

**VALLEY CLEAN ENERGY ALLIANCE**

**RESOLUTION NO. 2020-028**

**RESOLUTION OF THE BOARD OF DIRECTORS OF VALLEY CLEAN ENERGY ALLIANCE (VCE) APPROVING ENTERING INTO AN AGREEMENT FOR RESOURCE ADEQUACY WITH LEAPFROG POWER, INC. AND AUTHORIZING INTERIM GENERAL MANAGER IN CONSULTATION WITH LEGAL COUNSEL TO FINALIZE AND EXECUTE THE RESOURCE ADEQUACY AGREEMENT**

**WHEREAS**, Valley Clean Energy Alliance (“VCE”) is a joint powers agency established under the Joint Exercise of Powers Act of the State of California (Government Code Section 6500 et seq.) (“Act”), and pursuant to a Joint Exercise of Powers Agreement Relating to and Creating the Valley Clean Energy Alliance between the County of Yolo (“County”), the City of Davis (“Davis”), the City of Woodland and the City of Winters (“Cities”) (the “JPA Agreement”), to collectively study, promote, develop, conduct, operate, and manage energy programs;

**WHEREAS**, in November 2019 the California Public Utilities Commission (CPUC) directed all load-serving entities (LSE’s), including VCE, to procure additional “incremental” resource adequacy (RA);

**WHEREAS**, in April 2020, a request for offers (RFO) for long-term “incremental” RA was issued jointly with Redwood Coast Energy Authority (RCEA), a Community Choice Aggregator (CCA) similar to VCE in its size and needs; and,

**WHEREAS**, each CCA (VCE and RCEA) will contract separately for portions of resources scaled to their respective RA needs.

**NOW, THEREFORE**, the Board of Directors of the Valley Clean Energy Alliance resolves as follows:

1. The Resource Adequacy Agreement by VCE for aggregate demand response – residential and commercial / industrial load reduction from Leapfrog Power, Inc., attached hereto as Exhibit A, is hereby approved.
2. The Interim General Manager and/or his designee is authorized to execute and take all actions necessary to implement the agreement substantially in the form attached hereto on behalf of VCE, and in consultation with legal counsel is authorized to approve minor changes to the agreement so long as the term and price are not changed.

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**PASSED, APPROVED, AND ADOPTED**, at a regular meeting of the Valley Clean Energy Alliance, held on the 10<sup>th</sup> day of September 2020, by the following vote:

AYES: Saylor, Carson, Stallard, Cowan, Sandy, Frerichs, Barajas

NOES: None

ABSENT: Loren

ABSTAIN: None



\_\_\_\_\_  
Don Saylor, VCE Chair



\_\_\_\_\_  
Alisa M. Lembke, VCE Board Secretary

Attachment A: Resource Adequacy Agreement with Leapfrog Power, Inc.

**Attachment A**

**Resource Adequacy Agreement with Leapfrog Power, Inc.**

**RESOURCE ADEQUACY AGREEMENT**

**Between**

**LEAPFROG POWER, INC.**

**and**

**VALLEY CLEAN ENERGY ALLIANCE**

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## **PREAMBLE**

This Resource Adequacy Agreement (“Agreement”) is entered into between **Leapfrog Power, Inc.** (“Seller”) and **Valley Clean Energy Alliance**, a California joint powers authority (“Buyer”), each individually a “Party” and together the “Parties,” dated as of **September 11, 2020** (the “Effective Date”), in which Seller agrees to provide to Buyer the right to the Product, as such term is defined in Section 3.1 of this Agreement.

## **COVER SHEET**

### **A. Portfolio Information**

Seller shall provide Buyer with the Designated RA Capacity of RAR Attributes and, if applicable, LAR Attributes, from the Portfolio described on attached Exhibit D-1. The Portfolio shall consist of the Units and, potentially, Replacement Units as set forth from time to time on the Portfolio List attached as Exhibit D-2.

### **B. RA Product and Attributes**

#### **RAR and LAR Attributes**

Seller shall provide Buyer with the Designated RA Capacity of RAR Attributes and, if applicable, LAR Attributes, from the Portfolio, as measured in MWs, in accordance with the terms and conditions of this Agreement.

- RA Attributes
- RA Attributes with Flexible RA Attributes
- LAR Attributes
- LAR Attributes with Flexible RA Attributes
- Flexible RA Attributes

#### **Flexible RA Product**

Seller shall provide Buyer with Designated RA Capacity of FCR Attributes from the Portfolio in the amount of the applicable Contract Quantity.

#### **Firm RA Product**

Seller shall provide Buyer with Designated RA Capacity from the Portfolio in the amount of the Contract Quantity. If the Units are not available to provide the full amount of the Contract Quantity for any reason other than Force Majeure, including, without limitation, any Outage or any adjustment of the RA Capacity of any Unit, pursuant to Section 3.5, then, Seller shall provide Buyer with Designated RA Capacity from Alternate Capacity pursuant to Section 3.6 hereof. If Seller fails to provide Buyer with Alternate Capacity pursuant to Section 3.6, then Seller shall be liable for damages and/or be required to indemnify Buyer for CAISO costs, penalties or fines pursuant to the terms of Sections 3.8 and 3.9 hereof.

**Contingent Firm RA Product**

Seller shall provide Buyer with Product from the Portfolio in the amount of the applicable Contract Quantity; provided, however, that if the Units are not available to provide the full amount of the Contract Quantity on account of an Outage or Force Majeure, then Seller may provide Buyer with Designated RA Capacity from Alternate Capacity pursuant to Section 3.6 hereof. If Seller fails to provide Buyer with the Designated RA Capacity, then Seller shall be liable for damages and/or be required to indemnify Buyer for costs, penalties or fines pursuant to the terms of Sections 3.8 and 3.9 hereof; provided, however, that Seller shall not be liable for damages and/or required to indemnify Buyer for costs, penalties or fines pursuant to the terms of Sections 3.8 and 3.9 hereof in connection with a Planned Outage if, and only if, Seller has provided Buyer with timely notice pursuant to Section 3.5(a) of Seller's intent not to provide Alternate Capacity due to a Planned Outage in an amount equal to the portion of the Contract Quantity of that Showing Month that is unavailable due to such Planned Outage.

**C. Delivery Term**

The Delivery Term is set forth in Section 2.1(b).

**D. Contract Quantities and Payment Quantity**

The Contract Quantities and Payment Quantity for the entire Delivery Term shall be:

RA Attributes: at least 7 MW NQC

Local RA Attributes: 0 MW

Flexible RA Attributes: 0 MW EFC, Category N/A

Payment Quantity: 7MW

**E. Contract Price**

The Contract Price for every month of Contract Years 2021-2025 of the Delivery Term shall be [REDACTED] per kw-month, and the Contract Price for every month of Contract Years 2026-2030 shall be [REDACTED] per kw-month, subject to reduction for any Showing Month prior to the Expected Initial Delivery Date as specified in Section 3.10(b).

**F. Performance Security Amount and Milestones**

The Performance Security Amount shall be an amount equal to [REDACTED]/kW of the Payment Quantity, which for this Agreement is equal to \$[REDACTED], proportional amounts of which shall be returned to Seller following the completion of the milestones as specified under Section 16.1(a).

**G. Initial Delivery Date**



The Expected Initial Delivery Date shall be June 1, 2021.

The Initial Delivery Date Deadline shall be August 1, 2021.

**H. Notices**

**Seller Notices**

**Delivery Address:**

1700 Montgomery St. Suite 200  
San Francisco, CA 94111

**Mail Address:**

Attn: Andrew Hoffman  
Title: Chief Development Officer  
Phone: [REDACTED]  
Email: [REDACTED]

**DUNS:** [REDACTED]

**Federal Tax ID Number:** [REDACTED]

**Invoices:**

Attn: Thomas Folker  
Phone: [REDACTED]  
Facsimile:  
Email: [REDACTED]

**Scheduling:**

Attn: Stefan Nagy  
Phone 1: [REDACTED]  
Phone 2:  
Email: [REDACTED]

**Payments:**

Attn: Thomas Folker  
Phone: [REDACTED]  
Facsimile: N/A  
Email: [REDACTED]

**Wire Transfer:**

BNK: [REDACTED]  
ABA: [REDACTED]  
ACCT: [REDACTED]

**Buyer Notices**

**Delivery Address:**

Valley Clean Energy  
604 2<sup>Nd</sup> St.  
Davis, CA 95616

**Mail Address:**

Attn: [REDACTED]  
Title: [REDACTED]  
Phone: [REDACTED]  
Email: [REDACTED]

**DUNS:** [REDACTED]

**Federal Tax ID Number:** [REDACTED]

**Invoices:**

Attn: [REDACTED]  
Phone: [REDACTED]  
Facsimile:  
Email: [REDACTED]

**Scheduling:**

Attn:  
Day Ahead Desk Phone:  
Real Time Desk Phone:  
Email: [REDACTED]

**Payments:**

Attn: [REDACTED]  
Phone: [REDACTED]  
Facsimile:  
Email: [REDACTED]

**Wire Transfer:**

BNK: [REDACTED]  
ABA: [REDACTED]  
ACCT: [REDACTED]

**Credit and Collections:**

Attn: Thomas Folker

Phone: [REDACTED]

Email: [REDACTED]

**Credit and Collections:**

Attn: [REDACTED]

Phone: [REDACTED]

Email: [REDACTED]

**Notices of an Event of Default to:**

Attn: Andrew Hoffman

Phone: [REDACTED]

Facsimile: N/A

Email: [REDACTED]

**Notices of an Event of Default to:**

Attn: [REDACTED]

Phone: [REDACTED]

Facsimile:

Email: [REDACTED]

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

Attn: Amaani Hamid

Phone: [REDACTED]

Facsimile: N/A

Email: [REDACTED]

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

Attn: [REDACTED]

Phone: [REDACTED]

Facsimile:

Email: [REDACTED]

## **ARTICLE 1: DEFINITIONS**

- 1.1** “Affiliate” means, with respect to any person, any other person (other than an individual) that, directly or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control with, such person. For this purpose, “control” means the direct or indirect ownership of fifty percent (50%) or more of the outstanding capital stock or other equity interests having ordinary voting power.
- 1.2** “Agreement” has the meaning set forth in the Preamble.
- 1.3** “Alternate Capacity” means any replacement Product which Seller has elected to provide to Buyer in accordance with the terms of Section 3.6(b).
- 1.4** “Applicable Laws” means any law, rule, regulation, order, decision, judgment, or other legal or regulatory determination by any Governmental Body having jurisdiction over one or both Parties or this Agreement, including without limitation, the Tariff.
- 1.5** “Availability Incentive Payments” shall mean Availability Incentive Payments as defined in FERC filing ER09-1064 or such other similar term as modified and approved by FERC thereafter to be incorporated in the Tariff or otherwise applicable to CAISO.
- 1.6** “Availability Standards” shall mean Availability Standards as defined in FERC filing ER09-1064 or such other similar term as modified and approved by FERC thereafter to be incorporated in the Tariff or otherwise applicable to CAISO.
- 1.7** “Bankrupt” means with respect to any entity, such entity (i) 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, or has any such petition filed or commenced against it, (ii) makes an assignment or any general arrangement for the benefit of creditors, (iii) otherwise becomes bankrupt or insolvent (however evidenced), (iv) 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 (v) is generally unable to pay its debts as they fall due.
- 1.8** “Business Day” means any day except a Saturday, Sunday, or a Federal Reserve Bank holiday in California.
- 1.9** “Buyer” has the meaning specified in the introductory paragraph hereof.
- 1.10** “CAISO” means the California Independent System Operator or its successor.
- 1.11** “CAISO Control Area” has the meaning set forth in the Tariff.
- 1.12** “CAISO Markets” has the meaning set forth in the Tariff.
- 1.13** “Capacity Replacement Price” means (a) the price actually paid for any Replacement Capacity purchased by Buyer pursuant to Section 3.8(a) hereof, plus costs reasonably incurred by Buyer in purchasing such Replacement Capacity, or (b) absent a purchase of

any Replacement Capacity, the market price for such Designated RA Capacity not provided at the Delivery Point. The Buyer shall determine such market prices in a commercially reasonable manner. For purposes of the Agreement, "Capacity Replacement Price" shall be deemed to be the "Replacement Price."

