid, three (3) Business Days following the date of the postmark on the envelope in which such Notice was deposited in the United States mail; (b) if sent by a regularly scheduled overnight delivery carrier with delivery fees either prepaid or an arrangement with such carrier made for the payment of such fees, the next Business Day after the same is delivered by the sending Party to such carrier; (c) if sent by electronic communication (including electronic mail or other electronic means) and if concurrently with the transmittal of such electronic communication the sending Party provides a copy of such electronic Notice by hand delivery or express courier, at the time indicated by the time stamp upon delivery; 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.

## ARTICLE 10 FORCE MAJEURE

### 10.1 **Definition.**

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

(b) Without limiting the generality of the foregoing, so long as the following events, despite the exercise of reasonable efforts, cannot be avoided by, and are beyond the reasonable control (whether direct or indirect) of and without the fault or negligence of the Party relying thereon as justification for such delay, nonperformance or noncompliance, a Force Majeure Event may include an act of God or the elements, such as flooding, lightning, hurricanes, tornadoes, or ice storms; explosion; fire; volcanic eruption; flood; epidemic; 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.

(c) Notwithstanding the foregoing, the term “**Force Majeure Event**” does not include (i) economic conditions that render a Party’s performance of this Agreement at the Contract Price unprofitable or otherwise uneconomic (including an increase in component costs for any reason, including foreign or domestic tariffs, Buyer’s ability to buy electric energy at a lower price, or Seller’s ability to sell the Product, or any component thereof, at a higher price, than under this Agreement); (ii) Seller’s inability to obtain permits or approvals of any type for the construction, operation, or maintenance of the Facility, except to the extent such inability is caused by a Force Majeure Event; (iii) the inability of a Party to make payments when due under this Agreement, unless the cause of such inability is an event that would otherwise constitute a Force Majeure Event as described above that disables physical or electronic facilities necessary to transfer funds to the payee Party; (iv) a Curtailment Order, unless 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) any equipment failure except if such equipment failure is caused by a Force Majeure Event; or (vii) 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 unless the cause of such inability is an event that would otherwise constitute a Force Majeure Event as described above; 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.

10.2 **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. The Party rendered unable to fulfill any obligation by reason of a Force Majeure Event shall take reasonable actions necessary to remove such inability. Nothing herein shall be construed as permitting that Party to continue to fail to perform after said cause has been removed. Neither Party shall be considered in breach or default of this Agreement if and to the extent that any failure or delay in the Party’s performance of one or more of its obligations hereunder is caused by a Force Majeure Event. Notwithstanding the foregoing, the occurrence and continuation of a Force Majeure Event shall not (a) suspend or excuse the obligation of a Party to make any payments due hereunder, (b) suspend or excuse the obligation of Seller to achieve the Guaranteed Construction Start Date or the Guaranteed Commercial Operation Date beyond the extensions provided in Exhibit B, or (c) limit Buyer’s right to declare an Event of Default pursuant to Section 11.1(b)(ii) and receive a Damage Payment upon exercise of Buyer’s rights pursuant to Section 11.2;

10.3 **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.

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

## **ARTICLE 11 DEFAULTS; REMEDIES; TERMINATION**

**11.1 Events of Default.** An "**Event of Default**" shall mean,

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

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

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

(iii) the failure by such Party to perform any material covenant or obligation set forth in this Agreement (except to the extent constituting a separate Event of Default set forth in this Section 11.1 and such failure is not remedied within thirty (30) days after Notice thereof (or such longer additional period, not to exceed an additional ninety (90) days, if the Defaulting Party is unable to remedy such default within such initial thirty (30) days period despite exercising commercially reasonable efforts);

(iv) such Party becomes Bankrupt;

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

(vi) such Party consolidates or amalgamates with, or merges with or into, or transfers all or substantially all of its assets to, another entity and, at the time of such consolidation, amalgamation, merger or transfer, the resulting, surviving or transferee entity fails



to assume all the obligations of such Party under this Agreement to which it or its predecessor was a party by operation of Law or pursuant to an agreement reasonably satisfactory to the other Party.

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

(i) if at any time during the Delivery Term, Seller delivers or attempts to deliver electric energy to the Delivery Point for sale under this Agreement that was not generated by the Facility, except for Substitute Product;

(ii) the failure by Seller to achieve Commercial Operation [REDACTED];

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

(iv) [REDACTED];

(v) failure by Seller to satisfy the collateral requirements pursuant to Sections 8.7 or 8.8 after Notice and expiration of the cure periods set forth therein, 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;

(vi) with respect to any Guaranty provided for the benefit of Buyer, the failure by Seller to provide for the benefit of Buyer either (1) cash, (2) a replacement Guaranty from a different Guarantor meeting the criteria set forth in the definition of Guarantor, or (3) a replacement Letter of Credit from an issuer meeting the criteria set forth in the definition of Letter of Credit, in each case, in the amount required hereunder within ten (10) Business Days after Seller receives Notice of the occurrence of any of the following events:

(A) if any representation or warranty made by the Guarantor in connection with this Agreement is false or misleading in any material respect when made or when deemed made or repeated, and such default is not remedied within thirty (30) days after Notice thereof;

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

(C) the Guarantor becomes Bankrupt;

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

(E) the failure of the Guaranty to be in full force and effect (other than in accordance with its terms) prior to the indefeasible satisfaction of all obligations of Seller hereunder; or

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

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

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

(B) the issuer of such Letter of Credit becomes Bankrupt;

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

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

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

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

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

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

(a) to send Notice, designating a day, no earlier than the day such Notice is deemed to be received and no later than twenty (20) days after such Notice is deemed to be received, as an early termination date of this Agreement ("**Early Termination Date**") that

terminates this Agreement (the “**Terminated Transaction**”) and ends the Delivery Term effective as of the Early Termination Date;

(b) to accelerate all amounts owing between the Parties, and to collect as liquidated damages (i) the Damage Payment (in the case of an Event of Default by Seller occurring before the Commercial Operation Date, including an Event of Default under Section 11.1(b)(ii)) or (ii) the Termination Payment calculated in accordance with Section 11.3 below (in the case of any other Event of Default by either Party);

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

(d) to suspend performance; or

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

provided, that payment by the Defaulting Party of the Damage Payment or Termination Payment, as applicable, shall constitute liquidated damages and the Non-Defaulting Party’s sole and exclusive remedy for any Terminated Transaction and the Event of Default related thereto.

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

**11.4 Notice of Payment of Termination Payment.** As soon as practicable after a Terminated Transaction, Notice shall be given by the Non-Defaulting Party to the Defaulting Party of the amount of the Damage Payment or Termination Payment and whether the Termination

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

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

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

## **ARTICLE 12 LIMITATION OF LIABILITY AND EXCLUSION OF WARRANTIES.**

12.1 **No Consequential Damages.** EXCEPT TO THE EXTENT PART OF AN EXPRESS REMEDY OR MEASURE OF DAMAGES HEREIN, OR PART OF AN ARTICLE 16 INDEMNITY CLAIM, OR INCLUDED IN A LIQUIDATED DAMAGES CALCULATION, OR ARISING FROM FRAUD OR INTENTIONAL MISREPRESENTATION, NEITHER PARTY SHALL BE LIABLE TO THE OTHER OR ITS INDEMNIFIED PERSONS FOR ANY SPECIAL, PUNITIVE, EXEMPLARY, INDIRECT, OR CONSEQUENTIAL DAMAGES, OR LOSSES OR DAMAGES FOR LOST REVENUE OR LOST PROFITS, WHETHER FORESEEABLE OR NOT, ARISING OUT OF, OR IN CONNECTION WITH THIS AGREEMENT, BY STATUTE, IN TORT OR CONTRACT.

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

FOR BREACH OF ANY PROVISION FOR WHICH AN EXPRESS AND EXCLUSIVE REMEDY OR MEASURE OF DAMAGES IS PROVIDED, SUCH EXPRESS REMEDY OR MEASURE OF DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY, THE OBLIGOR'S LIABILITY SHALL BE LIMITED AS SET FORTH IN SUCH PROVISION, AND

ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED. IF NO REMEDY OR MEASURE OF DAMAGES IS EXPRESSLY PROVIDED HEREIN, THE OBLIGOR'S LIABILITY SHALL BE LIMITED TO DIRECT DAMAGES ONLY.

TO THE EXTENT ANY DAMAGES REQUIRED TO BE PAID HEREUNDER ARE LIQUIDATED, INCLUDING UNDER SECTIONS [3.7, 4.7, 4.8, 11.2 AND 11.3, AND AS PROVIDED IN EXHIBIT B AND EXHIBIT G] THE PARTIES ACKNOWLEDGE THAT THE DAMAGES ARE DIFFICULT OR IMPOSSIBLE TO DETERMINE, THAT OTHERWISE OBTAINING AN ADEQUATE REMEDY IS INCONVENIENT, AND THAT THE LIQUIDATED DAMAGES CONSTITUTE A REASONABLE APPROXIMATION OF THE ANTICIPATED HARM OR LOSS. IT IS THE INTENT OF THE PARTIES THAT THE LIMITATIONS HEREIN IMPOSED ON REMEDIES AND THE MEASURE OF DAMAGES BE WITHOUT REGARD TO THE CAUSE OR CAUSES RELATED THERETO, INCLUDING THE NEGLIGENCE OF ANY PARTY, WHETHER SUCH NEGLIGENCE BE SOLE, JOINT OR CONCURRENT, OR ACTIVE OR PASSIVE. THE PARTIES HEREBY WAIVE ANY RIGHT TO CONTEST SUCH PAYMENTS AS AN UNREASONABLE PENALTY.

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

### **ARTICLE 13 REPRESENTATIONS AND WARRANTIES; AUTHORITY**

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

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

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

(c) The execution and delivery of this Agreement, consummation of the transactions contemplated herein, and fulfillment of and compliance by Seller with the provisions of this Agreement will not conflict with or constitute a breach of or a default under any Law presently in effect having applicability to Seller, subject to any permits that have not yet been

obtained by Seller, the documents of formation of Seller or any outstanding trust indenture, deed of trust, mortgage, loan agreement or other evidence of indebtedness or any other agreement or instrument to which Seller is a party or by which any of its property is bound.

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

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

(f) As between Buyer and Seller, Seller will be responsible for obtaining all permits necessary to construct and operate the Facility, including to the extent applicable, Seller will be the applicant on any CEQA documents.

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

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

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

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

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

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

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

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

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

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

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

13.4 **Prevailing Wage.** Seller shall comply with all applicable federal, state and local laws, statutes, ordinances, rules and regulations, and orders and decrees of any courts or administrative bodies or tribunals, including without limitation employment discrimination laws and prevailing wage laws. If required by Law, Seller shall use reasonable efforts to ensure that all employees hired by Seller, and its contractors and subcontractors, that will perform construction work or provide services at the Site related to construction of the Facility are paid wages at rates not less than those prevailing for workers performing similar work in the locality as provided by applicable California law, if any (“**Prevailing Wage Requirement**”). Nothing herein shall require Seller, its contractors and subcontractors to comply with, or assume liability created by any inapplicable provisions of any California labor laws.

