



**MASTER PROFESSIONAL SERVICES AGREEMENT**  
**BETWEEN THE**  
**VALLEY CLEAN ENERGY ALLIANCE**  
**AND THE**  
**SACRAMENTO MUNICIPAL UTILITY DISTRICT**

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## **1 PREAMBLE**

This Master Professional Services Agreement (Agreement) is entered into between the VALLEY CLEAN ENERGY ALLIANCE (VCEA), a joint powers authority (JPA) within the State of California organized under Section 6500 *et seq.* of the California Government Code; and the SACRAMENTO MUNICIPAL UTILITY DISTRICT (SMUD), a local publicly owned electric utility within the State of California, acting as a contractor to VCEA. VCEA and SMUD may be referred to herein individually as the “Party” or collectively as the “Parties.”

## **2 EXPLANATORY RECITALS**

- 2.1** WHEREAS, VCEA seeks to develop, finance, implement, and operate a Community Choice Aggregation (CCA) program for its VCEA Members pursuant to Public Utilities Code Section 366.2 *et seq.* (Project);
- 2.2** WHEREAS, VCEA has solicited proposals to provide services related to the Project;
- 2.3** WHEREAS, SMUD submitted a proposal responsive to VCEA’s solicitation;
- 2.4** WHEREAS, SMUD provides many of the same services for its internal business purposes that are required by VCEA and has the ability to leverage these services and expertise to support VCEA;
- 2.5** WHEREAS, VCEA’s core mission and values align with SMUD’s community-owned structure and core mission to deliver cost-competitive clean electricity, product choice, price stability, energy efficiency, and greenhouse gas emission reductions;
- 2.6** WHEREAS, VCEA has selected SMUD to provide specified services set forth herein and related Task Orders to support VCEA’s launch and business operations;
- 2.7** WHEREAS, for purposes of clarity, SMUD is providing services to VCEA solely as a contractor subject to the terms and conditions set forth in this Agreement;
- 2.8** WHEREAS, this Agreement is a master agreement with individual Task Orders in Exhibit A, and as may be agreed to in the future, for different services, which is intended to retain flexibility for current and future services, and to permit the Parties to amend or modify the provisions of specific services without necessarily affecting other services;
- 2.9** WHEREAS, at the Effective Date of this Agreement, the Parties have negotiated Task Orders 1 and 2, and are in the process of negotiating Task Orders 3 and 4, which will be added to the Agreement before the Launch Date.

**NOW THEREFORE**, in view of the understandings set forth in the recitals above, which the Parties acknowledge and agree are accurate representations of the facts, the Parties agree to the terms of this Agreement that set forth the roles, obligations, and responsibilities of each Party to one another.

### 3 DEFINITIONS

The following terms with initial capitalization, whether singular or plural, have the meaning set forth below:

- 3.1 **Bankrupt** means, with respect to either Party, the Party (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.
- 3.2 **CCE Service** means VCEA's CCA program, hereinafter referred to as Community Choice Energy (CCE), to provide electric services to utility end-use customers located within their service area(s) as set forth in California Public Utilities Code Section 366.2 and other California Public Utilities Commission directives.
- 3.3 **CCE Service Request and CCESR** mean requests in a form approved by PG&E to change a CCE service customer's, utility customer's or direct access customer's choice of services which could include returning a CCE Service customer to bundled utility service or direct access service.
- 3.4 **Confidential Information** means: (a) all written materials marked "Confidential," "Proprietary," or with words of similar import provided to a Party by another Party; (b) all observations of equipment (including computer screens) and oral disclosures related to a Party's business, systems, operations, or activities that are indicated as such at the time of observation or disclosure (or is identified as "confidential" or "proprietary" in a letter sent to another Party no later than five (5) calendar days after the disclosure), respectively, and (c) VCEA customer names, account numbers, usage and billing information. Confidential Information includes portions of documents, records, and other material forms or representations that any Party may create, including but not limited to, handwritten notes or summaries that contain or are derived from such Confidential Information.
- 3.5 **Effective Date** means the date upon which the last of the Parties has executed this Agreement.
- 3.6 **Event of Default** means any Party's failure to perform its obligations in accordance with this Agreement as defined in Section 26.



- 3.7 *Launch Date*** means the date upon which VCEA begins providing CCA service to its customers, currently scheduled to be June 1, 2018, but which may be changed based on operational considerations, market conditions, and other factors.
- 3.8 *PG&E*** is the incumbent investor owned Utility Distribution Company.
- 3.9 *Prudent Utility Practice*** means any of the practices, methods and acts engaged in or accepted by a significant portion of the electrical utility industry in the United States of America at the time the decision was made or any of the practices, methods and acts that, in the exercise of reasonable judgment in the light of the facts known or that should reasonably have been known at the time a decision is made, could have been expected to accomplish the desired result at the lowest reasonable cost consistent with law, regulation, permits, codes, standards, equipment manufacturer's recommendations, reliability, safety, environmental protection, economy, and expedition. Prudent Utility Practices is not intended to be limited to the optimum practice, method or act to the exclusion of all others, but rather to be a spectrum of possible practices, methods or acts.
- 3.10 *Scope of Services*** shall mean those services described in the Task Orders to be performed by SMUD, as generally described in Sections 6 and 7, and set forth in more detail in Exhibit A to this Agreement.
- 3.11 *Task Order*** shall mean an individual scope of services, as described in Section 7.
- 3.12 *Uncontrollable Force*** shall mean any cause beyond the control of the Party affected, including but not limited to Act of God, change in law, flood, earthquake, storm, lightning, fire, epidemic, war, riot, civil disturbance, labor disturbance, sabotage, and restraint by court or public authority, which by exercise of due diligence and foresight, such Party could not reasonably have been expected to avoid and that prevents fulfillment of an obligation under this Agreement. Any Party rendered unable to fulfill any obligation by reason of Uncontrollable Force shall exercise commercially reasonable efforts to remove such inability with all reasonable dispatch. Notwithstanding the foregoing, Uncontrollable Force shall not include lack of financial resources, material cost increases, or other economic conditions.
- 3.13 *VCEA Members*** shall mean any and all local government entities that join the VCEA JPA, which are presently the City of Davis, Yolo County, and City of Woodland, and which may be expanded or contracted in accordance with VCEA's JPA Agreement.