- 1.14** "Change Notice" has the meaning set forth in Section 3.5(b)(i).
- 1.15** "Claiming Party" has the meaning set forth in Section 3.12.
- 1.16** "Compliance Obligation" means the RAR, LAR, FCR, and any other resource adequacy or capacity procurement requirements imposed on Load Serving Entities (as defined in the Tariff) by the CPUC pursuant to the CPUC Decisions, by the CAISO, by the WECC, or by any other Governmental Body having jurisdiction.
- 1.17** "Contingent Firm RA Product" has the meaning set forth in Section B of the Cover Sheet.
- 1.18** "Contract Price" has the meaning set forth in Section E of the Cover Sheet.
- 1.19** "Contract Quantity" means, with respect to any particular Showing Month of the Delivery Term, the amount of Product (in MWs) set forth in Section D of the Cover Sheet, which Seller has agreed to provide to Buyer from the Portfolio for such Showing Month, as such amount may be adjusted pursuant to Section 3.5.
- 1.20** "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.
- 1.21** "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 Portfolio, and any entity or person under contract with Seller or Seller's Affiliates for the purpose of developing, constructing, operating or maintaining the Portfolio.
- 1.22** "Costs" means, with respect to the Non-Defaulting Party, brokerage fees, commissions and other similar third party transaction costs and expenses reasonably incurred by such Party either in terminating any arrangement pursuant to which it has hedged its obligations or entering into new arrangements which replace a Terminated Transaction; and all reasonable attorneys' fees and expenses incurred by the Non-Defaulting Party in connection with the termination of a transaction.
- 1.23** "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 issues rating by S&P or Moody's.
- 1.24** "CPUC" means the California Public Utilities Commission or its successor.

- 1.25** “CPUC Decisions” means CPUC Decisions 04-01-050, 04-10-035, 05-10-042, 06-06-064, 06-07-031, 07-06-029, 08-06-031, 09-06-028, 10-06-036, 11-06-022, 12-06-025, 13-06-024, 14-06-050, 19-11-016 and subsequent decisions related to resource adequacy, as may be amended from time to time by the CPUC.
- 1.26** “CPUC Filing Guide” means the annual document issued by the CPUC which sets forth the guidelines, requirements and instructions for LSE’s to demonstrate compliance with the CPUC’s resource adequacy program.
- 1.27** “Defaulting Party” has the meaning set forth in Section 5.1.
- 1.28** “Delivery Point” has the meaning set forth in Section 3.4.
- 1.29** “Delivery Term” has the meaning set forth in Section 2.1(b).
- 1.30** “Designated RA Capacity” shall be equal to, with respect to any particular Showing Month of the Delivery Term, the Contract Quantity of Product for such Showing Month, including the amount of Contract Quantity that Seller has elected to provide Alternate Capacity with respect to, minus any reductions to Contract Quantity made in accordance with Section 3.5 with respect to which Seller has not elected to provide Alternate Capacity.
- 1.31** “Development Cure Period” has the meaning set forth in Section 16.2(a).
- 1.32** “Dispute” has the meaning set forth in Section 17.11(a).
- 1.33** “Dispute Notice” has the meaning set forth in Section 17.11(a).
- 1.34** “Early Termination Date” has the meaning set forth in Section 5.2.
- 1.35** “Effective Date” is the date set forth in the Preamble.
- 1.36** “Effective Flexible Capacity” means the flexible capacity of a resource that can be counted towards an LSE’s FCR obligation, as identified from time to time by the Tariff, the CPUC Decisions, LRA, or other Governmental Body having jurisdiction.
- 1.37** “EPC Contractor” means Seller’s engineering, procurement and construction contractor or such person performing those functions.
- 1.38** “Equitable Defenses” means any bankruptcy, insolvency, reorganization and other laws affecting creditors’ rights generally, and with regard to equitable remedies, the discretion of the court before which proceedings to obtain same may be pending.
- 1.39** “Event of Default” has the meaning set forth in Section 5.1.
- 1.40** “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 Portfolio or portion thereof.
- 1.41** “Expected Initial Delivery Date” is the date set forth in Section G of the Cover Sheet.

- 1.42** “FCR Attributes” means, with respect to a Unit, any and all flexible resource adequacy attributes that can be counted toward an LSE’s FCR, as they are identified from time to time by the CPUC Decisions, the Tariff, an LRA, or other Governmental Body having jurisdiction, exclusive of any LAR Attributes and any RAR Attributes.
- 1.43** “FCR Showings” means the FCR compliance showings (or similar or successor showings) an LSE is required to make to the CPUC (and, to the extent authorized by the CPUC, to the CAISO) pursuant to the CPUC Decisions and the Tariff, or to an LRA having jurisdiction over the LSE.
- 1.44** “FERC” means the Federal Energy Regulatory Commission or any successor government agency.
- 1.45** “Firm RA Product” has the meaning specified in Section B of the Cover Sheet.
- 1.46** “Flexible Capacity Requirements” or “FCR” means the flexible capacity requirements established for LSEs by the CPUC pursuant to the CPUC Decisions, or by an LRA or other Governmental Body having jurisdiction.
- 1.47** “Flexible RA Product” has the meaning specified in Section B of the Cover Sheet.
- 1.48** “Force Majeure” means an event or circumstance which prevents one Party from performing its obligations under the Agreement, which event or circumstance was not anticipated as of the date the Agreement was agreed to, which is not within the reasonable control of, or the result of the negligence of, the Claiming Party, and which, by the exercise of due diligence, the Claiming Party is unable to overcome or avoid or cause to be avoided. Force Majeure shall not be based on (i) the loss of Buyer’s markets; (ii) Buyer’s inability economically to use or resell the Product purchased hereunder; (iii) the loss or failure of Seller’s supply; or (iv) Seller’s ability to sell the Product at a price greater than the Contract Price. Neither Party may raise a claim of Force Majeure based in whole or in part on curtailment by a Transmission Provider unless such curtailment is due to “force majeure” or “uncontrollable force” or a similar term as defined under the Transmission Provider’s tariff; provided, however, that existence of the foregoing factors shall not be sufficient to conclusively or presumptively prove the existence of a Force Majeure absent a showing of other facts and circumstances which in the aggregate with such factors establish that a Force Majeure as defined in the first sentence hereof has occurred.
- 1.49** “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 a Terminated Transaction, determined in a commercially reasonable manner.
- 1.50** “Generic RA Product” means Designated RA Capacity consisting of RAR Attributes and, if applicable, LAR Attributes, which does not include FCR Attributes.
- 1.51** “Governmental Approvals” means all authorizations, consents, approvals, waivers, exceptions, variances, filings, permits, orders, licenses, exemptions, notices to and declarations of or with any Governmental Body 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 use and operation of the Portfolio.

- 1.52** “Governmental Body” means (i) any federal, state, local, municipal or other government; (ii) any governmental, regulatory or administrative agency, commission or other authority lawfully exercising or entitled to exercise any administrative, executive, judicial, legislative, police, regulatory or taxing authority or power; and (iii) any court or governmental tribunal.
- 1.53** “Governmental Charges” has the meaning set forth in Section 8.2.
- 1.54** “Initial Delivery Date” has the meaning set forth in Section 2.1(d).
- 1.55** “Initial Delivery Date Deadline” has the meaning specified in Section G of the Cover Sheet.
- 1.56** “Interconnection Agreement” means the interconnection agreement entered into by Seller pursuant to which the Portfolio and Seller’s Interconnection Facilities will be interconnected with the Transmission System during the Delivery Term.
- 1.57** “Interconnection Facilities” means the interconnection facilities, control and protective devices and metering facilities required to connect the Portfolio with the Transmission System in accordance with the Interconnection Agreement.
- 1.58** “Interest Rate” means, for any date, the lesser of (a) the per annum rate of interest equal to the prime lending rate as may from time to time be published in *The Wall Street Journal* under “Money Rates” on such day (or if not published on such day on the most recent preceding day on which published), plus two percent (2%) and (b) the maximum rate permitted by Applicable Law.
- 1.59** “LAR” means local area reliability, which is any program of localized resource adequacy requirements established for jurisdictional LSEs by the CPUC pursuant to the CPUC Decisions, or by another LRA having jurisdiction over the LSE, as implemented in the Tariff. LAR may also be known as local resource adequacy, local RAR, or local capacity requirement in other regulatory proceedings or legislative actions.
- 1.60** “LAR Attributes” means, with respect to a Unit, any and all resource adequacy attributes (or other locational attributes related to system reliability), as they are identified from time to time by the CPUC Decisions, CAISO, LRA, or other Governmental Body having jurisdiction, associated with the physical location or point of electrical interconnection of the Unit within the CAISO Control Area, that can be counted toward LAR, but exclusive of any RAR Attributes which are not associated with where in the CAISO Control Area the Unit is physically located or electrically interconnected. For clarity, it should be understood that if the CAISO, LRA, or other Governmental Body, defines new or re-defines existing local areas, then such change will not result in a change in payments made pursuant to this Agreement.
- 1.61** “LAR Showings” means the LAR compliance showings (or similar or successor showings) an LSE is required to make to the CPUC (and, to the extent authorized by the CPUC, to

the CAISO) pursuant to the CPUC Decisions and the Tariff, or to an LRA having jurisdiction over the LSE.

- 1.62** “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, operation, or decommissioning of the Portfolio, 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 Portfolio or purchasing equity ownership interests of Seller or its Affiliates for purposes of providing financing or refinancing for the Portfolio, 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 Portfolio.
- 1.63** “Letter(s) of Credit” means one or more irrevocable, standby letters of credit issued by a U.S. commercial bank or a foreign bank with a U.S. branch with such bank having a Credit Rating of at least A- with an outlook designation of “stable” from S&P or A3 with an outlook designation of “stable” from Moody’s, in a form as set forth in Exhibit A or as otherwise acceptable to Buyer.
- 1.64** “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 a Terminated Transaction, determined in a commercially reasonable manner.
- 1.65** “LRA” has the meaning set forth in the Tariff.
- 1.66** “LSE” means load-serving entity. LSEs may be an investor-owned utility, an electric service provider, a community aggregator or community choice aggregator, or a municipality serving load in the CAISO Control Area (excluding exports).
- 1.67** “Monthly Delivery Period” means each calendar month during the Delivery Term and shall correspond to each Showing Month.
- 1.68** “Monthly RA Capacity Payment” has the meaning set forth in Section 3.10.
- 1.69** “Moody’s” means Moody’s Investor Services, Inc. or its successor.
- 1.70** “MW” means megawatts in alternating current, unless expressly stated in terms of direct current.
- 1.71** “NERC” means the North American Electric Reliability Corporation, or its successor.
- 1.72** “NERC Business Day” means any day except a Saturday, Sunday or a holiday as defined by NERC. A NERC Business Day shall open at 8:00 a.m. and close at 5:00 p.m. local time



for the relevant Party's principal place of business. The relevant Party, in each instance unless otherwise specified, shall be the Party from whom the notice, payment or delivery is being sent and by whom the notice or payment or delivery is to be received.

- 1.73** "Net Qualifying Capacity" has the meaning set forth in the Tariff.
- 1.74** "Non-Availability Charges" has the meaning set forth in the Tariff.
- 1.75** "Non-Defaulting Party" has the meaning set forth in Section 5.2.
- 1.76** "Notification Deadline" has the meaning set forth in Section 3.6(a).
- 1.77** "Notifying Party" has the meaning set forth in Section 17.11(a).
- 1.78** "Outage" means any CAISO approved disconnection, separation, or reduction in the capacity of any Unit that relieves all or part of the offer obligations of the Unit consistent with the Tariff. For the avoidance of doubt, Outage shall be deemed to include Planned Outage (as defined below).
- 1.79** "Payment Quantity" has the meaning set forth in Section D of the Cover Sheet.
- 1.80** "Performance Security" means (i) cash or (ii) a Letter of Credit in the amount specified in Section F of the Cover Sheet.
- 1.81** "Planned Outage" means, subject to and as further described in the Tariff, a CAISO-approved planned or scheduled disconnection, separation or reduction in capacity of the Unit that is conducted for the purposes of carrying out routine repair or maintenance of such Unit, or for the purposes of new construction work for such Unit.
- 1.82** "Portfolio EFC" means the Effective Flexible Capacity set by the CAISO for the Portfolio. If the CAISO adjusts the Effective Flexible Capacity of a Portfolio after the Effective Date, then for the period in which the adjustment is effective, the Portfolio EFC shall be deemed the lesser of (i) the Portfolio EFC as of the Effective Date, and (ii) the CAISO-adjusted Effective Flexible Capacity.
- 1.83** "Portfolio NQC" means the Net Qualifying Capacity set by the CAISO for the Portfolio.
- 1.84** "Potential Event of Default" means an event which, with notice or passage of time or both, would constitute an Event of Default.
- 1.85** "Portfolio" means the aggregated group of resources, consisting of Shown Units and Replacement Units, as applicable, providing the Product. The Shown Units in the Portfolio may be removed and replaced by Seller from time to time in compliance with this agreement. "Portfolio" is further described in Section A of the Cover Sheet and in Exhibit D-1.
- 1.86** "Product" has the meaning set forth in Section 3.1.