## ARTICLE 14 ASSIGNMENT

14.1 **General Prohibition on Assignments.** Neither Party may voluntarily assign this Agreement or its rights or obligations under this Agreement, without the prior written consent of the other Party, such consent not to be unreasonably withheld. Any Change of Control of Seller or direct or indirect change of control of Buyer (whether voluntary or by operation of law) will be deemed an assignment and will require the prior written consent of the other Party, such consent not to be unreasonably withheld. Any assignment made without required written consent, or in violation of the conditions to assignment set out below, shall be null and void. The assigning Party

shall be responsible for the non-assigning Party's reasonable costs associated with the preparation, review, execution and delivery of documents in connection with any assignment of this Agreement, including without limitation reasonable attorneys' fees. Except to the extent expressly set forth in Section 14.2, neither Party will have the obligation to provide any consent or enter into any agreement that materially and adversely affects any of such Party's rights, benefits, risks or obligations under this Agreement.

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

In connection with any financing or refinancing of the Facility, Buyer shall in good faith work with Seller and Lender to agree upon a consent to collateral assignment of this Agreement ("**Collateral Assignment Agreement**"). The Collateral Assignment Agreement must be in form and substance agreed to by Buyer, Seller and Lender, which such agreement not to be unreasonably withheld, and must include, among others, the following provisions:

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

(b) Following an Event of Default by Seller under this Agreement, Buyer may require Seller (or Lender, if Lender has provided the notice set forth in subsection (c) below) to provide to Buyer a report concerning:

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

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

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

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

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

(c) Lender will have the right to cure an Event of Default on behalf of Seller, only if Lender sends a written notice to Buyer before the later of (i) the expiration of any cure period under this Agreement, and (ii) five (5) Business Days after Lender's receipt of notice of such Event of Default from Buyer, indicating Lender's intention to cure. Lender must remedy or



cure the Event of Default within the cure period under this Agreement and any additional cure periods agreed in the Collateral Assignment Agreement up to a maximum of ninety (90) days (or one hundred eighty (180) days in the event of a bankruptcy of Seller or any foreclosure or similar proceeding if required by Lender to cure any Event of Default);

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

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

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

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

(ii) Not assume this Agreement;

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

(h) Subject to Lender's cure of any Events of Defaults under the Agreement in accordance with Section 14.2(f), if (i) this Agreement is rejected in Seller's Bankruptcy or otherwise terminated in connection therewith Lender shall have the right to elect within forty-five (45) days after such rejection or termination, to enter into a replacement agreement with Buyer having substantially the same terms as this Agreement for the remaining term thereof and, promptly after Lender's written request, Buyer must enter into such replacement agreement with Lender or Lender's designee, or (ii) if Lender or its designee, directly or indirectly, takes possession of, or title to, the Facility (including possession by a receiver or title by foreclosure or deed in lieu of foreclosure) after any such rejection or termination of this Agreement, promptly after Buyer's written request which must be made within forty-five (45) days after Buyer receives notice of such rejection or termination, Lender must itself or must cause its designee to promptly enter into a new agreement with Buyer having substantially the same terms as this Agreement for the remaining term thereof, provided that in the event a designee of Lender, directly or indirectly, takes possession of, or title to, the Facility (including possession by a receiver or title by

foreclosure or deed in lieu of foreclosure), such designee must meet the definition of Permitted Transferee.

## **ARTICLE 15 DISPUTE RESOLUTION**

15.1 **Venue.** The Parties agree that any suit, action or other legal proceeding by or against any party (or its affiliates or designees) with respect to or arising out of this Agreement shall be brought in the federal courts of the United States or the courts of the State of California sitting in San Francisco County, California.

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

## **ARTICLE 16 INDEMNIFICATION**

16.1 **Indemnity.** Each Party (the "**Indemnifying Party**") agrees to defend, indemnify and hold harmless the other Party, its directors, officers, members, managers, agents, attorneys, employees and representatives (each an "**Indemnified Party**" and collectively, the "**Indemnified Group**") from and against all third party claims, demands, losses, liabilities, penalties, and expenses, including reasonable attorneys' and expert witness 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 negligent or willful misconduct of the Indemnifying Party, its Affiliates, its directors, officers, employees or agents (collectively, "**Indemnifiable Losses**").

Nothing in this Section 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 obligations to pay claims consistent with the provisions of a valid insurance policy.

16.2 **Notice of Claim.** Subject to the terms of this Agreement and upon obtaining knowledge of an Indemnifiable Loss for which it is entitled to indemnity under this Article 16, the Indemnified Party will promptly Notify the Indemnifying Party in writing of any damage, claim,

loss, liability or expense which Indemnified Party has determined has given or could give rise to an Indemnifiable Loss under Section 16.1 (“**Claim**”). The Notice is referred to as a “**Notice of Claim**”. A Notice of Claim will specify, in reasonable detail, the facts known to Indemnified Party regarding the Indemnifiable Loss.

16.3 **Failure to Provide Notice.** A failure to give timely Notice or to include any specified information in any Notice as provided in this Section 16.3 will not affect the rights or obligations of any Party hereunder except and only to the extent that, as a result of such failure, any Party which was entitled to receive such Notice was deprived of its right to recover any payment under its applicable insurance coverage or was otherwise materially damaged as a direct result of such failure and, provided further, Indemnifying Party is not obligated to indemnify any member of the Indemnified Group for the increased amount of any Indemnifiable Loss which would otherwise have been payable to the extent that the increase resulted from the failure to deliver timely a Notice of Claim.

16.4 **Defense of Claims.** If, within ten (10) Business Days after giving a Notice of Claim regarding a Claim to Indemnifying Party pursuant to Section 16.2, Indemnified Party receives Notice from Indemnifying Party that Indemnifying Party has elected to assume the defense of such Claim, Indemnifying Party will not be liable for any legal expenses subsequently incurred by Indemnified Party in connection with the defense thereof; provided, however, that if Indemnifying Party fails to take reasonable steps necessary to defend diligently such Claim within ten (10) Business Days after receiving Notice from Indemnified Party that Indemnified Party believes Indemnifying Party has failed to take such steps, or if Indemnifying Party has not undertaken fully to indemnify Indemnified Party in respect of all Indemnifiable Losses relating to the matter, Indemnified Party may assume its own defense, and Indemnifying Party will be liable for all reasonable costs or expenses, including attorneys’ fees, paid or incurred in connection therewith. Without the prior written consent of Indemnified Party, Indemnifying Party will not enter into any settlement of any Claim which would lead to liability or create any financial or other obligation on the part of Indemnified Party for which Indemnified Party is not entitled to indemnification hereunder; provided, however, that Indemnifying Party may accept any settlement without the consent of Indemnified Party if such settlement provides a full release to Indemnified Party and no requirement that Indemnified Party acknowledge fault or culpability. If a firm offer is made to settle a Claim without leading to liability or the creation of a financial or other obligation on the part of Indemnified Party for which Indemnified Party is not entitled to indemnification hereunder and Indemnifying Party desires to accept and agrees to such offer, Indemnifying Party will give Notice to Indemnified Party to that effect. If Indemnified Party fails to consent to such firm offer within ten (10) calendar days after its receipt of such Notice, Indemnified Party may continue to contest or defend such Claim and, in such event, the maximum liability of Indemnifying Party to such Claim will be the amount of such settlement offer, plus reasonable costs and expenses paid or incurred by Indemnified Party up to the date of such Notice.

16.5 **Subrogation of Rights.** Upon making any indemnity payment, Indemnifying Party will, to the extent of such indemnity payment, be subrogated to all rights of Indemnified Party against any Third Party in respect of the Indemnifiable Loss to which the indemnity payment relates; provided that until Indemnified Party recovers full payment of its Indemnifiable Loss, any and all claims of Indemnifying Party against any such Third Party on account of said indemnity payment are hereby made expressly subordinated and subjected in right of payment to Indemnified

Party's rights against such Third Party. Without limiting the generality or effect of any other provision hereof, Buyer and Seller shall execute upon request all instruments reasonably necessary to evidence and perfect the above-described subrogation and subordination rights.

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

## **ARTICLE 17 INSURANCE**

### **17.1 Insurance.**

(a) **General Liability.** Seller shall maintain, or cause to be maintained at its sole expense, (i) commercial general liability insurance, including products and completed operations and personal injury insurance, in a minimum amount of Two Million Dollars (\$2,000,000) per occurrence, and an annual aggregate of not less than Five Million Dollars (\$5,000,000), endorsed to provide contractual liability in said amount, specifically covering Seller's obligations under this Agreement and including Buyer as an additional insured; and (ii) an umbrella insurance policy in a minimum limit of liability of Five Million Dollars (\$5,000,000). Defense costs shall be provided as an additional benefit and not included within the limits of liability. Such insurance shall contain standard cross-liability and severability of interest provisions.

(b) **Employer's Liability Insurance.** If required by Law, Employers' Liability insurance shall not be less than One Million Dollars (\$1,000,000.00) for injury or death occurring as a result of each accident. With regard to bodily injury by disease, the One Million Dollar (\$1,000,000) policy limit will apply to each employee.

(c) **Workers Compensation Insurance.** Seller, if it has employees, shall also maintain at all times during the Contract Term workers' compensation and employers' liability insurance coverage in accordance with applicable requirements of California Law.

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

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

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

(g) Subcontractor Insurance. Seller shall require all of its subcontractors to carry the same levels of insurance as Seller. All subcontractors shall include Seller as an additional insured to (i) comprehensive general liability insurance; (ii) workers' compensation insurance and employers' liability coverage; and (iii) business auto insurance for bodily injury and property damage. All subcontractors shall provide a primary endorsement and a waiver of subrogation to Seller for the required coverage pursuant to this Section 17.1(g).

(h) 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.

## ARTICLE 18 CONFIDENTIAL INFORMATION

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

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

California Public Records Act (Government Code Section 6250 et seq.).

18.3 **Irreparable Injury; Remedies.** Receiving Party acknowledges that its obligations hereunder are necessary and reasonable in order to protect Disclosing Party and the business of Disclosing Party, and expressly acknowledges that monetary damages would be inadequate to compensate Disclosing Party for any breach or threatened breach by Receiving Party of any covenants and agreements set forth in this Article 18. Accordingly, Receiving Party acknowledges that any such breach or threatened breach will cause irreparable injury to Disclosing Party and that, in addition to any other remedies that may be available, in law, in equity or otherwise, Disclosing Party will be entitled to obtain injunctive relief against the threatened breach of this Article 18 or the continuation of any such breach, without the necessity of proving actual damages.