## **4 TERM AND TERMINATION**

### **4.1 Effective Date**

The Agreement shall be effective upon the Effective Date.

## **4.2 Term**

- 4.2.1 This Agreement shall remain in effect for five (5) years from the Launch Date, with two options to extend the Agreement each for an additional five-year term by mutual agreement of the Parties, for a maximum total of fifteen (15) years, or until terminated in accordance with Section 4.3 (Termination) or as otherwise agreed in writing by the Parties. Additionally, each Task Order will have its own term, not to exceed the term of the Agreement.
- 4.2.2 The Launch Date currently is scheduled for June 1, 2018. In the event the Launch Date is delayed to October 1, 2018 or later, the Parties shall meet and confer to discuss changes, if any, to the Task Order(s) as a result of a later Launch Date.

## **4.3 Termination**

### **4.3.1 Termination for Convenience**

Notwithstanding the Term, and except for Task Order 3: Wholesale Energy Services (Exhibit A.3), VCEA shall have the option, in its sole discretion, after year three (3) of each Task Order to terminate a Task Order.

Task Order 3 does not have an option to terminate, and can only be terminated by expiration of the term provided in the Task Order or mutual agreement of the Parties.

In the event VCEA exercises its option to terminate a Task Order, VCEA shall provide SMUD written notice of its intent at least one hundred and eighty (180) calendar days before the termination is effective. If VCEA elects termination, the termination will take effect no sooner than Midnight on the eve of the year three anniversary of the Launch Date. The Agreement will continue in effect with respect to any Task Order(s) not terminated. In the event that all Task Orders are terminated, then this Agreement shall be terminated as well.

### **4.3.2 Termination for Delayed Launch**

If VCEA has not launched by December 31, 2018, each Party may terminate this Agreement by giving sixty (60) calendar days' notice. The Parties acknowledge that the expected Launch Date may be delayed for unexpected reasons from the current Launch Date of June 1, 2018 to a later date. The Launch Date is dependent on, among other things, milestones in Task Order 3, which has two phases (Phase I and Phase II). Phase I entails the services necessary to procure wholesale power to begin serving VCEA's customers on the Launch Date. Phase II begins following the Launch Date. If this Agreement is terminated pursuant to this Section 4.3.2 then all Task Orders are terminated as well.

### **4.3.3 Termination for Event of Default**

If an Event of Default occurs, the non-defaulting party shall have a right to terminate this Agreement pursuant to Section 26.



#### 4.3.4 Transition

- 4.3.3.1 In the event of termination of the Agreement or any Task Order, SMUD agrees to work with VCEA to coordinate transfer to VCEA or a VCEA contractor for any or all Task Order services provided under this Agreement.
- 4.3.3.2 Within thirty (30) calendar days after the termination date, SMUD shall submit an invoice to VCEA for all fees, costs, and expenses incurred by SMUD for the Scope of Services rendered up to the effective date of termination.
- 4.3.3.3 In the course of performing the Scope of Services, SMUD may be required to commit to expenditures that will be incurred at a future date after the effective date of termination. In the event of a termination of the Agreement or a Task Order, SMUD and VCEA agree, to the extent reasonably possible, to transfer any such commitments to VCEA, or avoid the cost if a transfer is not feasible or desirable.
- 4.3.3.4 In the event VCEA elects to terminate this Agreement or a Task Order before the expiration of the applicable term, SMUD will submit to VCEA an invoice or invoices at the actual cost for all committed expenditures at the time such costs are incurred, that are not otherwise transferred to VCEA pursuant to section 4.3.3.3. Upon request by VCEA, SMUD will provide supporting documentation and/or invoice(s) for the incurred costs. Such costs shall be paid as provided in the applicable Task Order.

In the event that SMUD elects to terminate this Agreement or a Task Order before termination by VCEA or the expiration of the applicable term, SMUD shall not be entitled to recover any costs related to committed expenditures that are incurred after the effective date of termination and that are not otherwise transferred to VCEA pursuant to section 4.3.3.3.

For avoidance of doubt, this section 4.3.3.4 does not apply to resettlement under Section 23 of this Agreement.

## 5 PRE-CONTRACT ADVANCE WORK

The Parties recognize that SMUD has performed various tasks within the Scope of Services prior to execution of this Agreement to help VCEA meet its expected June 1, 2018 Launch Date. The Parties acknowledge that prior to execution of this Agreement they have agreed in good faith for SMUD to perform such services under an agreement-in-principle (Advance Work). SMUD will track for reimbursement its Advance Work. SMUD's first invoice to VCEA shall include its fees, costs, and expenses to perform the Advance Work, and VCEA shall pay SMUD for this Advance Work pursuant to Section 7 of this Agreement. Prior to execution of the Agreement, SMUD will provide an accounting of all incurred expenses and estimate the costs expected to be incurred by execution of the Agreement.

Notwithstanding the above, if certain services are performed by SMUD in advance of execution of a specific Task Order (e.g. Task Orders 3 and 4) that is executed after the Effective Date of this Agreement, the Parties agree to treat this advance work similarly to the Advance Work above and apply the Task Order execution timeline and estimated costs prior to Task Order approval.