- 1.87** “Project Safety Plan” means Seller’s written plan that includes the Safeguards and plans to comply with the Safety Requirements.
- 1.88** “Prudent Electrical Practices” means those practices, methods, codes and acts engaged in or approved by a significant portion of the electric power industry and applicable to demand response resources 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 Electrical 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.
- 1.89** “Qualified Transferee” means a person or entity with (i) equal or superior creditworthiness of the applicable Party and (ii) at least three (3) years of experience operating or managing units and portfolios of similar technology, size, and complexity as the Portfolio.
- 1.90** “Quantity” means that quantity of the Product that Seller agrees to make available or sell and deliver, or cause to be delivered, to Buyer, and that Buyer agrees to purchase and receive, or cause to be received, from Seller as specified in this Agreement.
- 1.91** “RA Capacity” means the qualifying and deliverable capacity of the Unit for RAR, LAR, and FCR purposes, as applicable, for the Delivery Term, as determined by the CAISO, or other Governmental Body authorized to make such determination under Applicable Laws. RA Capacity encompasses the applicable RAR Attributes, LAR Attributes and FCR Attributes of the capacity provided by a Unit.
- 1.92** “RAR” means the resource adequacy requirements, exclusive of LAR and FCR established for LSEs by the CPUC pursuant to the CPUC Decisions, or by an LRA or other Governmental Body having jurisdiction.
- 1.93** “RAR Attributes” means, with respect to a Unit, any and all resource adequacy attributes, as they are identified from time to time by the Tariff, CPUC Decisions, LRA, or any Governmental Body having jurisdiction that can be counted toward RAR, exclusive of any LAR Attributes and FCR Attributes.
- 1.94** “RAR Showings” means the RAR compliance showings (or similar or successor showings) an LSE is required to make to the CPUC (and/or, to the extent authorized by the CPUC, to the CAISO), pursuant to the Tariff or CPUC Decisions, or to an LRA having jurisdiction.
- 1.95** “Recipient Party” has the meaning set forth in Section 17.11(a).
- 1.96** “Recording” has the meaning set forth in Section 17.7.
- 1.97** “Regulatory Event” has the meaning set forth in Section 17.8.

- 1.98** “Remediation Event” means the occurrence of any of the following with respect to the Portfolio 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 any Governmental Body that requires modifications to the Safeguards; (d) a material change to the manufacturer’s guidelines that requires modification to equipment or the Portfolio’s operating procedures; (e) a failure or compromise of an existing Safeguard; or (f) any actual condition related to the Portfolio or a Site with the potential to adversely impact the safe construction, operation, or maintenance of the Portfolio or a Site.
- 1.99** “Replacement Capacity” has the meaning set forth in Section 3.8(a).
- 1.100** “Replacement Price” has the meaning set forth in Section 1.13.
- 1.101** “Replacement Unit” means a demand response resource or generating unit meeting the requirements set forth in Section 3.6(b).
- 1.102** “Resold Product” has the meaning set forth in Article 12.
- 1.103** “Resource Category” shall be as described in the CPUC Filing Guide, as such may be modified, amended, supplemented or updated from time to time.
- 1.104** “S&P” means the Standard & Poor’s Rating Group (a division of McGraw-Hill, Inc.) or its successor.
- 1.105** “Safeguard” means any procedures, practices, or actions with respect to the Portfolio, a Site or work for the purpose of preventing, mitigating, or containing foreseeable accidents, injuries, damage, release of hazardous material or environmental harm.
- 1.106** “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.
- 1.107** “Safety Requirements” means Prudent Electrical Practices, CPUC General Order No. 167, and all applicable requirements of Applicable Laws, the Utility Distribution Company, the Transmission Provider, Governmental Approvals, the CAISO, CARB, NERC and WECC.
- 1.108** “Schedule” or “Scheduling” means the actions of Seller, Buyer and/or their designated representatives, including each Party’s Transmission Providers, if applicable, of notifying, requesting and confirming to each other the quantity and type of Product to be delivered on any given day or days during the Delivery Term at a specified Delivery Point.
- 1.109** “Scheduling Coordinator” or “SC” has the same meaning as in the Tariff.
- 1.110** “Security Interest” has the meaning set forth in Section 14.2(a).
- 1.111** “Seller” has the meaning specified in the introductory paragraph hereof.

- 1.112** “Serious Incident” means a harmful event that occurs on a Site during the term arising out of, related to, or connected with the Portfolio 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 one hundred thousand dollars (\$100,000.00); (d) release of hazardous material above the limits, or violating the requirements, established by permits, codes, standards, regulations, Applicable Laws or Governmental Bodies; (e) environmental impacts exceeding those authorized by permits or Applicable Laws.
- 1.113** “Settlement Amount” means, with respect to the Non-Defaulting Party, the Losses or Gains, and Costs, expressed in U.S. Dollars, which such party incurs as a result of the liquidation of a Terminated Transaction pursuant to Section 5.2.
- 1.114** “Showing Month” shall be the calendar month during the Delivery Term that is the subject of the RAR Showing, LAR Showing, and/or FCR Showing, as applicable, as set forth in the CPUC Decisions or Tariff. For illustrative purposes only, pursuant to the CPUC Decisions in effect as of the Effective Date, the monthly RAR Showing made in June is for the Showing Month of August.
- 1.115** “Site” means the real property on which a Unit is located.
- 1.116** “Supply Plan” means the supply plans, or similar or successor filings, that each Scheduling Coordinator representing RA Capacity submits to the CAISO, LRA, or other Governmental Body, pursuant to Applicable Laws, in order for that RA Capacity to count, as applicable, for RAR Attributes, LAR Attributes, and/or FCR Attributes.
- 1.117** “Tariff” means the tariff and protocol provisions of the CAISO, as amended or supplemented from time to time.
- 1.118** “Terminated Transaction” has the meaning set forth in Section 5.2.
- 1.119** “Termination Payment” has the meaning set forth in Section 5.3.
- 1.120** “Transmission Provider” means the CAISO. “Transmission System” means the transmission facilities operated by the CAISO, which provide energy transmission service within the CAISO grid from the Delivery Point.
- 1.121** “Utility Distribution Company” has the meaning set forth in the Tariff.
- 1.122** “Unit” or “Units” shall mean demand response resources described in Exhibit D-2 hereof (including any Replacement Units), from which RA Capacity is provided by Seller to Buyer. A Unit or Replacement Unit may not include a coal-fired or nuclear generating resource.
- 1.123** “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.

## **ARTICLE 2: DELIVERY TERM AND CONDITIONS PRECEDENT**

### **2.1 Delivery Term.**

(a) The term of this Agreement shall commence upon the Effective Date, and shall continue until the expiration of the Delivery Term, provided that this Agreement shall thereafter remain in effect until the Parties have fulfilled all obligations arising under this Agreement, including any compensation for the Product, Termination Payment, indemnification payments or other damages, are paid in full (whether directly or indirectly, such as through set-off or netting) and the Performance Security is released and/or returned as applicable. All provisions relating to invoicing, payment, delivery, settlement of other liabilities incurred pursuant to this Agreement and dispute resolution survive for the period necessary to effectuate the rights of the Party benefited by such provision except as otherwise specified herein. Notwithstanding anything to the contrary in this Agreement, (i) all rights under Sections 17.2 (Indemnities) and any other indemnity rights survive the end of the Delivery Term for an additional twelve (12) months; (ii) all rights and obligations under Article 11 (Confidentiality) survive the end of the Delivery Term for an additional two (2) years; and (iii) all provisions relating to limitations of liability survive without limit.

(b) The “Delivery Term” is the period commencing on the Initial Delivery Date and continuing for a period of ten (10) Contract Years from the Initial Delivery Date unless earlier terminated in accordance with the terms and conditions of this Agreement.

(c) The “Expected Initial Delivery Date” is set forth in Section F of the Cover Sheet.

(d) Subject to Section 2.2, the “Initial Delivery Date” is the first day of the first Showing Month for which Product is delivered.

### **2.2 Conditions Precedent to 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 forty-five (45) 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 (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.

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

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

(d) Seller shall have provided Performance Security to Buyer as required by Section 14.1 and as subject to the terms of Section 16.1(a).

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

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

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

(h) In accordance with Section 3.7(a), Seller shall have (i) submitted, or caused the Portfolio's SC to submit, a notice to Buyer including Seller's proposed Supply Plan for the first Showing Month and (ii) submitted, or caused the Portfolio's SC to submit, a Supply Plan to CAISO.

(i) Seller shall have delivered to Buyer all insurance documents required under Article 15.

(j) As of the Initial Delivery Date, Seller shall have paid Buyer for all amounts owing under this Agreement, if any, including damages pursuant to Sections 3.8, 3.9, or 16.2(c).

(k) If any applicable Governmental Body requires Seller to develop a decommissioning plan as part of any permitting process for the Portfolio, then Seller shall provide such decommissioning plan to Buyer.

### **ARTICLE 3: TRANSACTION, DELIVERY AND PAYMENT**

#### **3.1 Resource Adequacy Capacity Product.**

During the Delivery Term, Seller shall provide to Buyer, pursuant to the terms of this Agreement, the Designated RA Capacity in the amount of the Contract Quantity of (i) RAR Attributes and, if applicable, LAR Attributes, and (ii) FCR Attributes, if Flexible RA Product is specified in Section B of the Cover Sheet to this agreement, and the Contract Quantity shall be either a Firm RA Product or a Contingent Firm RA Product, as specified in Section B of the Cover Sheet (the "Product"); provided, that, notwithstanding anything to the contrary herein (i) the Product does not confer to Buyer any right to the electrical output from the Portfolio, other than the right to

include the Designated RA Capacity associated with the Contract Quantity in RAR Showings, LAR Showings, and/or FCR Showings, as applicable, and any other capacity or resource adequacy markets or proceedings as specified in this Agreement ; (ii) any change by the CAISO, CPUC or other Governmental Body that defines new or re-defines existing local capacity areas that results in a decrease or increase in the amount of LAR Attributes or RAR Attributes related to a local capacity area provided hereunder will not result in a change in payments made pursuant to this Agreement; (iii) any change by the CAISO, CPUC or other Governmental Body that defines new or re-defines existing RAR or Flexible Capacity Requirements, LAR Attributes or RAR Attributes, or attributes of the Portfolio or any Unit, that results in a decrease or increase in the amount of LAR Attributes or RAR Attributes provided hereunder will not result in a change in payments made pursuant to this Agreement; (iv) the Parties agree that, under this Agreement, if the CAISO, CPUC or other Governmental Body defines new or re-defines existing local capacity areas whereby the Portfolio or any Unit subsequently qualifies for a local capacity area, the Product shall include all LAR Attributes or RAR Attributes related to such local capacity area; and (v) the Parties agree that, under this Agreement, if the CAISO, CPUC or other Governmental Body defines new or re-defines existing RAR or Flexible Capacity Requirements, LAR Attributes or RAR Attributes, or attributes of the Portfolio or any Unit whereby a Unit which did not previously qualify, subsequently qualifies to satisfy RAR or Flexible Capacity Requirements, the Product shall include all LAR Attributes or RAR Attributes of the Unit, including any LAR Attributes or RAR Attributes with respect to any portion of the Portfolio which previously was not able to satisfy RAR or Flexible Capacity Requirements, as applicable. Specifically, no energy or ancillary services associated with any Unit is required to be made available to Buyer as part of this Agreement and Buyer shall not be responsible for compensating Seller for Seller's commitments to the CAISO required by this Agreement. Seller retains the right to sell, pursuant to the Tariff, any RA Capacity from the Portfolio that is in excess of that Contract Quantity and any RAR Attributes, LAR Attributes, or FCR Attributes not otherwise transferred, conveyed, or sold to Buyer under this Agreement.

### **3.2 Seller's and Buyer's Obligations.**

Seller shall sell and deliver, or cause to be delivered, and Buyer shall purchase and receive, or cause to be received, the Designated RA Capacity of the Product at the Delivery Point, and Buyer shall pay Seller the Contract Price for the Designated RA Capacity delivered to Buyer at the Delivery Point. Seller shall be responsible for any costs or charges imposed on or associated with the Product or its delivery of the Product up to the Delivery Point. Buyer shall be responsible for any costs or charges imposed on or associated with the Product or its receipt at and from the Delivery Point.

### **3.3 Scheduling.**

Seller shall arrange and be responsible for scheduling of the Portfolio and, as applicable, each Unit and Replacement Unit. Buyer shall arrange and be responsible for any actions necessary for Buyer to receive the Product at the Delivery Point.

### **3.4 Delivery Point.**

The “Delivery Point” for each Unit shall be the CAISO Control Area, and if applicable, the LAR region in which the Unit is electrically interconnected.

### **3.5 Adjustments to Contract Quantity.**

(a) **Planned Outages:** Seller is obligated to meet the Tariff obligations with respect to securing Planned Outage approvals from CAISO. Seller’s obligation to deliver the Contract Quantity for any Showing Month may be reduced at Seller’s option if any portion of the Portfolio is scheduled for a CAISO-approved Planned Outage during the applicable Showing Month; provided, that Seller notifies Buyer, no later than the Notification Deadline for that Showing Month, of the amount of Product from the Portfolio that Buyer is permitted to include in Buyer’s RAR Showings, LAR Showings and/or FCR Showings applicable to that month as a result of such Planned Outage. If Seller is unable to provide the applicable Contract Quantity for a Showing Month, or any portion thereof, because of a Planned Outage, Seller has the right, but not the obligation, to provide Product for such Showing Month from Replacement Units; provided, that, Seller provides and identifies such Replacement Units in accordance with Section 3.6 hereof. If Seller chooses not to provide Product from Replacement Units and a Unit is on a Planned Outage for the applicable Showing Month, then, the Contract Quantity shall be revised in accordance with any applicable adjustments stipulated by the CPUC Filing Guide or Tariff in effect for the applicable Showing Month in which the Planned Outage occurs. For the avoidance of doubt, Planned Outages shall exclude forced outages or any other unexpected failure not otherwise the result of an event of Force Majeure.

