



MEETING DATE: 4/4/11  
ITEM NO: 8

## COUNCIL AGENDA REPORT

DATE: MARCH 29, 2011

TO: MAYOR AND TOWN COUNCIL


FROM: GREG LARSON; TOWN MANAGER 

SUBJECT: SOLAR POWER PURCHASE AGREEMENT

- A. AUTHORIZE THE TOWN MANAGER TO EXECUTE A SOLAR POWER PURCHASE AGREEMENT BETWEEN THE TOWN OF LOS GATOS AND FRESH AIR ENERGY-II, LLC. IN ORDER TO PROVIDE SOLAR POWER FOR THE TOWN SERVICE CENTER AT 41 MILES AVENUE, AND THE POLICE OPERATIONS BUILDING AT 15900 LOS GATOS BOULEVARD.
- B. AUTHORIZE THE TOWN MANAGER TO EXECUTE FUTURE AMENDMENTS TO THE POWER PURCHASE AGREEMENT THAT DO NOT EXTEND THE TERM OF THE AGREEMENT OR RESULT IN A RATE INCREASE OF MORE THAN 1%.

### RECOMMENDATION:

1. Authorize the Town Manager to execute a solar power purchase agreement between the Town of Los Gatos and Fresh Air Energy-II, LLC. in order to provide solar power for the Town Service Center at 41 Miles Avenue, and the Police Operations Building at 15900 Los Gatos Boulevard.
2. Authorize the Town Manager to execute future amendments to the power purchase agreement that do not extend the term of the agreement or result in a rate increase of more than 1%.

  
PREPARED BY: TODD CAPURSO  
Director of Parks and Public Works

Reviewed by: PSD Assistant Town Manager Q Town Attorney \_\_\_\_\_ Clerk Administrator  
64 Finance \_\_\_\_\_ Community Development

BACKGROUND:

In early 2010 the Town of Los Gatos along with Santa Clara County, VTA, South Bay Waste Management Authority, the cities of Mountain View, Milpitas, Cupertino, and Morgan Hill, conducted a group procurement process to select a provider for a solar Power Purchase Agreement (PPA). A solar PPA allows a facility to install solar panels with no capital investment and purchase power directly from the solar provider in lieu of PG&E. The advantages of a PPA include a known fixed cost for energy over a 20 year period, substantial energy cost savings, and use of renewable energy. The purchasing power of this large group worked to the participants' advantage, with prices coming in 10-14% below market rates.

Four town-owned sites were evaluated as potential PPA sites: the Town Service Yard at 41 Miles Avenue, the Adult Recreation Center at 208 East Main Street, the Police Operations Building at 15900 Los Gatos Boulevard, and the parking lot at Oak Meadow Park. Of these four sites, two were determined to be viable sites, the Service Yard, and the Police Operations Building.

- The Adult Recreation Center was determined to have shading issues and space limitations that were too costly to mitigate.
- Oak Meadow Park was eliminated because the installation and operation costs did not support a strong economic incentive model for the solar provider. Although this site did not provide a business model suitable for a PPA, the Town may want to consider this site for its own solar installation in the future.
- The Police Operations building installation is proposed as a roof-top system.
- The Service Yard system will be installed on top of the existing vehicle canopy.

DISCUSSION:

Staff recommends pursuing a solar power purchase agreement for the Police Operations Building and the Service Yard. It is estimated that these new panels will provide at least 75% of the electrical power needs for these sites, and will result in a 20-year energy cost savings of approximately \$280,000 (using conservative estimates). This savings estimate is based on the proposed solar rate, current energy use for these sites, and a PG&E rate escalation of 4.5% per year. If approved, the installation of the panels is projected to be complete by November 2011.

The power purchase agreement, by nature of the type of agreement, has some terms that may differ from a standard purchase contract. The main terms of this agreement are highlighted below:

- Term of agreement – The term of the agreement is 20 years. After the initial term, the Town has the option to renew for an additional 5 years. After 10 years, the Town may elect to purchase the generating facility equipment at a price equal to the fair market value at that point in time.

DISCUSSION (cont'd.):

- Termination – The Town has the option to terminate the agreement at any time after the commercial operation date. Termination during the first 10 years of the agreement is subject to a significant termination fee. The agreement contains a table that outlines the termination fee for each year. Termination provisions are also included for the period prior to construction, for events that would impact the proposed energy price, as well as unanticipated environmental review requirements.
- Deposit – In order to ensure that adequate funds are available for the removal of the generation equipment and the remediation of the site following expiration or termination of the agreement, Fresh Air Energy-II will make deposits into a removal fund throughout the life of the contract.
- Payment and Performance – The Town will pay for the energy generated by the solar panels. At times when the panels generate more energy than can be used, the Town will receive credit from PG&E that will then off-set energy use during times when the panels are not providing electricity (nights, cloudy days). Once every three years, a reconciliation of energy production will be performed. If during that three year period less than 80% of the expected annual contract quantity is delivered via the solar panels, Fresh Air Energy-II will pay the town any difference between the solar rate and the PG&E rate for the amount of the shortfall.
- Site access – A site access agreement is included within the power purchase agreement to ensure that Fresh Air Energy – II has access to their equipment for maintenance and repair.
- Renewable Energy Credits (RECs) – The Town will keep the renewable energy credits associated with the production of solar power at these sites.

CONCLUSION:

Staff is recommending that the Town Council authorize the Town Manager to execute the power purchase agreement between Town of Los Gatos and Fresh Air Energy-II LLC., and authorize the Town Manager to execute future amendments to the power purchase agreement that do not extend the term of the agreement or result in a rate increase of more than 1%.

ENVIRONMENTAL ASSESSMENT:

This action is not a project defined under CEQA, and no further action is required.

PAGE 4  
MARCH 29, 2011  
MAYOR AND TOWN COUNCIL  
SUBJECT: SOLAR PURCHASE POWER AGREEMENT

FISCAL IMPACT:

There are no immediate fiscal impacts associated with this agreement. However, there is a projected energy cost savings of approximately 15%, or \$280,000 for the two sites identified over the duration of the agreement. This on-going energy savings will be reflected in future operating budgets.

Attachments:

1. Solar Power Purchase Agreement between the Town of Los Gatos and Fresh Air Energy-II LLC.
2. Estimated cost savings per site.
3. Proposed solar panel layouts for 41 Miles Avenue and 15900 Los Gatos Boulevard .



**SOLAR POWER PURCHASE AGREEMENT  
BETWEEN  
TOWN OF LOS GATOS  
AND  
FRESH AIR ENERGY II – LLC.**

**TOWN OF LOS GATOS**  
**POWER PURCHASE AGREEMENT**

**TABLE OF CONTENTS**

ARTICLE 1: DEFINITIONS.....	2
ARTICLE 2: TERM .....	9
ARTICLE 3: ENGINEERING AND CONSTRUCTION REQUIREMENTS.....	12
ARTICLE 4: DELIVERY OF POWER, METERING & MONITORING.....	17
ARTICLE 5: BILLING AND PAYMENT.....	23
ARTICLE 6: DEPOSIT REQUIREMENTS .....	24
ARTICLE 7: SELLER’S ADDITIONAL OBLIGATIONS .....	25
ARTICLE 8: FORCE MAJEURE.....	31
ARTICLE 9: REMOVAL.....	33
ARTICLE 10: DISPUTE RESOLUTION .....	33
ARTICLE 11: DEFAULT & REMEDIES .....	34
ARTICLE 12: REPRESENTATIONS, WARRANTIES AND COVENANTS .....	39
ARTICLE 13: ASSIGNMENT AND FINANCING .....	42
ARTICLE 14: OTHER TERMS & CONDITIONS .....	43

**TOWN OF LOS GATOS**  
**POWER PURCHASE AGREEMENT**

This agreement ("Agreement" or "PPA"), by and between **TOWN OF LOS GATOS** (hereafter referred to as "Buyer") and **FRESH AIR ENERGY – II, LLC.** (hereafter referred to as "Seller") is effective April 4, 2011 ("Effective Date").

**RECITALS**

- A. Buyer wishes to meet its power requirements cost effectively, efficiently and in an environmentally-friendly manner;
- B. Buyer has solicited proposals from persons, firms, organizations, and/or other legal entities to provide such power from renewable resources in a cooperative/joint solicitation led by the Town of Los Gatos;
- C. Seller is in the business of designing, constructing and operating solar photovoltaic ("PV"), fuel cell or hybrid electric generating systems for the purpose of selling power generated by the systems to its customers;
- D. Buyer has selected Seller to design, construct, own and operate a solar PV, fuel cell or hybrid generating system to be located on its property subject to the terms, conditions, covenants and provisions set forth herein;
- E. Seller intends to construct, own, and operate renewable energy-powered generating facilities and desires to sell electricity produced by such generating facilities together with other attributes to Buyer pursuant to the terms, conditions, covenants and provisions set forth herein;
- F. Buyer desires to purchase electricity generated by Seller's generating facility, together with all Environmental Attributes pursuant to the terms and conditions set forth herein;

NOW, THEREFORE, in consideration of the mutual promises contained herein and other valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

## ARTICLE 1: DEFINITIONS

References in the Agreement to the terms or phrases below shall have the meanings as set forth in this Article. In the event of a conflict between the information in this Article and any more specific provision of the Agreement, the more specific provision shall control.

- 1.1 “Adjusted Delivered Energy” means the sum of (i) the Delivered Energy from the Generating Facility and (ii) any Energy that would have been delivered if the Seller had not been directed by the Buyer to reduce the Delivered Energy from the Generating Facility.
- 1.2 “Affiliate” means, with respect to any specified Person, any other Person directly or indirectly controlling or controlled by such specified Person.
- 1.3 “Agreement” has the meaning set forth in the preamble of this Agreement.
- 1.4 “Annual Escalation Adjustment” means the (3%) increase to be applied commencing on the first anniversary date of the Commercial Operation Date, and every anniversary date thereafter during the Term, as described in Exhibit 4 [Base Contract Price].
- 1.5 “Business Day” means a normal working day excluding weekends and holidays.
- 1.6 “Base Contract Price” means the price in \$U.S. per kWh to be paid by Buyer to Seller for the purchase of the Adjusted Delivered Energy, as specified in Article 4 and Exhibit 4 [Base Contract Price].
- 1.7 “Buyout Option” or “Purchase Option” means the option that Seller grants to Buyer pursuant to Article 2.3 to terminate this Agreement and purchase a Generating Facility.
- 1.8 “Buyer Address for Payments” means the address to which invoices to the Buyer should be sent, currently: 110 East Main Street, Los Gatos, CA 95031.  
“Buyer Address for Notices” means the addresses to which notices to the Buyer should be sent as set forth in Article 14.
- 1.10 “California Solar Initiative” means the program providing ratepayer funded incentives for eligible solar energy systems adopted by the PUC and implemented through chapter 8.8 (commencing with Section 25780) to Division 15 of the California Public Utilities Code.
- 1.11 “Commercial Operation” means that: (i) the Generating Facilities have been constructed in accordance with Prudent Industry Practice, all Permits, Requirements of Law, the specifications set forth in Exhibit 2 [Description of Generating Facilities] and Exhibit 11 [Engineering & Construction Requirements] and (ii) Seller has successfully completed the Commissioning Tests.
- 1.12 “Commissioning Tests” means the tests set forth in Section 7.9.

- 1.13 "Commercial Operation Date" means the date on which Commercial Operation first occurs and the Generating Facilities commence generating electricity for sale to the Buyer at the Project Sites.
- 1.14 "Contract Capacity" means the maximum instantaneous output of the Generating Facility in kilowatts measured at the Delivery Point.
- 1.15 "Contract Year" means each year beginning on January 1st and ending on December 31st of such year following the Commercial Operation Date; provided, however, that the first Contract Year shall commence on the Commercial Operation Date and end on the following December 31st, and the last Contract Year shall end on the relevant anniversary of the Commercial Operation Date as set forth in Section 2.2.
- 1.16 "Days" unless otherwise specified, shall mean calendar days.
- 1.17 "Delivered Energy" the amount of energy delivered by Seller as recorded by Seller's Meters.
- 1.18 "Delivery Point" means the metering point at the high side of the transformer for each Generating Facility..
- 1.19 "EA Agency" means any local, state or federal entity, or any other Person, that has responsibility for or jurisdiction over a program involving transferability of Environmental Attributes, including the Clean Air Markets Division of the United States Environmental Protection Agency, the California Resources, Conservation and Development Commission, the California Public Utilities Commission, and any successor agency thereto.
- 1.20 "Energy" means the electricity generated by each Generating Facility pursuant to this Agreement, as expressed in units of kWh.
- 1.21 "Environmental Attributes" means any and all credits, benefits, emissions reductions, offsets, and allowances, howsoever entitled, attributable to the generation from the Generating Facilities, and its displacement of conventional energy generation. Environmental Attributes including but not limited to: (i) any avoided emissions of pollutants to the air, soil or water such as sulfur oxides (Sox), nitrogen oxides (NOx), carbon monoxide (CO) and other pollutants; (ii) any avoided emissions of carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>) and other greenhouse gases that have been determined by the United Nations Intergovernmental Panel on Climate Change to contribute to the actual or potential threat of altering the Earth's climate by trapping heat in the atmosphere; and (iii) the reporting rights to these avoided emissions such as Green Tag Reporting Rights.
- 1.22 "Environmental Attributes Reporting Rights" means all rights to report ownership of the Environmental Attributes to any Person, including under the Energy Policy Act of 1992, and any regulations promulgated thereof.