## **6 SCOPE OF SERVICES**

### **6.1 General**

The Parties have structured this Agreement as a master agreement with individual Task Orders for specific services that will be attached to and incorporated into this Agreement in Exhibit A, pursuant to Section 7 below. Requirements and obligations under this Agreement will begin for each Task Order if or when VCEA and SMUD both approve the individual Task Order, at which time the general requirements of this Agreement shall apply to the services in the Task Order. In addition, from time to time, VCEA may require additional services that SMUD may be willing to provide. Additional services may be added to this Agreement through amending the existing Task Orders or entering into a new Task Order that is approved and executed by the Parties.

### **6.2 Prudent Utility Practices**

For all services related to providing utility services, SMUD agrees to use Prudent Utility Practices to perform the applicable Scope of Services set forth in the Task Orders, which are incorporated by reference herein. For all other services in the Task Orders, SMUD agrees to perform services in accordance with generally accepted professional practices and principles and in a manner consistent with commercially reasonable efforts.

### **6.3 Information Assistance**

Upon SMUD's request, VCEA shall provide such information and assistance (including, but not limited to, advice from the VCEA Board and various committees, customer interaction protocol, etc.) available to VCEA as is reasonably required for SMUD to provide the tasks set forth in the Scope of Services. If VCEA fails to provide SMUD with such requested information or assistance then SMUD shall continue to provide in a timely manner any such portion(s) of the affected Task Order that SMUD can reasonably provide to the extent possible in the absence of such information or assistance. Notwithstanding any provision to the contrary herein, failure by VCEA to provide SMUD with such information or assistance shall not constitute an Event of Default; provided, however, that SMUD's performance or lack of performance under this Agreement shall be excused to the extent that it is hindered, prevented, or impacted as a result of VCEA's failure to provide such information or assistance as is reasonably available to VCEA and not otherwise reasonably available to SMUD. In any case, the Parties shall timely inform each other of any such deficiencies in writing and correct such situation(s) as soon as reasonably practicable.



## **6.4 Subcontractors**

The Parties acknowledge and agree that certain services contemplated under this Agreement may be provided by a SMUD subcontractor. Notwithstanding the foregoing, SMUD shall remain responsible for the proper rendering of such services in accordance with this Agreement. Any subcontract for services (excluding power supply under Task Order 3 which are not considered services) that exceeds \$100,000 dollars in a fiscal year (July 1 - June 30) following the Effective Date shall require written notice to and approval by VCEA (to be provided to SMUD in written form), unless already identified within the Task Order as work to be done by a subcontractor. Such approval by VCEA shall not be unreasonably withheld.

## **7 TASK ORDERS**

### **7.1 Task Orders**

Pursuant to the provisions of this Agreement, SMUD shall provide certain Services to VCEA as described and implemented in the Task Orders as set forth in Exhibit A to this Agreement. Subsequent Task Orders shall be executed by the Parties and attached hereto. Each Task Order by this reference is incorporated as part of this Agreement.

### **7.2 Phases of Work**

The Task Orders shall be divided in two separate phases with designated services and time periods (each a "Phase"), and proceed in chronological order, as appropriate. The phases shall be as follows: Phase I (referred to as "Program Development and Launch") and Phase II (referred to as "Program Operations"). Each Task Order contains services for the applicable Phase(s).

### **7.3 Amendments**

Upon mutual agreement of the Parties, Task Orders may be amended, or new Task Orders issued, for additional services. Each Party's governing body may delegate authority to individuals (such as a Board member or staff member) to agree to any amended or new Task Orders.

## **8 COSTS AND COMPENSATION**

VCEA agrees to compensate SMUD for its performance of the Scope of Services in the Task Orders under this Agreement in accordance with the following:



## **8.1 Time and Materials**

For time and materials activities, SMUD will track and record the hours and material costs incurred that are associated with the Task Orders. For fixed fee activities under the Task Orders, the amount is predetermined according to the rates in the applicable Task Order.

A budget reflecting the expected costs for each Task Order is included in Exhibit C, which may be revised from time to time according to the terms of Exhibit C.

## **8.2 Expenses**

SMUD is authorized to pay, and shall pass through without mark-up, any and all regulatory and market expenses incurred by SMUD that are required to enable VCEA to serve as a CCA and participate in regulated and organized markets. These expenses include, but are not limited to, CPUC registration fees, CPUC bond, CAISO registration and market settlement fees, PG&E rates/charges and registration fees, WREGIS registration and fees (Expenses).

## **8.3 Invoice**

SMUD will submit to VCEA an invoice by e-mail and U.S. Mail for such hours, fixed fees, and Expenses. The invoice procedure may vary for each Task Order; as such, the Task Orders shall include the specific invoicing process for that Task Order.

## **8.4 Disputed Invoices**

VCEA shall pay SMUD according to the timeline(s) in each Task Order. VCEA shall give notice to SMUD of any disputed invoice charges before the applicable payment deadline or ten (10) business days, whichever occurs first, in accordance with this Section 8.4. VCEA shall pay all undisputed portions of invoices to SMUD according to the timeline(s) in each Task Order. Upon resolution of the invoice dispute, VCEA shall remit any amount owed with ten (10) calendar days from date of the resolution of the invoice dispute. If the invoice dispute cannot be resolved within a period ending no longer than thirty (30) calendar days of the date on which VCEA notifies SMUD of a dispute or such longer period as the Parties may agree to, then the dispute resolution process in Section 13 shall commence with executive negotiation. Notwithstanding the above, in no event shall payment of any invoice be a waiver of VCEA's rights to challenge an invoiced amount, invoke the dispute resolution proceedings in Section 13, file suit, or otherwise seek recovery of improper billings.

## **8.5 Late Payments**

Late payments of undisputed amounts hereunder shall accrue interest at an annual rate equal to the weekly average one year constant maturity United States Treasury yield at the time of the delinquency plus 2%, but not to exceed 7% per annum, commencing on the first day when such payment is delinquent, or, in the case of disputed amounts, ten (10) calendar days after such dispute is resolved.