(b) **Reductions in Portfolio NQC:** If Product is both (i) Generic RA Product, and (ii) Contingent Firm RA Product specified under Section B of the Cover Sheet, then Seller’s obligation to deliver the applicable Contract Quantity for any Showing Month may also be reduced if the Portfolio experiences a reduction in Portfolio NQC as determined by the CAISO and Seller has provided notice of such reduction to Buyer by the Notification Deadline for the Showing Month in which such day occurs. Seller’s potential reduction in Contract Quantity for each remaining Showing Month shall equal the product of (a) the applicable Showing Month Contract Quantity and (b) the total amount (in MW) that the Portfolio NQC was reduced since the Effective Date, divided by (c) Portfolio NQC as of the Effective Date. If the Portfolio experiences such a reduction in Portfolio NQC, then Seller has the right, but not the obligation, upon written notice to Buyer by the Notification Deadline, to provide the applicable Contract Quantity for such Showing Month from (i) a specific Unit, provided the Unit has sufficient remaining and available Product and/or (ii) from Replacement Units; provided, that in each case Seller provides and identifies such Replacement Units in accordance with Section 3.6.

(i) The Parties understand that the CAISO is considering revising its Tariff provisions relating to RA requirements as part of its resource adequacy enhancements initiative, and that these revisions could include the adoption of an installed capacity (ICAP) and unforced capacity (UCAP) structure such that a resource’s capacity could be reduced based on several factors. The Parties agree that if the CAISO amends its RA requirements through the resource adequacy enhancements initiative or any similar stakeholder process such that the available RA Capacity of the Portfolio is reduced based on the performance of the Portfolio, Seller shall exercise commercially reasonable efforts to maintain the Contract Quantity. If despite such efforts Seller is unable to maintain the



Contract Quantity as a result of such change in requirements, then either Party may provide notice to the other Party, once it is reasonably evident that the Contract Quantity cannot be maintained, specifying the altered amounts of Product (the “Change Notice”). Following the issuance of a Change Notice, Buyer shall confirm via notice to Seller the amended Contract Quantity and Payment Quantity based on such change and the date that Seller shall commence delivery of such amended amounts. Notwithstanding the foregoing, if the available RA Capacity of the Portfolio is reduced based on the performance of the Portfolio that is directly attributable to the negligence of Seller, then the Contract Quantity shall not be reduced.

(c) If Product is both Flexible RA Product and Contingent Firm RA Product, as specified in Section B of the Cover Sheet, then Seller’s obligation to deliver the applicable Contract Quantity of Product for any Showing Month may also be reduced if the Portfolio experiences a reduction in Portfolio EFC as determined by the CAISO and Seller has provided notice of such reduction to Buyer by the Notification Deadline for the Showing Month in which such day occurs. Seller’s potential reduction in Contract Quantity for each remaining Showing Month shall equal the product of (a) the applicable Showing Month Contract Quantity and (b) the total amount (in MW) Portfolio EFC was reduced since Effective Date, divided by (c) Portfolio EFC as of the Effective Date. If the Portfolio experiences such a reduction in Portfolio EFC, then Seller has the option, but not the obligation, upon written notice to Buyer by the Notification Deadline, to provide the applicable Contract Quantity for such Showing Month from (i) a specific Unit, provided the Unit has sufficient remaining and available Product and/or (ii) from Replacement Units, provided, that in each case Seller provides and identifies such Replacement Units in accordance with Section 3.6.

(d) The Parties acknowledge that Contract Quantity as stated in the table in Section D of the Cover Sheet is based on an expected Effective Flexible Capacity for the Portfolio as defined in the Tariff on the Effective Date, and the intention herein is for Seller to sell to Buyer, and Buyer to buy from Seller the entire Effective Flexible Capacity of the Portfolio.

(e) To the extent the Effective Date of this Agreement occurs prior to the CAISO’s setting of a Portfolio EFC for the Portfolio, the Portfolio EFC shall be as agreed to by the Parties and specified in Section D of the Cover Sheet and Seller represents that this Portfolio EFC is consistent with the CAISO’s methodology for determining Portfolio EFC as of the Effective Date. The above notwithstanding, to the extent the CAISO decides to reduce the applicable Portfolio EFC, Seller shall not be liable for any costs or damages related to such reduction and the Portfolio EFC shall be reduced per Section 3.5 of this Agreement.

(f) If the CAISO adjusts the Net Qualifying Capacity of the Portfolio after the Effective Date, then for the period in which the adjustment is effective, the Portfolio NQC shall be deemed the lesser of (i) the Portfolio NQC as of the Effective Date, and (ii) the CAISO-adjusted Net Qualifying Capacity for the Portfolio.

### **3.6 Alternate Capacity and Replacement Units.**

(a) The “Notification Deadline” for a given Showing Month shall be fifteen (15) Business Days before the earlier of the relevant deadlines for (a) the corresponding CPUC RAR

Showings, LAR Showings and/or FCR Showings, as applicable for that Showing Month, or (b) submission of the CAISO supply plan filings applicable to that Showing Month.

(b) If Seller is unable to provide the full Contract Quantity for any Showing Month for any reason, including, without limitation, due to one of the reasons specified in Section 3.5, or Seller desires to provide the Contract Quantity for any Showing Month from a different generating unit other than the Unit, then Seller may, at no additional cost to Buyer, provide Buyer with Alternate Capacity from one or more Replacement Units, with the total amount of Product provided to Buyer from the Unit and Replacement Units up to an amount equal to the Contract Quantity for the applicable Showing Month; provided that in each case, Seller shall notify Buyer of the amount of Product that Seller will not be able to deliver from the Unit and the portion of the Contract Quantity for which Seller intends, as applicable (i) not to provide or (ii) to provide Alternate Capacity and identify Replacement Units meeting the above requirements no later than the Notification Deadline; and provided further that Buyer's provision of such Alternate Capacity shall comply with the requirements of D.19-11-016. If Seller notifies Buyer in writing as to the particular Replacement Units in accordance with this Section 3.6(b) and such Replacement Units otherwise meet the requirements of a Unit under this Agreement, then such Replacement Units shall be automatically deemed a Unit for purposes of this Agreement for that Showing Month.

(c) With respect to a Contingent Firm RA Product, if Seller does not provide Alternate Capacity in an amount equal to the Contract Quantity for that Showing Month, then Buyer may, but shall not be required to, purchase replacement Product.

(d) In the event that Seller fails to provide the Contract Quantity to Buyer in connection with a Planned Outage and Seller has provided Buyer with timely notice pursuant to Section 3.5(a) of Seller's intent not to provide Alternate Capacity due to a Planned Outage in an amount equal to the portion of the Contract Quantity of that Showing Month that is unavailable due to such Planned Outage, Seller shall not be liable for damages and/or required to indemnify Buyer for penalties or fines pursuant to the terms of Sections 3.8 and 3.9 hereof if Seller has delivered written notice of such failure to Buyer by the Notification Deadline.

### **3.7 Delivery of Product.**

Seller shall provide Buyer with the Designated RA Capacity of Product for each Showing Month consistent with the following:

(a) No later than fifteen (15) Business Days prior to the applicable Showing Month deadline, Seller shall submit, or cause the Portfolio's Scheduling Coordinator to submit, Supply Plans to identify and confirm the Designated RA Capacity provided to Buyer for each pertinent Showing Month so that the total amount of Designated RA Capacity identified and confirmed for such Showing Month equals the Designated RA Capacity, unless specifically requested not to do so by the Buyer.

(b) Consistent with the substitution rules, take all action, or cause the Portfolio's Scheduling Coordinator to take all action, to allow Buyer or a subsequent purchaser to utilize the Contract Quantity during each Showing Month under the substitution rules, including, but not limited to, ensuring that the applicable capacity being provided as expected Contract Quantity in

the pertinent Showing Month will qualify for substitution under the substitution rules and providing Buyer or subsequent purchaser with all information needed to utilize the substitution rules.

### **3.8 Damages for Failure to Provide Designated RA Capacity.**

If Seller fails to provide Buyer with the Designated RA Capacity of Product for any Showing Month or the annual RA compliance filing during the Delivery Term, and such failure is not excused under the terms of this Agreement, then the following shall apply:

(a) Buyer may, but shall not be required to, replace any portion of the Designated RA Capacity not provided by Seller with D.19-11-016 compliant capacity having equivalent RAR Attributes, LAR Attributes and/or FCR Attributes as the Designated RA Capacity not provided by Seller, provided, that, if any portion of the Designated RA Capacity that Buyer is seeking to replace is Designated RA Capacity having RAR Attributes and no LAR Attributes, and no such RAR capacity is available (such capacity shall also include FCR Attributes if this is an Effective Flexible Capacity Product), then Buyer may replace such portion of the Designated RA Capacity with capacity having RAR Attributes and LAR Attributes (as well as FCR Attributes if this is a Flexible RA Product) (“Replacement Capacity”), in either case, by entering into purchase transactions with one or more third parties, including, without limitation, third parties who have purchased capacity from Buyer, so long as such transactions are done at prevailing market prices. Buyer shall use commercially reasonable efforts to minimize damages when procuring any Replacement Capacity.

(b) Seller shall pay to Buyer on the date payment would otherwise be due in respect of the Showing Month in which the failure occurred, an amount equal to the positive difference, if any, between (i) the sum of (A) the actual cost paid by Buyer (or charged to Buyer by CAISO) for any Replacement Capacity, plus (B) each Capacity Replacement Price times the amount of the Designated RA Capacity neither provided by Seller nor purchased by Buyer pursuant to Section 3.8(a), and (ii) the Designated RA Capacity not provided by Seller for the applicable Showing Month times the Contract Price for that month. If Seller fails to pay these damages, then Buyer may offset those damages owed it against any future amounts it may owe to Seller pursuant to Article 6 of this Agreement.

### **3.9 Indemnities for Failure to Deliver Contract Quantity.**

Seller agrees to indemnify, defend and hold harmless Buyer from any penalties, fines or costs assessed against Buyer by the CPUC or the CAISO, resulting from any of the following:

(a) Seller’s failure to provide any portion of the Designated RA Capacity as filed in the CAISO Supply Plan for the respective Showing Month for the Delivery Term;

(b) Seller’s failure to provide notice of the non-availability of any portion of Designated RA Capacity consistent with Sections 3.6 and 3.7; or

(c) A Portfolio’s Scheduling Coordinator’s failure to submit accurate Supply Plans that identify Buyer’s right to the Designated RA Capacity purchased hereunder for the respective Showing Month or the annual RA compliance filing during the Delivery Term.

With respect to the foregoing, the Parties shall use commercially reasonable efforts to minimize such penalties, fines and costs; provided, that in no event shall Buyer be required to use or change its utilization of its owned or controlled assets or market positions to minimize these costs, penalties and fines. If Seller fails to pay the foregoing penalties, fines or costs, or fails to reimburse Buyer for those penalties, fines or costs, then Buyer may offset those penalties, fines or costs against any future amounts it may owe to Seller under this Agreement.

### **3.10 Monthly RA Capacity Payment.**

Buyer shall make a Monthly RA Capacity Payment to Seller for each Portfolio, in arrears, after the applicable Showing Month. The Parties agree that all invoices under this Agreement shall be due and payable on the twentieth (20th) day of the month after the Showing Month, provided that if such day is not a Business Day, then such invoice will be due and payable on the next Business Day. Each Portfolio's "Monthly RA Capacity Payment" shall be equal to the product of (a) the applicable Contract Price for that Monthly Delivery Period, (b) the Designated RA Capacity for the Monthly Delivery Period, and (c) 1,000. The final product of this Monthly RA Capacity Payment calculation shall be rounded to the nearest penny (i.e., two decimal places).

### **3.11 Allocation of Other Payments and Costs.**

(a) Seller may retain any revenues it may receive from, and shall pay all costs charged by, the CAISO or any other third party with respect to the Portfolio for (i) start-up, shut-down, and minimum load costs, (ii) capacity revenue for ancillary services, (iii) energy sales, (iv) any revenues for black start or reactive power services, or (v) the sale of the unit-contingent call rights on the storage capacity of the Portfolio to provide energy to a third party, so long as such rights do not confer on such third party the right to claim any portion of the RA Capacity sold hereunder in order to make an RAR Showing, LAR Showing, FCR Showing, or any similar capacity or resource adequacy showing with the CAISO or CPUC.

(b) Buyer shall be entitled to receive and retain all revenues associated with the Designated RA Capacity of the Portfolio during the Delivery Term (including any capacity or availability revenues from RMR Agreements for the Portfolio, reliability compensation services Tariff, and residual unit commitment capacity payments, but excluding payments described in Section 3.11(a) (i)-(v) above).