18.4 **Disclosure to Lenders, Etc.** Notwithstanding anything to the contrary in this Article 18, Confidential Information may be disclosed by Seller to any actual or potential Lender or investor or any of its Affiliates, and Seller's actual or potential agents, consultants, contractors, or trustees, so long as the Person to whom Confidential Information is disclosed agrees in writing to be bound by the confidentiality provisions of this Article 18 to the same extent as if it were a Party.

18.5 **Press Releases.** Neither Party shall issue (or cause its Affiliates to issue) a press release regarding the transactions contemplated by this Agreement unless both Parties have agreed upon the contents of any such public statement.

## **ARTICLE 19 MISCELLANEOUS**

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

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

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

19.4 **No Agency, Partnership, Joint Venture or Lease.** Seller and the agents and

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

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

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

19.7 **Counterparts; Electronic Signatures.** This Agreement may be executed in one or more counterparts, all of which taken together shall constitute one and the same instrument and each of which shall be deemed an original. The Parties may rely on electronic, facsimile or scanned signatures as originals. Delivery of an executed signature page of this Agreement by electronic transmission (including facsimile and email transmission of a PDF image) shall be the same as delivery of an original executed signature page.

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

19.9 **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 or Buyer or its constituent members, in connection with this Agreement.

19.10 **Forward Contract.** The Parties acknowledge and agree that this Agreement

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

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

*[Signatures on following page]*



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

**KERN AND TULE HYDRO LLC**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**MARIN CLEAN ENERGY, a California  
joint powers authority**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

## **EXHIBIT A**

### **FACILITY DESCRIPTION**

**Site Name:** The Kern Canyon and Tule River hydro projects Kern County and Tulare County, respectively, in the State of California with a generating capacity of approximately 17.9 MW

**Site includes all or some of the following APNs:** [\_\_\_\_\_]

**County:** Kern and Tulare

**CEQA Lead Agency:** Counties of Kern and Tulare

**Type of Facility:** hydro

**Operating Characteristics of Facility:**

**Contract Capacity:** 17.9 MW (net, at the Delivery Point), as the same may be adjusted pursuant to Section 5 of Exhibit B

**Total Facility Capacity:** 17.9 MW (net, at the Delivery Point)

**Delivery Point:** Kern Canyon (KRNCNYN\_6\_N001) and Tule River (SPRINGVL\_6\_N002) on the CAISO grid

**Participating Transmission Owner:** PG&E (for Kern); PG&E initially, as may be updated to Southern California Edison (for Tule)

## EXHIBIT B

### CONSTRUCTION START AND COMMERCIAL OPERATION

1. **Construction Start.**

- a. **“Construction Start”** will occur upon Seller’s execution of an engineering, procurement, and construction contract (or similar agreement) and issuance thereunder of a notice to proceed that authorizes the contractor to mobilize to Site and begin physical construction at the Site. The date of Construction Start will be evidenced by and subject to Seller’s delivery to Buyer of a certificate substantially in the form attached as Exhibit J hereto, and the date certified therein by Seller shall be the **“Construction Start Date.”** Seller shall cause Construction Start to occur no later than the Guaranteed Construction Start Date.
- b. **Guaranteed Construction Start Date.** If Construction Start has not occurred by the Guaranteed Construction Start Date, Seller shall pay Construction Delay Damages for such delay. Construction Delay Damages shall be payable for each day for which Construction Start has not begun by the Guaranteed Construction Start Date. On or before the tenth (10<sup>th</sup>) day of each month, Buyer shall invoice Seller for Construction Delay Damages, if any, accrued during the prior month and, within ten (10) Business Days following Seller’s receipt of such invoice, Seller shall pay Buyer the amount of such Construction Delay Damages set forth in such invoice. Construction Delay Damages shall be refundable to Seller pursuant to Section 2(b) of this Exhibit B. If Seller fails to achieve Commercial Operation on or before the Guaranteed Commercial Operation Date, Buyer shall be entitled to collect and retain all accrued Construction Delay Damages on the Guaranteed Commercial Operation Date. The Parties agree that Buyer’s receipt of Construction Delay Damages shall be Buyer’s sole and exclusive remedy for Seller’s unexcused delay in achieving the 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.

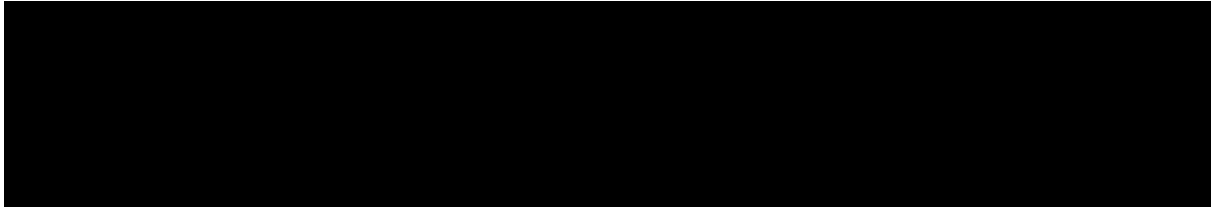
2. **Commercial Operation of the Facility.** **“Commercial Operation”** means the condition existing when (i) Seller has fulfilled all of the conditions precedent in Section 2.2 of the Agreement and provided Notice to Buyer substantially in the form of Exhibit H (the **“COD Certificate”**), (ii) Seller has notified Buyer in writing that it has provided the required documentation to Buyer and met the conditions for achieving Commercial Operation, and (iii) Buyer has acknowledged to Seller in writing that Buyer agrees that Commercial Operation has been achieved. Buyer’s failure to respond to Seller’s Notice within five (5) Business Days shall be deemed approval of Seller’s COD Certificate. If Buyer disagrees that Commercial Operation has occurred following receipt of the Notice, it shall within such five (5) Business Day period, deliver to Seller a valid detailed explanation as to why it believes that Commercial Operation has not occurred. Seller shall then remedy Buyer’s concern, if valid, and the Notice process of above shall repeat until Buyer has approved

Seller's COD Certificate or a deemed approval occurs. Upon Buyer's approval or deemed approval, Buyer shall provide Seller with written acknowledgement of the COD upon request. The "**Commercial Operation Date**" shall be the later of (x) the Expected Commercial Operation Date, or (y) the date on which Commercial Operation is achieved, except that if Seller makes a written request at least sixty (60) days prior to the requested Commercial Operation Date, the Commercial Operation Date may occur earlier than the Expected Commercial Operation Date with the prior written consent of Buyer, which shall not be unreasonably withheld.

- a. Seller shall cause Commercial Operation for the Facility to occur by the Guaranteed Commercial Operation Date. Seller shall notify Buyer that it intends to achieve Commercial Operation at least sixty (60) days before the anticipated Commercial Operation Date.
  - b. If Seller achieves the Commercial Operation Date by the Guaranteed Commercial Operation Date, all Construction Delay Damages paid to Buyer shall be refunded to Seller. Seller shall request the refund of the Construction Delay Damages with the first invoice to Buyer after Commercial Operation Date.
  - c. If Seller does not achieve Commercial Operation by the Guaranteed Commercial Operation Date, Seller shall pay COD Delay Damages to Buyer for each day after the Guaranteed Commercial Operation Date until the Commercial Operation Date. COD Delay Damages shall be payable to Buyer by Seller until the Commercial Operation Date. COD Delay Damages shall be paid in advance on a monthly basis by Seller to Buyers. A prorated amount of COD Delay Damages will be returned to Seller if the Commercial Operation Date occurs during a month in which the COD Delay Damages were paid in advance. The Parties agree that Buyer's receipt of COD Delay Damages shall be Buyer's sole and exclusive remedy for Seller's unexcused 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 11.2(b)(ii) and receive a Damage Payment upon exercise of Buyer's rights pursuant to Section 11.2.
3. **Extension of the Guaranteed Dates.** The Guaranteed Construction Start Date and the Guaranteed Commercial Operation Date shall, subject to notice and documentation requirements set forth below, be automatically extended on a day-for-day basis (the "**Development Cure Period**") for the duration of any and all delays arising out of the following circumstances:

[REDACTED]

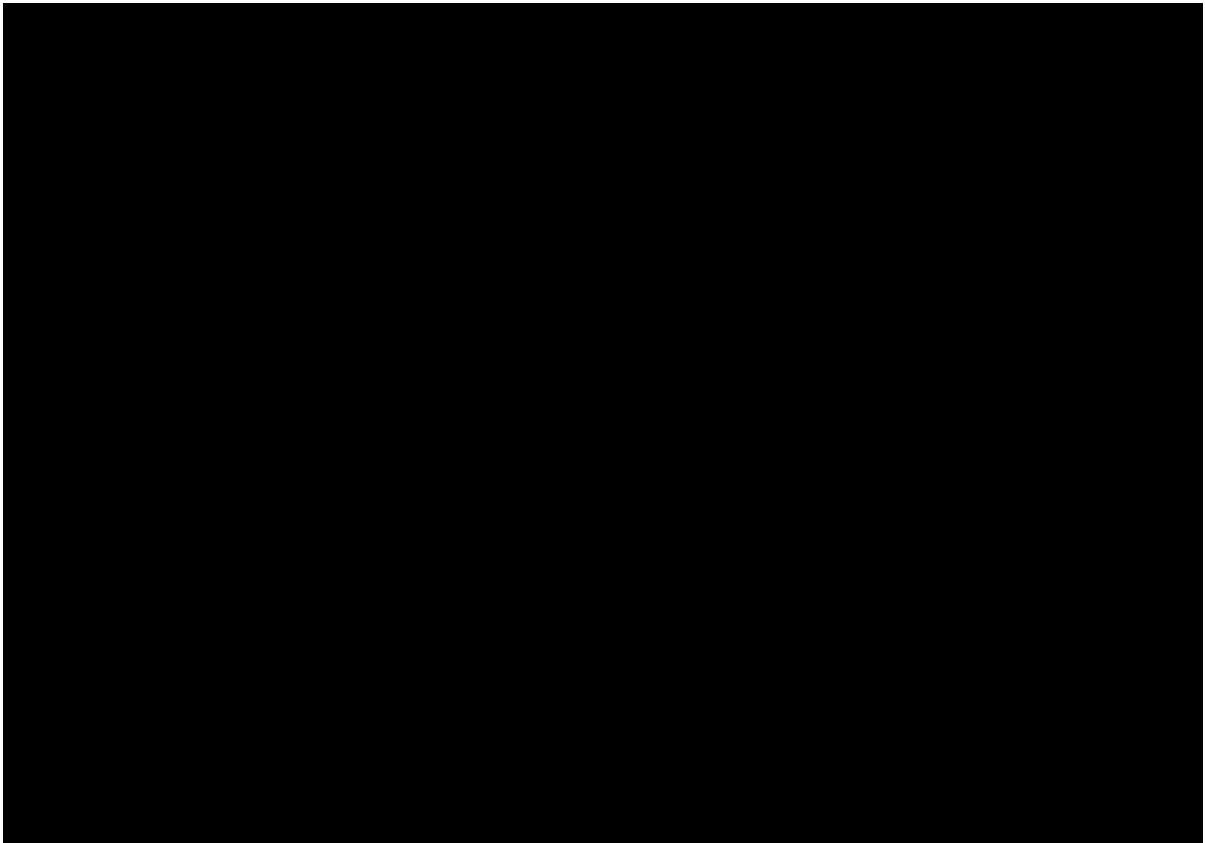
[REDACTED]