## **8.6 Payment Submittal**

Payments will be submitted via electronic wire pursuant to instructions provided by SMUD.

## **8.7 Taxes**

VCEA shall be responsible for and shall reimburse SMUD for any taxes and fees, including, without limitation, sales, use, excise, value added and gross receipts levied in direct relation to SMUD providing the Scope of Services under this Agreement.

## **8.8 Fee Deferment**

Except for payment for Power Supply Contracts in accordance with Task Order 3, all other fees payable to SMUD will be deferred until October 1, 2018 for the Deferment Period. "Deferment Period" means the period of time that includes Advance Work through September 30, 2018. Interest on any deferred payment shall be calculated using a 2.0% per annum interest rate. For all expenses incurred prior to October 1, 2017, interest shall be calculated beginning on Oct. 1, 2017. For all expenses incurred after October 1, 2017, interest shall be calculated from the date when VCEA's payments would have otherwise been due under this Agreement, but for the Deferment Period. All repayments and interest shall be amortized for payment in equal monthly amounts during the 24 month period beginning October 1, 2018.

## **8.9 Performance**

Except for the pre-contract Advance Work performed under Section 5 of this Agreement, SMUD shall be under no obligation to perform services under Task Orders unless VCEA has agreed through execution of the Task Order to pay for the services as set forth in the Task Order or the Parties have agreed through a Task Order to defer payment for the services pursuant to Section 8.8.

# **9 LIMITATION OF LIABILITY**

## **9.1 Direct Damages**

For breach of any provision of this Agreement, the liability of the defaulting party shall be limited to direct damages and each Party agrees to waive all other types of damages to which it might be entitled.

The cumulative maximum amount of SMUD's liability, if any, arising from any and all claims, lawsuits, actions, other legal proceedings by VCEA or any other person or entity arising out of or in connection with SMUD's performance or nonperformance hereunder, whether based upon contract, warranty, tort, strict liability, or any other theory of liability, shall be no more than an aggregate of Five Million Dollars (\$5,000,000 USD) (Liability Cap). Notwithstanding the foregoing, any liability arising from a negligent or wrongful act or omission by SMUD under Section 9.4 shall not apply to the Liability Cap.



## **9.2 Indirect Damages**

Except for liability under Section 9.4 arising from a Party's negligent or wrongful act or omission, in no event shall either Party be liable to the other Party for any consequential, incidental or indirect damages for any cause of action, whether by statute, in contract or tort, under any indemnity provision, or otherwise. Incidental, consequential or indirect damages include, but are not limited to, lost profits or revenues, lost opportunity costs, loss of business opportunity, or other business interruption damages not directly related to the defaulting party's conduct, whether or not the Party was aware or should have been aware of the possibility of such damages.

## **9.3 Risk Management**

The Scope of Services under this Agreement includes specific risk management policies, to be developed and agreed-upon by both Parties after the Effective Date of the Agreement. The Parties intend to develop two risk policies: 1) a VCEA Enterprise Risk Policy, which shall be attached and incorporated herein as Exhibit B to this Agreement, and 2) a Wholesale Power Procurement and Risk Policy included in Task Order 3. The Parties may develop additional risk policies as they see fit, subject to approval of the additional scope of services.

In providing the Scope of Services under this Agreement, in no event shall SMUD be liable to VCEA for losses which VCEA may incur by reason of engaging in risk management strategies recommended by SMUD, whether or not implemented by VCEA, or due to recommendations not made by SMUD in the provision of risk management services. In recommending risk management strategies, SMUD shall use Prudent Utility Practices.

## **9.4 Indemnification**

Subject to the limitations set forth in this Section 9, SMUD and VCEA, to the extent permitted by applicable law, agree to indemnify, hold harmless, and defend the other Party and its respective officers, directors, regents, members, subsidiaries, affiliates, partners, and employees from any and all liabilities, claims, actions, legal proceedings, demands, damages, losses, penalties, forfeitures and suits, and all costs and expenses incident thereto (including, but not limited to, costs of defense, settlements, and reasonable attorneys' fees), and further including damage or injury of any kind, in law or equity, to property or persons, including wrongful death, which the other Party may here after incur, become responsible for, or pay out as a result of any negligent or wrongful act or omission of the indemnifying Party, its employees, officers, directors, or agents in the performance of this Agreement. Neither Party shall be required to indemnify the other Party for liabilities, claims, suits, actions, legal proceedings, demands, damages, penalties, forfeitures and suits, and all costs and expenses incident thereto (including, but not limited to, costs of defense, settlements and reasonable attorneys' fees), to the extent caused by the negligence or wrongful act or omission of the other Party.



It is the intent of the Parties hereto that, where negligence is determined to have been contributory, principles of comparative negligence will be followed and each Party shall bear the proportionate costs of any loss, damage, expense and liability attributable to that Party's negligence.

## **10 CONFIDENTIALITY**

### **10.1 Treatment of Confidential Information**

The Parties recognize that for the purposes of carrying out the Scope of Services, SMUD and VCEA may receive information from each other that is considered Confidential Information. Except as set forth herein, the Parties agree to keep in confidence and not to voluntarily disclose, disseminate, or distribute outside of SMUD and VCEA any Confidential Information or any part thereof, without the prior written permission of the other Party.

### **10.2 Required Disclosure of Confidential Information**

As required by subpoena, the California Public Records Act, or other legal or regulatory law/process, the Parties may be required to disclose Confidential Information. Compliance with a subpoena, request under the California Public Records Act, or other legal or regulatory law/process shall not constitute a breach of this Agreement. If either Party is required to disclose any Confidential Information, the disclosing Party shall notify the other Party in writing as promptly as feasible so that the other Party may, if it so chooses and at its own expense, challenge the disclosure or seek a protective order. The Party challenging the disclosure or seeking a protective order shall be responsible for any costs or attorneys' fees awarded to a prevailing litigant seeking the records in the event that a court awards such costs or fees against the Party maintaining the records. However, disclosure pursuant to a legal requirement shall not constitute a breach of this section.