(c) In accordance with Section 3.10 of this Agreement:

(i) all such Buyer revenues described in Section 3.11(b) received by Seller, or the Portfolio's Scheduling Coordinator, owner, or operator shall be remitted to Buyer, and Seller shall pay such revenues to Buyer if the Portfolio's Scheduling Coordinator, owner, or operator fails to remit those revenues to Buyer (and upon any such payment by Seller, Seller shall be subrogated to all rights of Buyer against such Portfolio's Scheduling Coordinator, owner, or operator for the amount of such revenues paid). If Seller fails to pay such revenues to Buyer, Buyer may offset any amounts owing to it for such revenues against any future amounts it may owe to Seller under this Agreement.

(ii) all such Seller, or a Portfolio's Scheduling Coordinator, owner, or operator revenues described in Section 3.11(a)(i)-(v), but received by Buyer shall be remitted to

Seller, and Buyer shall pay such revenues to Seller if the Portfolio's Scheduling Coordinator, owner, or operator fails to remit those revenues to Seller (and upon any such payment by Buyer, Buyer shall be subrogated to all rights of Seller against the Portfolio's Scheduling Coordinator, owner, or operator for the amount of such revenues paid). If Buyer fails to pay such revenues to Seller, Seller may offset any amounts owing to it for such revenues against any future amounts it may owe to Buyer under this Agreement.

(d) If a centralized capacity market develops within the CAISO or WECC region, Buyer will have exclusive rights to offer, bid, or otherwise submit Designated RA Capacity provided to Buyer pursuant to this Agreement for re-sale in such market, and retain and receive any and all related revenues.

(e) If CAISO designates any part of the Contract Quantity as Capacity Procurement Mechanism capacity, then Seller will, or will cause the Portfolio's SC to, within one Business Day of the time Seller receives notification from CAISO, notify Buyer and not accept any such designation by CAISO unless and until Buyer has agreed to accept such designation.

(f) Buyer acknowledges and agrees that all Availability Incentive Payments are for the benefit of Seller and for Seller's account, and that Seller shall receive, retain, or be entitled to receive all credits, payments, and revenues, if any, resulting from Seller achieving or exceeding Availability Standards. The Parties acknowledge and agree that any Non-Availability Charges are the responsibility of Seller, and for Seller's account and Seller shall be responsible for all fees, charges, or penalties, if any, resulting from Seller failing to achieve Availability Standards.

### **3.12 Force Majeure.**

To the extent either Party is prevented by Force Majeure from carrying out, in whole or part, its obligations under this Agreement and such Party (the "Claiming Party") gives notice and details of the Force Majeure to the other Party as soon as practicable, then, unless the terms of the Product specify otherwise, the Claiming Party shall be excused from the performance of its obligations with respect to this Agreement (other than the obligation to make payments then due or becoming due with respect to performance prior to the Force Majeure). The Claiming Party shall remedy the Force Majeure with all reasonable dispatch. The non-Claiming Party shall not be required to perform or resume performance of its obligations to the Claiming Party corresponding to the obligations of the Claiming Party excused by Force Majeure.

## **ARTICLE 4: CAISO OFFER REQUIREMENTS**

During the Delivery Term, except to the extent any Unit is in an Outage, or is affected by an event of Force Majeure that results in a partial or full Outage of that Unit, Seller shall either schedule or cause the Portfolio's Scheduling Coordinator to schedule with, or make available to, the CAISO each Unit's Designated RA Capacity in compliance with the Tariff, and shall perform all, or cause the Portfolio's Scheduling Coordinator, owner, or operator, as applicable, to perform all obligations under the Tariff that are associated with the sale of Designated RA Capacity hereunder. Buyer shall have no liability for the failure of Seller or the failure of the Portfolio's Scheduling Coordinator, owner, or operator to comply with such Tariff provisions, including any penalties or fines imposed on Seller or the Portfolio's Scheduling Coordinator, owner, or operator for such noncompliance.

## **ARTICLE 5: EVENTS OF DEFAULT; REMEDIES**

### **5.1 Events of Default.**

An “Event of Default” shall mean, with respect to a Party (a “Defaulting Party”), the occurrence of any of the following:

- (a) the failure to make, when due, any payment required pursuant to this Agreement if such failure is not remedied within five (5) Business Days after written notice;
- (b) any representation or warranty made by such Party herein is false or misleading in any material respect when made or when deemed made or repeated;
- (c) the failure to perform any material covenant or obligation set forth in this Agreement (except to the extent constituting a separate Event of Default, and except for such Party’s obligations to deliver or receive the Product, the exclusive remedy for which is provided in Section 3.8 and 3.9) if such failure is not remedied within thirty (30) days after written notice;
- (d) such Party becomes Bankrupt;
- (e) the failure of such Party to satisfy the creditworthiness/collateral requirements agreed to pursuant to Article 14 hereof;
- (f) 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, either by operation of law or pursuant to an agreement reasonably satisfactory to the other Party.

### **5.2 Declaration of an Early Termination Date and Calculation of Settlement Amounts.**

If an Event of Default with respect to a Defaulting Party shall have occurred and be continuing, the other Party (the “Non-Defaulting Party”) shall have the right (i) to designate a day, no earlier than the day such notice is effective and no later than 20 days after such notice is effective, as an early termination date (“Early Termination Date”) to accelerate all amounts owing between the Parties and to liquidate and terminate this Agreement (referred to as a “Terminated Transaction”) between the Parties, (ii) withhold any payments due to the Defaulting Party under this Agreement and (iii) suspend performance. The Non-Defaulting Party shall calculate, in a commercially reasonable manner, a Settlement Amount for such Terminated Transaction as of the Early Termination Date (or, to the extent that in the reasonable opinion of the Non-Defaulting Party certain of such Terminated Transaction are commercially impracticable to liquidate and terminate or may not be liquidated and terminated under Applicable Law on the Early Termination Date, as soon thereafter as is reasonably practicable).

### **5.3 Net Out of Settlement Amounts.**

The Non-Defaulting Party shall aggregate all Settlement Amounts into a single amount by: netting out (a) all Settlement Amounts that are due to the Defaulting Party, plus, at the option of the Non-

Defaulting Party, any cash or other form of security then available to the Non-Defaulting Party pursuant to Article 14, plus any or all other amounts due to the Defaulting Party under this Agreement against (b) all Settlement Amounts that are due to the Non-Defaulting Party, plus any or all other amounts due to the Non-Defaulting Party under this Agreement, so that all such amounts shall be netted out to a single liquidated amount (the “Termination Payment”) payable by one Party to the other. The Termination Payment shall be due to or due from the Non-Defaulting Party as appropriate.

#### **5.4 Notice of Payment of Termination Payment.**

As soon as practicable after a liquidation, notice shall be given by the Non-Defaulting Party to the Defaulting Party of the amount of the Termination Payment and whether the Termination Payment is due to or due from the Non-Defaulting Party. The notice shall include a written statement explaining in reasonable detail the calculation of such amount. The Termination Payment shall be made by the Party that owes it within two (2) Business Days after such notice is effective.

#### **5.5 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 two (2) Business Days of receipt of 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; provided, however, that if the Termination Payment is due from the Defaulting Party, the Defaulting Party shall first transfer the current amount of the Performance Security to the Non-Defaulting Party in an amount equal to the Termination Payment.

#### **5.6 Closeout Setoffs.**

After calculation of a Termination Payment in accordance with Section 5.3, if the Defaulting Party would be owed the Termination Payment, the Non-Defaulting Party shall be entitled, at its option and in its discretion, to (i) set off against such Termination Payment any amounts due and owing by the Defaulting Party to the Non-Defaulting Party under any other agreements, instruments or undertakings between the Defaulting Party and the Non-Defaulting Party and/or (ii) to the extent the Agreement is not yet liquidated in accordance with Section 5.2, withhold payment of the Termination Payment to the Defaulting Party. The remedy provided for in this Section 5.6 shall be without prejudice and in addition to any right of setoff, combination of accounts, lien or other right to which any Party is at any time otherwise entitled (whether by operation of law, contract or otherwise).

#### **5.7 Suspension of Performance.**

Notwithstanding any other provision of this Agreement, if (a) an Event of Default or (b) a Potential Event of Default shall have occurred and be continuing, the Non-Defaulting Party, upon written notice to the Defaulting Party, shall have the right (i) to suspend performance under this Agreement; provided, however, in no event shall any such suspension continue for longer than ten (10) NERC Business Days unless an early Termination Date shall have been declared and notice thereof pursuant to Section 5.2 given, and (ii) to the extent an Event of Default shall have occurred and be continuing to exercise any remedy available at law or in equity.

## **ARTICLE 6: PAYMENT AND NETTING**

### **6.1 Billing Period.**

The calendar month shall be the standard period for all payments under this Agreement (other than Termination Payments). As soon as practicable after the end of each month, each Party will render to the other Party an invoice for the payment obligations, if any, incurred hereunder during the preceding month.

### **6.2 Timeliness of Payment.**

Unless otherwise agreed by the Parties, all invoices under this Agreement shall be due and payable in accordance with each Party's invoice instructions on or before the later of the twentieth (20th) day of each month, or tenth (10th) day after receipt of the invoice or, if such day is not a Business Day, then on the next Business Day. Each Party will make payments by electronic funds transfer, or by other mutually agreeable method(s), to the account designated by the other Party. Any amounts not paid by the due date will be deemed delinquent and will accrue interest at the Interest Rate, such interest to be calculated from and including the due date to but excluding the date the delinquent amount is paid in full.

### **6.3 Disputes and Adjustments of Invoices.**

A Party may, in good faith, dispute the correctness of any invoice or any adjustment to an invoice, rendered under this Agreement or adjust any invoice for any arithmetic or computational error within twelve (12) months of the date the invoice, or adjustment to an invoice, was rendered. In the event an invoice or portion thereof, or any other claim or adjustment arising hereunder, is disputed, payment of the undisputed portion of the invoice shall be required to be made when due, with notice of the objection given to the other Party. 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 due date to but excluding the date paid. Inadvertent overpayments shall be returned upon request or deducted by the Party receiving such overpayment from subsequent payments, with interest accrued at the Interest Rate from and including the date of such overpayment to but excluding the date repaid or deducted by the Party receiving such overpayment. Any dispute with respect to an invoice is waived unless the other Party is notified in accordance with this Section 6.3 within twelve (12) months after the invoice is rendered or any specific adjustment to the invoice is made. 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.

### **6.4 Netting of Payments.**

The Parties hereby agree that they shall discharge mutual debts and payment obligations due and owing to each other on the same date through netting, in which case all amounts owed by each Party to the other Party for the purchase and sale of Product during the monthly billing period under this Agreement, including any related damages calculated pursuant to Sections 3.8, 3.9, or



16.2(c), 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.

#### **6.5 Payment Obligation Absent Netting.**

If no mutual debts or payment obligations exist and only one Party owes a debt or obligation to the other during the monthly billing period, including, but not limited to, any related damage amounts calculated pursuant to Sections 3.8 or 3.9, interest, and payments or credits, that Party shall pay such sum in full when due.

#### **6.6 Security.**

Unless the Party benefiting from Performance Security notifies the other Party in writing, and except in connection with a liquidation and termination in accordance with Article 5, all amounts netted pursuant to this Article 6 shall not take into account or include any Performance Security, subject to the terms of Section 16.1(a), which may be in effect to secure a Party's performance under this Agreement.

### **ARTICLE 7: LIMITATIONS**

#### **7.1 Limitation of Remedies, Liability and Damages.**

EXCEPT AS 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. FOR BREACH OF ANY PROVISION FOR WHICH AN EXPRESS REMEDY OR MEASURE OF DAMAGES IS PROVIDED, SUCH EXPRESS REMEDY OR MEASURE OF DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY, THE OBLIGOR'S LIABILITY SHALL BE LIMITED AS SET FORTH IN SUCH PROVISION AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED. IF NO REMEDY OR MEASURE OF DAMAGES IS EXPRESSLY PROVIDED HEREIN, THE OBLIGOR'S LIABILITY SHALL BE LIMITED TO DIRECT ACTUAL DAMAGES ONLY, SUCH DIRECT ACTUAL DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED. UNLESS EXPRESSLY HEREIN PROVIDED, NEITHER PARTY SHALL BE LIABLE FOR CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY OR INDIRECT DAMAGES, LOST PROFITS OR OTHER BUSINESS INTERRUPTION DAMAGES, BY STATUTE, IN TORT OR CONTRACT, UNDER ANY INDEMNITY PROVISION OR OTHERWISE. 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. TO THE EXTENT ANY DAMAGES REQUIRED TO BE PAID HEREUNDER ARE LIQUIDATED, THE PARTIES ACKNOWLEDGE THAT THE DAMAGES ARE DIFFICULT OR IMPOSSIBLE TO DETERMINE, OR OTHERWISE OBTAINING AN ADEQUATE REMEDY IS

INCONVENIENT AND THE DAMAGES CALCULATED HEREUNDER CONSTITUTE A REASONABLE APPROXIMATION OF THE HARM OR LOSS.