- 1.23 “Environmental Laws” shall mean and include all federal, state and local laws, statutes, ordinances, regulations, resolutions, decrees and/or rules now or hereinafter in effect, as may be amended from time to time, and all implementing regulations, directives, orders, guidelines, and federal or state court decisions, interpreting, relating to, regulating or imposing liability (including, but not limited to, response, removal, remediation and damage costs) or standards of conduct or performance relating to industrial hygiene, occupational health, and/or safety conditions, environmental conditions, or exposure to, contamination by, or clean-up of, any and all Hazardous Materials, including without limitation, all federal or state superlien or environmental clean-up statutes.
- 1.24 “Existing Financial Incentives” means (i) the ITC and any tax deductions or other benefits under the Internal Revenue Code or applicable state law available as a result of the ownership and operation of the Generating Facilities or the Output generated by the Generating Facilities (including without limitation tax credits, accelerated depreciation, or bonus depreciation) that are in effect on the Effective Date and (ii) any other financial incentives that result from the ownership and operation of the Generating Facilities or the Output that are in effect on the Effective Date.
- 1.25 “Expected Annual Contract Quantity” means the amount of Delivered Energy and Environmental Attributes that Seller expects to deliver to Buyer hereunder in a given Contract Year other than the first and last Contract Years (which may be partial years and therefore subject to a pro-rata adjustment), as set forth in Exhibit 5 [Expected Contract Quantity Form].
- 1.26 “Expected Commercial Operation Date” means the date on which the Parties expect the Generating Facilities to achieve Commercial Operation, established in accordance with Section 3.7.
- 1.27 “Financing Party” means, as applicable (i) any Person (or its agent) from whom Seller (or an Affiliate of Seller) leases the Generating Facility, or (ii) any Person (or its agent) who has made or will make a loan to or otherwise provide financing to Seller (or an Affiliate of Provider) with respect to the System.
- 1.28 “Force Majeure Event” has the meaning set forth in Article 8.
- 1.29 “GAAP” means Generally Accepted Accounting Principles in the United States of America that is consistently applied.
- 1.30 “Generating Facilities” means Seller’s electricity generating facilities as more particularly described in Exhibit 2 [Description of Generating Facilities], excluding the Sites, land rights, and interests in land.
- 1.31 “Governmental Authority” means any federal or state government, or political subdivision thereof, including, any municipality, township or county, or any entity or authority exercising executive, legislative, judicial, regulatory or administrative

functions of or pertaining to government, including, any corporation or other entity owned or controlled by any of the foregoing.

- 1.32 "Green Tag Reporting Rights" are the right of a Green Tag purchaser to report the ownership of accumulated Green Tags in compliance with federal or state law, if applicable, and to a federal or state agency or any other party at the Green tag purchaser's discretion, and include those Green Tag Reporting Rights accruing under Section 1605(b) of The Energy Policy Act of 1992 and any present or future federal, state, or local law, regulation or bill, and international or foreign emissions trading program. "Green Tags" are accumulated on MWh basis and one Green Tag represents the Environmental Attributes associated with one (1) MWh of energy.
- 1.33 "Hazardous Substances" shall mean any and all (a) substances, products, by-products, waste, or other materials of any nature or kind whatsoever which is or becomes listed, regulated or addressed under any Environmental Laws, and (b) any materials, substances, products, by-products, waste, or other materials of any nature or kind whatsoever whose presence in and of itself or in combination with other materials, substances, products, by-products, or waste may give rise to liability under any Environmental Law or any statutory or common law theory based on negligence, trespass, intentional tort, nuisance, strict or absolute liability or under any reported decisions of any state or federal court; and (c) any substance, product, by-product, waste or any other material which may be hazardous or harmful to the air, water, soil, environment or affect industrial hygiene, occupational health, safety and/or general welfare conditions, including without limitation, petroleum and/or asbestos materials, products, by-products, or waste.
- 1.34 "Interconnection" means the interconnection of the Generating Facilities with the Transmission System, including construction, installation, operation, and maintenance of all Interconnection Facilities.
- 1.35 "Interconnection Agreement" means the agreement between Seller, the Transmission Provider, and if applicable, the ISO which sets forth the terms and conditions for Interconnection of the Generating Facilities to the Transmission System, as amended from time to time.
- 1.36 "Interconnection Facilities" means all of the facilities installed for the purpose of interconnecting the Generating Facilities to the Transmission System, including transformers and associated equipment, relay and switching equipment and safety equipment.
- 1.37 "Interest Rate" means the interest rate applicable for refunds calculated pursuant to 18 C.F.R. Section 35.19a of the FERC Regulations, as that section may be amended or superseded from time to time. The monthly interest rate shall be prorated by days from the date a payment is due until the date a payment is received.

- 1.38 "Investment Tax Credit" or "ITC" means the energy credit under Section 48 of the Internal Revenue Code
- 1.39 "kWh" means one kilowatt of electricity supplied for one hour.
- 1.40 "Lender(s)" means any Person(s) extending credit to Seller to finance the construction of the Generating Facilities.
- 1.41 "Material Change," in the context of a Generating Facilities, means a change which significantly changes the size, weight, generating capacity, technology or the footprint of the Generating Facilities.
- 1.42 "Mechanical Completion" means when (i) installation of all necessary components and systems of the Generating Facilities (except for completion of painting, final grading, and similar portions of the construction work not affecting the operability, safety, or mechanical and electrical integrity of the Generating Facilities) has been completed; (ii) the Generating Facilities are mechanically and electrically sound; and (iii) the Generating Facilities are ready for initial operation, adjustment, and testing.
- 1.43 "Meter" or "Meters" means the physical metering devices, data processing equipment and apparatus associated with the meters owned by Seller or Transmission Provider or its designee, and used to determine the quantities of Energy generated by each Generating Facility and to record other related parameters required for the reporting of data to Seller.
- 1.44 "Metered Energy" means the amount of Energy measured at the Meter for each Generating Facility, including any adjustments programmed into the Meter for distribution losses after the Delivery Point.
- 1.45 "Monitoring System" means physical devices, data processing equipment and apparatus associated with real-time monitoring of the quantities and quality of energy generated by each Generating Facility and complying with all requirements of Article 4. The Monitoring System shall meet or exceed PG&E monitoring and reporting standards.
- 1.46 "MW" means one megawatt of electric energy.
- 1.47 "MWh" means one megawatt of electricity supplied for one hour.
- 1.48 "Option Price" has the meaning set forth in Section 2.3.
- 1.49 "Outage" means a physical state in which all or a portion of the Generating Facilities is unavailable to provide Energy to the Delivery Point, including any reduction in the capacity of the Generating Facilities, and including tilting the photovoltaic panels away from the configuration set forth in the most recent approved as built drawings, whether planned or unplanned.



- 1.50 "Output" means (i) the Contract Capacity, or (ii) associated Energy produced by Generating Facility, as applicable.
- 1.51 "Parties" means Buyer and Seller, and each such Party's respective successors and permitted assignees.
- 1.52 "Party" means Buyer or Seller, and each such Party's respective successors and permitted assignees.
- 1.53 "Permits" means, collectively, all federal, state or local authorizations, certificates, permits, licenses, and approvals required by any Governmental Authority for the construction, ownership, operation and maintenance of the Generating Facilities.
- 1.54 "Person" means an individual, a corporation, a partnership, a joint venture or any other form of business association.
- 1.55 "PG&E" means the Pacific Gas and Electric Company.
- 1.56 "Preliminary Requirements" has the meaning set forth in Article 3.
- 1.57 "Project Site(s)" or "Sites" means the real property, on which the Generating Facilities are to be built and located.
- 1.58 "Prudent Industry Practice" means those practices, methods and equipment, as changed from time to time, that: (i) when engaged in, or employed, are commonly used in the State of California in prudent electrical engineering and operations to operate electricity equipment lawfully and with safety, reliability, efficiency and expedition; or (ii) in the exercise of reasonable judgment considering the facts known, when engaged in could have been expected to achieve the desired result consistent with applicable law, safety, reliability, efficiency, and expedition. Prudent Industry Practices are not limited to an optimum practice, method, selection of equipment or act, but rather are a range of acceptable practices, methods, selections of equipment or acts.
- 1.59 "Renewable Energy Credit" has the meaning set forth in California Public Utilities Code section 399.12(h) as may be amended from time to time or as further defined or supplemented by applicable law.
- 1.60 "Replacement Price" shall mean, at Buyer's sole discretion, the price at which Buyer, acting in a commercially reasonable manner, purchased or purchases a replacement for any Adjusted Delivered Energy required to be, but not delivered by Seller hereunder, plus costs reasonably incurred by Buyer in purchasing such substitute electricity, and additional transmission and distribution charges, if any, reasonably incurred by Buyer, to the Delivery Point.
- 1.61 "Requirements of Law" means, collectively, any federal or state law, treaty, franchise, rule, regulation, order, writ, judgment, injunction, decree, award or

determination of any arbitrator or a court or other Governmental Authority, in each case applicable to or binding upon Seller or Buyer or any of their property or to which Seller or Buyer or any of their respective properties are subject.

- 1.62 "Right of Access" means the Right of Access(es) described in Exhibit 8 of this Agreement, and which is to be executed by Seller and the Buyer for use of the Project Sites for the construction and operation of the Generating Facilities.
- 1.63 "Schedule" "Scheduled" 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 of Energy to be delivered for each interval on any given day on which the delivery of Energy is scheduled to occur during the Term at the Delivery Point.
- 1.64 "Seller" means Fresh Air Energy – II, LLC, the entity that has executed this Agreement as of the date hereof. Seller shall have the meaning set forth in the preamble. For purposes of access rights and other rights necessary for Seller to perform its obligations hereunder, the term "Seller" shall include Seller's authorized agents, contractors and subcontractors. The term "Contractor" may be used in place of the term "Seller."
- 1.65 "Seller Address" means: 650 Townsend Street, Ste. 310, San Francisco, CA 94103.
- 1.66 "Sites" has the same meaning as "Project Sites"
- 1.67 "Seller's Project Management Team" means individuals identified by Seller as responsible for oversight and contract management of all phases of project design/build, operations, maintenance, verification and billing account management.
- 1.68 "Taxes" means any federal, state, local or foreign income, gross receipts, license, payroll, employment, excise, severance, stamp, occupation, premium, windfall profits, environmental, customs duties, capital stock, franchise, profits, withholding, social security (or similar), unemployment, disability, real property (including assessments, fees or other charges based on the use or ownership of real property), personal property, transactional, sales, use, transfer, registration, value added, alternative or add on minimum, estimated tax, or other tax of any kind whatsoever, or any liability for unclaimed property or escheatment under common law principles, including any interest, penalty or addition thereto, whether disputed or not, including any item for which liability arises as a transferee or successor-in-interest.
- 1.69 "Term" has the meaning set forth in Article 2.
- 1.70 "Transmission Provider" means any entity or entities responsible for the interconnection of each Generating Facility (e.g. PG&E) with a Control Area or

distributing or transmitting Energy on behalf of Seller from each Generating Facility to the Delivery Point, and on behalf of the Buyer from the Delivery Point.

- 1.71 "Transmission Provider Tariffs" means the duly authorized tariff, rules, schedules, protocols and other requirements of the Transmission Provider, as these may be amended from time to time.
- 1.72 "Transmission System" means the facilities used for the distribution and transmission of electricity, including any modifications or upgrades made to such facilities, owned or operated by the Transmission Provider
- 1.73 "WREGIS" means the Western Renewable Energy Generation Information System or any successor renewable energy tracking program.

## **ARTICLE 2: TERM**

- 2.1 Term: The term of the Agreement shall commence on the Effective Date and shall continue for twenty (20) years from the Commercial Operation Date of the applicable Generating Facility ("Initial Term"), unless and until terminated earlier pursuant to the provisions of the Agreement. After the Initial Term, the Agreement may renew for additional five year terms ("Renewal Terms"), if a written request for renewal is given by the Buyer at least one hundred eighty (180) days prior to the expiration of the Initial Term. The parties shall confer and agree on a schedule for the Price, Escalation Rate, the Expected Annual Contract Quantity and termination and amendment procedure for any Renewal Term. The remainder of the terms and conditions shall remain substantially the same for the Renewal Term as for the Initial Term. If Seller consents to renewal, it shall provide written notice of consent to the renewal within sixty (60) days of the date of the request by Buyer. If consent by Seller is not provided within such sixty (60) day period, the Agreement shall expire as of the last day of the Initial Term. No later than 60 days after Seller provides such consent, Buyer shall confirm to Seller in writing of its intent to proceed with its option to renew. In the event Buyer does not provide such confirmation, the Agreement shall expire as of the last day of the Initial Term. Upon expiration of the Initial or Renewal Term, Seller shall cause the applicable Generating Facility to be removed from the Buyer's Sites pursuant to Article 9.
- 2.2 This Agreement (including all terms and conditions) shall apply to each Generating Facility described in Exhibit 2 as if separately executed for each such Generating Facility.
- 2.3 Purchase Option.