### **10.3 Destruction of Confidential Information**

Each Party will use commercially reasonable efforts to maintain the confidentiality of the Confidential Information. Within thirty (30) calendar days of termination of this Agreement, or a Task Order, unless directed to retain or return Confidential Information by the other Party, any and all Confidential Information in the possession or control of the receiving Party, its agents, representatives, assigns, employees, and subcontractors shall be destroyed in accordance with this section. Confidential Information contained in system backup media, including but not limited to servers, workstations, laptops, databases and electronic mail backup tapes, need not be returned or destroyed so long as the backup media are maintained in confidence, not readily accessible to unauthorized access, and are overwritten in the ordinary course of business. All paper documents that contain Confidential Information, must be shredded using at least a cross-cut shredder or pulverized.

## **11 COMMUNICATION**

Each Party shall designate a Primary Project Representative with sufficient knowledge about the services provided under this Agreement to serve as the primary point of contact. The Party's Primary Project Representative shall be identified in Appendix 1 to this Agreement. The Primary Project Representative shall be kept apprised of developments relevant to the services being provided. SMUD's Primary Project Representative, or his/her designee, shall attend all VCEA Board meetings, unless previously excused in writing. In addition, SMUD shall make available relevant staff for VCEA Board and advisory committee meetings, as reasonably requested.

## **12 PROPRIETARY INTEREST**

SMUD shall retain sole ownership of any patent, copyright, trade secret, trademark, or service mark that SMUD has developed or acquired outside of providing the services under this Agreement. VCEA acknowledges and agrees that SMUD shall be the sole owner of any intellectual property rights developed by SMUD outside of this Agreement and except as specifically set forth below in this section or by separate written agreement, VCEA is not receiving any license to use any of those intellectual property rights. To the extent VCEA is required to use any of SMUD's intellectual property described above in connection with the matters described in this Agreement and subject to any third-party obligations, then SMUD agrees to negotiate with VCEA for a non-exclusive, non-transferable, limited license to use such intellectual property solely for those purposes.

Any deliverables, including copyright therein, created or developed specifically for VCEA as part of the services rendered under this Agreement that is not otherwise owned by SMUD shall be the sole property of VCEA. Excluding any VCEA Confidential Information, SMUD shall have the right to use any of the deliverables developed by SMUD under this Agreement without restriction or limitation on their use. Nothing contained in this Section 11 shall be construed as limiting or depriving SMUD of its rights to use its basic knowledge and skills to design or carry out other projects or work for itself or others, whether or not such other projects or work are similar to the work to be performed pursuant to this Agreement. Nothing contained in this Agreement shall be deemed to grant either directly or by implication, estoppel, or otherwise any rights under any patents, patent applications, copyrights, or other proprietary interests of any other invention, discovery or improvement of SMUD, other than the specific copyright rights covering Deliverables arising under this Agreement.

## **13 DISPUTE RESOLUTION**

In the event of any dispute regarding the terms, conditions, and performance of this Agreement, the Parties shall attempt in good faith to promptly resolve any such dispute informally by the operating personnel of each Party. If the dispute cannot be settled through such negotiations within a period ending no longer than thirty (30) calendar days of the date on which one Party notifies the other in writing of a dispute or such longer period as the Parties may agree to, the



executive representative(s), or his or her delegate, from each Party, will personally and in good faith seek to resolve the dispute through negotiation (Negotiation Period). If the matter cannot be resolved through the executive negotiation, any Party shall proceed as follows:

### **13.1 Mediation**

At any time during the Negotiation Period, either party may initiate a mediation of the controversy. All negotiations, settlement conferences, compromise discussions, and any mediation conducted pursuant to this clause are non-binding, confidential, and shall be treated as compromise and settlement negotiations.

### **13.2 Arbitration**

In the absence of a voluntary resolution reached after mediation, or at any time after the Negotiation Period, and in the absence of either party electing to initiate mediation, the Parties may mutually agree to submit the dispute for arbitration in accordance with the provisions of this Section and in accordance with the Commercial Arbitration Rules of the American Arbitration Association (Rules). If the Parties agree to arbitration, the arbitration shall be binding and the sole and exclusive dispute resolution mechanism for any disputes subject to the arbitration.

#### **13.2.1 Notice of Arbitration**

Arbitration is commenced by both Parties mutually agreeing in writing to adjudicate a dispute through arbitration. If the Parties can agree on the identity of a single arbitrator, who shall be a neutral, disinterested party with significant experience in the electric power industry, who has never been an officer, director, employee or attorney of either Party, or any of their affiliates and who has a formal financial, accounting or legal education, then that single arbitrator shall decide the dispute. If the Parties are unable to agree upon the identity of a mutually acceptable single arbitrator on or before thirty (30) calendar days after receipt of the Arbitration Demand, then the arbitrator(s) shall be selected in accordance with the applicable Rules. The arbitration shall take place in Sacramento, California and shall be conducted under the Rules. The decision of the arbitrator, or a majority of the arbitrators, if applicable, shall be final and binding. Any judgment on the award rendered by the arbitrator(s) may be entered in any court of competent jurisdiction.

### **13.3 Government Claim Act**

Prior to initiating litigation against the other Party, the complaining Party must comply with all requirements and deadlines of the Government Claim Act, California Government Code Sections 810 *et seq.*; provided, however, that the Negotiation Period shall toll any presentment deadline or statute of limitations.

### **13.4 Continuing Performance Obligations**



While a dispute, controversy, or claim is pending, each Party will continue to perform its respective obligations under the Agreement, unless such Party is otherwise entitled to suspend its performance hereunder or terminate the Agreement in accordance with the terms hereof.