## **ARTICLE 8: GOVERNMENTAL CHARGES**

### **8.1 Cooperation.**

Each Party shall use reasonable efforts to implement the provisions of and to administer this Agreement in accordance with the intent of the parties to minimize all taxes, so long as neither Party is materially adversely affected by such efforts.

### **8.2 Governmental Charges.**

Seller shall pay or cause to be paid all taxes imposed by any government authority (“Governmental Charges”) on or with respect to the Product or a transaction arising prior to the Delivery Point. Buyer shall pay or cause to be paid all Governmental Charges on or with respect to the Product or a transaction at and from the Delivery Point (other than ad valorem, franchise or income taxes which are related to the sale of the Product and are, therefore, the responsibility of the Seller). In the event Seller is required by law or regulation to remit or pay Governmental Charges which are Buyer’s responsibility hereunder, Buyer shall promptly reimburse Seller for such Governmental Charges. If Buyer is required by law or regulation to remit or pay Governmental Charges which are Seller’s responsibility hereunder, Buyer may deduct the amount of any such Governmental Charges from the sums due to Seller under Article 6 of this Agreement. Nothing shall obligate or cause a Party to pay or be liable to pay any Governmental Charges for which it is exempt under the law.

## **ARTICLE 9: SAFETY**

### **9.1 Safety.**

(a) Seller shall, and shall cause any Affiliates performing any design, construction, operation or maintenance, and decommissioning of the Portfolio and Contractors to, design, construct, operate, maintain, and decommission the Portfolio 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 12/31/2020, Seller shall provide Buyer with a Project Safety Plan in a format reasonably acceptable to Buyer, demonstrating Seller’s plans to comply with the Safety Requirements and detailing the safety risks that Seller anticipates in delivering the Product, as well as Seller actions taken or planned to mitigate said risks. Seller shall incorporate the Project Safety Plan’s features into the design, operation, maintenance, and decommissioning of the Project. Upon Notice to Buyer, Seller may deviate from any specific procedures identified in the Project Safety Plan while designing, developing, constructing, operating, maintaining or decommissioning the Project, if in Seller’s judgment, the deviation is necessary to design, develop, construct, operate, maintain or decommission the Project safely or in accordance with the Safety Requirements.

(c) 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.

## **9.2 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 Bodies that arise as a result of the Serious Incident.

## **9.3 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 10: REPRESENTATIONS; WARRANTIES; COVENANTS**

## **10.1 Representations and Warranties.**

On the Effective Date, each Party represents and warrants to the other Party that:

(a) it is duly organized, validly existing and in good standing under the laws of the jurisdiction of its formation;

(b) it has all regulatory authorizations necessary for it to legally perform its obligations under this Agreement;

(c) the execution, delivery and performance of this Agreement are within its powers, have been duly authorized by all necessary action and do not violate any of the terms and conditions in its governing documents, any contracts to which it is a party or any law, rule, regulation, order or the like applicable to it;

(d) this Agreement and each other document executed and delivered in accordance with this Agreement constitutes its legally valid and binding obligation enforceable against it in accordance with its terms; subject to any Equitable Defenses.

(e) it is not Bankrupt and there are no proceedings pending or being contemplated by it or, to its knowledge, threatened against it which would result in it being or becoming Bankrupt;

(f) there is not pending or, to its knowledge, threatened against it or any of its Affiliates any legal proceedings that could materially adversely affect its ability to perform its obligations under this Agreement;

(g) no Event of Default or Potential Event of Default with respect to it has occurred and is continuing and no such event or circumstance would occur as a result of its entering into or performing its obligations under this Agreement;

(h) it is acting for its own account, has made its own independent decision to enter into this Agreement and as to whether this Agreement is appropriate or proper for it based upon its own judgment, is not relying upon the advice or recommendations of the other Party in so doing, and is capable of assessing the merits of and understanding, and understands and accepts, the terms, conditions and risks of this Agreement;

(i) it is a “forward contract merchant” within the meaning of the United States Bankruptcy Code; and

(j) it has entered into this Agreement in connection with the conduct of its business and it has the capacity or ability to make or take delivery of Product.

## **10.2 Buyer and Seller Covenants.**

Buyer and Seller shall, throughout the Delivery Term, take all commercially reasonable actions and execute any and all documents or instruments reasonably necessary to ensure Buyer’s right to the use of the Contract Quantity for the sole benefit of Buyer or any subsequent purchaser under Article 12. Such commercially reasonable actions shall include, without limitation:

(a) Cooperating with and providing, and in the case of Seller causing the Portfolio’s Scheduling Coordinator, owner, or operator to cooperate with and provide requested supporting documentation to the CAISO, the CPUC, or any other Governmental Body responsible for administering RAR, LAR, and/or FCR under Applicable Laws, to certify or qualify the Contract Quantity as RA Capacity and Designated RA Capacity. Such actions shall include, without limitation, providing information requested by the CAISO, CPUC, or by an LRA having jurisdiction, to demonstrate for each month of the Delivery Term the ability to deliver the Contract Quantity from each Portfolio to the CAISO controlled grid for the minimum hours required to qualify as RA Capacity, and providing information requested by the CPUC, CAISO or other Governmental Body having jurisdiction to administer RAR, LAR, or FCR to demonstrate that the Contract Quantity can be delivered to the CAISO controlled grid, pursuant to “deliverability” standards established by the CAISO, or other Governmental Body having jurisdiction to administer RAR LAR and/or FCR; and

(b) Negotiating in good faith to make necessary amendments, if any, to this Agreement to conform this Agreement to subsequent clarifications, revisions, or decisions rendered by the CAISO, CPUC, FERC, or other Governmental Body having jurisdiction to administer RAR LAR, or FCR so as to maintain the benefits of the bargain struck by the Parties on the Effective Date.

## **10.3 Seller Representations, Warranties and Covenants.**

Seller represents, warrants and covenants to Buyer that, throughout the Delivery Term:

(a) Seller is a corporation, duly organized, validly existing and in good standing under the laws of the State of Delaware, and is qualified to conduct business in the State of California and each jurisdiction where the failure to so qualify would have a material adverse effect on the business or financial condition of Seller;

(b) Seller has the power and authority to enter into and perform this Agreement and is not prohibited from entering into this Agreement or discharging and performing all covenants and obligations on its part to be performed under and pursuant to this Agreement. The execution, delivery and performance of this Agreement by Seller has been duly authorized by all necessary 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) 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;

(d) Seller owns or has the exclusive right to the RA Capacity sold under this Agreement from each Unit, and shall furnish Buyer, CAISO, CPUC or other jurisdictional LRA, or other Governmental Body with such evidence as may reasonably be requested to demonstrate such ownership or exclusive right;

(e) No portion of the Contract Quantity has been committed by Seller to any third party in order to satisfy RAR, LAR, FCR or analogous obligations in CAISO markets, other than pursuant to any reliability must-run agreement between the CAISO and either Seller or a Unit's owner or operator;

(f) No portion of the Contract Quantity has been committed by Seller in order to satisfy RAR, LAR, FCR, or analogous obligations in any non-CAISO market;

(g) Each Unit is connected to the CAISO controlled grid, is within the CAISO Control Area, or is under the control of CAISO;

(h) The respective cumulative amounts of LAR Attributes, RAR Attributes, and FCR Attributes that Seller has sold, assigned or transferred for any Unit does not exceed that Unit's RA Capacity;

(i) With respect to the RA Capacity provided under this Agreement, Seller shall comply with Applicable Laws, including the Tariff, relating to RA Capacity, RAR, LAR, and FCR;

(j) Seller has notified the Scheduling Coordinator of the Portfolio that Seller is obligated to cause the Portfolio's Scheduling Coordinator to provide to the Buyer, no later than fifteen (15) Business Days prior to the applicable Showing Month deadline, the Designated RA

Capacity of the Portfolio that is to be submitted in the Supply Plan associated with this Agreement for the applicable period;

(k) Seller has notified the Portfolio's Scheduling Coordinator that Buyer is entitled to the revenues set forth in Section 3.11 of this Agreement;

(l) As between Seller and Buyer, Seller shall be solely responsible for decommissioning of the Portfolio;

(m) As between Seller and Buyer, Seller shall be solely responsible for the presence and operation of a Unit on a Site and for managing the relationship with the owners and occupants of such Site;

(n) The Portfolio and Product, including and any Alternate Capacity, meets the requirements of CPUC D.19-11-016, for which the Parties' mutual understanding as of the Effective Date is described in Exhibit I, or has otherwise been approved by the CPUC through a decision, resolution, publicly issued guidance document, letter from the CPUC Executive Director, or other communication of approval mutually agreed to by the Parties, making it eligible to provide resource adequacy as an incremental resource; and

(o) The Portfolio as constructed, operated, and maintained by Seller corresponds with the description of Portfolio provided in Exhibit D of this agreement.

#### **10.4 Buyer's Representations and Warranties.**

As of the Effective Date, Buyer represents and warrants as follows:

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

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

(c) The execution and delivery of this Agreement, consummation of the transactions contemplated herein, and fulfillment of and compliance by Buyer with the provisions of this Agreement will not conflict with or constitute a breach of or a default under any Applicable Laws presently in effect having applicability to Buyer, including but not limited to community choice

aggregation, the Joint Powers Act, competitive bidding, public notice, open meetings, election, referendum, or prior appropriation requirements, the documents of formation of Buyer or any outstanding trust indenture, deed of trust, mortgage, loan agreement or other evidence of indebtedness or any other agreement or instrument to which Buyer is a party or by which any of its property is bound.

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

(e) Buyer warrants and covenants that with respect to its contractual obligations under this Agreement, it will not claim immunity on the grounds of sovereignty or similar grounds with respect to itself or its revenues or assets from (1) suit, (2) jurisdiction of court, (3) relief by way of injunction, order for specific performance or recovery of property, (4) attachment of assets, or (5) execution or enforcement of any judgment.

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

(g) Buyer cannot assert sovereign immunity as a defense to the enforcement of its obligations under this Agreement.

## **ARTICLE 11: CONFIDENTIALITY**

### **11.1 Confidential Information.**

Neither Party shall disclose the terms or conditions of this Agreement to a third party (other than the Party's employees, Lenders, counsel, accountants or advisors who have a need to know such information and have agreed to keep such terms confidential) except in order to comply with any Applicable Laws, regulation, or any exchange, control area or independent system operator rule or in connection with any court or regulatory proceeding; provided, however, each Party shall, to the extent practicable, use reasonable efforts to prevent or limit the disclosure. 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. Notwithstanding the foregoing, the Parties agree that Buyer may disclose the Designated RA Capacity under this Agreement to any Governmental Body, the CPUC, the CAISO or any LRA having jurisdiction in order to support its LAR Showings, RAR Showings and/or FCR Showings, as applicable, and Seller may disclose the transfer of the Designated RA Capacity under this Agreement to the Scheduling Coordinator of the Portfolio in order for such Scheduling Coordinator to timely submit accurate Supply Plans; provided, that each disclosing Party shall use reasonable efforts to limit, to the extent possible, the ability of any such applicable Governmental Body, CAISO, or Scheduling Coordinator to further disclose such information. In addition, in the event Buyer resells all or any portion of the Designated RA Capacity to another party, Buyer shall be permitted to disclose to the other party to such resale transaction all such information to the extent such disclosure is necessary to effect such resale transaction, provided that such other party agrees to keep such information confidential.

Seller acknowledges that Buyer is subject to the California Constitution Article 1, Section 3, and the California Public Records Act, Cal. Gov. Code § 6250 *et seq.* (“Public Records Act”) in regard to the documents comprising this Agreement, which items may constitute public records subject to inspection and copying by the public under the authority of the California Constitution and the Public Records Act. Buyer shall, consistent with those laws, use reasonable efforts to provide Seller with notice of any third-party request to inspect and copy any of the documents that comprise this Agreement, which Seller might deem confidential and exempt from disclosure, in order that Seller may timely seek to protect those documents from disclosure to the third party. Seller acknowledges and agrees that Buyer shall not be liable to Seller if Buyer makes disclosure in accordance with the California Constitution and/or the Public Records Act before Seller has timely obtained an order to prevent Buyer from making the requested disclosure to the third party.

## **11.2 Other Confidential Information.**

Seller shall comply with all applicable laws and regulations relating to the protection of customer-specific information and data, including California Public Utilities Code Section 8380, *et seq.* and Decision 12-08-045 “Decision Extending Privacy Protections to Customers of Gas Corporations and Community Choice Aggregators” adopted by the California Public Utilities Commission.

