



Town Council Agenda Report

Date: March 24, 2020 Item No. 2

To: Honorable Mayor and Town Council

Subject: APPROVE ENTERING INTO A LONG-TERM RENEWABLE ENERGY STORAGE RESOURCE ADEQUACY AGREEMENT WITH BLACK WALNUT ENERGY STORAGE, LLC

From: Douglas Robertson, Town Manager

Submitted by: Sydnie Harris, Director of Finance
Finance Department

Budgeted Item: Yes No N/A

RECOMMENDED ACTION

Approve entering into a long-term energy storage resource adequacy agreement with Black Walnut Energy Storage, LLC for Apple Valley Choice Energy.

SUMMARY:

Apple Valley Choice Energy (AVCE) is required by California Public Utilities Commission Decision 19-11-016 to enter into long-term contracts for incremental procurement of new system resource adequacy. This agreement is the one of several that will be entered into for AVCE to be compliant with this requirement.

BACKGROUND:

In November 2019, the California Public Utilities Commission (CPUC) approved Decision 19-11-016 (Decision) intended to address concerns that the state would have insufficient generation capacity resources beginning in summer 2021. The Decision requires all load serving entities, including Community Choice Aggregation (CCA) programs to procure 3300 MW of incremental resource adequacy. The Decision provides allocations for each load serving entity. Apple Valley Choice Energy (AVCE) was allocated 3.8 MWs of additional monthly resource adequacy procurement. Additionally, the Decision requires that the contract term for contracts for each non-natural gas resource used to satisfy this requirement be 10 years or greater.

In order to meet this requirement, California Choice Energy Authority (CalChoice), on behalf of AVCE and its other member agencies, has bilaterally engaged the market and has targeted preferred contracting opportunities. CalChoice and its legal and technical team have negotiated and finalized commercial and contract terms on behalf its member agencies with esVolta for its Black Walnut Energy Storage project. CalChoice and its member agencies will be contracting with Black Walnut Energy Storage, LLC (esVolta) for 15 MW of local and flexible resource adequacy, 3 MW of which is for AVCE. The project is a battery storage project located in Santa Paula, California.

As a condition of the contract, esVolta recognizes and accepts the secured deposit account in the name of AVCE as credit and collateral, and no other security or credit backing by the city will be required.

FISCAL IMPACT

\$ 178,000 annually for ten years. There will be sufficient revenues generated to cover operating expenses, including power procurement, and to fund reserves to provide financial and rate stability to the program.

ATTACHMENTS:

Power Purchase Agreement

EXECUTION VERSION

**IN FRONT OF THE METER
ENERGY STORAGE RESOURCE ADEQUACY AGREEMENT
COVER SHEET**

Seller: Black Walnut Energy Storage, LLC, a Delaware limited liability company

Buyer: Town of Apple Valley, California (d/b/a Apple Valley Choice Energy)

Description of Project: Black Walnut Energy Storage

Contract Amounts:

RA Attributes: [REDACTED]

Local RA Attributes: [REDACTED]

Flexible RA Attributes: [REDACTED]

Payment Quantity: [REDACTED]

Contract Price: \$ [REDACTED]

Milestones:

Milestone	Date
Interconnection Agreement Execution Deadline	April 15, 2022
Site Control Deadline	March 1, 2021
Construction Start Deadline	December 1, 2021
Commercial Operation Deadline	March 18, 2022
Expected Initial Delivery Date	June 1, 2022

Delivery Term: 10 Contract Years

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ENERGY STORAGE RESOURCE ADEQUACY AGREEMENT

This Energy Storage Resource Adequacy Agreement (“**Agreement**”) is made by and between the buyer (“**Buyer**”) and the seller (“**Seller**”) as of _____, 2020 (“**Effective Date**”), in each case as set forth on the cover sheet (“**Cover Sheet**”) to this Agreement. Seller and Buyer are referred to each individually as a “**Party**” and collectively as the “**Parties**.”

RECITALS

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

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

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

ARTICLE 1: DEFINITIONS

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

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

“**Agreement**” has the meaning set forth in the preamble.

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

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

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

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

“**Bankrupt**” means with respect to any entity, such entity that (a) files a petition or otherwise commences, authorizes or acquiesces in the commencement of a proceeding or cause of action under any bankruptcy, insolvency, reorganization or similar Law, (b) has any such petition filed or commenced against it which remains unstayed or undismissed for a period of ninety (90) days, (c) makes an assignment or any general arrangement for the benefit of creditors, (d) otherwise becomes bankrupt or insolvent (however evidenced), (e) has a liquidator, administrator,

receiver, trustee, conservator or similar official appointed with respect to it or any substantial portion of its property or assets, or (f) is generally unable to pay its debts as they fall due.

“**Bid**” shall have the meaning in the CAISO Tariff.

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

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

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

“**Buyer Lockbox Arrangement**” has the meaning set forth in Section 10.5.

“**Buyer Performance Security**” means cash deposited in an escrow agreement on terms and conditions satisfactory to Seller or Letter of Credit, in either case in an amount reasonably agreed to by the Parties.

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

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

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

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

“**Capacity Adjustment Date**” has the meaning set forth in Section 6.7(a).

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

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

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

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

“**Change Notice**” has the meaning set forth in Section 6.7(a).

“Change of Control” means any circumstance in which esVolta, LP ceases to own, directly or indirectly through one or more intermediate entities, more than fifty percent (50%) of the outstanding equity interests in Seller; provided that in calculating ownership percentages for all purposes of the foregoing clause (ii):

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

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

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

“Claim” has the meaning set forth in Section 15.1(a).

“Collateral Agent” has the meaning set forth in the Security Agreement.

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

“Commercial Operation Deadline” means the date that is seventy-five (75) days before the Expected Initial Delivery Date, as set forth on the Cover Sheet.

“Commercial Operation Milestone” means the Project becoming Commercially Operable on or before the Commercial Operation Deadline.

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

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

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

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

“Confidential Information” has the meaning set forth in Section 20.1.

“Confirmation Notice” has the meaning set forth in Section 6.7(a).

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

“Construction Delay Damages” means liquidated damages in an amount equal to [REDACTED]

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

“Construction Start Deadline” means the construction start deadline set forth on the Cover Sheet.

“Contract Amount” has the meaning set forth in Section 5.2(a).

“Contract Price” means the amount specified in Section 5.2(d).

“Contract Year” means a period of twelve (12) consecutive months; the first Contract Year shall commence on the Initial Delivery Date; and each subsequent Contract Year shall commence on the anniversary of the Initial Delivery Date. The final Contract Year may be a period of less than twelve (12) consecutive months.

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

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

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

“CPM” means “Capacity Procurement Mechanism” and has the meaning set forth in the CAISO Tariff and is inclusive of any successor mechanisms authorized by CAISO.

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

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

“CPUC Decisions” means CPUC Decisions 04-01-050, 04-10-035, 05-10-042, 06-04-040, 06-06-064, 06-07-031, 07-06-029, 08-06-031, 09-06-028, 10-06-036, 11-06-022, 12-06-025, 13-

06-024, 14-06-050, and any other existing or subsequent decisions, resolutions or rulings related to resource adequacy, as may be amended from time to time by the CPUC.

“**CPUC General Order No. 167**” issued by the CPUC directs the implementation and enforcement of standards for the maintenance and operation of electric generating facilities and power plants and can be found at the link below:

http://docs.cpuc.ca.gov/PUBLISHED/GENERAL_ORDER/108114.htm

“**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.

“**Critical Milestone**” has the meaning set forth in Section 3.5.

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

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

“**Delay Damages**” means any Construction Delay Damages or IDD Delay Damages.

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

“**Delivered Quantities**” has the meaning set forth in Section 5.2(c).

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

“**Delivery Term Security**” means

[REDACTED]

“**Development Security**” means

[REDACTED]

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

“**Disclosure Order**” has the meaning set forth in Section 20.2(a).

“**Disclosure Request**” has the meaning set forth in Section 20.2(b).

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

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

“Effective Date” has the meaning set forth in the preamble.

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

“Energy” means three-phase, 60-cycle alternating current electric energy, measured in MWhs.

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

“EPC Contract” means the Seller’s engineering, procurement and construction contract with the EPC Contractor.

“EPC Contractor” means Seller’s engineering, procurement and construction contractor or such Person performing those functions.

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

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

“Expected Initial Delivery Date” means the expected initial delivery date set forth on the Cover Sheet.

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

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

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

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

(a) Force Majeure may include:

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

(ii) transportation accidents affecting delivery of equipment only if such accident occurs prior to the Commercial Operation Date;

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

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

(b) Force Majeure does not include:

(i) a failure of performance of any third party, including Participating TO, Utility Distribution Company, or any other party providing electric interconnection, distribution or transmission service (except to the extent that such failure was caused by an event that would otherwise satisfy the definition of a Force Majeure event as defined above);

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

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

(iv) Seller’s ability to sell the Product at a price greater than the price set forth in this Agreement or Buyer’s ability to purchase the Product at a price lower than the price set forth in this Agreement;

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

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

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

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

(ix) Seller's failure to obtain Site control, unless caused solely by an event of Force Majeure of the specific type described in any of subsections (a)(i) through (a)(iv) above.

"Force Majeure Failure" has the meaning set forth in Section 8.1(d).

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

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

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

"Governmental Authority" means any federal, state, provincial, local or municipal government, any political subdivision thereof or any other governmental, congressional or parliamentary, regulatory, or judicial instrumentality, authority, body, agency, department, bureau,

or entity with authority to bind a Party at law, including CAISO; *provided, however*, that “Governmental Authority” shall not in any event include any Party.

“**Guarantor**” means a Person 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.

“**Guaranty**” means a guaranty issued by a Guarantor in the form and substance set forth in Appendix V-B or as otherwise deemed acceptable by Buyer.

“**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.

[REDACTED]

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

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

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

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

“**Intercreditor and Collateral Agency Agreement**” means that certain Intercreditor and Collateral Agency Agreement, dated as of January 30, 2017, by and among Wilmington Trust, National Association as Collateral Agent, the PPA Providers from time to time party thereto, and Buyer.

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

“**Joinder**” has the meaning set forth in the Intercreditor and Collateral Agency Agreement.

“**Law**” means any statute, law, treaty, rule, regulation, ordinance, code, Permit, enactment, injunction, order, writ, decision, authorization, judgment, decree or other legal or regulatory determination or restriction by a court or Governmental Authority of competent jurisdiction,

including any of the foregoing that are enacted, amended, or issued after the Effective Date, and which become effective during the Term; or any binding interpretation of the foregoing.