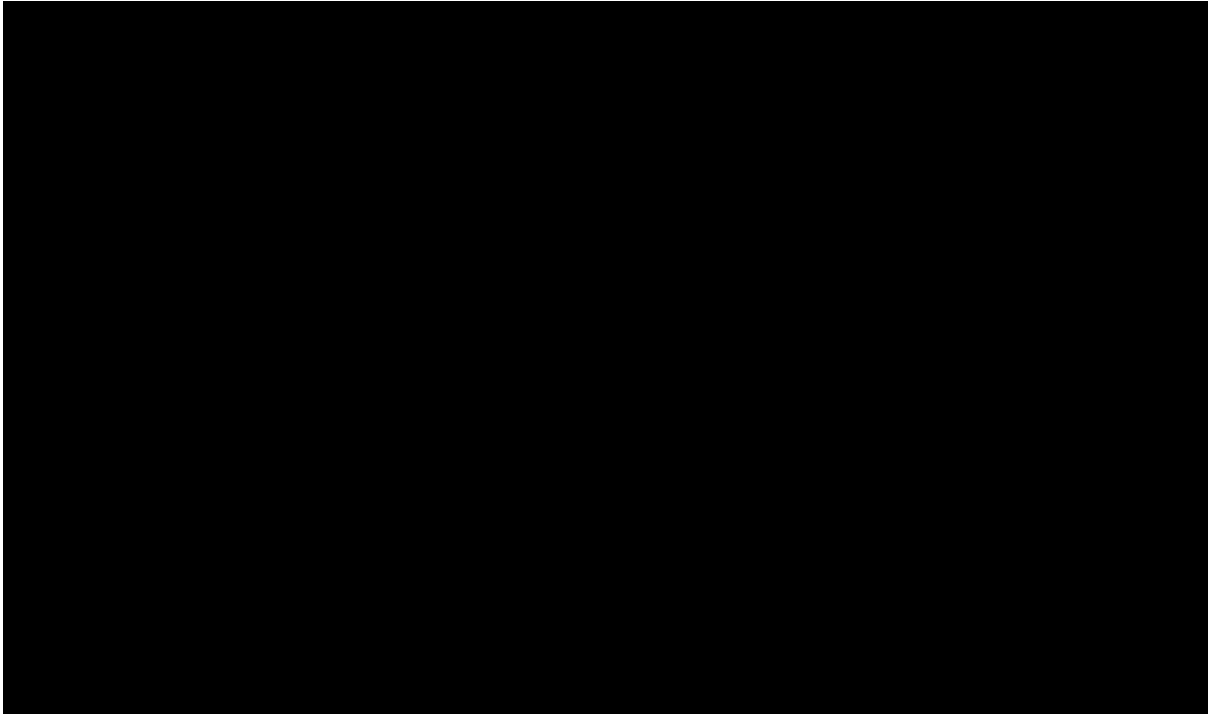



Notwithstanding anything in this Agreement to the contrary, the cumulative extensions granted under Section 4(a), 4(b), and 4(c) above under the Development Cure Period shall not [REDACTED], for any reason, including a Force Majeure Event, and no extension shall be given if the delay was the result of Seller's failure to take all reasonable actions to meet its requirements and deadlines. Upon request from Buyer, Seller shall provide documentation demonstrating to Buyer's reasonable satisfaction that the delays described above did not result from Seller's actions or failure to take reasonable actions.

Seller shall give Buyer notice promptly following Seller's receipt of notice of any delays with respect to the Interconnection Facilities and/or the Network Upgrades that would reasonably be expected to lead to a Development Cure Period.

4. **Substitute Product.**





5. **Installed Capacity.** .
6. **Buyer's Right to Draw on Development Security.** If Seller fails to timely pay any Construction Delay Damages or COD Delay Damages, Buyer may draw upon the Development Security to satisfy Seller's payment obligation thereof and Buyer shall replenish the Development Security to its full amount within five (5) Business Days after such draw.

**EXHIBIT C**

**RESERVED**

## EXHIBIT D

### SCHEDULING COORDINATOR RESPONSIBILITIES

(a) Buyer as Scheduling Coordinator for the Facility. 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 Test Energy and the Product at the Delivery Point, and bid the Delivered Energy into the Day-Ahead Market and the Real-Time Market, consistent with Prudent Operating Practice. Each Party shall perform all scheduling and transmission activities in compliance with (i) the CAISO Tariff, (ii) WECC scheduling practices, and (iii) Prudent Operating Practice. The Parties agree to communicate and cooperate as necessary in order to address any scheduling or settlement issues as they may arise, and to work together in good faith to resolve them in a manner consistent with the terms of the Agreement. The Delivered Energy will be scheduled with the CAISO by Buyer (or Buyer's designated Scheduling Coordinator) for Buyer's account.

(b) CAISO Costs and Revenues. As Scheduling Coordinator for the Facility, Buyer shall be responsible for all CAISO costs and all obligations under the CAISO Tariff related to the Scheduling Coordinator or its role as Buyer or re-seller of the Product hereunder, including without limitation, all Imbalance Energy charges, and other charges, and shall be entitled to all CAISO revenues, including without limitation, credits, Imbalance Energy payments, and 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 resulting from any failure by Seller to abide by the CAISO Tariff or the outage notification requirements set forth in this Agreement. Seller shall assume all liability and reimburse Buyer for any and all costs, penalties, or charges, including without limitation, any Non Availability Charges (as defined by the CAISO) (i) incurred by Buyer because of Seller's failure to perform its obligations under the CAISO Tariff or this Agreement, (ii) incurred by Buyer because of any outages for which notice has not been provided by Seller as required under the CAISO Tariff or this Agreement, or (iii) to the extent arising as a result of Seller's failure to comply with a timely Buyer Curtailment Order if such failure results in incremental costs to Buyer.

(c) CAISO Settlements. Buyer (as the Facility's SC) shall be responsible for all settlement functions with the CAISO related to the Facility.



**EXHIBIT E**  
**PROGRESS REPORTING FORM**

Each Progress Report must include the following items:

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

**EXHIBIT F-1**

**AVERAGE EXPECTED ENERGY**

[Average Expected Energy, MWh Per Hour]

	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
JAN																								
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JUL																								
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SEP																								
OCT																								
NOV																								
DEC																								

The foregoing table is provided for informational purposes only, and it shall not constitute, or be deemed to constitute, an obligation of any of the Parties to this Agreement.

**EXHIBIT F-2**

**AVAILABLE CAPACITY**

[Available Generating Capacity, 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 in the month]																								
Day 29																								
Day 30																								
Day 31																								

The foregoing table is provided for informational purposes only, and it shall not constitute, or be deemed to constitute, an obligation of any of the Parties to this Agreement.

**EXHIBIT G**

**RESERVED**

## EXHIBIT H

### FORM OF COMMERCIAL OPERATION DATE CERTIFICATE

This certification ("**Certification**") of Commercial Operation is delivered by \_\_\_\_\_ [*licensed professional engineer*] ("**Engineer**") to Marin Clean Energy, a California joint powers authority ("**Buyer**") in accordance with the terms of that certain Renewable Power Purchase 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.

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

1. The Facility is fully operational, reliable and interconnected, fully integrated and synchronized with the Transmission System.
2. Seller has installed equipment for the Facility with a nameplate capacity of no less than \_\_\_\_\_ of the Total Facility Capacity.
3. The Facility's testing included a performance test demonstrating peak electrical output of no less than \_\_\_\_\_ of the Total Facility Capacity for the Facility at the Delivery Point, as adjusted for ambient conditions on the date of the Facility testing, and such peak electrical output, as adjusted, was [peak output in MW].
4. Authorization to parallel the Facility was obtained by the Participating Transmission Provider, [Name of Participating Transmission Owner as appropriate] on \_\_\_\_[DATE]\_\_\_\_.
5. The Transmission Provider has provided documentation supporting full unrestricted release for Commercial Operation by [Name of Participating Transmission Owner as appropriate] on \_\_\_\_\_[DATE]\_\_\_\_\_.
6. The CAISO has provided notification supporting Commercial Operation, in accordance with the CAISO Tariff on \_\_\_\_\_[DATE]\_\_\_\_\_.

EXECUTED by [LICENSED PROFESSIONAL ENGINEER]

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

[LICENSED PROFESSIONAL ENGINEER]

By: \_\_\_\_\_

Its: \_\_\_\_\_

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

## EXHIBIT I

### FORM OF INSTALLED CAPACITY CERTIFICATE

This certification ("**Certification**") of Installed Capacity is delivered by [licensed professional engineer] ("**Engineer**") to Marin Clean Energy, a California joint powers authority ("**Buyer**") in accordance with the terms of that certain Renewable Power Purchase 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.

I hereby certify the following:

The performance test for the Facility demonstrated peak electrical output of \_\_ MW AC at the Delivery Point, as adjusted for ambient conditions on the date of the performance test ("**Installed Capacity**");

EXECUTED by [LICENSED PROFESSIONAL ENGINEER]

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

[LICENSED PROFESSIONAL ENGINEER]

By: \_\_\_\_\_

Its: \_\_\_\_\_

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

## EXHIBIT J

### FORM OF CONSTRUCTION START DATE CERTIFICATE

This certification of Construction Start Date (“**Certification**”) is delivered by [SELLER ENTITY] (“**Seller**”) to Marin Clean Energy, a California joint powers authority (“**Buyer**”) in accordance with the terms of that certain Renewable Power Purchase 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. Construction Start (as defined in Exhibit B of the Agreement) has occurred, and a copy of the notice to proceed that Seller issued to its contractor as part of Construction Start is attached hereto.
2. the Construction Start Date occurred on \_\_\_\_\_ (the “**Construction Start Date**”);  
and
3. the precise Site on which the Facility is located is, which must be within the boundaries of the previously identified Site:

\_\_\_\_\_.