### **13.5 Fees**

Each Party shall bear its own attorney's fees and costs with respect to any dispute. In the event the Parties pursue mediation and/or arbitration, the Parties shall share equally all fees and costs of the mediation or arbitration, the mediator or arbitrator(s), and similar expenses.

## **14 AMENDMENT**

This Agreement may only be amended or otherwise modified with the written agreement of the Parties, and approved by each Party's governing body where required by law or policy.

## **15 RELATIONSHIP OF PARTIES**

### **15.1 Independent Contractor**

SMUD shall perform the Scope of Services as an independent contractor, and SMUD or any of its officers, employees, or agents shall not be treated as an employee of VCEA for federal, state, or local tax purposes, workers' compensation purposes, or any other purpose. The Parties acknowledge and agree that nothing contained in this Agreement shall be deemed to create or constitute an employer-employee relationship, a partnership, or a joint venture between the Parties.

### **15.2 Non-Exclusive Relationship**

VCEA hereby expressly acknowledges that SMUD may provide the same or similar services as contemplated under this Agreement to other entities. However, SMUD's performance of the Scope of Services will not be adversely affected by work for other entities. In addition, the parties agree that VCEA may seek and obtain services from other entities that may supplement or be similar to services that SMUD may provide under this Agreement, so long as VCEA has not contracted with SMUD to provide the same service(s).

## **16 PROHIBITED INTERESTS**

SMUD maintains and warrants that it has not employed nor retained any company or person, other than an employee working solely for SMUD, to solicit or secure this Agreement. Further, SMUD warrants that it has not paid nor has it agreed to pay any company or person, other than an employee working solely for SMUD, any fee, commission, percentage, brokerage fee, gift or other consideration contingent upon or resulting from the award or making of this Agreement. If

required, SMUD further agrees to file, or shall cause its employees or subcontractors to file, a Statement of Economic Interest with VCEA as required under state law in the performance of the Scope of Services. For the term of this Agreement, no director, official, officer or employee of VCEA or its Member Agencies, during the term of his or her service with VCEA, shall have any direct interest in this Agreement, or obtain any present or anticipated material benefit arising therefrom.

SMUD further covenants that, in the performance of this Agreement, no company or person having any interest, direct or indirect, financial or otherwise, which would conflict in any manner or degree with the performance of the Scope of Services under this Agreement shall be employed. SMUD will provide VCEA a list of subcontractors as they are identified.

## **17 GOVERNING LAW**

The rights and obligations of the Parties and the interpretation and performance of this Agreement shall be governed by the laws of the State of California.

## **18 NO THIRD PARTY BENEFICIARIES**

No right or obligation contained in this Agreement shall inure to the benefit of any person or entity not a Party to this Agreement. Nothing in this Agreement shall be construed to create any duty to, any standard of care with reference to, or any liability to any third party.

## **19 ASSIGNMENTS**

VCEA or SMUD may make an assignment of its rights and obligations under this Agreement only after obtaining the written consent of the other Party, which consent may be withheld in the non-assigning Party's sole discretion. A Party's assignee shall expressly assume, in writing, the duties and obligations of such Party under this Agreement and shall immediately furnish or cause to be furnished to the other Party a true and correct copy of the documents evidencing such assignment and assumption of duties and obligations. The assigning Party shall give notice to and provide the other Party with a copy of the documents evidencing such proposed assignment no less than thirty (30) calendar days prior to the proposed effective date of the assignment.



Notwithstanding the general consent requirement above, consent shall not be required in the event of a change in law affecting VCEA's ability to continue providing Community Choice Aggregation. In such a change in law event, VCEA may assign its rights under this Agreement to a VCEA Member Agency. Change in law shall not include a VCEA or VCEA Member Agency policy, resolution, ordinance, or similar action.

## **20 NO EXCLUSIVE REMEDY**

Subject to the provisions of Section 13 (Dispute Resolution), no remedy in this Agreement conferred upon or reserved to any Party is intended to be exclusive of any other remedy or remedies available under this Agreement or existing at law, in equity, by statute, or otherwise, but each and every such remedy shall be cumulative and shall be in addition to every other remedy under this Agreement or now or hereafter existing at law or in equity or otherwise provided by statute. The pursuit by any Party of any specific remedy shall not be deemed to be an election of that remedy to the exclusion of any other or others, whether provided hereunder or at law, in equity, by statute, or otherwise.

## **21 INSURANCE**

SMUD and VCEA shall each at its own expense maintain an insurance program which adequately protects against liabilities and claims arising out of the performance of this agreement. All coverages are to be primary and non-contributory, and with the exception of Workers' Compensation, Employers Liability and Errors & Omissions, shall name the Parties as additional insureds as respects work performed pursuant to or incidental to this Agreement

VCEA acknowledges that SMUD is a self-insured public entity and agrees that SMUD's program of self-insurance fulfills any and all insurance requirements. SMUD shall provide a letter of self-insurance stating that SMUD's self-insurance program adequately protects against liabilities and claims arising out of the performance of this Agreement.

SMUD acknowledges that VCEA is, or will be prior to the Effective Date, a self-insured public entity through the Yolo County Public Agency Risk Management Insurance Authority, a joint powers agency, and agrees that coverage through YCPARMIA fulfills any and all insurance requirements. VCEA shall provide a letter of self-insurance stating that VCEA's self-insurance program adequately protects against liabilities and claims arising out of the performance of this Agreement.

## **22 NO LEGAL SERVICES**

VCEA acknowledges that, with respect to the services rendered or to be rendered by SMUD under this Agreement, SMUD will not provide and has not provided VCEA legal advice. VCEA represents to SMUD that VCEA (i) has obtained and shall obtain legal advice from VCEA's own

legal counsel regarding the legal aspects of any advice given or services performed by SMUD under this Agreement and (ii) has not relied and shall not rely on SMUD for the giving of legal advice. VCEA hereby waives and releases any claim that VCEA may now or hereafter have that VCEA has relied, directly or indirectly, on any advice given by SMUD, or to be given by SMUD, in connection with this Agreement as being in the nature of legal advice, and further waives and releases any claim for damages resulting therefrom.