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

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

“LIBOR” means the London Interbank Offered Rate for the corresponding deposits of U.S. dollars.

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

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

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

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

area reliability, local resource adequacy, local resource adequacy procurement requirements, or local capacity requirement in other regulatory proceedings or legislative actions.

“**Lockbox Account**” has the meaning set forth in the Security Agreement.

“**Lockbox Account Control Agreement**” has the meaning set forth in the Security Agreement.

“**Lockbox Arrangement Documents**” means, collectively, the Intercreditor and Collateral Agency Agreement, the Security Agreement, and the Lockbox Account Control Agreement.

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

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

“**Monthly Payment**” has the meaning set forth in Section 5.2(d).

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

“**MUA Decision**” has the meaning set forth in Section 4.2(p).

“**Must Offer Obligations**” means Seller’s obligation to Bid or cause Seller’s SC to Bid the Project into the CAISO Markets due to delivery of the Product to Buyer and in accordance with the CAISO Tariff.

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

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

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

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

“**Non-Spinning Reserve**” has the meaning set forth in the CAISO Tariff.

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

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

“**Notify**” means to provide a Notice.

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

“**Operational Characteristics**” means the operational characteristics set forth in Appendix II.

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

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

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

“**Party’s Event of Default**” has the meaning set forth in Section 7.1(b).

“**Payment Quantity**” has the meaning set forth in Section 5.2(d).

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

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

“**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.

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

“**Product**” has the meaning set forth in [Section 5.1\(a\)](#).

“**Progress Report**” means a reasonably detailed progress report including the items set forth in [Appendix III](#).

“**Project**” means the energy storage facility described in [Appendix I](#), as such may be revised from time to time in accordance with this Agreement.

“**Project Safety Plan**” means Seller’s written plan that includes the Safeguards and plans to comply with the Safety Requirements, as such Safeguards and Safety Requirements are generally outlined in [Appendix VI](#).

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

- (a) Safeguards are implemented and maintained for the Project and at each Site and are sufficient to address reasonably foreseeable incidents;
- (b) equipment, material, and supplies are sufficient and accessible to operate the Project safely and reliably;
- (c) operating personnel are trained, equipped, and capable of responsible operation and maintenance of the Project and at each Site, including identifying and responding to System Emergencies, emergencies, or Exigent Circumstances originating from or impacting the Project or Site;
- (d) the Project’s material components and control systems are designed, manufactured, and configured to meet the standard of durability and safety generally used for electric power or energy storage facilities operating in the relevant region; and
- (e) the Project is appropriately designed, operated, maintained, monitored, and tested to ensure it continues to function safely, reliably, and consistent with the intended design

specifications, applicable Laws, and Permits, and over the complete range of environmental conditions reasonably expected to occur at each Site.

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

“**Receiving Party**” has the meaning set forth in Section 20.2(b).

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

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

“**Regulatory Disclosure**” has the meaning set forth in Section 20.2(a).

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

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

“**Remediation Event**” means the occurrence of any of the following with respect to the Project or a Site: (a) an Exigent Circumstance (b) a Serious Incident; (c) a change in the nature, scope, or requirements of applicable Laws, Permits, codes, standards, or regulations issued by Governmental Authorities which requires modifications to the Safeguards; (d) a material change to the manufacturer’s guidelines that requires modification to equipment or the Project’s operating procedures; (e) a failure or compromise of an existing Safeguard; (f) Notice by Buyer pursuant to Section 11.1 that the Project Safety Plan is not consistent with the Safety Requirements; or (g) any actual condition related to the Project or a Site that would reasonably be expected to adversely impact the safe construction, operation, or maintenance of the Project or a Site.

“**Remediation Period**” means the time period between the first occurrence of the Remediation Event and the resolution of such Remediation Event which period may not exceed a total of ninety (90) days; provided, however, that Seller may request to extend the Remediation Period by up to ninety (90) days if Seller is unable to resolve the Remediation Event within the initial ninety (90) day period despite exercising diligent efforts (and Buyer shall not unreasonably withhold approval of such extension), and Seller may request an additional extension of the Remediation Period of up to ninety (90) days if Seller is unable to resolve the Remediation Event within the ninety (90) day extension period despite exercising diligent efforts, which Buyer may approve or reject in its sole discretion. The Remediation Period may not, under any circumstance, continue for more than two hundred and seventy (270) days from the first occurrence of the Remediation Event.

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

“Resold Product” has the meaning set forth in Section 5.1(b).

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

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

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

“RMR” means **“Reliability Must-Run”** and has the meaning set forth in, and as used in, the CAISO Tariff.

“RMR Contract” has the meaning set forth in the CAISO Tariff.

“RMR Generation” has the meaning set forth in the CAISO Tariff.

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

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

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

“Safety Requirements” means Prudent Operating Practices, CPUC General Order No. 167, and all applicable safety-related (construed broadly) requirements of Law, the Utility Distribution Company, the Transmission Provider, Governmental Approvals, the CAISO, CARB, FERC, NERC and WECC.

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

“SEC” means the U.S. Securities and Exchange Commission, or any successor entity performing similar functions.

“Security Agreement” means the Security Agreement, dated as of January 30, 2017, between Buyer and Collateral Agent, as collateral agent for the benefit of the Secured Creditors, or any successor agreement generally available to Buyer’s creditors.

“Security Interest” has the meaning set forth in Section 10.3(a).

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

“Seller’s Event of Default” has the meaning set forth in Section 7.1(a).

“Serious Incident” means a harmful event that occurs on a Site during the Term arising out of, related to, or connected with the Project or the Site that results in any of the following outcomes: (a) any injury to or death of a member of the general public; (b) the death or permanent, disabling injury to operating personnel, Seller’s Contractors or subcontractors, Seller’s employees, agents, or consultants, or authorized visitors to the Site; (c) any property damage greater than three hundred thousand dollars (\$300,000.00); (d) release of hazardous material above the limits, or violating the requirements, established by Permits, codes, standards, regulations, Laws or Governmental Authorities; (e) environmental impacts exceeding those authorized by Permits or applicable Law.

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

“Shortfall” means any difference between a Delivered Quantity and a Contract Amount.

“Showing Month” incorporates each day of each calendar month of the Delivery Term that is the subject of the Compliance Showings, as set forth in the CPUC Decisions. For illustrative purposes only, pursuant to the CPUC Decisions in effect as of the Effective Date, the monthly Compliance Showings made in June are for the Showing Month of August and the annual Compliance Showing made in October is for the twelve (12) Showing Months of the following year.

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

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

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

“Spinning Reserve” has the meaning set forth in the CAISO Tariff.

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

“Supplying Party” has the meaning set forth in Section 20.2(b).

“System Emergency” has the meaning set forth in the CAISO Tariff.

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

“**Term**” has the meaning set forth in Section 2.2(a).

“**Terminated Transaction**” has the meaning set forth in Section 7.2(a).

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

“**Transmission Provider**” means the CAISO.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARTICLE 2: TERM

2.1 Effectiveness.

(a) Upon Effective Date.

(i) Upon execution by both Parties, this Agreement shall be in full force and effect, enforceable and binding in all respects as of the Effective Date.

(ii) Seller shall deliver to Buyer on or before the Effective Date correct and complete copies of: (A) Seller's most recent annual report, audited consolidated financial statements, and unaudited consolidated financial statements; and (B) Seller's organizational documents (including any certification of formation, certification of incorporation, charter, operating agreement, partnership agreement, bylaws, or similar documents) and any amendments thereto.

2.2 Term.

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

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

ARTICLE 3: PROJECT DEVELOPMENT

3.1 Project Construction.

(a) Seller shall achieve Site Control no later than the Site Control Deadline, subject to Section 3.5.

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

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

(d) If Construction Start is not achieved on or before the Construction Start Deadline (except to the extent due to one or more Force Majeure events or Buyer Events of Default), then for each day beginning with the day after the Construction Start Deadline through and including the date on which Construction Start occurs, for a period beyond the Construction Start Deadline lasting no more than ninety (90) days (“**Construction Delay Cure Period**”), Seller shall pay Construction Delay Damages to Buyer. Buyer shall invoice Seller for the amount of any Construction Delay Damages. Seller agrees that Buyer may draw any Construction Delay Damages that are due to Buyer from the Development Security after providing an invoice for the amounts due. Prior to the expiration of the Construction Delay Cure Period, so long as Seller has paid Construction Delay Damages to Buyer in accordance with this Section 3.1(d), Seller’s failure to achieve Construction Start on or before the Construction Start Deadline shall not be deemed a Seller’s Event of Default. If Seller achieves the Initial Delivery Date on the Expected Initial Delivery Date, all Construction Delay Damages paid by Seller shall be refunded to Seller. Seller shall include the request for refund of the Construction Delay Damages with the first invoice to Buyer after the Initial Delivery Date. Each Party agrees that (i) the damages that Buyer would incur due to Seller’s delay in achieving the Construction Start Deadline would be difficult or impossible to predict with certainty and (ii) the Construction Delay Damages are an appropriate approximation of such damages.

3.2 **Interconnection.** Seller shall (a) execute all necessary Interconnection Agreements by the Interconnection Agreement Execution Deadline (subject to Section 3.5), (b) comply with all terms and conditions contained therein as necessary for the safe and reliable delivery of the Product, and (c) arrange, schedule and be responsible for any and all electric distribution and transmission service including any Governmental Approvals required for the foregoing. Seller shall fulfill all contractual, metering and applicable interconnection requirements, including Electric System Upgrades and those requirements set forth in the Utility Distribution Company’s applicable tariffs, the Participating Transmission Owner’s applicable tariffs, the CAISO Tariff and implementing CAISO standards and requirements, so as to be able to deliver the Product to Buyer.

3.3 **Metering.** At Seller’s expense, Seller shall obtain and maintain a single CAISO resource ID dedicated exclusively to the Project and shall install, or cause to be installed, all necessary metering and telemetry required by the CAISO to deliver the Product.

3.4 **Progress Reports.** Within fifteen (15) days after the close of each calendar quarter, starting with the first calendar quarter following the Effective Date and until the Initial Delivery Date, Seller shall provide to Buyer a Progress Report in a Notice and agree to regularly scheduled meetings between representatives of Buyer and Seller to review such quarterly reports and discuss Seller’s = progress. Following the Construction Start Deadline, Seller shall provide Buyer the Progress Report on a monthly basis. Seller shall also provide Buyer with any reasonable requested documentation, subject to the confidentiality restrictions set forth in this Agreement, directly related to the achievement of Critical Milestones within ten (10) Business Days of receipt of such request by Seller.