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

[SELLER ENTITY]

By: \_\_\_\_\_

Its: \_\_\_\_\_

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

**EXHIBIT K**  
**FORM OF LETTER OF CREDIT**

[Issuing Bank Letterhead and Address]

IRREVOCABLE STANDBY LETTER OF CREDIT NO. [XXXXXXX]

Date:  
Bank Ref.:  
Amount: US\$[XXXXXXXX]  
Expiry Date:

Beneficiary:

Marin Clean Energy  
1125 Tamalpais Avenue  
San Rafael, CA 94901

Ladies and Gentlemen:

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

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

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

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



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

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

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

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

This Letter of Credit is subject to the Uniform Customs and Practice for Documentary Credits (2007 Revision) International Chamber of Commerce Publication No. 600 (the "UCP"), except to the extent that the terms hereof are inconsistent with the provisions of the UCP, including but not limited to Articles 14(b) and 36 of the UCP, in which case the terms of this Letter of Credit shall govern. In the event of an act of God, riot, civil commotion, insurrection, war or any other cause beyond Issuer's control (as defined in Article 36 of the UCP) that interrupts Issuer's business and causes the place for presentation of the Letter of Credit to be closed for business on the last day for presentation, the Expiration Date of the Letter of Credit will be automatically extended without amendment to a date thirty (30) calendar days after 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 Marin Clean Energy, a California joint powers authority, as beneficiary (the "Beneficiary") of the Irrevocable Letter of Credit No. [XXXXXXX] (the "Letter of Credit") issued by [insert bank name] (the "Bank") by order of \_\_\_\_\_ (the "Applicant"), hereby certifies to the Bank as follows:

1. Applicant and Beneficiary are party to that certain Renewable Power Purchase Agreement dated as of \_\_\_\_\_, 20\_\_ (the "Agreement").
2. Beneficiary is making a drawing under this Letter of Credit in the amount of U.S. \$\_\_\_\_\_ because a Seller Event of Default (as such term is defined in the Agreement) has occurred or other occasion provided for in the Agreement where Beneficiary is authorized to draw on the letter of credit has occurred.

OR

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

3. The undersigned is a duly authorized representative of Marin Clean Energy, a California joint powers authority and is authorized to execute and deliver this Drawing Certificate on behalf of Beneficiary.

You are hereby directed to make payment of the requested amount to Marin Clean Energy, a California joint powers authority by wire transfer in immediately available funds to the following account:

[Specify account information]

Marin Clean Energy, a California joint powers authority

\_\_\_\_\_  
Name and Title of Authorized Representative

Date \_\_\_\_\_

## EXHIBIT L

### FORM OF GUARANTY

This Guaranty (this “Guaranty”) is entered into as of [\_\_\_\_\_] (the “Effective Date”) by and between [\_\_\_\_\_] a [\_\_\_\_\_] (“Guarantor”), and Marin Clean Energy, a California joint powers authority (together with its successors and permitted assigns, “Buyer”).

#### Recitals

- A. Buyer and [SELLER ENTITY], a \_\_\_\_\_ (“Seller”), entered into that certain Renewable Power Purchase Agreement (as amended, restated or otherwise modified from time to time, the “PPA”) dated as of [\_\_\_\_], 20\_\_\_\_.
- B. Guarantor is entering into this Guaranty as Performance Security to secure Seller’s obligations under the PPA, as required by Section 8.8 of the PPA.
- C. It is in the best interest of Guarantor to execute this Guaranty inasmuch as Guarantor will derive substantial direct and indirect benefits from the execution and delivery of the PPA.
- D. Initially capitalized terms used but not defined herein have the meaning set forth in the PPA.

#### Agreement

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

2. **Demand Notice.** For avoidance of doubt, a payment shall be due for purposes of this Guaranty only when and if a payment is due and payable by Seller to Buyer under the terms and conditions of the Agreement. If Seller fails to pay any Guaranteed Amount as required pursuant to the PPA for five (5) Business Days following Seller’s receipt of Buyer’s written notice of such failure (the “Demand Notice”), then Buyer may elect to exercise its rights under this Guaranty and

may make a demand upon Guarantor (a “Payment Demand”) for such unpaid Guaranteed Amount. A Payment Demand shall be in writing and shall reasonably specify in what manner and what amount Seller has failed to pay and an explanation of why such payment is due and owing, with a specific statement that Buyer is requesting that Guarantor pay under this Guaranty. Guarantor shall, within five (5) Business Days following its receipt of the Payment Demand, pay the Guaranteed Amount to Buyer.

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

- (i) the extension of time for the payment of any Guaranteed Amount, or
- (ii) any amendment, modification or other alteration of the PPA, or
- (iii) any indemnity agreement Seller may have from any party, or
- (iv) any insurance that may be available to cover any loss, except to the extent insurance proceeds are used to satisfy the Guaranteed Amount, or
- (v) any voluntary or involuntary liquidation, dissolution, receivership, insolvency, bankruptcy, assignment for the benefit of creditors, reorganization, arrangement, composition or readjustment of, or other similar proceeding affecting, Seller or any of its assets, including but not limited to any rejection or other discharge of Seller’s obligations under the PPA imposed by any court, trustee or custodian or any similar official or imposed by any law, statute or regulation, in each such event in any such proceeding, or
- (vi) the release, modification, waiver or failure to pursue or seek relief with respect to any other guaranty, pledge or security device whatsoever, or
- (vii) any payment to Buyer by Seller that Buyer subsequently returns to Seller pursuant to court order in any bankruptcy or other debtor-relief proceeding, or
- (viii) those defenses based upon (A) the legal incapacity or lack of power or authority of any Person, including Seller and any representative of Seller to enter into the PPA or perform its obligations thereunder, (B) lack of due execution, delivery, validity or enforceability, including of the PPA, or (C) Seller’s inability to pay any Guaranteed Amount or perform its obligations under the PPA, or

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

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

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

- (i) at any time or from time to time, without notice to Guarantor, the time for payment of any Guaranteed Amount shall be extended, or such performance or compliance shall be waived;
- (ii) the obligation to pay any Guaranteed Amount shall be modified, supplemented or amended in any respect in accordance with the terms of the PPA;
- (iii) subject to Section 10, any (a) sale, transfer or consolidation of Seller into or with any other entity, (b) sale of substantial assets by, or restructuring of the corporate existence of, Seller or (c) change in ownership of any membership interests of, or other ownership interests in, Seller; or
- (iv) the failure by Buyer or any other Person to create, preserve, validate, perfect or protect any security interest granted to, or in favor of, Buyer or any Person.

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

6. **Representations and Warranties.** Guarantor hereby represents and warrants that (a) it has all necessary and appropriate [*limited liability company*][*corporate*] powers and authority and the legal right to execute and deliver, and perform its obligations under, this Guaranty, (b) this Guaranty constitutes its legal, valid and binding obligations enforceable against it in accordance with its terms, except as enforceability may be limited by bankruptcy, insolvency, moratorium and other similar laws affecting enforcement of creditors' rights or general principles of equity, (c) the execution, delivery and performance of this Guaranty does not and will not contravene Guarantor's

organizational documents, any applicable Law or any contractual provisions binding on or affecting Guarantor, (d) there are no actions, suits or proceedings pending before any court, governmental agency or arbitrator, or, to the knowledge of the Guarantor, threatened, against or affecting Guarantor or any of its properties or revenues which may, in any one case or in the aggregate, adversely affect the ability of Guarantor to enter into or perform its obligations under this Guaranty, and (e) no consent or authorization of, filing with, or other act by or in respect of, any arbitrator or Governmental Authority, and no consent of any other Person (including, any stockholder or creditor of the Guarantor), that has not heretofore been obtained is required in connection with the execution, delivery, performance, validity or enforceability of this Guaranty by Guarantor.

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

If delivered to Buyer, to it at

[ ]

Attn: [ ]

Fax: [ ]

If delivered to Guarantor, to it at

[ ]

Attn: [ ]

Fax: [ ]

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

9. **Miscellaneous.** This Guaranty shall be binding upon Guarantor and its successors and assigns and shall inure to the benefit of Buyer and its successors and permitted assigns pursuant to the PPA. No provision of this Guaranty may be amended or waived except by a written instrument executed by Guarantor and Buyer. This Guaranty is not assignable by Guarantor without the prior written consent of Buyer. No provision of this Guaranty confers, nor is any provision intended to confer, upon any third party (other than Buyer's successors and permitted assigns) any benefit or right enforceable at the option of that third party. This Guaranty embodies the entire agreement and understanding of the parties hereto with respect to the subject matter hereof and supersedes all prior or contemporaneous agreements and understandings of the parties hereto, verbal or written, relating to the subject matter hereof. If any provision of this Guaranty is determined to be illegal or unenforceable (i) such provision shall be deemed restated in accordance with applicable Laws to

reflect, as nearly as possible, the original intention of the parties hereto and (ii) such determination shall not affect any other provision of this Guaranty and all other provisions shall remain in full force and effect. This Guaranty may be executed in any number of separate counterparts, each of which when so executed shall be deemed an original, and all of said counterparts taken together shall be deemed to constitute one and the same instrument. This Guaranty may be executed and delivered by electronic means with the same force and effect as if the same was a fully executed and delivered original manual counterpart.

*[Signature on next page]*

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

GUARANTOR:

[\_\_\_\_\_]

By: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_

BUYER:

[\_\_\_\_\_]

By: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_

By: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_



**EXHIBIT M**

**RESERVED**

**EXHIBIT N**  
**NOTICES**

<b>Kern and Tule Hydro LLC, a Utah limited liability company (“Seller”)</b>	<b>Marin Clean Energy, a California joint powers authority (“Buyer”)</b>
<p><b>All Notices:</b></p> <p>Kern and Tule Hydro LLC Street: 1032 Grandview Drive City: Ivins, UT 84738 Attn: Ted Sorenson Phone: 435-429-1878 Email: ted@tsorenson.net</p> <p>With a copy to:</p> <p>Miriah R. Elliott Street: 498 West 140 South City: Ivins, UT 84738 Phone: 435-429-1878 Email: miriah@tsorenson.net</p>	<p><b>All Notices:</b></p> <p>Marin Clean Energy 1125 Tamalpais Avenue San Rafael, CA 94901 Attn: Contract Administration Phone: (415) 464-6010 Email: <a href="mailto:Procurement@mcecleanenergy.org">Procurement@mcecleanenergy.org</a></p>
<p><b>Reference Numbers:</b></p> <p>Duns: [REDACTED] Federal Tax ID Number: [REDACTED]</p>	<p><b>Reference Numbers:</b></p> <p>Duns: [REDACTED] Federal Tax ID Number: [REDACTED]</p>
<p><b>Invoices:</b></p> <p>Attn: Miriah R. Elliott Phone: 435-429-1878 E-mail: miriah@tsorenson.net</p>	<p><b>Invoices:</b></p> <p>Attn: Power Settlement Analyst Phone: (415) 464-6683 E-mail: <a href="mailto:Settlements@mcecleanenergy.org">Settlements@mcecleanenergy.org</a></p>
<p><b>Scheduling:</b></p> <p>Attn: TBD Phone: E-mail:</p>	<p><b>Scheduling:</b></p> <p>Attn: ZGlobal Phone: (916) 458-4080 E-mail: <a href="mailto:dascheduler@zglobal.biz">dascheduler@zglobal.biz</a></p>
<p><b>Confirmations:</b></p> <p>Attn: TBD Phone: E-mail:</p>	<p><b>Confirmations:</b></p> <p>Attn: Director of Power Resources Phone: (415) 464-6685 Email: <a href="mailto:Procurement@mcecleanenergy.org">Procurement@mcecleanenergy.org</a></p>
<p><b>Payments:</b></p> <p>Attn: Miriah R. Elliott Phone: 435-429-1878 E-mail: miriah@tsorenson.net</p>	<p><b>Payments:</b></p> <p>Attn: Power Settlement Analyst Phone: (415) 464-6683 E-mail: <a href="mailto:Settlements@mcecleanenergy.org">Settlements@mcecleanenergy.org</a></p>