## **ARTICLE 12: BUYER’S RE-SALE OF PRODUCT**

Buyer may re-sell all or a portion of the Product and any associated rights, in each case, acquired under this Agreement. If Buyer re-sells all or a portion of the Product and any associated rights acquired under this Agreement (“Resold Product”), Seller agrees, and agrees to cause the Portfolio’s Scheduling Coordinator, to follow Buyer’s instructions with respect to providing such Resold Product to subsequent purchasers of such Resold Product to the extent such instructions are consistent with Seller’s obligations under this Agreement. Seller further agrees, and agrees to cause the Portfolio’s Scheduling Coordinator, to take all commercially reasonable actions and execute any and all documents or instruments reasonably necessary to allow such subsequent purchasers to use such Resold Product in a manner consistent with Buyer’s rights under this Agreement, and Buyer shall be responsible for Seller’s reasonable costs associated therewith, including reasonable attorneys’ fees, all of which Seller shall issue to Buyer for reimbursement in accordance with Section 6.1. If Buyer incurs any liability to any purchaser of such Resold Product due to the failure of Seller or the Portfolio’s Scheduling Coordinator to comply with the terms of this Agreement, then Seller shall be liable to Buyer for any liabilities Seller would have incurred under this Agreement if Buyer had not resold the Product, including without limitation, pursuant to Sections 3.8 and 3.9.

In the event there is any Resold Product, Buyer agrees to notify Seller that such a sale has occurred and agrees to provide Seller with the information specified below promptly following such sale (and any other information reasonably requested by Seller so that Seller may perform its obligations in this Article 12) and promptly notify Seller of any subsequent changes to such information with respect to any particular sale:

- i. Benefitting load serving entity SC identification number (SCID),
- ii. Volume (in MW) of Resold Product,



- iii. Subsequent sale delivery period for Resold Product.

### **ARTICLE 13: [RESERVED]**

### **ARTICLE 14: COLLATERAL REQUIREMENTS**

#### **14.1 Performance Security.**

To secure its obligations under this Agreement, and subject to the terms of Section 16.1(a), Seller shall deliver Performance Security to Buyer within ten (10) business days of the Effective Date. Seller shall maintain the Performance Security in full force and effect, subject to any draws made by Buyer in accordance with this Agreement, until the following have occurred: (A) the Delivery Term has expired or terminated early; and (B) all payment obligations of the Seller then due and payable under this Agreement, including compensation for penalties, termination payment, indemnification payments or other damages are paid in full (whether directly or indirectly such as through set-off or netting). Following the occurrence of both events, Buyer shall promptly return to Seller the unused portion of the Performance Security not allocated to invoiced but unpaid amounts and not otherwise returned as set forth under the terms of Section 16.1(a). Provided that no Event of Default has occurred and is continuing with respect to Seller, Seller may replace Performance Security or change the form of Performance Security to another form of Performance Security from time to time upon reasonable prior written notice to Buyer.

#### **14.2 First Priority Security Interest in Cash or Cash Equivalent Collateral.**

(a) To secure its obligations under this Agreement, and until released as provided herein and subject to the terms of Section 16.1(a), 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 Performance Security, any other cash collateral and cash equivalent collateral posted under this Agreement, 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.

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

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

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

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

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

## **ARTICLE 15: INSURANCE**

### **15.1 Insurance.**

Throughout the term of this Agreement, 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 15.1 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, Applicable 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.

### **15.2 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.

## **ARTICLE 16: PORTFOLIO ASSEMBLY AND INITIAL DELIVERY DATE**

### **16.1 Assembly of the Portfolio.**

(a) Unit Recruiting. Seller shall use commercially reasonable efforts to recruit Units and have them committed to join the Portfolio. In support of the obligation specified in this Section 16.1(a), Seller shall achieve the following Unit recruitment milestones:

(i) Milestone 1: By no later than December 31, 2020, Seller shall have (i) identified and contracted with the Portfolio's Scheduling Coordinator, (ii) directed the Portfolio's Scheduling Coordinator to have completed its registration with the CAISO, and (iii) received confirmation from the Portfolio's Scheduling Coordinator of the completion of all applicable CAISO requirements. After the completion of this milestone, Buyer shall return to Seller █████ percent █████ of the Performance Security, the return of which shall not be unreasonably withheld or delayed .

(ii) Milestone 2: By no later than January 1, 2021, Seller shall have enrolled or otherwise have a binding commitment from customers sufficient to supply fifty percent (50% ) of the Contract Quantity, the evidence of which shall be provided by Seller to Buyer substantially in the form of Exhibit J. After the completion of this milestone, Buyer shall return to Seller █████ percent █████ of the Performance Security, the return of which shall not be unreasonably withheld or delayed.

(iii) Milestone 3: By no later than March 31, 2021, Seller shall have enrolled or otherwise have a binding commitment from customers sufficient to supply seventy-five percent (75%) of the Contract Quantity, the evidence of which shall be provided by Seller to Buyer substantially in the form of Exhibit J. After the completion of this milestone, Buyer shall return to Seller █████ percent █████ of the Performance Security, such that Buyer is only holding █████ of the initial Performance Security, the return of which shall not be unreasonably withheld or delayed

(iv) Milestone 4: By no later than January 1, 2026, Seller shall have enrolled or otherwise have a binding commitment from customers sufficient to supply 100% of the Contract Quantity for delivery years 2026 – 2030, the evidence of which shall be provided by Seller to Buyer substantially in the form of Exhibit J. After the completion of this milestone, Buyer shall return to Seller █████ of the Performance Security such that Buyer is only holding █████ of the initial Performance Security, the return of which shall not be unreasonably withheld or delayed.

Buyer shall be entitled to rely, and shall be fully protected in relying, upon any writing, resolution, notice, consent, certificate, affidavit, letter, electronic mail message or other document submitted by Seller to Buyer that confirms the completion of the various milestones submitted above.

(b) Failure to Meet Unit Recruitment Milestones. If Seller fails to meet any of the Unit recruitment milestones specified in Section 16.1(a), such failure shall not constitute an independent

Event of Default and Seller's sole obligation shall be to provide a proposed plan to achieve the subsequent milestone in the next occurring progress report provided to Buyer pursuant to Section 16.1(c).

(c) Progress Reports. The Parties agree time is of the essence in regard to the Agreement. No less frequently than once every three (3) months, starting at the Effective Date and increasing in frequency to once every month as of ninety (90) days prior to the Expected Initial Delivery Date, Seller shall provide to Buyer a progress report and agree to regularly scheduled meetings between representatives of Buyer and Seller to review such monthly reports and discuss Seller's progress with the Portfolio, provided that after the Initial Delivery Date, Seller shall no longer be required to submit monthly progress reports. The form of the progress report is set forth in Exhibit F.

## **16.2 Initial Delivery Date.**

(a) Extension of the Expected Initial Delivery Date. The Expected Initial Delivery Date shall, subject to notice and documentation requirements set forth below, be automatically extended on a day-for-day basis (the "Development Cure Period") for the duration of any and all delays arising out of the following circumstances:

(i) Seller has not acquired all material permits, consents, licenses, approvals, or authorizations from any Governmental Body required for Seller to own, construct, interconnect, operate or maintain the Portfolio, and to permit the Seller and Portfolio to make available and sell Product by the Expected Initial Delivery Date, despite the exercise of commercially reasonable efforts by Seller; or

(ii) An event of Force Majeure occurs.

(b) If Seller has not achieved the Initial Delivery Date by the Expected Initial Delivery Date, as may be extended pursuant to Section 16.2(a), then Seller shall pay Buyer, or the Performance Security shall be drawn upon to promptly pay Buyer, for an amount equal to the amount that Seller would owe to Buyer pursuant to Section 3.8 for such month if such month had occurred during the Delivery Term and Seller had failed to provide Buyer with the Designated RA Capacity of Product for such month.

(c) Notwithstanding anything in this Agreement to the contrary, the cumulative extensions granted under the Development Cure Period shall not extend the Expected Initial Delivery Date beyond the Initial Delivery Date Deadline for any reason, including an event of Force Majeure. No extension shall be given pursuant to Section 16.2(a) if the corresponding delay was the result of Seller's failure to take all commercially reasonable actions to meet its requirements and deadlines. Upon request from Buyer, Seller shall provide documentation demonstrating to Buyer's reasonable satisfaction that the delays described in Section 16.2(a)(i)-(ii) did not result from Seller's failure to take such commercially reasonable actions.

(d) Termination for Failure to Achieve Initial Delivery Date. If the Portfolio has not achieved the Initial Delivery Date on or before the Initial Delivery Date Deadline, Buyer may terminate this Agreement upon written notice to Seller and collect as liquidated damages an

amount equal to the remaining Performance Security; provided, that payment of such amount shall constitute liquidated damages and Buyer's sole and exclusive remedy for such termination.

## ARTICLE 17: MISCELLANEOUS

### 17.1 Title and Risk of Loss.

Title to and risk of loss related to the Product shall transfer from Seller to Buyer at the Delivery Point. Seller warrants that it will deliver to Buyer the Designated RA Capacity free and clear of all liens, security interests, claims and encumbrances or any interest therein or thereto by any person arising prior to the Delivery Point.

### 17.2 Indemnity.

(a) Indemnity by Seller. Seller shall release, indemnify and hold harmless Buyer or Buyers' respective directors, officers, agents, and representatives against and from any and all loss, claims, actions or suits, including costs and attorney's fees resulting from, or arising out of or in any way connected with (i) the Product delivered under this Agreement to the Delivery Point, or (ii) Seller's operation and/or maintenance of the Portfolio, 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 of property belonging to Buyer, Seller, or others, excepting only such loss, claim, action or suit as may be caused solely by the willful misconduct or gross negligence of Buyer, its Affiliates, or Buyers' and Affiliates' respective agents, employees, directors, or officers.

(b) Indemnity by Buyer. Buyer shall release, indemnify, and hold harmless Seller, its directors, officers, agents, and representatives against and from any and all loss, claims, actions or suits, including costs and attorney's fees resulting from, or arising out of or in any way connected with Buyer's failure to maintain any regulatory or CAISO compliance obligations required of Buyer in conjunction with Seller's delivery of the Product under this Agreement at or after the Delivery Point, excepting only such loss, claim, action or suit as may be caused by the willful misconduct or negligence of Seller, its Affiliates, or Seller's and Affiliates' respective agents, employees, directors or officers.

(c) No Dedication. Without limitation of each Party's obligations under Sections 17.2(a) and 17.2(b) herein, nothing in this Agreement shall be construed to create any duty to, any standard of care with reference to, or any liability to any person or entity not a Party to this Agreement. No undertaking by one Party to the other under any provision of this Agreement shall constitute the dedication of that Party's system or any portion thereof to the other Party or the public, nor affect the status of Buyer as an independent public utility corporation or Seller as an independent individual or entity.

### 17.3 Assignment.

Neither Party shall assign this Agreement or its rights hereunder without the prior written consent of the other Party, which consent may be withheld in the exercise of its sole discretion; provided, however, either Party may, without the consent of the other Party (and without relieving itself from liability hereunder), (i) transfer, sell, pledge, encumber or assign this Agreement or the accounts, revenues or proceeds hereof in connection with any financing or other financial arrangements, (ii)

transfer or assign this Agreement to an affiliate of such Party which affiliate's creditworthiness is equal to or higher than that of such Party, (iii) transfer or assign this Agreement to any Qualified Transferee, or (iv) transfer or assign this Agreement to any person or entity succeeding to all or substantially all of the assets whose creditworthiness is equal to or higher than that of such Party; provided, however, that in each such case, any such assignee shall agree in writing to be bound by the terms and conditions hereof and so long as the transferring Party delivers such tax and enforceability assurance as the non-transferring Party may reasonably request.

#### **17.4 Governing Law.**

THIS AGREEMENT AND THE RIGHTS AND DUTIES OF THE PARTIES HEREUNDER SHALL BE GOVERNED BY AND CONSTRUED, ENFORCED AND PERFORMED IN ACCORDANCE WITH THE LAWS OF THE STATE OF CALIFORNIA, WITHOUT REGARD TO PRINCIPLES OF CONFLICTS OF LAW. TO THE EXTENT ENFORCEABLE AT SUCH TIME, EACH PARTY WAIVES ITS RESPECTIVE RIGHT TO ANY JURY TRIAL WITH RESPECT TO ANY LITIGATION ARISING UNDER OR IN CONNECTION WITH THIS AGREEMENT.

#### **17.5 Notices.**

All notices, requests, statements or payments shall be made as specified in the Cover Sheet. Notices (other than scheduling requests) shall, unless otherwise specified herein, be in writing and may be delivered by hand delivery, United States mail, overnight courier service or facsimile. Notice by facsimile or hand delivery shall be effective at the close of business on the day actually received, if received during business hours on a Business Day, and otherwise shall be effective at the close of business on the next Business Day. Notice by overnight United States mail or courier shall be effective on the next Business Day after it was sent. A Party may change its addresses by providing notice of same in accordance herewith.

#### **17.6 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 Portfolio construction contracts. In addition, Seller shall require that construction Contractors utilize locally sourced and union labor to the extent practicable. Seller shall attempt to maximize the enrollment of the Portfolio of customers that are located within Buyer's service territory and purchase electricity from Buyer.

#### **17.7 Recording.**

Unless a Party expressly objects to a Recording (defined below) at the beginning of a telephone conversation, each Party consents to the creation of a tape or electronic recording ("Recording") of all telephone conversations between the Parties to this Agreement, and that any such Recordings will be retained in confidence, secured from improper access, and may be submitted in evidence in any proceeding or action relating to this Agreement. Each Party waives any further notice of such monitoring or recording, and agrees to notify its officers and employees of such monitoring or recording and to obtain any necessary consent of such officers and employees.