3.5 **Remedial Action Plans.** The Site Control Deadline and the Interconnection Agreement Execution Deadline are each a “**Critical Milestone**.” If Seller anticipates that it will not be able to timely satisfy a Critical Milestone or the Commercial Operation Milestone, except

as the result of Force Majeure or a Buyer Event of Default, Seller shall submit to Buyer no later than thirty (30) days prior to the relevant deadline a remedial action plan (“**Remedial Action Plan**”), which will describe in detail the actual delay, any anticipated delay beyond the scheduled deadline, the cause of the delay, and Seller’s proposed course of action to achieve the missed deadline, any subsequent Critical Milestones, and the Initial Delivery Date by the Expected Initial Delivery Date. Delivery of a Remedial Action Plan shall not relieve Seller of any obligation under this Agreement. So long as Seller complies with its obligations under Section 3.4 and this Section 3.5, however, Seller shall not be considered in default of its obligations under this Agreement solely as a result of failing to timely satisfy a Critical Milestone.

ARTICLE 4: INITIAL DELIVERY DATE

4.1 Timing of the Initial Delivery Date.

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

(b) **Early Initial Delivery Date.** If Seller wishes for the Initial Delivery Date to occur prior to the Expected Initial Delivery Date, Seller may provide Buyer with a written request for a specified earlier date, so long as such written request is provided at least one (1) year prior to the Expected Initial Delivery Date. If Buyer agrees to the requested earlier date, the Parties shall execute a written amendment to this Agreement memorializing the agreement that each reference to the Expected Initial Delivery Date in this Agreement shall thereafter be deemed a reference to such earlier date.

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

(i) Seller shall provide Buyer with advance Notice of any delay in achieving the Initial Delivery Date on the Expected Initial Delivery Date, including a true and reasonably detailed explanation of the cause of such delay (“**Delay Notice**”), at least ninety (90) days in advance of the Expected Initial Delivery Date (or, if Seller’s anticipation of such delay does not arise until after such advance window, then as soon as reasonably possible following such anticipation arising).

[REDACTED]

(ii)

[REDACTED]

[REDACTED]

(iii)

[REDACTED]

4.2 **Conditions Precedent to the Initial Delivery Date.** Seller shall take all actions and obtain all approvals necessary to meet the obligations of this Agreement and to deliver the Product to Buyer pursuant to the terms of this Agreement. The following obligations of Seller are conditions precedent to the Initial Delivery Date (collectively the “**Conditions Precedent**”) and must be satisfied at least seventy-five (75) days before the Initial Delivery Date, unless a different deadline is set forth below, in which case such other deadline shall govern, to Buyer’s reasonable satisfaction:

(a) Seller shall have provided to Buyer updated correct and complete copies of the items identified in Section 2.1(a)(ii).

(b) Seller shall have secured all CAISO and Governmental Approvals as are necessary for the safe and lawful operation and maintenance of the Project and to enable Seller to deliver the Product to Buyer, including at the Contract Amounts.

(c) Seller has secured and maintained Site Control.

(d) Intentionally omitted.

(e) On or before the Commercial Operation Deadline, Seller shall have caused the Project to become Commercially Operable.

(f) Seller or Contractor shall have constructed or caused to be constructed the Project as of the Initial Delivery Date in accordance with this Agreement to enable Seller to satisfy the obligations of the Seller herein, including the provision of the Product from the Project.

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

(h) Seller shall have provided to Buyer all documentation reasonably acceptable to Buyer demonstrating that the Project successfully completed all applicable testing and registration procedures required by CAISO to Bid into the CAISO Markets.

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

(j) On or before the Commercial Operation Deadline, Seller shall have provided Delivery Term Security to Buyer as required by Section 10.2.

(k) As of the Initial Delivery Date, no Event of Default on the part of Seller shall have occurred and be continuing and no Remediation Event shall have occurred and remain unresolved.

(l) Seller shall have submitted to Buyer a Project Safety Plan.

(m) Intentionally omitted.

(n) Seller shall have obtained certification of Product in accordance with the CAISO Tariff and CPUC requirements applicable to Product (i) resulting in certifications of not less than the Contract Amounts and (ii) so as to ensure the Project is fully deliverable such that Seller is able to deliver Product in the Contract Amounts to Buyer for purposes of counting towards Buyer's Compliance Obligations.

(o) As of the dates required under Section 5.2(b) and Section 5.2(c), as applicable, (i) Seller shall have submitted, or shall have caused its SC to have submitted, a Notice to Buyer including Seller's proposed Supply Plan for the first Showing Month in accordance with Section 5.2(b) and (ii) Seller shall have submitted, or shall have caused its SC to have submitted, a Supply Plan to CAISO in accordance with Section 5.2(c).

(p) Seller shall have provided to Buyer an attestation, in the form attached hereto as Appendix VII, that Seller is following all of the rules set forth in CPUC Decision 18-01-003 on Multiple-Use Application Issues, issued January 17, 2018, regarding the multiple-use applications of energy storage facilities (the "MUA Decision").

(q) Seller shall have delivered to Buyer all insurance documents required under Article 16.

(r) As of the Initial Delivery Date, Seller shall have paid Buyer for all amounts owing under this Agreement, if any, including Delay Damages.

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

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

ARTICLE 5: TRANSACTION

5.1 **Product.**

(a) During the Term, Seller grants, pledges, assigns and otherwise commits and shall deliver to Buyer, for Buyer’s exclusive use, all Capacity Attributes that may be calculated or derived from the Operational Characteristics, which must be exclusively from the Project (collectively, the “**Product**”), pursuant to the terms and conditions contained herein. Operational Characteristics shall not be modified during the Term.

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

(c) Product does not confer to Buyer any right to dispatch or receive Energy or Ancillary Services from the Project.

5.2 **Purchase and Sale Obligation.**

(a) For each day of each Showing Month during the Delivery Term, Seller agrees to deliver all Capacity Attributes of Product to Buyer, including in the amounts and categories set forth on the Cover Sheet (“**Contract Amounts**”).

(b) No later than fifteen (15) Business Days prior to the applicable Compliance Showing deadlines for each Showing Month, Seller shall submit, or cause its SC to submit, a Notice to Buyer which includes Seller’s proposed Supply Plan for such Showing Month in a format and to a platform as Notified by Buyer to Seller prior to such deadline. No later than ten (10) Business Days before the applicable Compliance Showing deadlines for each Showing Month, Buyer may Notify Seller of any administrative or typographical corrections to the Supply Plan and Seller shall implement any such corrections in the Supply Plan that it submits, or causes to be submitted, to the CAISO. In the event that Buyer does not Notify Seller of any such corrections to the proposed Supply Plan, Seller shall submit the Supply Plan to CAISO as it was proposed by Notice to Buyer.

(c) After following the procedure in Section 5.2(b), Seller shall submit, or cause to be submitted, a Supply Plan to CAISO, in accordance with the applicable Compliance Showing deadlines for each Showing Month, to identify and confirm the Product to be delivered to Buyer (or, with regard to Resold Product, Buyer’s designee) for each day within the applicable Showing Month. For each of the Capacity Attributes of Product that Seller submits in its Supply Plan in the applicable Showing Month, Seller shall not submit an amount greater than the Contract Amount of each of the respective Capacity Attributes. The lowest daily quantity that Seller submits for each of the Capacity Attributes in a Supply Plan shall be deemed to be the amount of the respective Capacity Attributes that Seller has delivered for such Showing Month (“**Delivered Quantities**”).

(d) [REDACTED]

[REDACTED]

5.3 **Allocation of CAISO Payments and Costs.**

(a) Except as may otherwise be provided in this Agreement, Seller shall retain any revenues it may receive from and pay all costs charged by, the CAISO or any other third party with respect to the Product or Project.

(b) To the extent that the Project is subject to the terms of the Availability Standards, Non-Availability Charges, and Availability Incentive Payments of the CAISO Tariff, the Parties agree that any Availability Incentive Payments are for the benefit of Seller and for Seller's account and that any Non-Availability Charges are the responsibility of Seller and for Seller's account.

ARTICLE 6: OPERATIONS

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

6.2 **Charging Energy.** Seller shall be responsible for procuring and delivering all of the Charging Energy to the Project and paying all of the associated costs of such Charging Energy.

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

6.4 **Buyer's Compliance Obligations; Certification of Product.**

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

[REDACTED]

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

6.5 **Scheduling.**

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

(b) Seller shall comply, and shall cause SC to comply, with all applicable CAISO Tariff provisions, CPUC Decisions and all other applicable rules, requirements or Laws, including any Bidding of the Project to meet any Must Offer Obligations, in order to deliver the Product to Buyer and allow Buyer to use the Product to satisfy Buyer's Compliance Obligations.

(c) Buyer shall have no liability for the failure of Seller or SC to comply with any applicable Law, Requirements, or other requirement of the Transmission Provider or Utility Distribution Company, including any penalties, charges or fines imposed for such noncompliance. In no event shall Buyer be required to use or change its utilization of its owned or controlled assets or market positions to minimize a Shortfall.

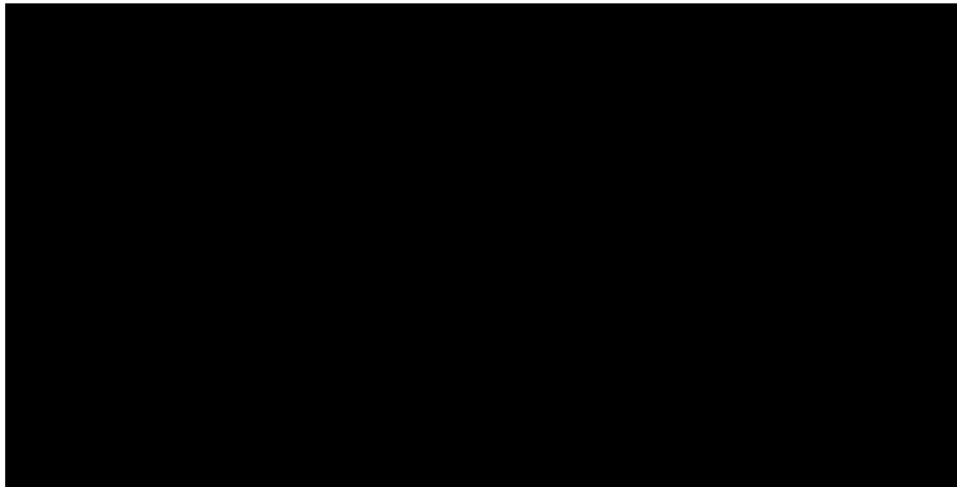
(d) Seller shall not accept, and shall cause the Project's SC to not accept, any proposed CPM or RMR designation by the CAISO unless and until Buyer has agreed to accept such designation in a Notice. In addition, Seller shall promptly Notify, or cause the Project's SC to promptly Notify, Buyer within one (1) Business Day of the time Seller or the SC receives a proposal from CAISO to designate any portion of the Product as CPM Capacity or RMR Generation. During the Delivery Term, Buyer has exclusive right to enter into a RMR Contract with respect to the Product or any component thereof, provided that the RMR Contract would not require the Project to operate beyond the Operational Characteristics or beyond the end of the Delivery Term.