<b>Kern and Tule Hydro LLC, a Utah limited liability company</b> ("Seller")	<b>Marin Clean Energy, a California joint powers authority</b> ("Buyer")
<b>Wire Transfer:</b> BNK: [REDACTED] ABA: [REDACTED] ACCT: [REDACTED]	<b>Wire Transfer:</b> BNK: [REDACTED] ABA: [REDACTED] ACCT: [REDACTED]
<b>With additional Notices of an Event of Default to:</b>  Attn: Phone: E-mail:  With a copy to:	<b>With additional Notices of an Event of Default to:</b> Hall Energy Law PC Attn: Stephen Hall PO Box 10406 Portland, Oregon 97296 Phone: (503) 477-9354 Email: <a href="mailto:steve@hallenergylaw.com">steve@hallenergylaw.com</a>
<b>Emergency Contact:</b> Attn: Ted S. Sorenson Phone: 208-589-6908 Facsimile: 208-522-8223 E-mail: <a href="mailto:ted@tsorenson.net">ted@tsorenson.net</a>  Back-Up Emergency Contact: TBD	<b>Emergency Contact:</b> Attn: Phone: Facsimile: E-mail:

## **EXHIBIT O**

### **OPERATING RESTRICTIONS**

Buyer may not issue a Buyer Curtailment Order more than (a) three times per day, (b) five times per calendar month, or (c) 20 times per Contract Year.

**EXHIBIT P**  
**METERING DIAGRAM**

**EXHIBIT Q**

**RESERVED**



December 5, 2019

TO: MCE Technical Committee

FROM: Justin Kudo, Strategic Analysis and Rates Manager

RE: Proposed Changes to MCE's Net Energy Metering Tariff and Cash-Out Program (Agenda Item #07)

Attachment: Revised Electric Schedule NEM: Net Energy Metering (NEM) Tariff

Dear Committee Members:

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**SUMMARY:**

Net Energy Metering (NEM) is a broadly-used term for utility programs which compensate customers for their renewable energy production. NEM customers see their usage and energy production netted out across each billing segment. Any excess energy production exported to the grid is credited to the customer and can be applied to future usage charges, eliminating the need for customers to match their energy production with their usage.

In 2010, MCE's Board of Directors adopted MCE's original NEM tariff, enabling MCE to provide service to the first CCA-served NEM households and businesses. Under the original NEM tariff, MCE credits customers for any surplus electricity production in each billing segment at their regular retail rate, plus an extra \$0.01/kWh for excess electricity delivered. Customers are billed on their net consumption each month, and any net generation credits are accrued in an escrow account which is automatically applied to future MCE charges. Following each March-April billing cycle, an annual "Cash-Out" period occurs where customers can be paid equivalent to the retail rate credits on their accounts.

Staff is proposing to transition MCE's NEM program from its current retail credit Cash-Out to a simplified, wholesale rate-based Cash-Out, similar to the programs used by Clean Power SF, San Jose Clean Energy, the new program under consideration by Sonoma Clean Power, most southern California CCAs, and PG&E. Wholesale rate programs are collectively referenced as using Net Surplus Compensation (NSC), named for the flat wholesale rate-based payment granted for net surplus kilowatt-hours exported. The proposed program would offer a payment rate set at two times the current 12-month average PG&E NSC rate, or about \$0.067/kWh.

Balances under MCE's current program rollover from year to year, and are only paid out upon request. Last year \$2.8 million was available for Cash-Out, with requests totaling \$1.2 million. Staff proposed changes would remove the requirement that customers request payment, issuing annual Cash-Out checks for all payment eligible balances over

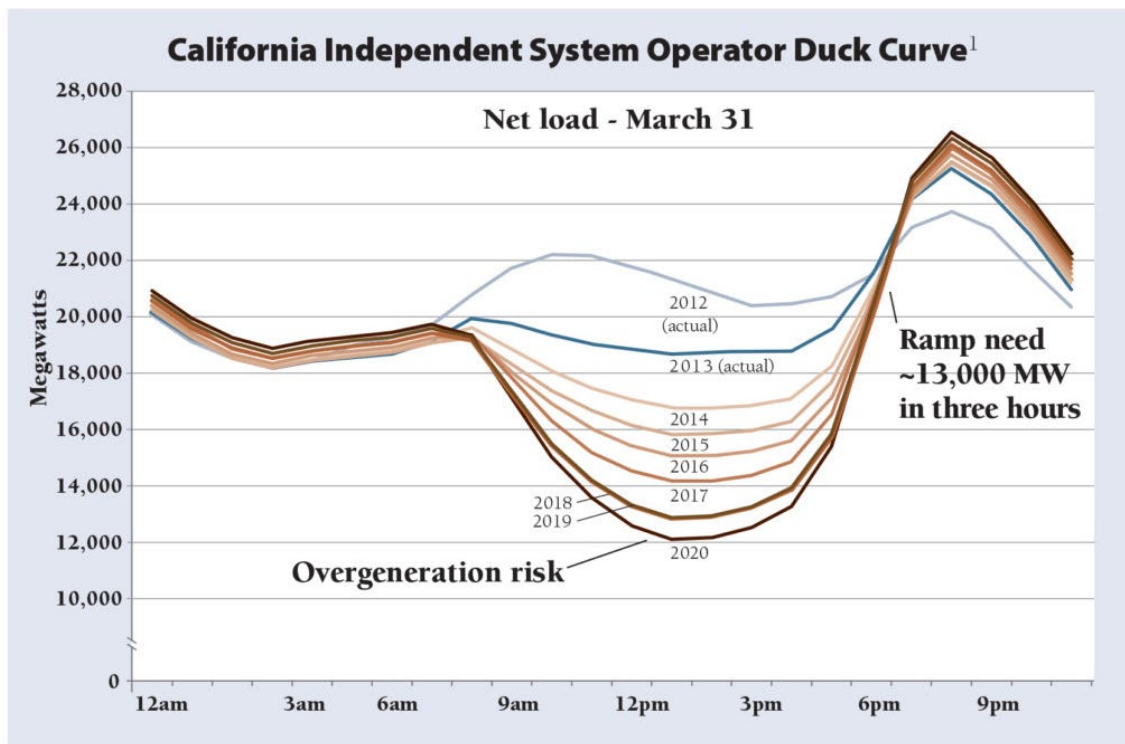
\$50. Balances under \$50 would be converted back into credit towards the customer's next annual MCE True-Up cycle.

Based on previous annual accruals, MCE staff would expect continuance of the current program to result in approximately \$2.3 million in customer payments during the 2020-2021 Cash-Out period. Adoption of the recommendations in this report would reduce future payments to approximately \$630,000 annually, inclusive of rollover balances under \$50.

### Background – Evolving NEM Programs

Since MCE's initial program launch, 18 CCAs have launched a myriad of NEM programs throughout the state, and NEM overall has seen major overhauls through "NEM 2.0" and new 4 p.m. to 9 p.m. Time-Of-Use rates. Overall, the growth of solar is considered a big success in propelling renewable energy usage. Through 2012 NEM made up less than 1% of MCE's customer base; today it represents over 7% of MCE's total accounts served.

The growth of solar has also created a significant drop in demand during solar generation hours, creating the bulk of the phenomenon known as the "Duck Curve". The Duck Curve is named after the duck-like load shape created by the intermittency of solar; because the typical California solar installation only generates power about 16% of the time, it must significantly overproduce during those hours to meet total on-site energy demands. This creates an abundance of solar power in the middle of the day, and a steep drop once the solar goes offline.



The net impact is an imbalance between the depreciating value of solar production and the significant compensation granted by legacy NEM programs – perhaps the most generous of which are CCA retail rate Cash-Out programs that allow customers to be paid their full retail credits, some as high as \$0.35/kWh.



Newly formed CCAs are increasingly adopting a model for payment used by the Investor-Owned Utilities (IOUs), Net Surplus Compensation. IOUs only allow customers to keep their retail credits within the same annual billing period (commonly known as the True-Up), after which they are allowed a credit based on recent wholesale market rates for electricity. These rates range from about \$0.03/kWh to \$0.04/kWh. The majority of California CCA programs now only offer payments under this model.

Current MCE NEM Cash-Out payments only benefit a small subset of customers. In MCE's 2019 Annual NEM Cash-Out, 5,100 (15%) of NEM accounts were Cash-Out eligible, and only 931 (3% of NEM accounts) submitted Cash-Out requests.

### **Cash-Out Program Changes**

Staff recommends migrating MCE's current retail value NEM Cash-Out compensation towards wholesale payment per kilowatt-hour for electricity exported to MCE. The current PG&E NSC rate average over the last 12 months has been just over \$0.033/kWh. Based on internal discussion, staff recommends that the initial NSC rate be set to double the wholesale rate, which would have been \$0.067 in the last 12-month period.

Moving to a double wholesale rate payment would significantly simplify communications about how MCE's program functions, especially relative to PG&E. Current retail rate payments depend on when electricity is generated and which rate the customer is on, whereas the proposed NSC rate could clearly be messaged as a much higher rate: double the rate paid by PG&E. Also, with payment made using NSC, credits would be reset to zero during each True-Up at the end of each customer's March-April billing cycle.

Staff recommends that these payments be automatically made to the billing address for each account, rather than requiring customers to request payment. Balances over \$50 would be eligible for cash payment. Balances under \$50 would be credited to customers to start their next True-Up cycle, limiting payments made for very small balances and providing customers with a starting point for their next annual cycle.

	<b>Cash-Out Eligible</b>	<b>Payments Made</b>	<b>Balances Auto Forwarded</b>	<b>Estimated Total Cost</b>
<b>Current</b>	5,100	931	Under \$100	\$2,300,000
<b>Proposed</b>	3,047	3,047	Under \$50	\$630,000

### **Local Government Accounts**

Local government accounts such as city facilities, school districts, fire departments, and public water agencies, are currently exempt from MCE's \$5,000 cap on Cash-Out balances, and as a result have represented a significant portion of MCE's Cash-Out payments. Many public facilities with solar often generate more energy than they consume, resulting in larger Cash-Out payments. In 2019, MCE provided approximately \$968,000 in payments to over 25 agencies.

To more gradually introduce the impact of these policy changes, staff recommends a gradual scaling down approach to Cash-Outs. The revised tariff would allow local government agencies after the April 2020 Cash-Out to still be eligible to receive the greater of: a) their full retail credit, subject to a \$5,000 cap or; b) 50% of their retail credit,

with no cap. Following the April 2021 Cash-Out, these accounts would fully transition to double wholesale compensation. This two-step process will limit the largest revenue impacts to outlying accounts, and provide additional time for finances to adjust.