After the ten (10) year anniversary of the Effective Date, so long as a Buyer Default shall not have occurred and be continuing, Buyer has the option to purchase the Generating Facility for a purchase price (the "Option Price") equal to

the Fair Market Value of the Generating Facility at the date of the purchase. To exercise its purchase option, Buyer shall, not less than one hundred and eighty (180) days prior to the proposed purchase date ("Purchase Date"), provide written notice to Seller of Buyer's intent to exercise its option to purchase the Generating Facility on such Purchase Date. Within thirty (30) days of receipt of Buyer's notice, Seller shall specify the Option Price, and Buyer shall then have a period of sixty (60) days after notification to confirm or retract its decision to exercise the purchase option or to dispute the determination of the Fair Market Value of the Generating Facility. In the event Buyer confirms its exercise of the purchase option in writing to Seller (whether before or after any determination of the Fair Market Value determined pursuant to Section 2.4), (i) the Parties shall promptly execute all documents necessary to (A) cause title to the Generating Facility to pass to Buyer on the Purchase Date, free and clear of any Liens, and assign all vendor warranties for the Generating Facility to Buyer, and (ii) Buyer shall pay the Option Price to Seller on the Purchase Date, such payment to be made in accordance with any previous written instructions delivered to Buyer by Seller or Seller's Financing Party, as applicable, for payments under the Agreement. Upon execution of the documents and payment of the Option Price, in each case as described in the preceding sentence, the Agreement shall terminate automatically. In the event Buyer retracts its exercise of, or does not timely confirm, the purchase option, the provisions of the Agreement shall be applicable as if the Buyer had not exercised any option to purchase the Generating Facility.

#### 2.4 Determination of Fair Market Value.

If Buyer disputes Seller's Option Price as not reflecting the Fair Market Value of the Generating Facility, then, within thirty (30) days of receipt of notification of the Option Price from Seller, the Parties shall mutually select an independent appraiser with experience and expertise in the solar photovoltaic industry. Such appraiser shall act reasonably and in good faith to determine Fair Market Value and shall provide such determination in a written opinion delivered to the Parties. The valuation determined by the appraiser shall be binding upon the Parties in the absence of fraud or manifest error. The determination of Fair Market Value by the independent appraiser shall not create an obligation on the part of the Buyer to purchase the applicable Generating Facility. The Parties shall equally share such appraisal costs.

#### 2.5 Buyer's Option to Terminate:

- (a) Buyer may terminate the Agreement at any time, after the Commercial Operations Date of the Generating Facility upon at least ninety (90) days' prior written notice. Buyer and Seller shall confer on a mutually-acceptable timetable for disconnection, removal, remediation, clean-up and payment. Buyer shall promptly pay to Seller as liquidated damages the Termination Fee pursuant to the schedule in Exhibit 1 and Seller shall cause the applicable Generating Facility to be

removed from the Buyer's Sites pursuant to Article 9. Upon payment of the Termination Fee, this agreement shall automatically terminate.

(b) Seller's Obligations upon Notice of Termination

Upon receipt of the notice specified in 2.5(a), Seller shall commence and perform, with diligence, all actions necessary on the part of Seller to effect the termination of this Agreement on the date specified by the Buyer and to minimize the liability of Seller and Buyer to third parties as a result of termination. All such actions shall be subject to the prior approval of the Buyer. Such actions shall include, without limitation:

- (i) Halting the performance of all services and other work under this Agreement on the Site(s) and date(s) and in the manner specified by Buyer
- (ii) Not placing any further orders or subcontracts for materials, services, equipment or other items for the Site(s) noticed for termination.
- (iii) Terminating all existing orders and subcontracts for the Site(s) and Generating Facility or Facilities noticed for Termination.
- (iv) At the Buyer's direction, assigning to the Buyer any or all of Seller's right, title, and interest under the orders and subcontracts terminated. Upon such assignment, Buyer shall have the right, in its sole discretion, settle or pay any or all claims arising out of the termination of such orders and subcontracts.
- (v) Subject to Buyer's approval, settling all outstanding liabilities and all claims arising out of the termination of orders and subcontracts.
- (vi) Completing performance of any services or work that Buyer designates to be completed prior to the date of termination specified by the Buyer.
- (vii) Taking such action as may be necessary, or as the Buyer may direct, for the protection and preservation of any property related to this Agreement which is in the possession of Seller and in which Buyer has or may acquire an interest.

- (c) Non-Recoverable Costs: In no event shall Buyer be liable for costs, not included in Termination Fee identified in Exhibit 1, incurred by Seller or any of its subcontractors after the termination date specified by Buyer. Such non-recoverable costs include, but are not limited to, anticipated profits on this Agreement, post-termination employee salaries, post-termination administrative expenses, post-termination overhead or unabsorbed overhead, attorneys' fees or other costs relating to the prosecution of a claim or lawsuit, prejudgment interest, or any other expense which is not reasonable.

- 2.6 Seller's Option to Terminate Prior to Installation. In the event that Seller is unable to obtain financing for the Generating Facilities at the prices in this Agreement within six (6) months after the Effective Date, Seller may (at its sole discretion) terminate the Agreement, in which case neither party shall have any liability to the other.
- 2.7 Seller Obligations for Termination Prior to Installation
- (a) Remediation: If Seller exercises its rights found in section 2.6 with regard to a specific Generating Facility, Seller shall take all actions necessary to return the Buyer's site where the applicable Generating Facility was to be installed to the condition the Seller first encountered it in at Seller's own cost.
  - (b) In the event Seller exercises its rights to terminate pursuant to section 2.6 with regard to a specific Generating Facility, Seller will also provide to Buyer, within five (5) business days, all analysis, designs, structural evaluations and any other work product related to such Generating Facility. Such materials and work product will be provided by Seller to Buyer at no cost to Buyer.

### **ARTICLE 3: ENGINEERING AND CONSTRUCTION REQUIREMENTS**

- 3.1 All elements of engineering and construction of Generating Facilities are Seller's responsibility.
- 3.2 Seller shall provide services as described herein and pursuant to Exhibit 11 – Engineering and Construction Requirements.
- 3.3 Seller shall establish mutually agreeable milestones with the Buyer to complete all Work in this Agreement.
- 3.4 Seller shall provide bi-weekly status reports throughout this phase, as well as any additional briefing requested by Buyer.
- 3.5 Seller will create, maintain and provide to Buyer, minutes of meetings between Buyer's representatives and Seller's Project Management Team.
- 3.6 CEQA Compliance
- (a) Compliance with the California Environmental Quality Act ("CEQA"), Pub. Res. Code § 21000 *et seq.*, is a condition precedent to the Buyer's obligations under this Agreement. The Seller shall not have any right to install the Generating Facilities until the Buyer has fully complied with CEQA and issued a notice to proceed to Seller. Buyer agrees to begin the initial analysis within ten (10) days after the Effective Date of this Agreement. If that analysis indicates that an exemption or a negative

declaration will suffice, then Buyer will proceed to complete the exemption or negative declaration in accordance with applicable law. Seller shall promptly reimburse Buyer for Buyer costs, up to but not exceeding \$3,000 per site for negative declaration, and \$250 for exemption letter per site, for such analysis and completion of exemption or negative declaration no later than 30 days after Buyer sends invoice for same to Seller. Seller shall promptly proceed to perform its obligations under this Agreement. If Buyer determines that the costs for such analysis and completion of exemption or negative declaration for each applicable Generating Facilities shall exceed the stated maximum amount eligible for reimbursement, it shall notify Seller in advance prior to expending more than the maximum amount and state in writing the additional costs Buyer reasonably expects to incur for such analysis and completion of exemption or negative declaration for each applicable Generating Facilities. Seller may, in its sole discretion, agree to pay Buyer additional sums to defray such costs. If Seller does not agree to do so within thirty (30) days of receipt of Buyer's written notification of such additional costs, then the Agreement shall terminate as to the applicable Generating Facility, and neither Party shall have any liability to the other Party (other than any such liabilities that have accrued prior to such termination).

- (b) If the Buyer reasonably determines that a mitigated negative declaration ("MND") or environmental impact report ("EIR") is required to comply with CEQA, then Buyer shall promptly provide Seller with a written statement detailing the reasons that Buyer believes that an MND or EIR is required; to comply with CEQA for the applicable Generating Facility and the estimated cost to comply with CEQA for the applicable Generating Facility. Unless within thirty (30) days of receipt of Buyer's written statement, Seller issues Buyer a written statement signed by an authorized representative of Seller agreeing to pay for all of the estimated cost to comply with CEQA for the applicable Generating Facility and agreeing to proceed with MND or EIR; then this Agreement will terminate as to the applicable Generating Facility, and neither Party shall have any liability to the other Party (other than any such liabilities that have accrued prior to such termination).

### 3.7 Engineering - Design Phase

- (a) Within sixty (60) days of the Effective Date, Buyer shall provide Seller with all applicable, and to the extent available, blueprints, plans, and structural reports for each Project Site. Within thirty (30) days of receiving such reports, Seller will provide Buyer with a report demonstrating that the Generating Facility proposed for a Project Site can meet the structural support and weight standards that Buyer reported to Seller. Within ninety (90) days of the Effective Date, Seller shall provide written notices to Buyer that the Site(s) is/are adequate for purposes of proceeding with construction of the Generating Facilities ("Notice(s) of

Site Acceptance.”) Seller shall proceed with all activities necessary to allow commencement of the construction phase, including completing the Preliminary Requirements (as set forth below). Upon completion of the Preliminary Requirements phase, Seller shall proceed with the installation & construction phase.

(b) Preliminary Requirements:

(i) Prior to the execution of the Power Purchase Agreement, the Seller must comply with the Design Phase Insurance Requirements included in Exhibit 7.

(ii) Seller must comply with all requirements set forth in Exhibit 11 [Engineering & Construction Requirements].

(iii) Within two months of the Effective Date:

1. Seller shall execute the Right of Access Agreement for each site substantially in the form in which it has been authorized and drafted by the Buyer;
2. Seller shall notify the Buyer in writing of the Expected Commercial Operation Date. Such Expected Commercial Operation Date shall be no later than the earlier of (1) the applicable Generating Facility's CSI Reservation Expiration deadline including approved extensions and (2) fifteen (15) months from the Effective Date;
3. Seller shall provide Buyer with a project plan and milestone schedule for approval such that the Expected Commercial Operation date may be achieved and that all design standards specified in the Agreement are met or exceeded. This project plan shall be subject to approval by the Buyer and may be amended by Buyer. Seller shall create a revised project plan upon Buyer's request.

(iv) Within six (6) calendar months from the Effective Date:

1. Seller must have submitted to Buyer for approval the final 100% detailed engineering drawings and specifications for the Generating Facilities.
2. Seller must have obtained a financing commitment for construction of the System and submitted satisfactory proof thereof to the Buyer. If the financing commitment is conditioned on any assignment to the Lender of an interest in this Agreement or the Right of Access(es), Seller shall also submit satisfactory proof to Buyer that the assignee meets all requirements of this Agreement,



and agrees to comply, without modification, with the terms and condition of this Agreement and the Site Right of Accesses.

- (v) Within the earlier of the CSI Reservation Expiration date including approved extensions or fifteen (15) calendar months from the Effective Date, Seller must have obtained from the Transmission Provider Permission to Operate (PTO) Letter for each Site.
- (c) Failure to Complete the Preliminary Requirements by the deadline: If Seller fails to complete the Preliminary Requirements in conformance with the timeline above, following thirty (30) days for Seller to cure each separate Preliminary Requirement, Buyer may terminate this Agreement without penalty, liability or expense of any kind to Buyer by providing to Seller a written notice of termination after the deadline for completion of the Preliminary Requirements. The Buyer may extend deadlines at its option.

### 3.8 Construction Phase:

- (a) Prior to the commencement of construction, the Seller must comply with the Insurance Requirements for construction phase included in Exhibit 7.
- (b) Seller must comply with all requirements set forth in Exhibit 11 [Engineering & Construction Requirements].
- (c) Seller shall provide to Buyer an Installation & Construction plan that shall include, at a minimum, the following:
  - (i) Detailed array layout with stringing configuration
  - (ii) Mounting and racking details
  - (iii) Details of electrical transmission showing conduit routing and location of electrical enclosures, conduit support details, and enclosure mounting details
  - (iv) Electrical single line diagram
  - (v) Electrical three line diagram
  - (vi) Monitoring plan
  - (vii) Construction project plan with timeline
  - (viii) Certification by Seller that the design complies with all applicable laws, codes and regulations of all governmental jurisdictions

- (d) Seller shall cause the System to be designed, installed and constructed in accordance with the California Building Code, with the laws and regulations of all governmental authorities with jurisdiction, with all requirements of the Agreement and pursuant to the final approved project design, and at Seller's sole cost. Upon completion of construction of the System, Seller shall be responsible for verifying System performance on an ongoing basis.
- (e) Minimum Standards: Seller shall ensure that minimum design standards are followed, including:
  - (i) All power generation and transmission equipment shall be UL listed for its use
  - (ii) Generating Facility must meet all regulatory and environmental requirements including but not necessarily limited to PG&E, CSI, CPUC, Fire Marshall, UL, UBC, and CEQA.
  - (iii) Requirements of Material
    1. Fasteners and hardware throughout system shall be stainless steel or material of equivalent corrosion resistance
    2. Racking components shall be anodized aluminum, hot dipped galvanized steel, or material of equivalent corrosion resistance
    3. Unprotected steel shall not to be used in any components
  - (iv) All conductors, RHW and otherwise, must be covered to prevent exposure to sunlight
  - (v) Seller will warranty roof penetrations (if any) against leakage for twenty (20) years ("Warranty"). This Warranty specifically excludes any leakage that is the result of pre-existing roof conditions, and all roof and underlying damage caused by the Generating Facility installation that is the result of pre-existing roofing and underlying conditions. If the Generating Facility fails to conform to this Warranty, the Seller will, at its sole option, either repair or replace any Generating Facility or component at no cost to the Buyer. This repair or replacement remedy shall be the sole and exclusive remedy provided under this Warranty and the original System warranty period will remain in effect and will not be extended, nor will a new warranty period begin, upon repair or replacement of defective System components. This Warranty is effective from the date of completion of the Generating Facility installation. Seller will work with Buyer's existing roofing

contractors and manufacturers to ensure original roof warranties, if applicable, stay in effect.