6.6 **Information Sharing and Shared Learning.** Seller understands and acknowledges that Buyer is entering into this Agreement in part to gain operational and market information regarding the performance, efficiency, operations, maintenance, and multiple uses of energy storage and storage assets as an integral part of Buyer's portfolio of assets to meet its customers' needs as well as to gain an understanding of the impact of energy storage on load forecasting as a load serving entity. Throughout the Term, Seller agrees to share such information

with Buyer, including meter data and hourly charging and discharging data but excluding cost or similar proprietary information, upon Buyer's request, with such information to be treated by Buyer as Confidential Information. Seller shall provide such applicable meter data to Buyer in a format and to a platform specified by Buyer that is reasonably acceptable to Seller. For information related to Seller's multiple uses of the Project, Seller shall promptly provide Notice to Buyer any time it provides any services, attributes, or products from the Project to a third party.

6.7 Changes in Law.

(a) In the event of any change in Requirements by the CPUC, CAISO, or other Governmental Authority or Person (in each case, other than a Party) having jurisdiction over Capacity Attributes that results in an increase or decrease to the amount of Capacity Attributes (other than Other Capacity Attributes) that may be calculated or derived from the Operational Characteristics (including in the case of a new category of Capacity Attributes), then either Party shall provide Notice to the other Party as soon as practicable following knowledge of such change specifying the altered amounts of Capacity Attributes of Product ("**Change Notice**"). Following a Change Notice, Buyer will confirm via Notice to Seller the amended Contract Amounts and Payment Quantity based on such change and the date that Seller shall commence delivery of such amended amounts ("**Confirmation Notice**"); provided that, in the case of an increase to the amount of Capacity Attributes that may be calculated or derived from the Operational Characteristics, Buyer shall have sole discretion over whether to accept a corresponding increase to any Contract Amount and the Payment Quantity; provided further that, if Buyer declines to accept any such increase, Seller shall have the right to sell to third parties any Capacity Attributes resulting from such increase that are in excess of the Contract Amounts. The Contract Amounts and Payment Quantity shall automatically adjust upon the date set forth in the Confirmation Notice ("**Capacity Adjustment Date**") without further need for the Parties to amend this Agreement. Until the Capacity Adjustment Date, Seller shall continue to deliver the Contract Amounts of the Capacity Attributes of Product as stated prior to the Confirmation Notice, unless otherwise required by Law or other Requirements.



[REDACTED]

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

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

ARTICLE 7: EVENTS OF DEFAULT; REMEDIES

7.1 Events of Default.

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

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

(ii) any material misrepresentation or omission, in any metering or submetering, Supply Plan, report, or Notice with regard to delivery of the Product, or undue delay or withholding of such data, report or Notice, which misrepresentation or undue delay or withholding is not cured within ten (10) Business Days of Buyer's receipt thereof;

(iii) Seller intentionally or knowingly delivers, or attempts to deliver Product that is not produced by the Project;

(iv) Seller fails to achieve Construction Start by the Construction Start Deadline for reasons other than Force Majeure or a Buyer Event of Default, subject to Section 3.1(d);

(v) Seller fails to deliver a Delay Notice in accordance with Section 4.1(c)(i) or (B) Seller fails to achieve the Initial Delivery Date by the Expected Initial Delivery

Date for reasons other than Force Majeure or a Buyer Event of Default, subject to Section 4.1(c)(ii); or

(vi) Any failure by Seller in a Showing Month to deliver Delivered Quantities to Buyer equal to the Contract Amounts in accordance with Section 5.2; provided that a Seller's Event of Default shall not be deemed to have occurred under this Section 7.1(a)(vi) if such failure has not been preceded by two (2) or more such failures in separate Showing Months within the last six (6) months and Seller provides Buyer with substitute Capacity Attributes in the amount of such shortfall and for the time period of such shortfall that are acceptable to Buyer in Buyer's sole discretion.

(vii)



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

(i) the failure by such Party to make, when due, any payment required pursuant to this Agreement and such failure is not remedied within ten (10) Business Days after Notice thereof;

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

(iii) the failure by such Party to perform any material covenant or obligation set forth in this Agreement, including any failure by Seller to comply with Sections 5.1, 5.2, or 6.4 or with any Requirement or Safety Requirement in accordance with Section 6.3, in any case except to the extent constituting a separate Event of Default, and such failure is not remedied within thirty (30) days after Notice thereof, or such longer additional period, not to exceed an additional ninety (90) days, if the Defaulting Party is unable to remedy such default within such initial thirty (30) days period despite exercising diligent efforts;

(iv) such Party becomes Bankrupt;

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

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

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

(a) to send Notice, designating a day, no earlier than the day such Notice is deemed to be received and no later than 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 Initial Delivery Date, including an Event of Default under Section 7.1(a)(v), or (ii) the Termination Payment calculated in accordance with Section 7.3 below, in the case of any other Event of Default by either Party;

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

(d) to suspend performance; or

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

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

7.3 **Termination Payment.** The Termination Payment ("**Termination Payment**") for a Terminated Transaction shall be the aggregate of the Settlement Amount plus any or all other amounts due to or from the Non-Defaulting Party, as of the Early Termination Date, netted into a single amount. The Non-Defaulting Party shall calculate a Settlement Amount for the Terminated Transaction as of the Early Termination Date. Third parties supplying information for purposes of the calculation of Gains or Losses may include, without limitation, dealers in the relevant markets, end-users of the relevant product, information vendors and other sources of market information. The Settlement Amount shall not include consequential, incidental, punitive, exemplary, indirect or business interruption damages. Without prejudice to the Non-Defaulting Party's duty to mitigate, the Non-Defaulting Party shall not have to enter into replacement transactions to establish a Settlement Amount. Each Party agrees and acknowledges that (a) the actual damages that the Non-Defaulting Party would incur in connection with a Terminated Transaction would be difficult or impossible to predict with certainty, (b) the Damage Payment or Termination Payment described in Section 7.2 or this Section 7.3, as applicable, is a reasonable and appropriate

approximation of such damages, and (c) the Damage Payment or Termination Payment described in Section 7.2 or this Section 7.3, as applicable, is the exclusive remedy of the Non-Defaulting Party in connection with a Terminated Transaction but shall not otherwise act to limit any of the Non-Defaulting Party's rights or remedies if the Non-Defaulting Party does not elect a Terminated Transaction as its remedy for an Event of Default by the Defaulting Party.

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

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

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

ARTICLE 8: FORCE MAJEURE

8.1 **Force Majeure.**

(a) **Effect of Force Majeure.** A Party shall not be considered to be in default in the performance of its obligations to the extent that the failure or delay of its performance is due to a Force Majeure event, and the non-affected Party shall be excused from its corresponding performance obligations for the period of the affected Party's failure or delay of performance. The burden of proof for establishing the existence and consequences of an event of Force Majeure lies with the Party initiating the claim.

(b) **Notice of Force Majeure.** The Party desiring to invoke the Force Majeure event as a cause for delay in its performance of, or failure to perform, any obligation hereunder, shall provide prompt Notice to the other Party in the form of a letter identifying the event of Force Majeure and describing in detail the particulars of the occurrence giving rise to the Force Majeure event including the expected duration, when known, and the effect of such Force Majeure event. Failure to provide timely Notice constitutes a waiver of a claim of Force Majeure. Promptly, but in any event within ten (10) days after a Notice is given pursuant to the preceding sentence, the Parties shall meet to discuss the basis and terms upon which the arrangements set out in this Agreement shall be continued taking into account the effects of such event of Force Majeure.

(c) **Mitigation of Force Majeure.** The suspension of a Party's performance under the Agreement due to a claim of Force Majeure shall be of no greater scope and of no longer duration than is required by the Force Majeure event. A Party suspending performance due to Force Majeure shall take, or cause to be taken, such action as may be necessary to void, or nullify, or otherwise to mitigate, in all material respects, the effects of such event of Force Majeure. The Parties shall take all reasonable steps to resume normal performance under this Agreement after the cessation of any Force Majeure event. If Seller cannot meet the Expected Initial Delivery Date as a result of a Force Majeure event declared by Seller in accordance with this Agreement, then Seller shall work diligently to resolve the effect of the Force Majeure and provide evidence of its efforts promptly upon Buyer's written request.

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

(i) if during the Delivery Term:

(A) due to a Force Majeure event, Seller is unable to meet its obligations under this Agreement (including any failure to deliver Delivered Quantities to Buyer equal to the Contract Amounts) on more than [REDACTED] or [REDACTED]

(B) the Project is destroyed or rendered inoperable by an event of Force Majeure; provided that Seller may repair or restore the Project if: (1) Seller provides to Buyer within the sixty (60) day period following the conclusion of the Force Majeure event a certificate from a non-affiliated, licensed professional engineer attesting that the Project can be restored to original operational status within the six (6) month period following the conclusion of the Force Majeure event; (2) Seller provides Buyer with Notice of Seller's election to repair or restore the Project within the sixty (60) day period following the conclusion of the Force Majeure event; and (3) Seller completes such repair or restoration to original operational status within the six (6) month period following the conclusion of the Force Majeure event;

(ii) if Seller is unable, [REDACTED].

(e) **Effect of Termination for Force Majeure Failure.** If Buyer exercises its termination right in connection with a Force Majeure Failure under Section 8.1(d), then the Agreement shall terminate without further liability of either Party to the other, effective upon the date set forth in Buyer's Notice of termination, subject to each Party's satisfaction of all of the final payment and survival obligations set forth in Section 21.3.

ARTICLE 9: INVOICING AND PAYMENT

9.1 **Invoicing.** Seller shall make good faith efforts to deliver an invoice, in arrears, to Buyer no sooner than ten (10) Business Days after the end of each Showing Month of the Delivery Term for all amounts due from Buyer to Seller under this Agreement, including, as applicable: (a) the Monthly Payment, and (b) other compensatory adjustments required by this Agreement, including adjustments for Taxes. Each invoice shall (i) contain data sufficient to document and

verify all amounts included therein, including any relevant records, invoices, or settlement data from CAISO, necessary to verify the accuracy of any amount and (ii) be in a format specified by Buyer.