## **23 RESETTLEMENT**

From time-to-time transactions that may have otherwise been fully completed and settled may be required to be resettled due to market rules (for example markets operated by the California Independent System Operator Corporation, or another Regional Transmission Operator approved by the Federal Energy Regulatory Commission) or order of a court, regulatory authority, or other entity with jurisdiction to order such. If such resettlement related to any transaction, or applicable share of any transaction, performed by SMUD on behalf of VCEA results in a refund to SMUD from a third party, SMUD shall pay to VCEA any such refund, or applicable share of such refund, received by SMUD. If such resettlement related to any transaction performed by SMUD on behalf of VCEA results in SMUD owing an amount to a third party, VCEA shall pay to SMUD any such amount owed by SMUD, or applicable share of such amount, owed by SMUD. Whether such resettlement results in a refund to, or additional amount owed by VCEA, SMUD agrees to provide to VCEA sufficient, timely and reasonable documentation verifying the accuracy and applicability of such resettlement. This provision shall survive the termination of this Agreement.

## **24 UNCONTROLLABLE FORCE**

### **24.1 Performance**

No Party shall be considered to be in default in the performance of any of its obligations when a failure to perform is due to an Uncontrollable Force.

### **24.2 Obligation**

No Party shall be considered to be in default in respect to any obligation hereunder if prevented from fulfilling such obligation by reason of an Uncontrollable Force.

### **24.3 Strike or Labor Dispute**

Nothing contained herein shall be construed to require a Party to settle any strike or labor dispute in which it may be involved.

### **24.4 Written Notice**



In the event a Party is rendered unable to fulfill any of its obligations under this Agreement by reason of an Uncontrollable Force, such Party shall give prompt written notice of such fact the other Party, and describe in detail the efforts made to remove such inability.

## **25 TASK ORDERS, EXHIBITS, SCHEDULES, AND CONTROLLING TERMS**

All Task Orders, exhibits, schedules and related attachments which are attached to this Agreement are incorporated by reference, as if set out in full herein. The provisions of each Task Order including exhibits, schedules and related attachments are subject to the Terms and Conditions of the Agreement between the Parties. If any provisions of any Task Order including any exhibit, schedule or related attachment conflicts or is inconsistent with any provisions in the Agreement, the provisions of the Task Order shall take precedence unless otherwise expressly stated otherwise.

## **26 EVENT OF DEFAULT**

### **26.1 General**

Each of the following shall constitute an “Event of Default” with respect to a Party (the “Defaulting Party”) under this Agreement:

- 26.1.1 the failure to make, when due, any payment or funding obligation required pursuant to this Agreement if such failure is not remedied within ten (10) business days after written notice of such a breach;
- 26.1.2 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;
- 26.1.3 the failure to perform any covenant or obligation set forth in this Agreement if such failure is not remedied within ten (10) business days after written notice of such as breach;
- 26.1.4 a Party becomes Bankrupt.

### **26.2 No Uncontrollable Force.**

If an Event of Default with respect to a Defaulting Party has occurred, and if the Event of Default is not caused by an Uncontrollable Force as described in Section 24 hereof, then the non-defaulting Party shall have the right to (i) suspend performance or payment, (ii) designate an early termination date, or (ii) immediately terminate this Agreement subject to any surviving obligations. Both Parties shall continue to perform their obligations or make payments then due or becoming due with respect to performance or payment obligations which arose prior to the date of termination.

## **27 JUDGMENTS AND DETERMINATIONS**

When the terms of this Agreement provide that an action may or must be taken, or that the existence of a condition may be established, based on a judgment or determination of a Party, such action or judgment shall be exercised or such determination shall be made in good faith and where applicable in accordance with Prudent Utility Practice, and shall not be arbitrary or capricious.

## **28 COMPLIANCE WITH LAW**

Each Party shall be responsible for compliance with all laws or regulations applicable to the Scope of Services being provided under this Agreement. If either Party's activities hereunder become subject to law or regulation of any kind, which renders the activity illegal, unenforceable, or which imposes additional costs on such Party for which the Parties cannot mutually agree upon an acceptable price modification, then such Party shall at such time have the right to terminate this Agreement upon written notice to the other Party with respect to the illegal, unenforceable, or uneconomic provisions only; the remaining provisions of this Agreement will remain in full force and effect. Any such termination shall not constitute a basis for Termination for Event of Default as defined in Section 4.3.3.

## **29 NON-WAIVER**

Any waiver at any time by a Party of its rights with respect to any default or other matter arising in connection with this Agreement shall not constitute or be deemed a waiver with respect to any subsequent default or other matter arising in connection with this Agreement. Any delay short of the statutory period of limitations in asserting or enforcing any right shall not constitute or be deemed a waiver.

## **30 SEVERABILITY**

If any term, covenant, or condition of this Agreement or the application or effect of any such term, covenant, or condition shall be held invalid as to any person, entity, or circumstance, or is determined to be unjust, unreasonable, unlawful, imprudent, or otherwise not in the public interest, by any court or government agency of competent jurisdiction, then such term, covenant, or condition shall remain in force and effect to the maximum extent permitted by law, and all other terms, covenants, and conditions of this Agreement and their application shall not be affected thereby but shall remain in force and effect and the Parties shall be relieved of their obligations only to the extent necessary to eliminate such determination unless a court or governmental agency of competent jurisdiction holds that such provisions are not separable from all other provisions of this Agreement.