Both parties acknowledge that cooperation by Buyer's existing roofing contractors will be required in order to maintain original roof warranties. Should existing roofing contractor be unwilling to maintain roof warranty, Seller will inform Buyer in writing, and Buyer will advise Seller how to proceed.

- (vi) Seller shall be responsible for protection of Buyer's property pursuant to Exhibit 11 [Engineering and Construction Requirements Exhibit].
- (vii) Array layout shall be designed to provide walking access around the perimeter of the roof and convenient access to existing roof mounted HVAC equipment
- (viii) Parking canopy systems shall be designed to include safety lighting, impact resistance, and height requirements as specified by site.
- (ix) A Monitoring System shall be included for each Generating Facility.

#### **ARTICLE 4: DELIVERY OF POWER, METERING & MONITORING**

##### **4.1 Purchase & Sale**

- (a) Commencing on the Commercial Operation Date and continuing throughout the Term, Seller shall sell and deliver at the Delivery Point, and Buyer shall purchase and accept from Seller at the Delivery Point, and pay for, the Adjusted Delivered Energy as follows:

Adjusted Delivered Energy multiplied by the Base Contract Price as per Exhibit 4.

Seller shall only Schedule and deliver Energy and Environmental Attributes from the Generating Facilities.

The Output represents a package of services and benefits including reduction in the Buyer's peak demand from the Local Electric Utility.

- (b) Annual Escalation Adjustment. Commencing on the first anniversary date of the Actual Commercial Operation Date, and every anniversary date thereafter during the Term, the applicable Base Contract Price shall be escalated to reflect the Annual Escalation Adjustment as set forth in Exhibit 4- Base Contract Price.

(c) Meters

- (i) The transfer of Energy from Seller to Buyer shall be measured by Meters at the Delivery Point, which are selected, provided, installed, owned, maintained, programmed and operated, at the Seller's sole cost and expense, by Seller or its designee. Meters and all metering activities shall comply with all applicable requirements of the Transmission Provider Tariffs and the Buyer-PG&E Interconnection Agreement. Seller shall exercise reasonable care in the maintenance and operation of the Meters and Monitoring Systems.
- (ii) Meter Reading and Communications Equipment. After Operation Date, Seller shall, at its sole cost and expense, read, or cause to be read, the Meters at least as frequently as is needed during the Term. Seller shall install, own and maintain, at its sole cost and expense, communications equipment and services necessary to allow remote reading of the Meters pursuant to the requirements of the Meter Service Agreement for ISO Metered Entities, whether or not the Generating Facilities are an ISO Metered Entity. Seller shall apply verification, editing and estimation techniques to ensure that the meter data accurately represent actual Output and are in compliance with all applicable requirements of (i) the Transmission Provider; and (ii) the Buyer-PG&E Interconnection Agreement.
- (iii) Seller shall at its sole cost and expense, install any updates or upgrades to the Meters, and all associated measuring equipment necessary to permit an accurate determination of the quantities of Energy delivered under this Agreement.
- (iv) Transmission Provider and PG&E Requirements. If and to the extent requested to do so by Buyer, Seller shall submit to the Transmission Provider and/or PG&E, or allow the Transmission Provider and/or PG&E to retrieve, any meter data required by the Transmission Provider and/or PG&E related to each Generating Facility and associated with the provision of transmission or distribution for the Output of each Generating Facility in accordance with the Transmission Provider Tariffs, and the Buyer PG&E Interconnection Agreement.
- (v) Meters must meet the Performance Based Incentive eligibility requirements outlined by the California Energy Commission and Seller must provide to Buyer, prior to Commercial Operation Date, documentation certifying the meters accuracy to less than 2%. During the Term, Buyer may request calibration testing of the meter to ensure accuracy of billings to Buyer, Buyer shall be

responsible for the cost of such testing. Seller shall furnish a copy of all technical specifications and accuracy calibrations for the meter when testing is performed. If testing of the metering equipment indicates that such equipment is in error by more than two percent (2%), then Seller shall promptly repair or replace such equipment and shall reimburse Buyer for the cost of testing which determined the inaccuracy of the equipment by more than 2%. Seller shall make a corresponding adjustment to the records of the amount of electricity delivered by the Facility based on such test results for (i) the actual period of time when such error caused inaccurate meter readings, if that period can be determined to the mutual satisfaction of the Parties, or (ii) if such period cannot be so determined, then a period equal to one-half of the period from the later of the date of the most recent test confirming accurate metering or the date the meter was placed into service, but not to exceed twelve (12) months.

(d) Energy.

- (i) Buyer agrees, subject to the limitation addressed in Section 4.1 (d) (ii) – (iii), to purchase one hundred percent (100%) of the Adjusted Delivered Energy.
- (ii) In the event that the Adjusted Delivered Energy exceeds 100% of Expected Annual Contract Quantity at a particular site for any given year, and is greater than Buyer's electrical consumption at the Site, Buyer has the first option, but is not required, to purchase Adjusted Delivered Energy above 100% of Expected Annual Contract Quantity for such site. If Buyer does not purchase excess Adjusted Delivered Energy, Seller shall have the right to resell such excess energy to a third party, pursuant to all applicable laws, in which case proceeds from the sale of such electricity will solely accrue to the Seller.
- (iii) For any Adjusted Delivered Energy which exceeds 120% of the Expected Annual Contract Quantity (specified in Exhibit 5) that Buyer purchases subject to (ii), Buyer agrees to pay for such excess Adjusted Delivered Energy at the lesser of the Base Contract Price and the Replacement Price.
- (iv) At the end of each three (3) Contract Year Period, if the Adjusted Delivered Energy is less than 80 percent (80%) of the total Expected Annual Contract Quantity for such three (3) Contract Years, Seller shall pay to Buyer the product of the positive difference between the Replacement Price and the Base Contract Price for the kwh shortfall, if any, between the Adjusted Delivered

Energy and 80% of the Expected Annual Contract Quantity for the three (3) year period.

- (v) If Seller is prevented from generating or delivering the Adjusted Delivered Energy due to a Force Majeure Event, Seller's obligation under this Section shall be reduced to the extent of such impact.
- (vi) The Parties recognize and agree that (A) with the exception of an event of a default pursuant to 11.1(b) payment of amounts by Seller to Buyer pursuant to this Section is an appropriate remedy, and (B) any such payment does not constitute a forfeiture or penalty of any kind, but rather constitutes anticipated costs to Buyer under the terms of this Agreement.

#### 4.2 Monitoring System and Web Interface

- (a) Seller shall provide the Buyer with a Monitoring System for each Generating Facility.
- (b) The Monitoring System shall include, without limitation, ability to monitor Revenue grade AC production data. Additionally, for Generating Facilities over 250KW in size, Seller shall include building consumption data, and weather station with ability to monitor or access localized weather data, to include ambient temperature and irradiance.
- (c) Seller shall make available to Buyer a web-based tool or interface to view, collect and store data, in real time, including the energy delivered and greenhouse gas emissions reduced.

#### 4.3 Delivery Point

- (a) Allocation of Costs and Risks. Except as expressly set forth in this Agreement, Seller shall be responsible for any costs or charges imposed on or associated with the Output or the delivery of the Output hereunder up to and at the Delivery Point. Except as expressly set forth in this Agreement, the Buyer shall be responsible for any costs or charges imposed on or associated with the Output, or its receipt, after the Delivery Point.

#### 4.4 Environmental Attributes

- (a) Throughout the Term, Seller shall transfer to Buyer, and Buyer shall receive from the Seller, all rights, titles and interest in and to the Environmental Attributes, if any, whether now existing or subsequently generated or acquired (other than by direct purchase from a third party) by Seller, or that hereafter come into existence, during the Term, as a component of the Adjusted Delivered Energy purchased by Buyer from Seller hereunder. Seller agrees to transfer and make such Environmental

Attributes available to Buyer immediately to the fullest extent allowed by applicable law upon Seller's production or acquisition of the Environmental Attributes. Seller agrees that the Base Contract Price is the full compensation for all Environmental Attributes.

- (b) Seller shall not assign, transfer, convey, encumber, sell or otherwise dispose of any portion of the Environmental Attributes to any Person other than Buyer, other than in connection with sales of Output permitted pursuant to Sections 4.1.(d)(ii) and 11.2(b).
- (c) During the Term, Seller shall not report to any Person that the Environmental Attributes granted hereunder to the Buyer belong to anyone other than the Buyer, and the Buyer may report under any program that such attributes purchased hereunder belong to it.
- (d) Seller shall document the production of Environmental Attributes under this Agreement by delivering on an annual basis to Buyer an attestation of Environmental Attributes produced by the Generating Facilities and purchased by Buyer in the preceding calendar year on or before the Commencement Anniversary of each year following a Contract Year, Seller shall document the transfer of Environmental Attributes to Buyer under this Agreement by delivering to the Buyer an attestation of Environmental Attributes transferred under this Agreement in the preceding Contract Year. The form of attestation is set forth as Exhibit 6 [Form of Attestation]. Exhibit 6 [Form of Attestation] may be updated or changed by Buyer as necessary to ensure that the Buyer receives full and complete title to, and the ability to record with any EA Agency as its own, all of the Environmental Attributes purchased hereunder.
- (e) Documentation. At Buyer's option, the Parties, each at their own expense, shall execute all such documents and instruments in order to affect the transfer of the Environmental Attributes specified in this Agreement to the Buyer or its designees, as Buyer may reasonably request. Upon notification by an EA Agency that any transfers contemplated by this Agreement will not be recorded, the Parties shall promptly cooperate in taking all reasonable actions necessary so that such transfer can be recorded. Each Party shall promptly give the other Party copies of all documents it submits to the EA Agency to effectuate any transfers.

#### 4.5 Tax Credits and Financial Incentives

- (a) Buyer agrees and acknowledges that the ITC and Section 1603 Grant shall be owned by Seller.
- (b) In connection with Seller's rights and interests in performance based incentive payments to be made under the California Solar Initiative after the Commercial Operation Date, Buyer agrees to cooperate with Seller,

including signing authorizations needed by Seller, to obtain or transfer any such performance based incentives under the California Solar Initiative.

- (c) Seller acknowledges that Buyer has made no statements, representations or warranties regarding the eligibility of the Generating Facilities for the ITC or the CSI, and Seller is not relying on any statement, representation or warranty by Buyer or any third party with respect to the ITC or CSI in entering into this Agreement.

#### 4.6 Temporary Shutdowns, Sale of Site, Relocation of Facility

- (a) Buyer may request that Seller temporarily stop operation of a Generating Facility for any purpose reasonably related to Buyer's maintenance and improvement of the Site at which a Generating Facility is located. For a shutdown up to seventy-two (72) hours that does not occur within thirty-six (36) months of a prior requested shutdown, Buyer shall not be obligated to pay Seller for lost revenues associated with the shutdown. Subject to the exception mentioned in this section, for all other shutdown periods requested by Buyer, Buyer will pay Seller an amount equal to the sum of payments that Buyer would have made to Seller hereunder for Adjusted Delivered Energy from the Generating Facility that would have been produced during the period of the shutdown, unless the shutdown is for maintenance or repairs that were due to the failure of components or installation of the Generating Facility. If a shutdown request has not been made by Buyer for 36 months, and the shutdown period that the Buyer subsequently requests is longer than 72 hours, Buyer shall only be responsible for payment to Seller for the Adjusted Delivered Energy that would have been produced from the 73<sup>rd</sup> hour of the shutdown until the end of the shutdown. Determination of the amount of energy that would have been produced during the period of the shutdown shall be based, during the first year of the Facility's Operations Period, on the estimated levels of production and, after the first year of the Operations Period, based on actual operation of the Facility in the same period in the previous calendar year, unless Seller and Buyer mutually agree to an alternative methodology. (b) In the event Buyer requires the Generating System to be temporarily removed for reroofing or any other purpose, Buyer shall pay all costs associated with the removal and relocation of the Generating Facility, including installation and testing costs and interconnection costs. Buyer shall also be liable for shutdown costs, if applicable, identified in Section 4.6 (a).

#### 4.7 Utility Rate Schedule Changes

To the extent that Seller has represented to Buyer that Buyer will be able to change Utility Rate Schedules at a site where Seller will be installing a Generating Facility, and such Utility Rate Schedule change is subsequently not possible, and comparable savings to those projected are not possible, Buyer shall have the right, but not the obligation, to terminate this Agreement with respect to such Generating Facility, provided written notice of such termination occurs



before commencement of construction of the Generating Facility. Upon termination of the Agreement for such Generating Facility, Buyer shall have no further obligations under this Agreement for such Generating Facility.