9.2 **Payment.** Buyer shall make payment to Seller by wire transfer or ACH payment to the bank account provided on each monthly invoice. Buyer shall pay undisputed invoice amounts by the twenty-third (23rd) day of the month following the month in which the invoice was provided by Seller. If such due date falls on a weekend or legal holiday, such due date shall be the next Business Day. Payments made after the due date will be considered late and will bear interest on the unpaid balance. If the amount due is not paid on or before the due date or if any other payment that is due and owing from one Party to another is not paid on or before its applicable due date, a late payment charge shall be applied to the unpaid balance and shall be added to the next billing statement. Such late payment charge shall be calculated based on an annual interest rate equal to the three-month LIBOR, plus two percent (2%) (the "**Interest Rate**"). If the due date occurs on a day that is not a Business Day, the late payment charge shall begin to accrue on the next succeeding Business Day.

9.3 **Payment Adjustments; Billing Errors.** Payment adjustments shall be made if Buyer or Seller discovers there have been good faith inaccuracies in invoicing that are not otherwise disputed under Section 9.4 or an adjustment to an amount previously invoiced or paid is required due to a correction of data by CAISO. If the required adjustment is in favor of Buyer, Buyer's next monthly payment shall be credited in an amount equal to the adjustment. If the required adjustment is in favor of Seller, Seller shall add the adjustment amount to Buyer's next monthly invoice. Adjustments in favor of either Buyer or Seller shall bear interest, until settled in full, in accordance with Section 9.2, accruing from the date on which the adjusted amount should have been due.

9.4 **Billing Disputes.** A Party may, in good faith, dispute the correctness of any invoice or any adjustment to an invoice rendered under this Agreement or adjust any invoice for any arithmetic or computational error within twelve (12) months of the date of the invoice, or adjustment to an invoice, was rendered. In the event an invoice or portion thereof, or any other claim or adjustment arising hereunder, is disputed, payment of the undisputed portion of the invoice shall be required to be made when due. Any invoice dispute or invoice adjustment shall be in writing and shall state the basis for the dispute or adjustment. Payment of the disputed amount shall not be required until the dispute is resolved. Upon resolution of the dispute, any required payment shall be made within five (5) Business Days of such resolution along with interest accrued at the Interest Rate from and including the original due date to but excluding the date paid. Inadvertent overpayments shall be returned via adjustments in accordance with Section 9.3. Any dispute with respect to an invoice is waived if the other Party is not notified in accordance with this Section 9.4 within twelve (12) months after the invoice is rendered or subsequently adjusted, except to the extent any misinformation was from a third party not affiliated with any Party and such third party corrects its information after the twelve (12) month period. If an invoice is not rendered within twelve (12) months after the close of the month during which performance occurred, the right to payment for such performance is waived.

9.5 **Netting of Payments.** The Parties hereby agree that they shall discharge mutual undisputed debts and payment obligations due and owing to each other on the same date through

netting, in which case all amounts owed by each Party to the other Party for the purchase and sale of Product during the monthly billing period under this Agreement or otherwise arising out of this Agreement, including any related damages, interest, and payments or credits, shall be netted so that only the excess amount remaining due shall be paid by the Party who owes it.

ARTICLE 10: PERFORMANCE ASSURANCE

10.1 **Seller's Development Security.** To secure its obligations under this Agreement, Seller shall deliver the Development Security to Buyer within thirty (30) days of 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 Termination Payment. Upon the earlier of (a) Seller's delivery of the Delivery Term Security, or (b) sixty (60) days after termination of this Agreement, Buyer shall return the Development Security to Seller, less the amounts drawn in accordance with this Agreement. If the Development Security is a Letter of Credit and the issuer of such Letter of Credit (i) fails to maintain the minimum Credit Rating specified in the definition of Letter of Credit, (ii) indicates its intent not to renew such Letter of Credit and such Letter of Credit expires prior to the Commercial Operation Deadline, or (iii) fails to honor Buyer's properly documented request to draw on such Letter of Credit by such issuer, Seller shall have ten (10) Business Days to either post cash or deliver a substitute Letter of Credit that meets the requirements set forth in the definition of Development Security.

10.2 **Seller's Delivery Term Security.** To secure its obligations under this Agreement, Seller shall deliver Delivery Term Security to Buyer on or before the Commercial Operation Deadline. Seller shall maintain the Delivery Term Security in full force and effect, and shall within five (5) Business Days after any draws made by Buyer in accordance with this Agreement (other than to satisfy a Termination Payment) replenish the Delivery Term Security (except in the case of a Guaranty, as to which there is no obligation of Seller to replenish), until the following have occurred: (a) the Delivery Term has expired or terminated early; and (b) all payment obligations of Seller then due and payable under this Agreement, including compensation for penalties, Termination Payment, indemnification payments or other damages are paid in full (whether directly or indirectly such as through set-off or netting). Following the occurrence of both events, Buyer shall promptly return to Seller the unused portion of the Delivery Term Security. If the Delivery Term Security is a Letter of Credit and the issuer of such Letter of Credit (i) fails to maintain the minimum Credit Rating set forth in the definition of Letter of Credit, (ii) indicates its intent not to renew such Letter of Credit and such Letter of Credit expires prior to the end of the Delivery Term, or (iii) fails to honor Buyer's properly documented request to draw on such Letter of Credit by such issuer, Seller shall have ten (10) Business Days to deliver substitute Delivery Term Security that meets the requirements set forth in the definition of Delivery Term Security. If the Delivery Term Security is a Guaranty and the Guarantor (i) fails to maintain the minimum Credit Rating set forth in the definition of "Guarantor," (ii) becomes Bankrupt, or (iii) fails to honor Buyer's properly demanded payment in accordance with the terms of the Guaranty, Seller shall have ten (10) Business Days to deliver substitute Delivery Term Security that meets the requirements set forth in the definition of Delivery Term Security.

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

(a) To secure its obligations under this Agreement, and until released as provided herein, Seller hereby grants to Buyer a present and continuing first-priority security interest (“**Security Interest**”) in, and lien on (and right to net against), and assignment of the Development Security, Delivery Term Security, any other cash collateral and cash equivalent collateral posted pursuant to Sections 10.1 and 10.2 and any and all interest thereon or proceeds resulting therefrom or from the liquidation thereof, whether now or hereafter held by, on behalf of, or for the benefit of Buyer, and Seller agrees to take all action as Buyer reasonably requires in order to perfect Buyer’s Security Interest in, and lien on (and right to net against), such collateral and any and all proceeds resulting therefrom or from the liquidation thereof. Upon or any time after the occurrence of a Seller’s Event of Default or a Party’s Event of Default on the part of Seller, an Early Termination Date resulting from a Seller’s Event of Default or a Party’s Event of Default on the part of Seller, or an occasion provided for in this Agreement where Buyer is authorized to retain all or a portion of the Development Security or Delivery Term Security, Buyer may do any one or more of the following (in each case subject to the final sentence of this Section 10.3):

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

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

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

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

10.4 **Seller Financial Information.** If requested by Buyer, Seller shall deliver to Buyer (a) within one hundred twenty (120) days following the end of each fiscal year, a copy of Seller’s annual report containing unaudited consolidated financial statements for such fiscal year, if available, (or audited consolidated financial statements for such fiscal year if otherwise available) and (b) within sixty (60) days after the end of each of its first three fiscal quarters of each fiscal year, a copy of such Seller’s quarterly report containing unaudited consolidated financial statements for such fiscal quarter, if available. In all cases the statements shall be for the most recent accounting period and shall be prepared in accordance with Generally Accepted Accounting Principles. This information shall be deemed to be Confidential Information for purposes of this Agreement.

■ [REDACTED]

■ [REDACTED]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]



ARTICLE 11: SAFETY

11.1 Safety.

(a) Seller shall, and shall cause any Affiliates performing any design, construction, operation or maintenance of the Project and Contractors to, design, construct, operate, and maintain the Project and conduct all Work or cause all Work to be conducted in accordance with the Safety Requirements. Seller shall, and shall cause its Affiliates and Contractors to, take all actions to comply with the Safety Requirements.

(b) Prior to Seller's execution of a Contractor's contract (i) with a value of \$500,000 or more (calculated on an aggregated basis with any other contract with such Contractor) or (ii) relating to any element of the Work that involves significant safety considerations, Seller shall demonstrate to Buyer's reasonable satisfaction that the Contractor has the qualifications, experience, and safety record to develop, construct, operate and maintain the Project, as applicable; provided that Seller has pre-approved the Contractors set forth in Appendix IX. During the period that a Contractor is conducting Work, Seller shall cause the Contractor to meet and comply with the Safety Requirements.

(c) Seller shall document a Project Safety Plan and incorporate the Project Safety Plan's features into the design, development, construction, operation, and maintenance of the Project. Seller shall submit for Buyer's review a Project Safety Plan, in a format reasonably acceptable to Buyer, which must demonstrate (A) Seller's plans to comply with the Safety Requirements and (B) Seller's consideration of the Project Safety Plan items in Part Two (Project Design and Description) of Appendix VI. Upon Notice to Buyer, Seller may deviate from any specific procedures identified in the Project Safety Plan while designing, developing, constructing, operating, or maintaining the Project, if in Seller's judgment, the deviation is necessary to design, develop, construct, operate, or maintain the Project safely or in accordance with the Safety Requirements.

(d) Throughout the Delivery Term, Seller shall update the Safeguards and the Project Safety Plan as required by Safety Requirements or as necessitated by a Safety Remediation Plan. Seller shall provide such updated Project Safety Plan to Buyer within thirty (30) days of any such updates. Throughout the Delivery Term, Buyer shall have the right to request Seller to provide its Project Safety Plan, or portions thereof, and demonstrate its compliance with the Safety Requirements within thirty (30) days of Buyer's Notice.

(e) Seller shall remove any Contractor that engages in repeated, material violations of the Project Safety Plan or Safety Requirements, unless doing so would present an ongoing material adverse effect to the operation of the Project.

11.2 **Reporting Serious Incidents.** Seller shall provide Notice of a Serious Incident to Buyer within five (5) Business Days of occurrence. The Notice of Serious Incident must include the time, date, and location of the incident, the Contractor involved in the incident (as applicable), the circumstances surrounding the incident, the immediate response and recovery actions taken, and a description of any impacts of the Serious Incident. Seller shall cooperate and provide reasonable assistance, and cause each of its Contractors to cooperate and provide reasonable assistance, to Buyer with any investigations and inquiries by Governmental Authorities that arise as a result of the Serious Incident.