### **31 NO DEDICATION OF FACILITIES**

Any undertaking by a Party under any provision of this Agreement is rendered strictly as an accommodation and shall not constitute the dedication of its electric system by the undertaking Party to the public, to the other Party, or to any third party, and any such undertaking by a Party shall cease upon the termination of all such Party's obligations under this Agreement. The electric system of a Party shall at all times be, and remain, in the exclusive ownership, possession, and control of that Party, and nothing in this Agreement shall be construed to give the other Party any right of ownership, possession, or control of such electric system.

### **32 OWNERSHIP AND MAINTENANCE OF RECORDS**

Books, documents, papers, accounting records, and other evidence pertaining to costs incurred shall be maintained by SMUD and made available at all reasonable times during the contract period and for three (3) years from the date of final payment under this Agreement for inspection by VCEA. Subject to Section 11 and excluding any SMUD Confidential Information, all professional and technical documents and information developed specifically for VCEA under this Agreement, and all work products, including writings, work sheets, reports, and related data, materials, copyrights and all other rights and interests therein ("Work Products"), shall become the property of VCEA, and SMUD agrees to deliver and assign the foregoing to the VCEA upon completion of the services hereunder or upon any earlier termination of this Agreement; provided, however that SMUD has received full payment from VCEA for such services. . Excluding any VCEA Confidential Information, SMUD shall have the right to use any of the Work Products developed by SMUD under this Agreement without restriction or limitation on their use. In addition, data particular to VCEA prepared or obtained under this Agreement shall be made available to the VCEA without restriction or limitation on their use.

### **33 AUDIT RIGHTS**

During the term of this Agreement, and for three (3) years following the effective date of termination, each Party may audit the other Party's books and records for the sole purpose of verifying the calculation of payments made or received, including the calculation of pricing or compensation due pursuant to this Agreement. Any such audit shall be conducted at the audited Party's offices during its normal business hours, at the auditing Party's own expense. The auditing Party shall be responsible for the audited Party's expenses to accommodate such audit.

Each Party shall maintain the confidentiality of the other Party's accounting records and supporting documents in compliance with Section 9 (Confidentiality) of this Agreement and shall use them only for the purpose of confirming the accuracy of billings and payments under this Agreement.

### **34 NOTICES**

Any notice, demand, or request in accordance with this Agreement, shall be in writing and shall be deemed properly served, given, or made if delivered in person or sent by first class United States mail postage prepaid, by confirmed electronic facsimile, or by prepaid commercial courier service to a Party via its representative or alternate representative at the address set forth in Appendix 1, unless otherwise provided in this Agreement. Any Party may at any time change the designation or address of a person specified in Appendix 1 upon written notice to the other Party designated for such notice. Such a change to Appendix 1 shall not constitute an amendment to this Agreement.

### **35 PRESERVATION OF OBLIGATIONS**

Upon termination of this Agreement, all unsatisfied obligations of each Party shall be preserved until satisfied.

### **36 APPENDICES AND EXHIBITS MADE PART OF AGREEMENT**

Referenced Appendices and Exhibits shall become a part of this Agreement; however, may be amended as provided individually therein. The initial Appendix 1 and Exhibits A-C are attached hereto, and shall be in force and effect in accordance with their respective terms until superseded by a subsequent appendix or exhibit or modified in accordance with this Agreement and the terms thereof.

### **37 MULTIPLE COUNTERPARTS**

This Agreement and any exhibit or appendix may be executed in two or more counterparts, each of which is deemed an original, but all constitute one and the same instrument.

### **38 SIGNATURE CLAUSE**

The signatories to this Agreement represent that they have been appropriately authorized to enter into this Agreement on behalf of the Party for whom they sign.



IN WITNESS THEREOF, the Parties have executed this Agreement and it is effective as of the Effective Date set forth in Section 4.1.

**VALLEY CLEAN ENERGY ALLIANCE**

**By:**



**Name:**

Don Saylor

**Title:**

Board chair

**Date:**

10/25/17

**Approved as  
to Form:**



VCEA Legal Counsel

**SACRAMENTO MUNICIPAL UTILITY DISTRICT**

**By:**



**Name:**

Arlen Orchard

**Title:**

Chief Executive Officer & General  
Manager

**Date:**

10/20/17

**Approved as  
to Form:**



SMUD Legal Counsel

## Appendix 1 – Notices

### **Sacramento Municipal Utility District**

#### *Primary Project*

##### *Representative*

Name:	Victoria Zavattero
Title:	Director, Research & Development
Company:	SMUD
Address:	6301 S Street, M.S. A277
City/State/Zip Code:	Sacramento, CA 95817
Email Address:	<a href="mailto:Victoria.zavattero@smud.org">Victoria.zavattero@smud.org</a>
Phone:	916-732-5413

#### *Alternate Project*

##### *Representative*

Name:	Michelle Yung
Title:	Senior Project Manager, Research & Development
Company:	SMUD
Address:	6301 S Street, M.S. A277
City/State/Zip Code:	Sacramento, CA 95817
Email Address:	<a href="mailto:Michelle.yung@smud.org">Michelle.yung@smud.org</a>
Phone:	916-732-6526

### **Valley Clean Energy Alliance**

#### *Primary Project*

##### *Representative*

Name:	Mitch Sears
Title:	Interim General Manager
Company:	Valley Clean Energy Alliance
Address:	23 Russell Blvd.
City/State/Zip Code:	Davis, CA 95616
Email Address:	<a href="mailto:msears@cityofdavis.org">msears@cityofdavis.org</a>
Phone:	530-757-5610

#### *Alternate Project*

##### *Representative*

Name:	Eric May
Title:	Interim General Counsel
Company:	Valley Clean Energy Alliance
Address:	625 Court Street
City/State/Zip Code:	Woodland, CA 95695
Email Address:	<a href="mailto:eric.may@yolocounty.org">eric.may@yolocounty.org</a>
Phone:	530-666-8278

This Appendix 1 may be updated as needed by either Party. Any changes will be provided to all individuals listed herein. Email may be used to communicate the revisions.