#### **17.8 General.**

This Agreement (including the exhibits, schedules and any written supplements hereto), if any, any designated collateral, credit support or margin agreement or similar arrangement between the Parties constitute the entire agreement between the Parties relating to the subject matter. Notwithstanding the foregoing, any collateral, credit support or margin agreement or similar arrangement between the Parties shall, upon designation by the Parties, be deemed part of this Agreement and shall be incorporated herein 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. Except to the extent herein provided for, no amendment or modification to this Agreement shall be enforceable unless reduced to writing and executed by both Parties. Each Party agrees if it seeks to amend any applicable wholesale power sales tariff during the term of this Agreement, such amendment will not in any way affect outstanding transactions under this Agreement without the prior written consent of the other Party. Each Party further agrees that it will not assert, or defend itself, on the basis that any applicable tariff is inconsistent with this Agreement. This Agreement shall not impart any rights enforceable by any third party (other than a permitted successor or assignee bound to this Agreement). Waiver by a Party of any default by the other Party shall not be construed as a waiver of any other default. Any provision declared or rendered unlawful by any applicable court of law or regulatory agency or deemed unlawful because of a statutory change (individually or collectively, such events referred to as “Regulatory Event”) will not otherwise affect the remaining lawful obligations that arise under this Agreement; and provided, further, that if a Regulatory Event occurs, the Parties shall use their best efforts to reform this Agreement in order to give effect to the original intention of the Parties. The term “including” when used in this Agreement shall be by way of example only and shall not be considered in any way to be in limitation. The headings used herein are for convenience and reference purposes only. All indemnity and audit rights shall survive the termination of this Agreement for twelve (12) months. This Agreement shall be binding on each Party’s successors and permitted assigns.

#### **17.9 Audit.**

Each Party has the right, at its sole expense and during normal working hours, to examine the records of the other Party to the extent reasonably necessary to verify the accuracy of any statement, charge or computation made pursuant to this Agreement. If requested, a Party shall provide to the other Party statements evidencing the Quantity delivered at the Delivery Point. If any such examination reveals any inaccuracy in any statement, the necessary adjustments in such statement and the payments thereof will be made promptly and shall bear interest calculated at the Interest Rate from the date the overpayment or underpayment was made until paid; provided, however, that no adjustment for any statement or payment will be made unless objection to the accuracy thereof was made prior to the lapse of twelve (12) months from the rendition thereof, and thereafter any objection shall be deemed waived.

#### **17.10 Forward Contract.**

The Parties acknowledge and agree that this Agreement constitutes a “forward contract” within the meaning of the United States Bankruptcy Code.

#### **17.11 Dispute Resolution.**

(a) In the event of any claim, controversy or dispute between the Parties arising out of or relating to or in connection with this Agreement (including any dispute concerning the validity of this Agreement or the scope and interpretation of this Section 17.11) (a “Dispute”), any Party (the “Notifying Party”) may deliver to the other Parties (the “Recipient Party”) notice of the Dispute with a detailed description of the underlying circumstances of such Dispute (a “Dispute Notice”). The Dispute Notice shall include a schedule of the availability of the Notifying Party’s senior officers (having a title of senior vice president (or its equivalent) or higher) duly authorized to settle the Dispute during the thirty (30) day period following the delivery of the Dispute Notice.

(b) The Recipient Party shall, within five (5) Business Days following receipt of the Dispute Notice, provide to the Notifying Party a brief summary of the Recipient Party’s position on the Dispute and a parallel schedule of availability of the Recipient Party’s senior officers (having a title of senior vice president (or its equivalent) or higher) duly authorized to settle the Dispute. Following delivery of the respective senior officers’ schedules of availability, the senior officers of the Parties shall meet and confer as often as they deem reasonably necessary during the remainder of the thirty (30) day period in good faith negotiations to resolve the Dispute to the satisfaction of each Party.

(c) In the event a Dispute is not resolved pursuant to the procedures set forth in Sections 17.11(a) and (b) by the expiration of the thirty (30) day period set forth in Section 17.11(b), then a Party may pursue any legal remedy available to it in accordance with this Agreement.

#### **17.12 Execution.**

A signature received via facsimile or email shall have the same legal effect as an original.

#### **17.13 Joint Powers Authority.**

Seller acknowledges and agrees that Buyer is organized as a joint powers authority in accordance with the Joint Powers Act of the State of California (Government Code Section 6500 *et seq.*) pursuant to a Joint Powers Agreement and is a public entity separate from its members. Buyer shall solely be responsible for all debts, obligations and liabilities accruing and arising out of this Agreement and Seller agrees that it shall have no rights and shall not make any claim, take any actions or assert any remedies against any of Buyer’s members in connection with this Agreement.

#### **17.14 Seller's Portfolio.**

The terms and conditions of the agreements governing the relationship between Seller or its Affiliate and a customer with respect to such customer’s participation in Seller’s Portfolio are independent of Buyer and Buyer shall have no responsibility with respect to such customers or Seller’s Affiliate for purposes of Seller’s Portfolio. Seller agrees to independently resolve, or shall cause its Affiliate to resolve, any disputes arising between Seller or its Affiliate and any customer.

#### **17.15 Public Announcements and Marketing.**

Seller shall make no public announcement regarding any aspect of this Agreement without the prior written consent of Buyer. For the avoidance of doubt, Seller and Buyer shall not engage in



any joint marketing campaign for the purposes of Unit recruitment without prior written consent of Buyer.

*[Remainder of Page Intentionally Left Blank]*

**DRAFT**

**Acknowledged and agreed to as of the Effective Date.**

**Leapfrog Power, Inc., a Delaware corporation**

**Valley Clean Energy Alliance, a California joint powers authority**

By: Thomas Folker

By: 

Name: Thomas Folker

Name: Mitch Sears

Title: CEO

Title: Interim General Manager

**EXHIBIT A: FORM OF LETTER OF CREDIT**

[Issuing Bank Letterhead and Address]

IRREVOCABLE STANDBY LETTER OF CREDIT NO. [XXXXXXXX]

Date:

Bank Ref.:

Amount: US\$[XXXXXXXXXX]

Expiry Date:

**APPLICANT DETAILS TO BE PROVIDED**

Beneficiary:

[Buyer], a California joint powers authority

[Address]

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 [Buyer], a California joint powers authority (“Beneficiary”), [Address], for an amount not to exceed the aggregate sum of U.S. \$[XXXXXXXX] (United States Dollars [XXXXXX] and 00/100), pursuant to that certain 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 [XXXXXXXX] 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, or (b) facsimile to [bank fax number [XXX-XXX-XXXX]] confirmed by [e-mail to [bank email address]] (if presented by fax it must be followed up by a phone call to us at [XXXXXXXX] or [XXXXXXXX] to confirm receipt) with the originals to follow via courier. The drawing will be effective upon our receipt of the original documents at the above noted address.

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 documents presented under and in compliance with the terms of this Letter of Credit 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 registered mail or 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.

All notices to Beneficiary shall be in writing and are required to be sent by certified letter, overnight courier, or delivered in person to:[Buyer], Chief Operating Officer, [Address]. Only notices to Beneficiary meeting the requirements of this paragraph shall be considered valid. Any notice to Beneficiary which is not in accordance with this paragraph shall be void and of no force or effect.

[Bank Name]

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[Insert officer name]

[Insert officer title]

Exhibit A: (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 [Buyer], a California joint powers authority, [Buyer address], 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 Agreement dated as of \_\_\_\_\_, (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) 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 we have received notice from the Bank that you have elected not to extend the Expiration Date of the Letter of Credit beyond its current Expiration Date and 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 [Buyer], a California joint powers authority and is authorized to execute and deliver this Drawing Certificate on behalf of Beneficiary.

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

[Specify account information]

[Buyer]

\_\_\_\_\_

Name and Title of Authorized Representative

Date \_\_\_\_\_

**EXHIBIT B: [RESERVED]**

**EXHIBIT C: [RESERVED]**



## EXHIBIT D: PORTFOLIO

### Exhibit D-1: Portfolio Overview

**PORTFOLIO:** The following describes the Portfolio:

<b>Portfolio Specific Information</b>	
Resource Name	<b>Leap DR</b>
CAISO Resource ID	Multiple
SCID of Resource	LEAP
Minimum Portfolio NQC by month	Jan: 7 Feb: 7 Mar: 7 Apr: 7 May: 7 Jun: 7 Jul: 7 Aug: 7 Sep: 7 Oct: 7 Nov: 7 Dec: 7
Portfolio EFC by month	Not Applicable
TAC Area	PG&E or CAISO System, as agreed by the Parties
Capacity Area	CAISO System
Resource Category as defined by the CPUC	DR

### Exhibit D-2: Portfolio List of Shown Units:

Shown Unit Specific Information	
CAISO Resource ID	
Resource Type	

Physical Location	
Unit NQC by month (e.g., Jan =50, Feb =65)	

*[Shown Unit information will be provided prior to the Delivery Date]*

**EXHIBIT E: [RESERVED]**

## **EXHIBIT F: PROGRESS REPORTING FORM**

Each progress report must include the following items:

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

**EXHIBIT G: [RESERVED]**

**EXHIBIT H: PLANNED OUTAGE SCHEDULE**

<b>Portfolio Name</b>	<b>CAISO Resource ID</b>	<b>Outage (MW)</b>	<b>SLIC Outage Start Date</b>	<b>SLIC Outage End Date</b>
N/A	N/A	N/A	N/A	N/A

## EXHIBIT I: INCREMENTALITY OF THE SHOWN UNITS

Pursuant to D.19-11-016, Seller and Buyer agree that the Commission has yet to determine a specific set of rules regarding incrementality of Demand Response Resources and continues to refer to D.16-12-036 “as a starting point for incrementality principles for demand-side resources.”<sup>1</sup> The baseline resources list adopted in R.16-02-007 against which incrementality required by D.19-11-016 is measured, does not explicitly list Demand Response Resources and states that “LSEs need to demonstrate that the demand response being procured is incremental to the IOU demand response programs funded in the 2018-2022 funding cycle.” From an initial inquiry on May 19, 2020, Buyer received no guidance from Energy Division as to how to demonstrate incrementality of DR Resources.

In developing their own guidelines for incrementality, pursuant to D.16-12-036 which allows for the creation of different methods to determine incrementality so that the Commission “can determine which one method provides the best outcomes,”<sup>2</sup> Seller and Buyer have reviewed incrementality models 2, 4, and 5 proposed during the August 2016 working group in R.14-10-003 as well as SCE’s incrementality matrix published in 2019 and approved by the Commission in 2020 under R.16-02-007. Using these models as a guide, Seller and Buyer agree that the Shown Units in Seller’s Portfolio are in line with the principles of incrementality and conform to the following criteria:

- Shown Units do not leverage any kind of technology-specific incentive program (*i.e.* SGIP) to join the Portfolio;
- Seller has not taken any technology incentives to build out the company or technology
- Seller’s Portfolio will consist of new CAISO Resource IDs that have never been registered with CAISO;
- Although Seller does not have access to customers’ IOU DR program enrollment information prior to 2019 due to customer privacy regulations and has not yet received guidance from Energy Division on how to ascertain this information, Seller ensures that customers in the Portfolio have not participated in any IOU DR programs funded in the years 2019-2022, and will not participate in any IOU DR programs throughout the term of the agreement;
- The capacity MWs recruited for this agreement are incremental to the capacity MWs used by the Seller in previous RA contracts from 2019 - 2020;
- As the Demand Response Auction Mechanism (DRAM) is a pilot program that solicits offers for only a one-year term and its continuation after 2022 remain uncertain, it is the mutual understanding of Seller and Buyer that DRAM resources should not be considered a permanent source of DR or incorporated into utility long-term forecasting. Thus, resources previously procured for DRAM are “not reasonably expected to be sourced

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<sup>1</sup> R.16-02-007: “Administrative Law Judge’s Ruling Finalizing Baseline for Purposes of Procurement Required by Decision 19-11-016.” Filed Jan 3, 2020. Pp 8. <https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M323/K767/323767159.PDF>

<sup>2</sup> D.16-12-036: “Decision Addressing Competitive Solicitation Framework and Utility Regulatory Incentive Pilot.” Issued Dec 22, 2016. Pp 21 - 22. <https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M171/K555/171555623.PDF>

through another utility procurement, program, or tariff”<sup>3</sup> and are considered wholly incremental under SCE’s matrix.

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<sup>3</sup> R.16-02-007: “Southern California Edison Company’s (U 338-E) Comments on Commission Staff’s Proposed Baseline List of Resources.” Filed Dec 9, 2019. Appendix A ‘SCE’s Incrementality Matrix.’”



**EXHIBIT J: MILESTONE COMPLETION CONFIRMATION**

Customer Type	Load Type	Per-Customer Capacity (kW)	Count of Customers	Aggregate Capacity (kW)