11.3 **Remediation.**

(a) Seller shall resolve any Remediation Event within the Remediation Period. Within ten (10) days of the date of the first occurrence of any Remediation Event, Seller shall provide a Safety Remediation Plan to Buyer for Buyer's review.

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

ARTICLE 12: TAXES

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

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

ARTICLE 13: LIMITATIONS

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

15 INDEMNITY CLAIM, OR INCLUDED IN A LIQUIDATED DAMAGES CALCULATION, OR ARISING FROM FRAUD OR INTENTIONAL MISREPRESENTATION, NEITHER PARTY SHALL BE LIABLE TO THE OTHER OR ITS INDEMNIFIED PERSONS FOR ANY SPECIAL, PUNITIVE, EXEMPLARY, INDIRECT, OR CONSEQUENTIAL DAMAGES, OR LOSSES OR DAMAGES FOR LOST REVENUE OR LOST PROFITS, WHETHER FORESEEABLE OR NOT, ARISING OUT OF, OR IN CONNECTION WITH THIS AGREEMENT.

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

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

(b) 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.

(c) TO THE EXTENT ANY DAMAGES REQUIRED TO BE PAID HEREUNDER ARE LIQUIDATED, INCLUDING UNDER SECTIONS 3.1(d), 4.1(c), 7.1(a)(vi)(B), 7.2 AND 7.3, THE PARTIES ACKNOWLEDGE THAT THE DAMAGES ARE DIFFICULT OR IMPOSSIBLE TO DETERMINE, THAT OTHERWISE OBTAINING AN ADEQUATE REMEDY IS INCONVENIENT, AND THAT THE LIQUIDATED DAMAGES CONSTITUTE A REASONABLE APPROXIMATION OF THE ANTICIPATED HARM OR LOSS. IT IS THE INTENT OF THE PARTIES THAT THE LIMITATIONS HEREIN IMPOSED ON REMEDIES AND THE MEASURE OF DAMAGES BE WITHOUT REGARD TO THE CAUSE OR CAUSES RELATED THERETO, INCLUDING THE NEGLIGENCE OF ANY PARTY, WHETHER SUCH NEGLIGENCE BE SOLE, JOINT OR CONCURRENT, OR ACTIVE OR PASSIVE. THE PARTIES HEREBY WAIVE ANY RIGHT TO CONTEST SUCH PAYMENTS AS AN UNREASONABLE PENALTY.

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

PERFORMANCE WITH RESPECT TO ANY OBLIGATION OF THE OTHER PARTY UNDER THIS AGREEMENT.

ARTICLE 14: REPRESENTATIONS; WARRANTIES; COVENANTS

14.1 **Seller's Representations and Warranties.** As of the 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 State of California, and is qualified to conduct business in the State of California and each jurisdiction where the failure to so qualify would have a material adverse effect on the business or financial condition of Seller.

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

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

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

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

(f) Seller will be responsible for obtaining all permits necessary to construct and operate the Project and Seller will be the applicant on any California Environmental Quality Act documents.

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

California or a family member of a government official in Alameda County, California or (ii) has a personal, business, or other relationship or association with any government official in Alameda County, California or family member thereof who may have responsibility for or oversight of any activities of Buyer; Seller does not employ any government official in Alameda County, California or family member thereof.

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

(a) Buyer is a California municipality 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 within its city. All Persons making up the governing body of Buyer are the elected or appointed incumbents in their positions and hold their positions in good standing in accordance with applicable Law.

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

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

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

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

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

14.3 **General Covenants.** Each Party covenants that commencing on the Effective Date and continuing throughout the Term it shall continue to be duly organized, validly existing and in good standing under the laws of the jurisdiction of its formation and to be qualified to conduct business in the State of California and each jurisdiction where the failure to so qualify would have a material adverse effect on its business or financial condition.

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

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

(b) Seller will use reasonable efforts to ensure that all employees hired by Seller, and its Contractors, that will perform construction work or provide services at the Site related to construction of the Project are paid wages at rates not less than those prevailing for workers performing similar work in the locality as provided by applicable California Law, if any. Nothing herein shall require Seller or its Contractors to comply with, or assume liability created by other inapplicable provisions of any California labor Laws. Buyer agrees that Seller’s obligations under this Section 14.4(b) will be satisfied upon the execution of a project labor agreement related to construction of the Project.

(c) Seller shall perform the obligations related to workforce development and community investment set forth in Appendix XX.

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

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

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

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

(h) Seller shall follow all the rules set forth in Appendix A of the MUA Decision.

ARTICLE 15: INDEMNITIES

15.1 Indemnity by Seller.

(a) Seller shall defend, indemnify and hold harmless Buyer, its directors, officers, agents, attorneys, employees, and representatives (“**Buyer Group**”) from and against all third party claims, demands, losses, liabilities, penalties, and expenses, including reasonable attorneys’ and expert witness fees, however described (collectively, “**Claims**”), which arise out of or relate to or are in any way connected with (i) Seller’s delivery of the Product to Buyer, (ii) Seller’s or its Affiliates’ ownership, development, construction, operation or maintenance of the Project, including the Site(s); (iii) Seller’s or its Affiliates’ actions or inactions, including Seller’s breach of this Agreement or other agreements related to the development, construction, ownership, operation or maintenance of the Project or Site (including any Claims relating to a Shortfall); (iv) any environmental matters associated with the Project, including the disposal and transportation of Hazardous Substances by or on behalf of the Seller or at the Seller’s direction or agreement; (v) any agreement between Seller or its Affiliates and a third party; or (vi) Seller’s or its Affiliates’ violation of any applicable Law, Requirements, or other requirements of Transmission Provider, Utility Distribution Company, NERC, WECC or Reliability Organization; in each case including any loss, claim, action or suit, for or on account of injury to, bodily or otherwise, or death of, persons, or for damage to or destruction or economic loss of property belonging to Buyer, Seller, Seller’s Affiliates, or others, excepting only such losses, to the extent solely caused by the willful misconduct or gross negligence of a member of the Buyer Group (collectively, “**Indemnifiable Losses**”).

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

15.2 Notice of Claim.

(a) **Notice of Claim.** Subject to the terms of this Agreement and upon obtaining knowledge of an Indemnifiable Loss for which it is entitled to indemnity under this Article 15, Buyer will promptly Notify Seller in writing of any Claim which Buyer has determined has given or could give rise to an Indemnifiable Loss under Section 15.1. The Notice is referred to as a “**Notice of Claim**.” A Notice of Claim will specify, in reasonable detail, the facts known to Buyer regarding the Indemnifiable Loss.

(b) **Failure to Provide Notice.** A failure to give timely Notice or to include any specified information in any Notice as provided in this Section 15.2 will not affect the rights or obligations of any Party hereunder except and only to the extent that, as a result of such failure, any Party which was entitled to receive such Notice was deprived of its right to recover any payment under its applicable insurance coverage or was otherwise materially damaged as a direct result of such failure and, provided further, Seller is not obligated to indemnify Buyer for the increased amount of any Indemnifiable Loss which would otherwise have been payable to the extent that the increase resulted from the failure to deliver timely a Notice of Claim.

15.3 **Defense of Claims.** If, within ten (10) days after giving a Notice of Claim regarding a Claim to Seller pursuant to Section 15.2(b), Buyer receives Notice from Seller that Seller has elected to assume the defense of such Claim as provided in the last sentence of Section 15.2(b), Seller will not be liable for any legal expenses subsequently incurred by Buyer in connection with the defense thereof; provided, however, that if Seller fails to take reasonable steps necessary to defend diligently such Claim within ten (10) days after receiving Notice from Buyer that Buyer believes Seller has failed to take such steps, or if Seller has not undertaken fully to indemnify Buyer in respect of all Indemnifiable Losses relating to the matter, Buyer may assume its own defense, and Seller will be liable for all costs or expenses, including attorneys' fees, paid or incurred in connection therewith. Without the prior written consent of Buyer, Seller will not enter into any settlement of any Claim which would lead to liability or create any financial or other obligation on the part of Buyer for which Buyer is not entitled to indemnification hereunder; provided, however, that Seller may accept any settlement without the consent of Buyer if such settlement provides a full release to Buyer and no requirement that Buyer acknowledge fault or culpability. If a firm offer is made to settle a Claim without leading to liability or the creation of a financial or other obligation on the part of Buyer for which Buyer is not entitled to indemnification hereunder and Seller desires to accept and agrees to such offer, Seller will give Notice to Buyer to that effect. If Buyer fails to consent to such firm offer within ten (10) calendar days after its receipt of such Notice, Buyer may continue to contest or defend such Claim and, in such event, the maximum liability of Seller to such Claim will be the amount of such settlement offer, plus reasonable costs and expenses paid or incurred by Buyer up to the date of such Notice.

15.4 **Subrogation of Rights.** Upon making any indemnity payment, Seller will, to the extent of such indemnity payment, be subrogated to all rights of the Buyer against any third party in respect of the Indemnifiable Loss to which the indemnity payment relates; provided that (a) Seller is in compliance with its obligations under this Agreement in respect of such Indemnifiable Loss, and (b) until Buyer recovers full payment of its Indemnifiable Loss, any and all claims of the Seller against any such third party on account of said indemnity payment are hereby made expressly subordinated and subjected in right of payment to Buyer's rights against such third party. Without limiting the generality or effect of any other provision hereof, Buyer and Seller shall execute upon request all instruments reasonably necessary to evidence and perfect the above-described subrogation and subordination rights.

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

ARTICLE 16: INSURANCE

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

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

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

(ii) Employers' liability insurance will not be less than 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.

(b) **Commercial General Liability.**

(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 named insured.

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

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

(c) **Business Auto.**

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

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

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

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

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

(ii) The limit will be at least two million dollars (\$2,000,000.00) each occurrence for bodily injury and property damage.

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

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

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

ARTICLE 17: RECORDS AND AUDIT RIGHTS

17.1 **Operations Logs.** Seller shall maintain a complete and accurate log of all material operations on a daily basis. Such log will include, but not be limited to, information on charging, discharging, availability, maintenance performed, outages, electrical characteristics of the energy storage systems and similar information relating to the availability, testing and operation of the Project. Seller shall provide this information electronically to Buyer on a monthly basis. At the request of Buyer, the CPUC, or the staff of the CPUC, Seller shall provide all records demonstrating that the Project is operated and maintained in accordance with Requirements.

17.2 **Records and Audit.**

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

(b) To facilitate payment and verification, each Party shall maintain all books and records necessary for billing and payments, including copies of all invoices under this Agreement, for a period of at least five (5) years or as otherwise required by Law. Seller will make all records available to Buyer at its principal place of business during normal working hours.