## **ARTICLE 5: BILLING AND PAYMENT**

### **5.1 Billing and Payment**

- (a) Generally. During the Term, on a monthly basis, Seller shall invoice Buyer, and Buyer shall make payment for Energy delivered to Buyer during the prior month, in accordance with Article 4. Such payment shall be full compensation to Seller for the Adjusted Delivered Energy received under this Agreement. Invoices furnished by Seller under this Agreement must be in a form acceptable to the Buyer, must include a unique invoice number and must indicate past due amounts, if any. All amounts paid by Buyer to Seller shall be subject to audit by the Buyer.
- (b) Payment. All payments shall be made on or before thirty (30) days after receipt of an undisputed invoice. Each Party shall make payments by electronic funds transfer or by other mutually agreeable method(s), to the account designated by the other Party.
- (c) Method of Payment. Buyer shall make all payments under the Agreement by electronic funds transfer in immediately available funds to the account designated by Seller from time to time. All payments that are not paid when due, and whose nonpayment is not attributable to any act or omission by Seller, shall bear interest, at a rate of ten (10%) percent per annum, accruing from the date payment became past due until the date payment is made in full. All payments made hereunder shall be non-refundable, be made free and clear of any tax, levy, assessment, duties or other charges and not subject to reduction, withholding, set-off, or adjustment of any kind.
- (d) Disputed Payments. If a *bona fide* dispute arises with respect to any invoice, Buyer shall not be obligated to pay such invoice during such dispute and not be deemed in default under the Agreement and the Parties shall not suspend the performance of their respective obligations hereunder, so long as Buyer promptly pays all undisputed amounts owed hereunder. If an amount disputed by Buyer is subsequently deemed to have been due in the amount claimed by the Seller, interest shall accrue at the rate of 10% per annum on such amount from the date becoming past due under such invoice until the date paid.

### **5.2 Allocation of Taxes and Possessory Interest Tax**

- (a) Delivery Point. Seller shall pay or cause to be paid all Taxes due under or by virtue of this Agreement or the sale and delivery of Output sold

hereunder including but not limited to ad valorem, franchise or income taxes which are solely related to the sale of Output.

- (b) Real Estate or Property Taxes. Seller shall pay or cause to be paid all real estate or personal property taxes, possessory interest taxes, business or license taxes or fees, service payments in lieu of such taxes or fees, annual or periodic license or use fees, excises, assessments, bonds, levies, fees or charges of any kind which are now or hereafter assessed, levied, charged, confirmed or imposed by any Governmental Authority on Seller's occupancy and use of the Property (or any portion or component thereof) or on Seller's ownership or operation of the Generating Facilities.
- (c) Buyer Credit for Payment of Taxes. If the Buyer is required by law or regulation to remit or pay Taxes which are Seller's responsibility hereunder, the Buyer may deduct the amount of any such Taxes from the sums due to Seller under this Agreement. Nothing shall obligate or cause a Party to pay or be liable to pay any Taxes for which it is exempt under the law.

#### **ARTICLE 6: DEPOSIT REQUIREMENTS**

##### **6.1 Deposit Requirements during Operation.**

- (a) Removal and Disposal Fund – General. In order to ensure that funds are available for the removal of the Generating Facilities and remediation of the Site upon the expiration or termination of this Agreement, Seller agrees to establish an interest bearing escrow account at a federally insured banking institution to hold funds dedicated for such purpose (the "Removal Fund"). The terms for the escrow account shall be reasonably acceptable to the Buyer and the Seller.
- (b) Interest. All interest earned shall become part of the Removal Fund.
- (c) Deposits. Seller shall make deposits into the Removal Fund in annual amounts of \$6 per KW, one-twelfth (1/12th) of which shall be the "Monthly Contribution." The Seller shall deposit the first Monthly Contribution into the Removal Fund on the first day of the month following the Commercial Operation Date, and shall deposit additional Monthly Contributions on the first day of each subsequent month during the Term. Seller agrees to deposit the Monthly Contribution until the Removal Fund (including interest income) has a balance equal to or greater than \$120 per KW. Such Removal Fund shall be disbursed, as needed, on a pro-rata per KW basis for individual Sites.
- (d) Remediation Cost Estimate and Additional Deposit. Five (5) years prior to the expiration of this Agreement, Seller shall provide Buyer with an estimate of the cost to remove the Generating Facilities and restore each

Project Site in accordance with Section 9.1 below. Seller and Buyer shall then meet and confer within thirty (30) days after such estimate is provided to resolve any concerns regarding such estimated cost, and a revised estimate taking those concerns into account shall then constitute the final restoration cost estimate. If the final restoration cost estimate as approved by Buyer exceeds \$120 per KW, Seller shall then increase the Monthly Contributions due by the amount necessary to ensure that the escrow fund, including all interest earned thereon, is on deposit as of the scheduled termination date in an amount equal to the final restoration cost estimate.

- (e) If this Agreement expires or terminates and, in accordance with this Agreement, the Seller has the obligation to pay for the removal of the Generating Facilities and the remediation of the Sites, then Seller shall remove the Generating Facilities and remediate the Sites within 90 days of the date of expiration or termination of this Agreement. Within fifteen (15) days of notice by the Seller to the Buyer that removal of the Generating Facilities has been completed and that the Sites has been remediated, Buyer shall either (1) certify in writing that Seller has completed removal and remediation in accordance with this Agreement or (2) list in writing any outstanding tasks. Upon Buyer's certification that Seller has completed removal and remediation in accordance with the requirements of this Agreement, which certification shall not be unreasonably conditioned, withheld or delayed, the funds in the Removal Fund shall be released to the Seller. In the event that the Seller and its Lenders fail to fully remove the Generating Facilities and remediate the Project Site(s) as required in this Agreement within the applicable deadline set forth in this Agreement, the Buyer may access the Removal Fund and use the available balance to undertake removal of the Generating Facilities and remediation of the Site(s). Seller shall be responsible for payment of all Buyers' reasonable removal or remediation costs, including any in excess of the Removal Fund. Any excess funds remaining in the Removal Fund after the completion of payment for the removal of the Generating Facilities and remediation of the Sites by the Buyer shall be released to Seller within sixty (60) days of payment of the last related invoice.
- (f) Disbursement if Seller does not have obligation to pay for removal and remediation. If this Agreement expires or terminates, and in accordance with this Agreement, Seller does not have the obligation to pay for the removal of the Generating Facilities and the remediation of the Site(s), the Removal Fund shall be released to Seller within sixty (60) days of the date of expiration or termination of this Agreement.

#### **ARTICLE 7: SELLER'S ADDITIONAL OBLIGATIONS**

- 7.1 Seller shall reimburse the Buyer for Buyer's payment of the California Solar Initiative rebate reservation fee within 30 days of receipt of the Buyer's invoice

for such payment. In addition, Seller shall apply for any rebates from the State of California, PG&E or other electricity provider on behalf of the Buyer.

- 7.2 Seller shall provide Buyer with an as-built plan set after project completion.
- 7.3 Seller shall develop, finance, own, maintain and operate the Generating Facilities in accordance with this Agreement, the requirements of the California Solar Initiative (CSI) Program including Warranty Requirements, all Requirements of Law, all Permits, the Transmission Provider Tariffs and Prudent Industry Practice. Additionally, Seller shall obtain the warranties described in Exhibit 9 [Panel and Inverter Warranties] for the equipment detailed in that Exhibit.
- 7.4 Seller agrees it shall pay prevailing wages in connection with the construction and operation of the Generation Facilities.
- 7.5 Milestones

- (a) Generally.

Seller shall diligently pursue all milestones established pursuant to Article 3 and the Expected Commercial Operation Date. The Parties agree that time is of the essence in connection with the completion of the Generating Facilities, and that Milestones for the development, financing and construction of the Generating Facilities must be achieved in a timely fashion. Seller shall strive to achieve the Milestones mutually agreed to at the time of PPA execution by the Seller and Buyer.

- (b) Monthly Reports.

Unless otherwise specified in this Agreement, starting on the Effective Date, Seller shall provide to Buyer the monthly progress reports concerning the progress towards completion of the Milestones. Seller shall provide to the Buyer additional information concerning Seller's progress towards, or confirmation of, achievement of the Milestones, as the Buyer may reasonably request from time to time.

- (c) Notice of Failure to Achieve a Milestone.

Upon becoming aware that Seller will, or is reasonably likely to, fail to achieve one or more Milestone(s) by the required date, for any reason including a Force Majeure Event, Seller shall so notify the Buyer in writing immediately. Such notice shall explain the cause of the delay, provide an updated date for achievement of the Milestone(s), and describe Seller's plan for meeting such Milestone(s). Seller's notice will also explain any impact such delay may or will have on any other Milestone, and the measures to be taken to mitigate such impact.

- (d) Facility Mechanical Completion Inspection.

Seller shall notify Buyer when Mechanical Completion of the Generating Facilities is achieved. At discretion of Buyer, Seller shall schedule and arrange for Buyer to conduct an inspection of the Generating Facilities. The inspection shall be scheduled for a date, mutually agreeable to Seller and Buyer, which is within ten (10) Business Days of Seller's notification of Mechanical Completion. Based on the inspection, Buyer may, within ten (10) Business Days of the inspection, prepare and provide to Seller a punch list of any observed defects or deficiencies in the construction work or discrepancies between installed equipment and workmanship and this Agreement. Seller shall be responsible for completion, correction, or otherwise addressing issues identified by the Buyer, and shall provide a written response to document actions taken in response to the punch list items. If requested by Buyer, Seller shall schedule and arrange a follow-up inspection for Buyer after all punch list items are resolved. All punch list items shall be resolved prior to the Commercial Operation Date of the Generating Facilities except those items specifically excepted by mutual agreement between Buyer and Seller.

- (e) Force Majeure Event. In the event that a Force Majeure Event causes any delay in the achievement of a Milestone, such Milestone's deadline may be extended, together with any Force Majeure Event extensions for other Milestones, for a period not to exceed, in the aggregate, six (6) months. The extension of the deadline for any Milestone shall extend the deadline for all subsequent Milestones, provided that in no event shall the combined extensions for Force Majeure Events for any or all of the Milestones exceed six (6) months. The extension provided for in this Section shall be the only effect of a Force Majeure Event on Seller's obligations with respect to the Milestones.
- (f) Waiver of Right. The Buyer may, at its discretion, grant waivers for Seller's failure to meet any of the Milestones, but in no way shall any such waiver constitute a waiver of any future failures by Seller to meet other Milestones.

7.6 Compliance: Seller shall, in its own name and at its own expense, seek, obtain, maintain, comply with and, as necessary, renew and modify from time to time, all Permits and other authorizations that are required by any Requirements of Law, the Transmission Provider Tariffs or any Governmental Authority as are necessary for Seller to engage in the activities and obligations required by the Agreement.

#### 7.7 Maintenance, Audit and Inspection of Records

- (a) Maintenance of Records. Seller shall maintain any and all documents and records which demonstrate performance under this Agreement and the lease, and all ledgers, books of account, invoices, vouchers, cancelled checks, and other documents evidencing or relating to charges for

services, or expenditures and disbursements charged to Buyer for a minimum period of five (5) years, or for any longer period required by law, from the date of final payment to Seller pursuant to this Agreement.

- (b) Inspection. Any documents required to be maintained pursuant to this Agreement shall be made available for inspection or audit at no cost to Buyer, at any time during regular business hours, upon written request by a designated representative of the Buyer. Seller shall provide copies of such documents to Buyer for inspection at a time and place that is convenient to Buyer.
- (c) Custody of Records. Where Buyer has reason to believe that any of Seller's documents relating to this Agreement may be lost or discarded due to dissolution, disbandment or termination of Seller's business, Buyer may, by written request by any of the above-named officers, require that custody of the Seller's documents be given to Buyer. Seller shall comply with Buyer's reasonable written request.

#### 7.8 Insurance:

Seller shall obtain and maintain the policies of insurance in amounts and with coverage as set forth in Exhibit 7 [Insurance Requirements].

#### 7.9 Commissioning and Performance Reports

- (a) Seller shall comply with all applicable ISO, Transmission Provider and CSI Handbook Field Verification requirements for preoperational testing. Subsequently, Seller will perform an annual performance evaluation for the term of this agreement on approximately the annual anniversary that the first commissioning test was performed. No later than seventy-two (72) hours prior to conducting its Commissioning Tests, Seller shall notify Buyer of the date on which it intends to conduct such tests. Within seven (7) days of the successful completion of Seller's Commissioning Test, Seller shall provide to Buyer written notification of the Commercial Operation Date, including any relevant data demonstrating that Commercial Operation has occurred. Buyer has the right to be present during any Commissioning Test, and to receive all information, including meter and performance data associated with such tests. Seller may change the date for such tests upon written notice to Buyer, provided that Buyer has at least 24 hours' notice of the date of such tests.
- (b) Seller will provide Buyer with an annual performance evaluation report of the energy production over the last 12 months as compared to the expected energy production over that same period.

#### 7.10 Obligation to Interconnect:

Seller shall be solely responsible for Interconnection of the Generating Facilities to the Transmission System. Seller shall, at its own cost and expense, negotiate and enter into an Interconnection Agreement and such other agreements with the Transmission Provider as needed to enable Seller to transmit Energy to the Delivery Points. Seller shall be responsible for all costs under the Interconnection Agreement and any other agreements with the Transmission Provider including but not limited to the costs of any upgrades to the Transmission System associated with the Interconnection of the Generating Facilities. Seller shall, at its own cost and expense, maintain the Interconnection Facilities including metering facilities.