### Transition Timing

Staff proposes that the following modifications be made to the existing NEM program commencing with each customer's Cash-Out in 2020, consistent with the revised NEM tariff:

- All balances over \$100 will be paid out to eligible customers as a check in-full regardless of if a request was received, based on the credit balance as of the end of their billing cycle ending in April 2020.
- Balances under \$100 will be added to the customer's new retail credit balance, but be ineligible for Cash-Out.
- Following the April 2020 Cash-Out, subsequent NEM charges and credits will be treated in accordance with the revised NEM tariff. The MCE Cash-Out occurring in April 2021 will be done at double wholesale rates per the updated tariff, except for local government agencies. This would also apply to any off-cycle Cash-Out requests associated with account closures.
- Following the April 2020 Cash-Out, local government agencies will be granted a partial retail rate Cash-Out in April 2021 as described above. Double wholesale compensation will occur the following year.

<b>NEM Changes</b>	<b>Apr 2019 – 2020</b>	<b>Apr 2020 – 2021</b>	<b>Apr 2021 - 2022</b>
<b>Standard NEM</b>	Retail	Double wholesale	Double wholesale
<b>Local Government NEM</b>	Retail	50% of Retail or \$5,000 cap	Double wholesale
<b>\$5,000 Cap</b>	Non-Local Government NEM	All Accounts	All Accounts

### Net Generator Bonus Credit

MCE currently provides an additional \$0.01/kWh retail credit on all surplus usage in any discrete billing period, based on the Deep Green charge for 100% renewable electricity. However, MCE is unable to take credit for any surplus solar generation without a transfer of renewable energy credits. While this policy has been left in place as an incentive for solar, it has not provided value to MCE's customer base overall. The current annual cost of the \$0.01/kWh retail credit is approximately \$475,000 annually.

Under the proposed program, MCE would be paying a premium rate for electricity exported to MCE, and this rate would be significantly higher than the value of the electricity. This is because solar power is exported to MCE in the middle of the day when electricity value is now much lower than it was when MCE first established the NEM tariff. Staff recommends that the \$0.01/kWh credit be phased out, except as below, as part of the transition to double wholesale rates in the revised tariff.

Deep Green customers pay an additional \$0.01/kWh as part of their retail rates for usage, and therefore it is appropriate for these customers to continue to receive an additional \$0.01/kWh credit for any surplus kWh generation within any billing period. It is recommended that these credits be applied to additional usage but not eligible for Cash-Out in the revised tariff.

## **Battery Storage and Resiliency**

MCE expects to develop battery storage offerings in early 2020, with a particular focus on batteries for customers with solar. Storage will play a key role in developing resiliency, mitigating duck curve issues, and ensuring continued opportunity to further increase solar installations. Under NEM 2.0, the requirement of afternoon peak Time-Of-Use rates has already created an additional value to charging batteries with solar, and discharging them in the evening.

Battery storage is also becoming a key piece of resiliency in the era of Public Safety Power Shutoffs. During an outage, solar systems are not operational and are unable to provide any benefit. Batteries bring not only backup power to solar customers, but a rechargeable asset which can endure a planned or unplanned outage.

Reduced expenditures from transitioning MCE NEM customers from retail to double wholesale rate compensation could have a significant impact on battery storage programs. For example, a typical utility battery incentive program may compensate customers with \$600 per installation. Based on that cost, the proposed changes would free up enough revenue to fund approximately 2,800 installation incentives annually.

### **Recommendations:**

1. Approve the recommended changes to MCE's Electric Schedule NEM: Net Energy Metering Tariff and associated transitional schedule, effective following each customer's March-April 2020 billing cycle.
2. Direct staff to issue checks to all eligible NEM customers for the April 2020 Cash-Out, without requiring a customer request.



## **ELECTRIC SCHEDULE NEM - NET ENERGY METERING TARIFF**

**--DRAFT--**

***Effective Date: March 26, 2020***

**APPLICABILITY:** This net energy metering (NEM) schedule is applicable to customers operating an eligible Renewable Electrical Generation Facility, as defined in PG&E's Electric Schedule NEM or NEM2. This rate schedule is available on a first-come, first-served basis to customers that provide PG&E with a completed PG&E NEM Application and comply with all PG&E NEM requirements as described in PG&E Electric Schedule NEM, NEM2, and other related NEM programs. This includes customers served by NEMV (Virtual Net Energy Metering), NEMVMASH (Virtual Net Energy Metering for Multifamily Affordable Housing), NEMA (NEM Aggregation), Multiple Tariff facilities, and any other forms of Net Energy Metering as defined by PG&E Electric Schedules NEM and NEM2.

**RATES:** All rates charged under this tariff will be in accordance with the eligible customer-generator's Otherwise-Applicable MCE rate Schedule (OAS). An eligible customer-generator served under this schedule is responsible for all MCE charges from its OAS including demand charges, Deep Green surcharges, taxes, and all other charges owed to MCE. Charges or credits for energy (kWh) supplied or delivered to MCE will be based on the net metered usage in accordance with this tariff.

PG&E NEM tariffs and rates still apply – MCE customers will continue to be subject to the terms, conditions, and billing procedures of PG&E for services other than electric generation.

**BILLING:** Customers with NEM service will be billed as follows:

a) Monthly Settlement of MCE Charges/Credits:

1. "Net Electric Consumption" is defined as when customer energy usage exceeds production during any billing segment, and shall be billed in accordance with applicable TOU period-specific rates/charges, as described in the eligible customer-generator's OAS.
2. "Net Electric Generation" is defined as when customer energy generation exceeds usage during any billing segment, and shall be credited in consideration of the applicable TOU period-specific rates/charges, as described in the eligible customer-generator's OAS.
3. Any charges due for Net Electric Consumption will be assessed in each monthly statement. If the customer's account has available credits from current or previous Net Electric Generation, these credits will be applied against usage charges first before any charges are assessed.

4. Any excess Net Electric Generation credits will be tracked by MCE on the customer's bill as a credit, and will be applied to future billing cycles within the same MCE Annual True-Up period as defined below.
5. Credit balances do not have any cash value except as defined in the Cash-Out process below.

b) MCE Annual Cash-Out and True-Up:

1. Following the final date and bill for each customer's March-April billing cycle, MCE will initiate a true-up of each customer account's NEM balance. Any accrued credit balance will be reset to zero for the beginning of the next 12-month period.
2. A review will be conducted for each customer's kilowatt-hour consumption and production during the annual true-up. If the customer's account produced more electricity than it consumed, it is eligible for a Cash-Out payment at the Net Surplus Compensation (NSC) rate.
3. The "Net Surplus Compensation" rate is intended to reflect two times (2X) the average wholesale rate over a 12-month period as determined by MCE.
4. The NSC rate will be updated as part of MCE's rate setting process, with consideration for market factors and comparable rates.
  - a. The initial NSC rate is set at \$0.067/kWh.
5. NSC payments are subject to a cap of \$5,000 per account annually.
6. Customers will receive NSC payments automatically, paid by check issued to the customer's mailing address on their PG&E account. Credit balances of less than \$50 will instead be added to the customer's new account balance.

c) Customers Returning to PG&E Bundled Service and Account Closures:

1. MCE customers with NEM service may opt-out and return to PG&E bundled service at any time, subject to MCE and PG&E's terms and conditions for return to bundled service. Customers are advised that PG&E will perform a True-Up of their account for any PG&E charges at the time of return to PG&E bundled service.
2. Customers returning to PG&E service or closing their PG&E account may request a review of their account for NSC payment. This settlement will follow the MCE Annual Cash-Out and True-Up process as defined in Sections (b)(2) through (b)(4), and be issued as a check to the address provided by the customer.

d) Aggregated NEM

1. Per the California Public Utilities Commission Section 2827(h)(4)(B), aggregated NEM customers are "permanently ineligible to receive net surplus electricity compensation." MCE's aggregated NEM accounts are ineligible to receive NSC payments.

e) Municipal Accounts

1. During the 2020-2021 cycle that results in an April 2021 MCE Cash-Out and true-up, municipal customers will receive a transitional Cash-Out payment instead of the process defined in Section (b). This transitional payment will be equivalent to the greater of: a) 50% of available retail credit or; b) 100% of retail credit subject to a maximum of \$5,000. After the April 2021 Cash-out, credit balances for each customer will be reset to zero for the start of the next 12-month period.
2. Subsequent MCE Cash-Out and true-ups for municipal accounts will be billed according to the standard process defined in Section (b).



December 5, 2019

TO: MCE Technical Committee

FROM: Michael Callahan, Senior Policy Counsel

RE: Background on Allocation of Greenhouse Gas (GHG) Free Resources (Agenda Item #08)

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### Introduction

Currently, through the power charge indifference adjustment (PCIA), MCE customers are required to pay a portion of the costs to operate PG&E's existing large hydropower ("hydro") fleet and the Diablo Canyon Nuclear Power Plant (Diablo). However, historically, PG&E has kept all of the energy output and associated GHG-free attributes generated from these resources. This has an unintended consequence of making PG&E's portfolio appear "cleaner" as PG&E has fewer customers to share the same amount of GHG-free resources. These PCIA costs are in addition to the decommissioning costs MCE customers currently pay for Diablo, which will be permanently shut down by 2025.<sup>1</sup>

PCIA charges are only supposed to cover the difference in cost between the price at which PG&E bought the resources and the price at which PG&E can now sell the resources. PG&E sells the electricity from these resources in the market administered by the California Independent System Operation (CAISO). Therefore, the total cost CCA customers pay for these GHG-free resources in the PCIA is reduced by the revenue PG&E receives in the CAISO market for the energy generated from these assets.

However, the CAISO revenue does not reflect any value for the GHG-free attributes of this energy. Given that an increasing number of CCAs have launched with a mission to reduce electricity-related GHGs, the GHG-free attributes of this energy are becoming increasingly valuable. Numerous CCAs and CalCCA requested the California Public Utilities Commission (CPUC) establish a GHG-free benchmark to reflect the value of the GHG-free attribute and reduce the PCIA fee by that amount. This is a similar approach to the existing Renewable Portfolio Standard and Resource Adequacy benchmarks that reflect the value of those resources and reduce the PCIA rates. The CPUC denied the request to establish a GHG-free benchmark; this results in a cost shift from PG&E to CCA customers because CCA customers are paying for a portion of the GHG-free attributes that PG&E claims for its own customers.

To address this cost shift, PG&E has voluntarily offered to allocate a proportionate share of the output of these GHG-free resources at no additional cost to CCAs and Direct Access providers whose customers pay the PCIA. There are two parallel processes to develop a mechanism to allow the voluntary allocations.

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<sup>1</sup> Diablo has two generating units. One unit is planned to be taken offline in 2024 with the second in 2025.