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

17.4 **State Auditor.** In accordance with Government Code Section 8546.7, Seller may be subject to audit by the California State Auditor with regard to Seller's performance of this Agreement if the compensation under this Agreement exceeds ten thousand dollars (\$10,000.00).

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

17.6 **Access Rights**. Buyer, its authorized agents, employees and inspectors, have, while observing and abiding by safety and security procedures of the Parties, the right of ingress to and egress from the Project, including the Site(s) with reasonable advance Notice and for any purposes connected with this Agreement. To the extent reasonably possible, Buyer will limit its requests to access the Project or the Site to normal business hours and coordinate its emergency activities with the safety and security departments, if any, of the Project operator. Seller shall keep Buyer advised of current procedures for contacting the Project operator's safety and security departments.

ARTICLE 18: ASSIGNMENT

18.1 **General Prohibition on Assignments**. Except as provided below, neither Party may assign this Agreement or its rights or obligations under this Agreement, without the prior written consent of the other Party, which consent shall not be unreasonably withheld, conditioned or delayed. 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, which consent shall not be unreasonably withheld, conditioned or delayed.

18.2 **Collateral Assignment**.

(a) Subject to the provisions of this Section 18.2, Seller has the right to assign this Agreement as collateral for any financing or refinancing of the Project.

(b) In connection with any collateral assignment of this Agreement for purposes of the financing or refinancing of the Project by Seller, Buyer agrees to work with Seller and Lender to agree upon a consent to collateral assignment of this Agreement ("**Collateral Assignment Agreement**"). The Collateral Assignment Agreement must be in form and substance agreed to by Buyer, Seller and Lender.

18.3 **Permitted Assignment by Seller**. Except as may be precluded by, or would cause Buyer to be in violation of the Political Reform Act (Cal. Gov. Code section 81000 et seq.) or the regulations thereto, Cal. Government Code section 1090, Buyer's Conflict of Interest Code/Policy or any other conflict of interest Law, Seller may, without the prior written consent of Buyer, transfer or assign this Agreement, including through a Change of Control, to an Affiliate of Seller.

18.4 **Unauthorized Assignment; Costs**.

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

(b) No assignment of this Agreement shall be effective unless such assignment is memorialized in a written agreement signed by the assignee and, except in connection with a

collateral financing, in which agreement the assignee assumes all of the assignor's obligations and liabilities under this Agreement.

(c) Seller shall be responsible for Buyer's reasonable costs associated with the preparation, review, execution and delivery of documents in connection with any assignment of this Agreement, including without limitation reasonable attorneys' fees.

ARTICLE 19: DISPUTE RESOLUTION

19.1 **Governing Law.** This Agreement and the rights and duties of the Parties hereunder shall be governed by and construed, enforced and performed in accordance with the laws of the State of California, without regard to principles of conflicts of law. The Parties agree that any suit, action or other legal proceeding by or against any Party (or its Affiliates or designees) with respect to or arising out of this Agreement shall be brought in the federal courts of the United States Central District of California, or the courts of the State of California sitting in the County of Los Angeles, California.

19.2 **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. To the fullest extent permitted under applicable Law, any statute of limitations applicable to a dispute that is mediated by the Parties pursuant to this Agreement shall toll during any period in which such dispute is being mediated in accordance with this [Section 19.2](#).

ARTICLE 20: CONFIDENTIAL INFORMATION

20.1 **Confidential Information.** Throughout the Term, neither Party shall disclose (a) the non-public terms or conditions of this Agreement or (b) information disclosed to such Party by the other Party that is (i) marked or expressly identified as "confidential" and (ii) accompanied by a statutory reference to the applicable section of the Public Records Act pursuant to which such information may be kept confidential (collectively, "**Confidential Information**") to a third party.

20.2 **Permitted Disclosures.** A Party may disclose Confidential Information: (a) to the Party's Affiliates and the Party's and its Affiliate's employees, counsel, accountants, advisors, lenders, or equity investors who have a need to know such information and have agreed to keep such terms confidential; (b) in order to comply with any applicable Law or any exchange,

regulation, Balancing Authority, control area or Transmission Provider rule, or order issued by a court or entity with competent jurisdiction over the disclosing Party ("**Disclosing Party**"), other than to those entities set forth in subsection (c); or (c) in order to comply with any applicable regulation, rule, or order of the CPUC, CEC, or FERC.

(a) **Procedure for Permitted Disclosures.** In connection with requests made pursuant to Section 20.2(b) ("**Disclosure Order**") and disclosures pursuant to Section 20.2(c) ("**Regulatory Disclosure**") each Party shall, to the extent practicable, use reasonable efforts to: (A) Notify the other Party prior to disclosing the Confidential Information and (B) prevent or limit such disclosure. After using such reasonable efforts, the Disclosing Party shall not be: (I) prohibited from complying with a Disclosure Order or making the Regulatory Disclosure or (II) liable to the other Party for monetary or other damages incurred in connection with such disclosures of the Confidential Information.

(b) **Disclosure Requests.** If a Party ("**Receiving Party**") receives a request from a third party for access to, or inspection, disclosure or copying of, any of the other Party's (the "**Supplying Party**") Confidential Information ("**Disclosure Request**"), then the Receiving Party shall provide Notice and a copy of the Disclosure Request to the Supplying Party promptly after receipt of the Disclosure Request. Within three (3) Business Days of receipt of such Notice, the Supplying Party may provide a Notice to the Receiving Party stating that the Supplying Party believes there are reasonable legal grounds for denying or objecting to the Disclosure Request and will seek a protective order or other judicial determination to protect the confidential information, in such case, the Supplying Party will cover all of its own costs and further agrees to indemnify and pay any and all costs incurred by Receiving Party as a result of the Supplying Party's attempts to protect from disclosure the information. If the Supplying Party does not seek or does not receive a protective order or other judicial determination protecting the Confidential Information, the Receiving Party may disclose the Confidential Information, which disclosure will not be considered a violation of this Agreement. The Parties recognize that Buyer is a public entity subject to the provisions of the California Public Records Act, and that disclosures made thereunder shall not be considered a violation of this Agreement.

20.3 **Remedies.** Except as provided in Section 20.2 with respect to the Parties' permitted disclosures, the Parties shall be entitled to all remedies available at Law or in equity to enforce, or seek relief in connection with, this confidentiality obligation.

ARTICLE 21: GENERAL PROVISIONS

21.1 **Entire Agreement; Integration; Exhibits.** This Agreement constitutes the entire agreement and understanding between Seller and Buyer with respect to the subject matter hereof and supersedes all prior agreements relating to the subject matter hereof, which are of no further force or effect. The Cover Sheet and any exhibit, appendix, or other attachment hereto is an integral part hereof and is made a part of this Agreement by reference. This Agreement shall be considered for all purposes as prepared through the joint efforts of the Parties and shall not be construed against one Party or the other as a result of the preparation, substitution, submission or other event of negotiation, drafting or execution hereof.

21.2 **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.

21.3 **Survival.** Applicable provisions of this Agreement shall continue in effect after termination, to the extent necessary to enforce or complete the duties, obligations or responsibilities of the Parties arising prior to termination. Notwithstanding anything to the contrary in this Agreement, (i) all rights under Sections 15.1 through 15.5 (Indemnities) and any other indemnity rights survive the end of the Term without limit, (ii) all audit rights under Sections 17.2 and 17.3 survive the end of the Term for an additional one (1) year, or as required by applicable Law, (iii) all rights and obligations under Article 20 (Confidentiality) survive the end of the Term without limit, and (iv) all provisions relating to limitations of liability survive without limit.

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

21.5 **No Agency, Partnership, Joint Venture or Lease.** Seller and the agents and employees of Seller shall, in the performance of this Agreement, act in an independent capacity and not as officers or employees or agents of Buyer. Under this Agreement, Seller and Buyer intend to act as Product seller and Product purchaser, respectively, and do not intend to be treated as, and shall not act as, partners in, co-venturers in or lessor/lessee with respect to the Project, the Product or any business related to the Project. This Agreement shall not impart any rights enforceable by any third party other than a permitted successor or assignee bound to this Agreement or, to the extent set forth herein, any Lender or indemnitee. In no event shall Buyer's receipt or review of any Seller submission, or Buyer's monitoring of Project data or cooperation in Project operations be construed as an assumption of any responsibility, liability or obligation of Seller for the design, construction or operation of the Project.

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

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

Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1 of Snohomish, 554 U.S. 527 (2008)
and *NRG Power Mrkt'g, LLC v. Maine Pub. Util. Comm'n, 558 U.S. 165 (2010)*.

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

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

21.10 **Lockbox Account.** For so long as the Buyer Lockbox Arrangement exists, Seller agrees that Buyer's obligations to make payments with respect to this Agreement are to be made solely from the Buyer Lockbox Arrangement as set forth in the applicable Security Agreement. For so long as either (a) the Buyer Lockbox Arrangement exists or (b) Buyer has provided and continues to maintain Buyer Performance Security for the benefit of Seller, obligations to make payments under the Agreement do not constitute any kind of indebtedness of Buyer or create any kind of lien on, or security interest in, any property or revenues of Buyer, except as set forth in the Buyer Lockbox Arrangement or Buyer Performance Security, as applicable.

21.11 **Forward Contract.** The Parties intend that this Agreement constitutes a "forward contract" within the meaning of the U.S. Bankruptcy Code, and that Buyer and Seller are "forward contract merchants" within the meaning of the U.S. Bankruptcy Code. Each Party 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.

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

ARTICLE 22: NOTICES

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

22.2 **Time of Delivery.** Each Notice required, permitted, or contemplated hereunder shall be deemed to have been validly served, given or delivered as follows: (a) if sent by United States mail with proper first class postage prepaid, three (3) Business Days following the date of

the postmark on the envelope in which such Notice was deposited in the United States mail; (b) if sent by a regularly scheduled overnight delivery carrier with delivery fees either prepaid or an arrangement with such carrier made for the payment of such fees, the next Business Day after the same is delivered by the sending Party to such carrier; (c) if sent by electronic communication (including electronic mail or other electronic means) and if concurrently with the transmittal of such electronic communication the sending Party provides a copy of such electronic Notice by hand delivery, United States mail, or express courier, at the time indicated by the time stamp upon delivery; or (d) if delivered in person, upon receipt by the receiving Party. Notwithstanding the foregoing, 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.