7.11 WREGIS

As applicable, prior to the Commercial Operation Dates, Seller shall register the Generating Facilities in the WREGIS, and take all other actions necessary to ensure that the Energy or Environmental Attributes produced by the Generating Facilities are issued and tracked for purposes of satisfying the requirements of the California Renewables Portfolio Standard and transferred to Buyer as applicable. In the event that WREGIS is not in operation as of the Actual Commercial Operation Date, Seller shall perform its obligations, as required under this Section as soon as WREGIS is in operation.

7.12 Facility Conformance to Buyer Specifications. Seller shall assure that each Generating Facility remains in conformance with the most recent version of the as-built drawings approved by the Buyer; all specifications and requirements of this Agreement during the Term, including when maintenance is performed or when modifications are implemented. Buyer may, at any time, prepare and provide to Seller a letter or notice of any observed defects, deficiencies or deviations between each Generating Facility and the most recent version of the as-built drawings approved by the Buyer, or any specification or requirement of this Agreement. Within twenty (20) Days of Buyer's notification, Seller shall correct or address the issue(s) or propose to Buyer a reasonable schedule for correcting or addressing the issue(s). The schedule shall be subject to the written consent of the Buyer which consent shall not be unreasonably withheld or delayed. If Seller fails to correct or address undisputed and material issue(s) identified by Buyer within 20 days, Buyer shall have the right to withhold any payments due to Seller until the issue(s) identified by Buyer are addressed by Seller. Such withholding of payment(s) shall not cause the Buyer to be considered in default or to be obligated to pay any kind of penalty or late charge interest on the withheld payments.

7.13 Coordination with the ISO, Transmission Provider and Western Electricity Coordinating Council ("WECC")

- (a) ISO, Transmission Provider and WECC Standards. Each Party shall undertake its obligations under this Agreement in compliance with all applicable (i) operating policies, criteria, rules, guidelines, tariffs and

protocols of the ISO and Transmission Provider; (ii) WECC scheduling practices; and (iii) Prudent Utility Practices.

- (b) Start-ups and Shut-downs. Seller shall coordinate all Generating Facilities start-ups and shut-downs, in whole or in part, with Buyer in accordance with the reasonable protocols established by Buyer and applicable requirements of the ISO Tariff.

7.14 Seller shall use commercially reasonable efforts to minimize the number and duration of Outages during periods when the Generating Facilities otherwise would be able to produce Energy. Planned Outages shall be limited to no more than five (5) calendar days per Contract Year. Seller shall be responsible for all expenses and costs, excluding those resulting from Buyer's shutdown addressed in Section 4.6, associated with all requirements and timelines for generation Outage scheduling, including, if applicable, those posted on the ISO's website. Planned and forced Outages shall be coordinated between Seller and the Buyer.

7.15 Transmission and Distribution Maintenance Information: If either Party receives information through the ISO or from the Transmission Provider regarding maintenance that will directly affect the Generating Facilities, it will provide this information promptly to the other Party.

7.16 Modifications to the Generating Facilities

Upon approval by Buyer of the design of the Generating Facilities, Seller shall have no right to make a Material Change to the Generating Facilities nor attach fixtures or erect additions or structures in or upon the Facility (collectively "Alterations") without receiving prior written approval of Buyer prior to undertaking any such Alterations. Seller shall submit to Buyer detailed and complete plans and specifications for a Material Change. Buyer may, in its sole discretion, waive the requirement for detailed plans upon Seller's demonstration that the Material Change consists solely of modification or replacement of like-kind equipment. Buyer shall not unreasonably delay or withhold written approval of Seller's Material Change, provided that such Material Change shall impose no additional burdens or obligations on Buyer. As a condition to consenting to the Material Change, Buyer may impose reasonable requirements, including the requirement that Seller provide Buyer with a surety bond or other financial assurance that the cost of the Material Change will be paid when due, and reimbursement of any costs incurred by Buyer in responding to Seller's request or inspecting such Material Change. Any such Material Change performed by Seller shall be performed in accordance with all Applicable Laws and Requirements, including any and all necessary permits and approvals to be obtained from Buyer. Seller agrees to provide Buyer with sufficient advance notice of any proposed Material Change to allow the coordination and consideration by Buyer of the construction schedule for such Material Change. Notwithstanding the foregoing, Seller's routine repair, replacement, or maintenance of the equipment components of the Generating Facilities shall not require Buyer's consent. Seller shall provide



Buyer with written notice 48 hours in advance of any routine repair, replacement, or maintenance of the equipment components of the Generating Facilities. Such notice will include the time, location and nature of the planned repair or maintenance.

## **ARTICLE 8: FORCE MAJEURE**

### **8.1 Force Majeure Events**

- (a) Excuse. Subject to Section 8.2 below, and except as expressly set forth herein, neither Party shall be considered in default under this Agreement for any delay or failure in its performance under this Agreement (including any obligation to deliver or accept Output) if such delay or failure is due to a Force Majeure Event, but only to the extent that:
  - (i) Such Force Majeure Event is not attributable to fault or negligence or action or inaction on the part of that Party;
  - (ii) Such Force Majeure Event is caused by factors beyond that Party's reasonable control; and
  - (iii) Despite taking all commercially reasonable technical precautions and measures to prevent, avoid, mitigate or overcome such event and the consequences thereof, the Party affected has been unable to prevent, avoid, mitigate or overcome such event or consequences.
- (b) "Force Majeure Event" may include, subject to this section:
  - (i) acts of Nature such as storms, floods, lightning, volcanic eruptions, forest fires, and earthquakes;
  - (ii) sabotage or destruction by a third party of facilities and equipment relating to the performance by the affected Party of its obligations under this Agreement;
  - (iii) Utility Transmission System outage or failure not caused by Seller or Seller activities;
  - (iv) war, riot, acts of a public enemy or other civil disturbance;
  - (v) strike, walkout, lockout or other significant labor dispute; or
  - (vi) theft, vandalism, accidents, or construction related power interruptions and mechanical moves
  - (vii) curtailment by the ISO, or its successor, but only to the extent that the ISO declares a "Force Majeure" under the ISO Tariff.

- (c) Exclusion. "Force Majeure Event" does not include the following:
  - (i) economic hardship of either Party;
  - (ii) an Outage, except if caused directly by an event or circumstance that meets the requirements set forth in this Section 8.1;
  - (iii) failure or delay in the granting of Permits;
  - (iv) failures or delays by the Transmission Provider or the ISO in entering into, or performing under, all agreements with Seller contemplated by this Agreement;
  - (v) curtailment or interruption of transmission services, other than by the ISO where the ISO declares a "Force Majeure" under the ISO Tariff; or
  - (vi) insufficiency, unavailability, failure, or diminishment of solar resource, except as a result of an event that would otherwise qualify as a Force Majeure Event
- (d) Notwithstanding anything to the contrary, due to the constitutional limitations on Buyer, a Force Majeure event shall include a "budget non-appropriation event" in which the Buyer's appropriation for any year covered in this Agreement does not appropriate funds for the procurement of any utility services for Buyer. During the continuation of a budget non-appropriation event as defined above, if the Buyer does not otherwise have other funds available to make payments otherwise due on this Agreement, the Buyer shall not be obligated to pay for (and the Seller shall not be required to deliver) any services provided under this Agreement until the budget non-appropriation event has terminated. Buyer agrees that it shall use its best efforts to seek appropriation for utility services during the term of this Agreement. If a budget non-appropriation event continues for more than 180 days, Seller (but not Buyer) may terminate this Agreement.

## 8.2 Conditions

- (a) In addition to the conditions set forth in Section 8.1(a) above, a Party may rely on a claim of a Force Majeure Event to excuse its performance only to the extent that such Party:
  - (i) provides prompt notice of such Force Majeure Event to the other Party, giving an estimate of its expected duration and the probable impact on the performance of its obligations under this Agreement;
  - (ii) exercises all reasonable efforts to continue to perform its obligations under this Agreement;

- (iii) expeditiously takes action to correct or cure the event or condition excusing performance so that the suspension of performance is no greater in scope and no longer in duration than is dictated by the problem; provided, however, that settlement of strikes or other labor disputes shall be completely within the sole discretion of the Party affected by such strike or labor dispute;
- (iv) exercises all reasonable efforts to mitigate or limit damages to the other Party; and
- (v) provides prompt notice to the other Party of the cessation of the event or condition giving rise to its excuse from performance.

### 8.3 Termination Due To Force Majeure Event

In addition to and without limiting any other provisions of this Agreement, if a Party is prevented from performing its material obligations under this Agreement for a period of 180 consecutive or non-consecutive days or more (whether full or partial days) due to a Force Majeure Event, the other Party may terminate this Agreement, without liability of either Party to the other, upon ninety (90) days written notice at any time during the Force Majeure Event. Seller shall be responsible for removing the applicable Generating Facility and restoring the Site where the applicable Generating Facility was installed to the condition described in article 9.1 within ninety (90) days after provision of written notice.

## ARTICLE 9: REMOVAL

### 9.1 Removal of Personal Property and the Generating Facilities

Unless the parties otherwise mutually agree in writing, upon expiration of any Initial or Renewal Terms, Seller shall, in a manner that minimizes the disruption of Buyer's business to the extent commercially practicable, (i) remove the Generating Facility's modules and related equipment from the Site other than roof standoffs secured to the Site, (ii) repair, in a commercially reasonable manner, any damage to the Site caused by the Generating Facility and such removal, but leaving roof standoffs in place, and (iii) remove all trash and debris introduced to the Site by Seller or its representatives, leaving the Site in substantially the same condition existing prior to installation of the Facility (reasonable wear and tear excepted, and with roof standoffs still in place). This section shall survive termination of this Agreement.

## ARTICLE 10: DISPUTE RESOLUTION

- 10.1 Buyer and Seller shall negotiate in good faith in event of any dispute during the performance of this Agreement. If the dispute cannot be resolved between the Buyer's Project Manager and the Seller's Project Manager after 2 days of

negotiations, at either the Buyer's or Seller's option, the matter may be promptly escalated to the next level of command within each party's organization. If the dispute or problem cannot be resolved within five (5) additional business days, the matter shall be promptly escalated to the CEO level of the Buyer and director of the Seller who shall attempt to resolve the dispute within five (5) business days.

- 10.2 Notwithstanding anything to this contrary, this Article is not intended to limit or restrict the rights of either party to seek any judicial remedy.

## **ARTICLE 11: DEFAULT & REMEDIES**

### **11.1 Seller Event of Default**

A Seller Event of Default shall occur under this Agreement upon the occurrence of any of the following events (severally "Seller Event of Default" and collectively "Seller Events of Default"):

- (a) Seller Schedules and/or delivers to Buyer, without Buyer's consent, energy or other product from a resource other than the Generating Facilities specified in this Agreement; or
- (b) Seller fails for any reason, except as a result of a Force Majeure Event, to deliver at least one-half of the Expected Annual Contract Quantity during a Contract Year; or
- (c) Seller sells or transfers Output to any Person other than Buyer other than pursuant to a Buyer Event of Default; or
- (e) Seller shall have failed to pay, when due, any rent, fee, charge or obligation of Seller requiring the payment of money under the terms of this Agreement within thirty (30) days from receipt of notice from Buyer of such past due amount; or
- (f) Seller shall have failed to maintain any insurance required pursuant to this Agreement; or
- (g) Seller shall have failed to achieve Commercial Operation Date by the Expected Commercial Operation Date as such deadline is established pursuant to Article 3; or
- (h) Any representation or warranty made by Seller hereunder shall have been false or misleading in any material respect; or
- (i) Seller shall have made a general assignment of its assets for the benefit of its creditors without prior written approval by Buyer; or

- (j) Seller shall have assigned or otherwise transferred its interest in this Agreement in violation of the provisions contained in this Agreement whether voluntarily or by operation of law; or
- (k) Seller shall have failed to maintain continuous operations at any Project Site for any thirty (30) consecutive days, have been dispossessed by process of law or otherwise, or have otherwise abandoned the Site; or
- (l) A court shall have made or entered any decree or order: (i) adjudging Seller to be bankrupt or insolvent; (ii) approving as properly filed a petition seeking reorganization of Seller or an arrangement under the bankruptcy laws or any other applicable debtor's relief law or statute of the United States or any state thereof; (iii) appointing a receiver, trustee or assignee of Seller in bankruptcy or insolvency or for its property; (iv) directing the winding up or liquidation of Seller and such decree or order shall have continued for a period of sixty (60) days; or (v) Seller shall have voluntarily submitted to or filed a petition seeking any such decree or order; or
- (m) The sequestration or attachment of or execution or other levy on Seller's interest in this Agreement or the Site or any improvements located thereon shall have occurred and Seller shall have failed to obtain a return or release of such property within thirty (30) days thereafter, or prior to sale pursuant to such levy, whichever first occurs; or
- (n) The occurrence of any act or omission on the part of Seller which operates to suspend, revoke or terminate any certificate, permit, franchise, approval, authorization or power necessary for Seller to lawfully conduct the operations which Seller is required or permitted to conduct on the Site; or
- (o) Any lien shall be filed against the Sites because of any act or omission of Seller, and shall not be discharged or contested by Seller in good faith by proper legal proceedings within twenty (20) calendar days after receipt of notice thereof by Buyer; or
- (p) An Event of Default by Seller under one of the Rights of Access, as defined therein; or
- (q) Seller shall have failed to perform any term, covenant, or condition of this Agreement to be performed by Seller, including those referred to in the immediately preceding subparagraphs, and Seller shall have failed to cure the same within sixty (60) days after written notice from Buyer, provided, however, Buyer may give Seller additional time to cure at Buyer's option. Buyer and Seller shall attempt to resolve all such disputes pursuant to Article 10's dispute resolution procedure, provided however, nothing shall

prejudice Buyer's rights and remedies in the event that Seller fails to cure within the 60-day period or within any other period granted by Buyer.