In mid-2019, East Bay Community Energy (EBCE) approached PG&E to discuss whether it would sell energy from its large hydro facilities.<sup>2</sup> In 2018, PG&E had issued a solicitation and sold energy from large hydro resources, but it did not make any sales in 2019. PG&E subsequently approached EBCE and offered to allocate GHG-free resources (nuclear and large hydro) to them and other eligible load serving entities (LSEs), and are having discussions with EBCE (leading on behalf of PG&E territory CCAs) on the mechanics of implementation.<sup>3</sup>

Separately, there is another effort occurring in the PCIA Phase 2, Working Group 3 (WG 3)<sup>4</sup> that is also focusing on the allocation of GHG-free energy, among other things. Since the WG 3 effort is not expected to be implemented until 2021 at the earliest, the EBCE effort is being considered as an interim approach until WG 3 decisions are finalized. To distinguish the two efforts from each other, the EBCE effort shall be called the “Interim Proposal,” and the PCIA WG 3 effort the “PCIA Proposal.” Both proposals are works in progress and subject to change pending final CPUC approval.

The purpose of this memorandum is to provide sufficient background and information for the Technical Committee to decide whether to take its share of the GHG-free allocation under the Interim Proposal, and if so, from which pool(s).

### Interim Proposal

Under the Interim Proposal, in 2020, PG&E will allocate to each eligible Load Serving Entity (LSE) its load share of large hydro (hydro pool) and/or nuclear resources (nuclear pool) based on an LSE’s election.<sup>5</sup> The LSE has 30 days to accept its allocation of hydro and/or nuclear pool(s), and any unallocated amounts will revert back to PG&E to use or dispose as it sees fit pursuant to applicable law. Although there is an attempt by EBCE for LSEs to receive allocations retroactively for 2019, that effort has significant obstacles.<sup>6</sup>

In exchange for the allocation by PG&E, the receiving LSE accepts the conditions that 1) the manner in which the disposition of the resource pools is reasonable; and 2) the LSE waives its ability to make arguments to the CPUC or the California Legislature asserting that PG&E has not offered any allocation, sale, or transfer of GHG-free energy or environmental attributes for that year.

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<sup>2</sup> Large hydro and nuclear resources count as GHG-free on the power content label (PCL), and investor-owned utilities (IOUs) have been benefiting from counting those resources to meet their GHG-free targets. CCA Customers and PCIA-paying Direct Access Customers on the other hand have been paying for those same assets through PCIA, yet do not receive any of the GHG-free benefits through the PCL.

<sup>3</sup> Clean Power Alliance is having similar negotiations with Southern California Edison (SCE) in SCE territory, but both Interim Proposals are distinct and separate from each other.

<sup>4</sup> WG 3 was established by a CPUC scoping memo in early 2019. The memo indicated that there should be three working groups to implement the CPUC’s directives. The first working group focuses on appropriate forecasting and benchmarking, the second focuses on prepayment of the PCIA, and the third working group is generally supposed to focus on the transition of contracts from the investor-owned utilities to the CCAs.

<sup>5</sup> An eligible LSE (as defined in the CAISO Tariff) is one that (1) has forecasted load identified in PG&E’s Energy Resource Recovery Account (ERRA) Forecast Application (ERRA Forecast Departed Load) for the calendar year in which the allocation amount is accepted; and (2) serves customers who pay the PCIA departing load charges for the above market costs of resources.

<sup>6</sup> For the backwards-looking piece of the Interim proposal, action by the CEC amending its Draft Modified Power Source Disclosure rules will be required. The Interim Proposal requires CPUC and CEC action before PG&E will make allocations available, and it may be directed not to implement the backwards-looking element.



The Interim Proposal will become effective upon CPUC approval of an advice letter that PG&E will file to amend PG&E's Bundled Procurement Plan to permit allocations.<sup>7</sup> The Interim Proposal will remain in effect until the effective date of a CPUC action on the PCIA Proposal in Rulemaking (R.17-06-026) that orders an alternative methodology (PCIA Decision). The Interim Proposal is expected to remain in effect through 2020.

### PCIA Proposal

On October 11, 2018 the CPUC issued Decision (D.)18-10-019, which modified the PCIA Methodology and opened a second phase of the proceeding to further develop proposals for portfolio optimization and cost reduction. On February 1, 2019, the CPUC directed the parties to convene three working groups to further develop PCIA-related proposals for consideration by the CPUC. Working Group 3 (WG 3) is focused on portfolio optimization and tasked with answering the question: "what are the structures, processes, and rules governing portfolio optimization that the CPUC should consider in addressing excess resources in utility portfolios?" A final CPUC decision on the activities of WG 3 is expected in Q2 2020; therefore, implementation of the PCIA Proposal is expected in 2021 at the earliest.

Under the PCIA Proposal, an LSE would receive a proportional share of GHG-free attributes and energy on an hourly basis related to the generation from each applicable vintage<sup>8</sup> of the IOUs' generation.<sup>9</sup> Allocation is based on each LSE's customers' forecasted share of vintage load on an asset.

Similar to the Interim Proposal, an LSE may opt-out of its allocation of one or both pools of resources (for example, an LSE could opt out of nuclear allocation but keep its hydro allocation), but *it would not receive compensation in lieu of allocation*. Unlike the Interim Proposal, allocations not accepted by a LSE under the PCIA Proposal would be reallocated automatically among LSEs participating in the allocation of that category of resources, and not simply return to the IOU. Allocations would continue for as long as the underlying assets are in the PCIA mechanism, but LSEs could opt in or out each year by a certain deadline.<sup>10</sup> Attributes would be tradeable or available for sale after received by an LSE, with no further involvement of the IOU.

### Estimated Allocations

MCE's estimated allocation volumes per resource pool are highlighted in Tables 1 and 2 below, for large hydro, and nuclear resources, respectively. Note that the estimated volumes do not reflect vintaging and are based on a combination of various sources.

#### **Table 1: Large Hydro Allocation Estimates**

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<sup>7</sup> PG&E will provide some historical production data and ongoing allocation amounts for LSEs to forecast and keep track of allocation amounts. They will also provide the LSE with an annual attestation confirming actual year-end totals of generation from the resource pool(s), and notify the California Energy Commission (CEC) of the sale of the product for purposes of Power Content Label reporting.

<sup>8</sup> Vintage is a term that refers to the year in which a CCA customer departed. A CCA customer is responsible for all of the generation contracts signed by the IOU up until the year of its departure, or vintage. Therefore, a customer with a 2010 vintage would be responsible for fewer contract commitments than a customer with a 2020 vintage. Because of MCE's inclusion of new communities since its launch, MCE customers have a wide variety of vintages depending on when their community voted to join MCE and customers departed.

<sup>9</sup> The generation resources would have to be GHG-free, not be counted towards the IOU's Renewable Standard Portfolio compliance, and be eligible for the PCIA.

<sup>10</sup> The IOUs will provide forecasts of aggregated hydro and nuclear production or aggregated hydro-only production, and quarterly updates for the remaining balance of year of the monthly total, aggregated production. They will also provide the past three years of historical, aggregated, hourly production data by combined nuclear and non-nuclear pool or only hydro pool.

PG&E Territory - Large Hydro		Estimated share (GWh)										
2020 GWh from 2019 IEPR Mid Demand case	2020 Demand	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030
CCA - CleanPowerSF	2,927	340	340	340	347	328	329	330	331	332	333	334
CCA - East Bay Community Energy	5,637	654	654	654	669	632	633	635	637	639	641	644
CCA - King City Community Power	23	3	3	3	3	3	3	3	3	3	3	3
CCA - Marin Clean Energy	5,267	611	611	611	625	591	591	593	595	597	599	602
CCA - Monterey Bay Community Power	3,303	383	383	383	392	371	371	372	373	375	376	377
CCA - Peninsula Clean Energy Authority	3,492	405	405	405	414	392	392	393	394	396	397	399
CCA - Pioneer Community Energy	1,106	128	128	128	131	124	124	125	125	125	126	126
CCA - Redwood Coast Energy Authority	686	80	80	80	81	77	77	77	78	78	78	78
CCA - San José Clean Energy	4,419	513	513	513	524	496	496	498	499	501	503	505
CCA - Silicon Valley Clean Energy	3,969	460	460	460	471	445	446	447	448	450	452	453
CCA - Sonoma Clean Power	2,552	296	296	296	303	286	287	287	288	289	290	292
CCA - Valley Clean Energy Alliance	702	81	81	81	83	79	79	79	79	80	80	80
<b>Total</b>	<b>34,083</b>	<b>3,953</b>	<b>3,953</b>	<b>3,953</b>	<b>4,043</b>	<b>3,824</b>	<b>3,827</b>	<b>3,839</b>	<b>3,850</b>	<b>3,865</b>	<b>3,878</b>	<b>3,893</b>

**Table 2: Nuclear Allocation Estimates**

PG&E Territory - Nuclear		Estimated share (GWh)					
2020 GWh from 2019 IEPR Mid Demand case	2020 Demand	2020	2021	2022	2023	2024	2025
CCA - CleanPowerSF	2,927	668	668	668	683	646	323
CCA - East Bay Community Energy	5,637	1,287	1,287	1,287	1,316	1,245	623
CCA - King City Community Power	23	5	5	5	5	5	3
CCA - Marin Clean Energy	5,267	1,202	1,202	1,202	1,230	1,163	582
CCA - Monterey Bay Community Power	3,303	754	754	754	771	729	365
CCA - Peninsula Clean Energy Authority	3,492	797	797	797	815	771	386
CCA - Pioneer Community Energy	1,106	252	252	252	258	244	122
CCA - Redwood Coast Energy Authority	686	157	157	157	160	152	76
CCA - San José Clean Energy	4,419	1,009	1,009	1,009	1,032	976	488
CCA - Silicon Valley Clean Energy	3,969	906	906	906	927	876	439
CCA - Sonoma Clean Power	2,552	583	583	583	596	563	282
CCA - Valley Clean Energy Alliance	702	160	160	160	164	155	78
<b>Total</b>	<b>34,083</b>	<b>7,781</b>	<b>7,781</b>	<b>7,781</b>	<b>7,957</b>	<b>7,525</b>	<b>3,766</b>

## Conclusion

Both the Interim and PCIA Proposals are opportunities for CCAs to gain access to significant volumes of GHG-free resources that their customers are already paying for through the PCIA. They would also stop the current effect of the IOUs portfolios appearing more GHG-free as customers depart the IOUs for CCAs. The implementation of both proposals vary slightly as PG&E (Interim Proposal) and Southern California Edison (PCIA Proposal) have different views on issues such as allocation methodology and the treatment of unallocated volumes (revert back to PG&E v. reallocated among LSEs choosing allocation). Both proposals are still a work in progress but the decisions for the draft Interim Proposal and draft PCIA Proposal are expected in Q1 2020, and Q2 2020, respectively.

To allow for additional discussion of this issue, staff will be seeking input from the Ad Hoc Contracts committee for 2020, and the MCE Community Power Coalition. It is expected that this topic will return to the Technical Committee for further discussion in early 2020.