SIGNATURES

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

BLACK WALNUT ENERGY STORAGE,
LLC

By: _____
Name: _____
Title: _____

TOWN OF APPLE VALLEY,
CALIFORNIA (d/b/a Apple Valley Choice
Energy)

By: _____
Name: _____
Title: _____

Approved as to form:

By: _____
Name: _____
Title: _____

APPENDIX I

DESCRIPTION OF PROJECT

The following describes the Project to be constructed, operated and maintained by Seller through the Term in accordance with the Agreement.

A. PROJECT DESCRIPTION

Project name: Black Walnut Energy Storage

Technology type: Lithium-Ion Battery Energy Storage

Project physical address: [REDACTED], Santa Paula, CA 93060

Interconnection:

CAISO transmission access charge area (e.g. PG&E): SCE

Point of interconnection: [REDACTED]

Existing zone (e.g. NP-15): SP-15

PNode: TBD

CAISO Resource ID: TBD

B. PROJECT SIZE

Nameplate capacity: 15 MW

The following describes the Operational Characteristics to determine the amount of Capacity Attributes of Product generated by the entire Project, including Capacity Attributes of Product associated with portions of the Project that are being purchased by third parties. The Capacity Attributes of Product being sold and transferred under this Agreement are limited to the Contract Amounts set forth on the Cover Sheet.

APPENDIX II

OPERATIONAL CHARACTERISTICS

The following describes the Operational Characteristics to determine the amount of Capacity Attributes of Product.

Physical Location and Point of Interconnection

Shall be as set forth in Appendix I-A.

Discharging and Charging

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[Redacted]

[Redacted]

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[Redacted]

[Redacted]

[Redacted]

[Redacted]

[REDACTED]

APPENDIX III
PROGRESS REPORTING FORM

Each Progress Report must include the following items:

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

APPENDIX IV
CERTIFICATION
FOR COMMERCIAL OPERATION

This certification of commercial operation ("Certification") is delivered by each of _____ ("Seller") and _____ ("Engineer") to Town of Apple Valley, California (d/b/a Apple Valley Choice Energy) ("Buyer") in accordance with the terms of that certain Energy Storage Resource Adequacy Agreement dated _____ ("Agreement") by and between Seller and Buyer. All capitalized terms used in this Certification but not otherwise defined herein shall have the respective meanings assigned to such terms in the Agreement.

Seller and Engineer each hereby certifies and represents to Buyer the following, severally and not jointly:

- (1) The Project became Commercially Operable on */ /*.
- (2) The Project has been constructed in accordance with Appendix I of the Agreement.
- (3) The Project has been constructed in accordance with the Project Safety Plan.
- (4) The Project is capable of producing and delivering Capacity Attributes of Product in the Contract Amounts, and a performance test was conducted to confirm this capability.
- (5) Seller has designed and built the Project to have a design life for the Delivery Term in accordance with Prudent Operating Practices.
- (6) The design and construction of the Project was carried out by the original equipment manufacturer or other qualified organization in accordance with the designs and requirements of the original equipment manufacturer.

SELLER:

ENGINEER:

Signature: _____	Signature: _____
Name: _____	Name: _____
Title: _____	Title: _____
Date: _____	Date: _____
	License Number: _____
	LPE Stamp: _____

APPENDIX V-A
FORM OF LETTER OF CREDIT¹

[Issuing Bank Letterhead and Address]

IRREVOCABLE STANDBY LETTER OF CREDIT NO. [XXXXXXXX]

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

Beneficiary:

Town of Apple Valley
Attn: Doug Robertson
14955 Dale Evans Parkway
Apple Valley, CA 92307

Ladies and Gentlemen:

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

Funds under this Letter of Credit are available to Beneficiary by 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. [XXXXXXXX] (“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.

¹ Note: proposed changes to form of letter of credit subject to esVolta’s issuing bank’s review.

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. [XXXXXXXX]. 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 Town of Apple Valley, California (d/b/a Apple Valley Choice Energy), 14955 Dale Evans Parkway, Apple Valley, CA 92307, as beneficiary (the "Beneficiary") of the Irrevocable Letter of Credit No. [XXXXXXXX] (the "Letter of Credit") issued by [insert bank name] (the "Bank") by order of _____ (the "Applicant"), hereby certifies to the Bank as follows:

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

OR

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

3. The undersigned is a duly authorized representative of Town of Apple Valley 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 Town of Apple Valley by wire transfer in immediately available funds to the following account:

[Specify account information]

Town of Apple Valley

Name and Title of Authorized Representative

Date _____

APPENDIX V-B

FORM OF GUARANTY

This Guaranty (this "**Guaranty**") is entered into as of [_____] (the "**Effective Date**") by and between [_____] a [_____] ("**Guarantor**"), and Town of Apple Valley, California (d/b/a Apple Valley Choice Energy) (together with its successors and permitted assigns, "**Buyer**").

Recitals

A. Buyer and [SELLER ENTITY], a _____ ("**Seller**"), entered into that certain Energy Storage Resource Adequacy Agreement (as amended, restated or otherwise modified from time to time, the "**RA Agreement**") dated as of [_____] 2020.

B. Guarantor is entering into this Guaranty as Delivery Term Security to secure Seller's obligations under the RA Agreement, as required by Section 10.2 of the RA Agreement.

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 RA Agreement.

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

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 RA Agreement, including, without limitation, compensation for penalties, the Termination Payment, indemnification payments or other damages, as and when required pursuant to the terms of the RA Agreement (the "**Guaranteed Amount**"), provided, that Guarantor's aggregate liability under or arising out of this Guaranty shall not exceed [XXXXXXXXXX] (\$XXXXXX) (the "**Liability Limit**"). 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 RA Agreement, 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 RA Agreement. If Seller fails to pay any Guaranteed Amount as required pursuant to the RA Agreement for ten (10) 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 following have occurred: (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) and the Delivery Term has expired or terminated early or (y) replacement Delivery Term Security is provided in an amount and form required by the terms of the RA Agreement. 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 RA Agreement, 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 RA Agreement 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

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Energy Storage Resource Adequacy Agreement Form

(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 RA Agreement or perform its obligations thereunder, (B) lack of due execution, delivery, validity or enforceability, including of the RA Agreement, or (C) Seller's inability to pay any Guaranteed Amount or perform its obligations under the RA Agreement, 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 RA Agreement, 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 RA Agreement, 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 RA Agreement;

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

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(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 7.

If delivered to Buyer, to it at

[____]
Attn: [____]
Fax: [____]

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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 Los Angeles, 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 RA Agreement. 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]

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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: _____

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APPENDIX VI

PROJECT SAFETY PLAN AND DOCUMENTATION

Project Safety Plan Elements:

Part One: Safety Requirements and Safety Programs

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

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

Part Two: Project Design and Description

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

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

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

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

Part Three: Project Safety Management

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

- a) Engineering controls,
- b) Work practices,
- c) Administrative controls,
- d) Personal protective equipment and procedures,
- e) Incident response and recovery plans,
- f) Contractor pre-qualification and management,

- g) Operating procedures,
- h) Emergency plans,
- i) Training and qualification programs,
- j) Disposal, recycle, transportation and reuse procedures, and
- k) Physical security measures.

APPENDIX VII

MUA DECISION ATTESTATION

This attestation is delivered by _____ (“Seller”) to Town of Apple Valley, California (d/b/a Apple Valley Choice Energy) (“Buyer”) in accordance with the terms of that certain Energy Storage Resource Adequacy Agreement dated _____ (“Agreement”) by and between Seller and Buyer. All capitalized terms used in this attestation but not otherwise defined herein shall have the respective meanings assigned to such terms in the Agreement.

Seller hereby certifies and represents to Buyer, as of the date set forth below, that with regard to the Project, Seller is following all the rules set forth in Appendix A of CPUC Decision 18-01-003 on Multiple-Use Application Issues, issued January 17, 2018, regarding the multiple-use applications of energy storage facilities.

EXECUTED by SELLER this _____ day of _____, 20__.

Signature: _____

Name: _____

Title: _____

APPENDIX VIII

NOTICES

SELLER	BUYER
<p>All Notices:</p> <p>Name: Black Walnut Energy Storage, LLC Street: 65 Enterprise, 3rd Floor City: Aliso Viejo, CA. 92656 Attn: Development</p> <p>Phone: (949) 330-6300 Email: Lizette.Vidrio@esVolta.com</p> <p>With a copy to:</p> <p>Rishad Olpadwala, Vice President Development 65 Enterprise, 3rd Floor Aliso Viejo, CA 92656 Rishad.Olpadwala@esVolta.com</p>	<p>All Notices:</p> <p>Town of Apple Valley Attn: Doug Robertson 14955 Dale Evans Parkway Apple Valley, CA 92307</p> <p>Facsimile: 760-961-6240 Phone: E-mail: drobertson@applevalley.org</p> <p>With a copy to:</p> <p>Hall Energy Law PC Attn: Stephen Hall Phone: (503) 313-0755 Email: steve@hallenergylaw.com</p>
<p>Invoices:</p> <p>Attn: Lizette Vidrio Phone: (949) 330-6300 E-mail: Lizette.Vidrio@esVolta.com</p>	<p>Invoices:</p> <p>Attn: Apple Valley Choice Energy - Finance Phone: 760-240-7700</p>
<p>Scheduling:</p> <p>Attn: Lizette Vidrio Phone: (949) 330-6300 Email: Lizette.Vidrio@esVolta.com</p>	<p>Scheduling:</p> <p>Attn: Phone: Email:</p>
<p>Payments:</p> <p>Attn: Lizette Vidrio Phone: (949) 330-6300 E-mail: Lizette.Vidrio@esVolta.com</p>	<p>Payments:</p> <p>Attn: Phone: E-mail:</p>
<p>Wire Transfer:</p> <p>BNK: ABA: ACCT:</p>	<p>Wire Transfer:</p> <p>BNK: ABA: ACCT:</p>
<p>Emergency Contact:</p> <p>Attn: Lizette Vidrio, Director of Asset Management Phone: (949) 330-6300 E-mail: Lizette.Vidrio@esVolta.com</p>	<p>Emergency Contact:</p> <p>Attn: Phone: E-mail:</p>

APPENDIX IX
APPROVED CONTRACTORS

1. Powin Energy Corporation

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Energy Storage Resource Adequacy Agreement Form

APPENDIX X

[NOT USED]

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APPENDIX XI

[NOT USED]

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APPENDIX XX

WORKFORCE DEVELOPMENT AND COMMUNITY INVESTMENT OBLIGATIONS

Seller shall conduct outreach with qualified local contractors, so that local firms have a fair opportunity to compete for Project construction contracts. In addition, Seller shall require that construction contractors utilize locally sourced labor to the extent practicable.

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END OF AGREEMENT

Energy Storage Resource Adequacy Agreement Form