#### 11.2 Buyer Event of Default

A Buyer Event of Default shall occur under this Agreement upon the occurrence of any of the following events (severally "Buyer Event of Default" and collectively "Buyer Events of Default", and together with Seller Event of Default, individually and collectively "Event of Default" and "Events of Default"):

- (a) Buyer shall have failed to pay, when due, any rent, fee, charge or obligation of Buyer requiring the payment of money under the terms of this Agreement within thirty (30) days from receipt of notice from Seller of such past due amount; or
- (b) A court shall have made or entered any decree or order: (i) adjudging Buyer to be bankrupt or insolvent; (ii) approving as properly filed a petition seeking reorganization of Buyer or an arrangement under the bankruptcy laws or any other applicable debtor's relief law or statute of the United States or any state thereof; (iii) appointing a receiver, trustee or assignee of Buyer in bankruptcy or insolvency or for its property; (iv) directing the winding up or liquidation of Buyer and such decree or order shall have continued for a period of sixty (60) days; or (v) Buyer shall have voluntarily submitted to or filed a petition seeking any such decree or order; or
- (c) Any representation or warranty made by Buyer hereunder shall have been false or misleading in any material respect; or
- (d) Buyer shall have assigned or otherwise transferred its interest in this Agreement in violation of the provisions contained in this Agreement whether voluntarily or by operation of law; or
- (e) If the Buyer sells or vacates the Site, fails to pay Seller for a period of three (3) consecutive months and is unable to assign its obligations under this Agreement to the new owner or occupier of the Site in accordance with Section.
- (f) Buyer shall have failed to perform any term, covenant, or condition of this Agreement to be performed by Buyer, and Buyer shall have failed to cure the same within sixty (60) days after written notice from Seller, provided, however, Seller may give Buyer additional time to cure at Seller's option. Buyer and Seller shall attempt to resolve all such disputes pursuant to Article 10's dispute resolution procedure, provided however, nothing shall prejudice Seller's rights and remedies in the event that Buyer fails to cure within the 60-day period or within any other period granted by Seller.

### 11.3 Termination for Event of Default and Other Remedies

- (a) Termination for Event of Default. In the Event of Default, the non-defaulting Party may terminate the Agreement by notifying the defaulting Party in writing of (i) the decision to terminate; and (ii) the effective date of the termination. In the event of termination of the Agreement for an Event of Default under the Right of Access as defined therein, this Agreement will terminate on the same date as the date of the termination of the Right of Access.
- (b) Remedies. For all claims, causes of action and damages with respect to an Event of Default, in addition to the right to termination under Section 11.3(a), the non-defaulting Party shall be entitled (1) to foreclose upon, or otherwise employ, any security provided by the defaulting Party, (2) to recover actual damages allowed by law, and (3) to seek equitable remedies including specific performance of all or any part of this Agreement unless otherwise limited by this Agreement. In addition, Buyer shall have the right (but no obligation) to cure (or cause to be cured) on behalf of Seller any Event of Default; Seller shall pay to Buyer on demand all costs and expenses incurred by the Buyer in effecting such cure, with interest thereon from the date of incurrence at the Interest Rate. Buyer shall have the right to offset from any amounts due to Seller under this Agreement or any other agreement between Buyer and Seller all damages, losses, costs or expenses incurred by Buyer as a result of such Event of Default and any liquidated damages due from Seller pursuant to the terms of this Agreement or any other agreement. Neither the enumeration of Events of Default nor the termination of this Agreement by a non-defaulting Party shall limit the right of a non-defaulting Party to rights and remedies available at law or in equity. Except as otherwise specifically and expressly provided herein, all remedies provided for in this Agreement may be exercised individually or in combination with any other remedy available hereunder or under applicable laws, rules and regulations. The exercise of any remedy shall not preclude or in any way be deemed to waive any other remedy.

### 11.4 Limitation

- (a) Except as otherwise specifically and expressly provided in this Agreement, neither Party shall be liable to the other under this Agreement for any indirect, special or consequential damages, including loss of use, loss of revenues, loss of profit, interest charges, or cost of capital or claims of its customers or members to which service is made.
- (b) Under no circumstances shall the non-defaulting Party be required to make a termination payment or any other payment to the defaulting Party (except for payments due under this Agreement for performance prior to termination).

- (a) Removal and Restoration. Unless the Parties otherwise mutually agree in writing, upon termination (for any reason other than a purchase by Buyer in accordance with Article 2), Seller shall remove all of its property from the Sites within ninety (90) days of such termination or expiration, including any materials, equipment and, if it has been constructed, the Generating Facilities and remediate and restore the Sites to the conditions described in Article 9. In addition, the Seller shall comply with all the requirements of the Right of Access for the remediation and return of the Sites to its owner.

Seller shall, in a manner that minimizes the disruption of Buyer's business to the extent commercially practicable, (i) remove the Generating Facility's modules and related equipment from the Site other than roof standoffs secured to the Site, (ii) repair, in a commercially reasonable manner, any damage to the Site caused by the Generating Facility and such removal, but leaving roof standoffs in place, and (iii) remove all trash and debris introduced to the Site by Seller or its representatives, leaving the Site in substantially the same condition existing prior to installation of the Facility (reasonable wear and tear excepted, and with roof standoffs still in place). This section shall survive termination of this Agreement.

- (b) Abandonment. If Seller has an obligation to remove the Generating Facilities from the Sites and remediate the Sites due to the termination or expiration of this Agreement, but Seller and/or its Lender(s) fails to complete its removal and remediation obligations within one hundred and twenty (120) days of such termination, then any part of the Generating Facilities and all personal property of Seller not removed from the Sites within one hundred twenty (120) days after such termination of this Agreement shall be deemed abandoned by Seller and shall become the property of Buyer, and Buyer may, at its option, remove and warehouse or otherwise dispose of such property or retain ownership thereof indefinitely, as it determines in its sole discretion.
- (c) Survival of Obligations. The following rights, obligations or provisions shall survive termination or expiration of this Agreement:
  - (i) obligations by one Party to the other for payment of any amounts, or for performance of any duties, that have accrued or arose prior to, or have directly resulted from, the expiration or termination of this Agreement;
  - (ii) indemnity obligations pursuant to the Agreement, which shall survive to the full extent of the statute of limitations period applicable to any third party claim;



- (iii) limitation of liability provisions pursuant to the Agreement;
- (iv) for a period of one (1) year after the expiration or termination date, the right to dispute an invoice;
- (v) seller removal and remediation obligations
- (vi) Sections 6.1(e), (f), 9.1, 11.3(b), 11.5(a), (b), (c), 11.6, 14.12, 14.25, 14.28, 14.29, and 14.35.

#### 11.6 Indemnification

Each Party ("Indemnifying Party") shall defend, indemnify and hold harmless the other Party, and its permitted successors and assigns, and their officers, directors, employees, agents, affiliates and representatives (each, an "Indemnified Party") from and against any and all losses, including but not limited to losses arising from personal injury or death, or damage to property, to the extent such losses result from or arise out of the negligence and/or willful misconduct by the Indemnifying Party, its employees, subcontractors or agents.

#### 11.7 Buyer's Right to Operate in the Event of Seller's Default

- (a) If (i) Seller fails to achieve (A) the Commercial Operation Date set forth in the Milestones, or (B) a revised estimated Commercial Operation Date that has received written approval by the Buyer, or (ii) an Event of Seller's Default under Article 11 occurs, then the Buyer or its designee may, but shall not be obligated to, step-in and assume operational control from Seller of the Generating Facility. The Buyer, its employees, contractors and designees shall have the unrestricted right to enter the Generating Facility to the extent necessary to operate the Generating Facility. Notwithstanding the foregoing, Seller shall not be excused from any obligation or remedy available to the Buyer as a result of the Buyer's operation of, or election not to operate, the Generating Facility. The Buyer shall pay Seller the applicable Base Contract Price for Adjusted Delivered Energy provided hereunder, less any costs incurred by the Buyer to operate the Generating Facility. Upon the Buyer's satisfaction that Seller has the ability to operate the Generating Facility in accordance with this Agreement, Seller shall resume operational control.

### **ARTICLE 12: REPRESENTATIONS, WARRANTIES AND COVENANTS**

#### 12.1 Seller's Representations, Warranties and Covenants

Seller represents, warrants and covenants to the Buyer that as of the date of execution of this Agreement:

- (a) Seller is duly organized and validly existing as a Limited Liability Corporation under the laws of the State of California, and has the lawful power to engage in the business it presently conducts and contemplates conducting in this Agreement and Seller is duly qualified in each jurisdiction wherein the nature of the business transacted by it makes such qualification necessary;
- (b) Seller has the legal power and authority to make and carry out this Agreement and to perform its obligations hereunder; all such actions have been duly authorized by all necessary proceedings on its part;
- (c) This Agreement has been duly and validly executed and delivered by Seller and, as of the Effective Date, constitutes a legal, valid and binding obligation of Seller, enforceable in accordance with its terms against Seller, except to the extent that its enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium or other similar laws affecting the rights of creditors generally or by general principles of equity;
- (d) There are no actions, suits, proceedings or investigations pending or, to the knowledge of Seller, threatened in writing against Seller, at law or in equity before any Governmental Authority, which individually or in the aggregate are reasonably likely to have a materially adverse effect on the business, properties or assets or the condition, financial or otherwise, of Seller, or to result in any impairment of Seller's ability to perform its obligations under this Agreement;
- (e) Seller will deliver to Buyer at the Delivery Point the Adjusted Delivered Energy free and clear of all liens, security interests, claims and encumbrances or any interest therein, or thereto, by any Person.
- (f) Prior to conveyance to Buyer, Seller holds and will hold throughout the Term, the rights to all Environmental Attributes, which it has conveyed and has committed to convey to Buyer hereunder; and
- (g) The execution, delivery and performance of this Agreement by Seller will not conflict with its governing documents, any applicable laws, or any covenant, agreement, understanding, decree or order to which Seller is a party or by which it is bound or affected.

#### 12.2 Seller's Additional Representations, Warranties and Covenants

- (a) Seller warrants, represents and covenants that all of its operating and maintenance personnel shall be adequately qualified and trained throughout the term of the Agreement.
- (b) Seller represents, warrants and covenants that any goods and/or services furnished under this Agreement shall be covered by commercial

warranties substantially similar to those Seller provides to any of its customers for the same or substantially similar goods and/or services. Any warranties provided by Seller shall supplement, and shall not limit or reduce, any rights afforded to Buyer by any clause in this Agreement, any applicable Uniform Commercial Code warranties, including, without limitation, Implied Warranty of Merchantability and Implied Warranty of Fitness for a Particular Purpose as well as any other express warranty.

- (c) In the event the Buyout Option is exercised by Buyer, the existing system warranties and covenants shall be transferred from Seller to Buyer.
- (d) Seller expressly warrants that all goods supplied shall be new, suitable for the use intended, of the grade and quality specified, free from all defects in conformance with specifications furnished by the Buyer, and in compliance with all applicable federal, state and local laws and regulations.
- (e) During the provision of goods and services, Seller may not disclaim any warranty, express or implied, and any such disclaimer shall be void. Additionally, the warranties above shall not be deemed to exclude Seller's standard warranties or other rights and warranties that the Buyer may have or obtain.
- (f) Seller covenants to maintain and repair Project Sites if such maintenance and repairs are necessary as a result of Sellers' authorized or permitted use, normal wear and tear of roofs excluded.

### 12.3 Buyer Representations and Warranties

Buyer represents and warrants to Seller that as of the Effective Date of this Agreement:

- (a) Buyer has the legal power and authority to make and carry out this Agreement and to perform its obligations hereunder and all such actions have been duly authorized by all necessary proceedings on its part; and
- (b) This Agreement has been duly and validly executed and delivered by Buyer and, as of the Effective Date, constitutes a legal, valid and binding obligation of Buyer, enforceable in accordance with its terms against Buyer, except to the extent that its enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium or other similar laws affecting the rights of creditors generally or by general principles of equity; and
- (c) There are no actions, suits, proceedings or investigations pending or, to the knowledge of Buyer, threatened in writing against Buyer, at law or in equity before any Governmental Authority, which individually or in the aggregate are reasonably likely to result in any impairment of the Buyer's

ability to perform its obligations under this Agreement. Seller and Buyer further understand and agree that the Buyer is entering into this Agreement in its capacity as a purchaser of electric power. Nothing in this Agreement shall limit in any way Seller's obligation to obtain any required approvals from departments, boards, commissions or governmental entities having jurisdiction over this Agreement. By entering into this Agreement, Buyer is in no way modifying Seller's obligation to cause the Generating Facilities to be installed and operated in accordance with all Requirements of Law.

### **ARTICLE 13: ASSIGNMENT AND FINANCING**

#### **13.1 Assignment by Seller.**

Seller shall not sell, transfer or assign (collectively, an "Assignment") the Agreement or any interest therein, without the prior written consent of Buyer, which shall not be unreasonably withheld, conditioned or delayed; however, that, without the prior consent of Buyer, Seller may (i) assign this Agreement to an Affiliate of Seller; (ii) assign this Agreement as collateral security in connection with any financing of the Generating Facility (including, without limitation, pursuant to a sale-leaseback transaction). In the event that Seller identifies such secured Financing Party in a written notice to Buyer, then Buyer shall comply with the provisions set forth in Exhibit 10 of these General Terms and Conditions. ). In the event of a collateral assignment, the assignee shall assume all obligations under this Agreement if assignor defaults on its obligations to assignee and assignee exercises its rights as a secured party under its collateral assignment and thereafter becomes the successor-in-interest to Seller under this Agreement. In all other assignments, Seller or any of its successors and assigns, shall cause Assignee to assume in writing the rights and obligations of this Agreement, which shall, in any event, bind and benefit any successors or assigns of the Seller.

Any Financing Party shall be an intended third-party beneficiary of this Section 13.1. Any assignment by Seller pursuant to this Section 13.1 without any required prior written consent of Seller shall not release Buyer of its obligations hereunder.

#### **13.2. Acknowledgment of Collateral Assignment. In the event that Seller identifies a secured Financing Party in a written notice to Buyer, then Buyer hereby:**

- (a) Acknowledges the collateral assignment by Seller to the Financing Party, of Seller's right, title and interest in, to and under the Agreement, as consented to under Section 13.1 of the Agreement.
- (b) Acknowledges that the Financing Party as such collateral assignee shall be entitled to exercise any and all rights of lenders generally with respect to the Seller's interests in this Agreement.
- (c) Acknowledges that it has been advised that Seller has granted a first priority

perfected security interest in the Generating Facility to the Financing Party and that the Financing Party has relied upon the characterization of the Generating Facility as personal property, as agreed in this Agreement in accepting such security interest as collateral for its financing of the Generating Facility. Any Financing Party shall be an intended third party beneficiary of this Section 13.2.

- 13.3 Assignment by Buyer. Buyer shall not assign the Agreement or any interest therein, without Seller's prior written consent, which consent shall not be unreasonably withheld, conditioned or delayed. Any assignment by Buyer without the prior written consent of Seller shall not release Buyer of its obligations hereunder.
- 13.4 The consent of Buyer to any transfer described in this Section shall not relieve Seller of its obligation to obtain the further consent of Buyer for any subsequent transfer.

#### **ARTICLE 14: OTHER TERMS & CONDITIONS**

14.1 Notices

All deliveries, notices, requests, demands or other communications provided for or required by this Agreement shall be in writing and shall be deemed to have been given when sent by registered or certified mail, return receipt requested; when sent by overnight carrier; or upon email confirmation to sender of receipt of a facsimile communication which is followed by a mailed hard copy from sender. Notices shall be addressed to:

Buyer                      Town of Los Gatos  
Title:                      Parks and Public Works Director  
Address 1:                41 Miles Ave  
City:                        Los Gatos  
State:                      CA  
Zip:                         95030  
Phone:                    408-399-5770  
Email:                    PPW2@losgatosca.gov

With a copy to:

Title:                      Town Attorney  
Address:                 110 East Main Street  
City:                        Gatos  
State:                      CA  
Zip:                         95031

Seller: Fresh Air Energy II, LLC.  
Name: John Gorman and Erik Stuebe  
Titles: CEO, and President, respectively  
Company: Fresh Air Energy II, LLC.  
Address 1: 650 Townsend Street, Ste. 310  
City: San Francisco  
State: CA  
Zip: 94107  
Phone: 415-626-1802  
E-Mail: [johng@ecoplexus.com](mailto:johng@ecoplexus.com), [eriks@ecoplexus.com](mailto:eriks@ecoplexus.com)

Each party may designate a different person and address by sending written notice to the other party, to be effective no sooner than ten (10) days after the date of the notice.

#### 14.2 Compliance with All Laws

Seller shall at all times comply with all applicable laws, ordinances, rules and regulations. Seller shall keep itself fully informed of Buyer's charter, codes, ordinances and regulations and of all state, and federal laws in any manner affecting the performance of this Agreement, and must at all times comply with all applicable local codes, ordinances, and regulations and all applicable laws as they may be amended from time to time. Seller shall procure and maintain all Permits necessary for its performance under this Agreement, and shall pay its respective charges and fees in connection therewith.

#### 14.3 No Dedication

Any undertaking by one Party to the other under any provision of this Agreement shall not constitute the dedication of the Generating Facilities or any portion thereof to the public or to any portion thereof.

#### 14.4 Non-Waiver of Rights

Waivers of any rights hereunder must be in writing and shall not be implied from performance or usage of trade. The failure of either party to this Agreement to enforce or insist upon compliance with or strict performance of any of the terms or conditions hereof, or to take advantage of any of its rights hereunder, shall not constitute a waiver or relinquishment of any such terms, conditions or rights, but the same shall be and remain at all times in full force and effect.

#### 14.5 Headings

All titles, subject headings, section titles and similar items are provided for the purpose of reference and convenience and are not intended to be inclusive, definitive or to affect the meaning of the contents or scope of the Agreement.

14.6 No Third Party Beneficiary

This Agreement shall not be construed to create rights in, or to grant remedies to, any third party (other than a permitted successor or assignee bound to this Agreement) as a beneficiary of this Agreement or any duty, obligation or undertaking established herein.

14.7 Forward Contract

The Parties acknowledge and agree that this Agreement and the transactions contemplated by this Agreement constitute a "forward contract" within the meaning of the United States Bankruptcy Code.

14.8 Governing Law

This Agreement is made in the State of California and shall be interpreted and governed by the laws of the State of California without regard to conflict of law principles.

14.9 Governing Law

This Agreement shall be governed by and construed in accordance with the domestic laws of the State of California without reference to any choice of law principles. The Parties agree that the courts of the State of California and the Federal Courts sitting therein shall have jurisdiction over any action or proceeding arising under the Agreement to the fullest extent permitted by Applicable Law. The Parties waive to the fullest extent permitted by Applicable Law any objection it may have to the laying of venue of any action or proceeding under this Agreement in any courts described in this Section 14.9.

14.10 Nature of relationship

- (a) The duties, obligations and liabilities of the Parties are intended to be several and not joint or collective. The Agreement shall not be interpreted or construed to create an association, joint venture, fiduciary relationship or partnership between Seller and the Buyer or to impose any partnership obligation or liability or any trust or agency obligation or relationship upon either Party. A Party shall not have any right, power or authority to enter into any agreement or undertaking for, or act on behalf of, or act as or be an agent or representative of or otherwise bind the other Party.
- (b) Seller shall perform pursuant to this Agreement as an independent contractor and not as an officer, agent, servant, or employee of Buyer. Seller shall be solely responsible for the acts and omissions of its officers, agents, employees, contractors, and subcontractors, if any. Nothing herein shall be considered as creating a partnership or joint venture between the Buyer and Seller. No person performing any services and/or supplying all goods shall be considered an officer, agent, servant, or employee of Buyer,

nor shall any such person be entitled to any benefits available or granted to employees of the Buyer.

- (c) Seller shall be responsible for all obligations and payments, whether imposed by federal, state or local law, including, but not limited to, FICA, income tax withholdings, unemployment compensation, insurance, and other similar responsibilities related to Seller's performing services and work, or any agent or employee of Seller providing same.
- (d) Any terms in this Agreement referring to direction from Buyer shall be construed as providing for direction as to policy and the result of Seller's work only, and not as to the means by which such a result is obtained. Buyer does not retain the right to control the means or the method by which Seller performs work under this Agreement.
- (e) Payment of Taxes and Other Expenses. Should Buyer, in its discretion, or a relevant taxing authority such as the Internal Revenue Service or the State Employment Development Division, or both, determine that Seller is an employee for purposes of collection of any employment taxes, the amounts payable under this Agreement shall be reduced by amounts equal to both the employee and employer portions of the tax due (and offsetting any credits for amounts already paid by Seller which can be applied against this liability). Buyer shall then forward those amounts to the relevant taxing authority. Should a relevant taxing authority determine a liability for past services performed by Seller for the Buyer, upon notification of such fact by Buyer, Seller shall promptly remit such amount due or arrange with Buyer to have the amount due withheld from future payments to Seller under this Agreement (again, offsetting any amounts already paid by Seller which can be applied as a credit against such liability).
- (f) A determination of employment status pursuant to the 14.10 (e) shall be solely for the purposes of the particular tax in question, and for all other purposes of this Agreement, Seller shall not be considered an employee of Buyer. Notwithstanding the foregoing, should any court, arbitrator, or administrative authority determine that Seller is an employee for any other purpose, then Seller agrees to a reduction in the Buyer's financial liability so that Buyer's total expenses under this Agreement are not greater than they would have been had the court, arbitrator, or administrative authority determined that Seller was not an employee.

#### 14.11 No Subcontracting by Seller without Written Buyer Approval

Seller is prohibited from subcontracting this Agreement or any part of it unless such subcontracting is first approved by the Buyer in writing. Seller shall be responsible for directing the work of any approved subcontractors and for any compensation due to any approved subcontractors. Seller shall ensure that all



Seller subcontractors comply with this Agreement and shall be responsible for such compliance. Seller shall require any or all subcontractors to sign an agreement requiring compliance with this Agreement. Buyer shall be the third party beneficiary of such agreement(s). However, Buyer assumes no responsibility whatsoever concerning compensation or any other responsibility or liability to subcontractors.

#### 14.12 Good Faith & Fair Dealing

The Parties agree to act reasonably and in accordance with the principles of good faith and fair dealing in the performance of this Agreement. Unless expressly provided otherwise in this Agreement: (i) wherever the Agreement requires the consent, approval or similar action by a Party, such consent, approval or similar action shall not be unreasonably withheld or delayed; and (ii) wherever the Agreement gives a Party a right to determine, require, specify or take similar action with respect to matters, such determination, requirement, specification or similar action shall be reasonable.

#### 14.13 Severability

Should any provision of this Agreement be or become void, illegal or unenforceable, the validity or enforceability of the other provisions of this Agreement shall not be affected and shall continue in full force and effect. The Parties will, however, use their best endeavors to agree on the replacement of the void, illegal, or unenforceable provision(s) with legally acceptable clauses that correspond as closely as possible to the sense and purpose of the affected provision.

#### 14.14 Counterparts

This Agreement may be executed in two or more counterparts and by different Parties on separate counterparts, all of which shall be considered one and the same Agreement, and each of which shall be deemed an original.

#### 14.15 Cooperation

The Parties agree to reasonably cooperate with each other in the implementation and performance of the Agreement. Such duty to cooperate shall not require either Party to act in a manner inconsistent with its rights under this Agreement.

#### 14.16 Necessary Acts and Further Assurances

The Seller shall at its own cost and expense execute and deliver such further documents and instruments and shall take such other actions as may be reasonably required or appropriate to evidence or carry out the intent and purposes of this Agreement.

#### 14.17 Time of the Essence

Time is of the essence in performance by the Seller.

#### 14.18 Construction

The Parties acknowledge that this Agreement was jointly prepared by them, by and through their respective legal counsel, and any uncertainty or ambiguity existing herein shall not be interpreted against either Party on the basis that the Party drafted the language, but otherwise shall be interpreted according to the application of the rules on interpretation of contracts.

#### 14.19 Entire Agreement, Integration/Merger Clause

This Agreement together with all exhibits attached hereto, constitute the entire agreement between the Parties and supersedes any and all prior oral or written understandings. No amendment, addition to or modification of any provision hereof shall be binding upon the Parties, and neither Party shall be deemed to have waived any provision or any remedy available to it, unless such amendment, addition, modification or waiver is in writing and signed by a duly authorized officer or representative of the Parties.

#### 14.20 Non-Discrimination

Seller shall comply with all applicable Federal, State, and local laws and regulations including Los Gatos's policies concerning nondiscrimination and equal opportunity in contracting. Such laws include but are not limited to the following: Title VII of the Civil Rights Act of 1964 as amended; Americans with Disabilities Act of 1990; The Rehabilitation Act of 1973 (Sections 503 and 504); California Fair Employment and Housing Act (Government Code sections 12900 et seq.); and California Labor Code sections 1101 and 1102. Seller shall not discriminate against any subcontractor, employee, or applicant for employment because of age, race, color, national origin, ancestry, religion, sex/gender, sexual orientation, mental disability, physical disability, medical condition, political beliefs, organizational affiliations, or marital status in the recruitment, selection for training including apprenticeship, hiring, employment, utilization, promotion, layoff, rates of pay or other forms of compensation. Nor shall Seller discriminate in provision of services provided under this contract because of age, race, color, national origin, ancestry, religion, sex/gender, sexual orientation, mental disability, physical disability, medical condition, political beliefs, organizational affiliations, or marital status.

#### 14.22 Non-Exclusive Contract

This Agreement does not establish an exclusive contract between the Buyer and the Seller for the purchase of electricity or power or any services. The Buyer expressly reserves all its rights, including but not limited to, the following: the right to utilize others to provide Electricity, products, support and services; the

right to request proposals from others with or without requesting proposals from the Seller; and the unrestricted right to bid any such product, support or service.

#### 14.23 Modification

This Agreement may be supplemented, amended, or modified only by the mutual agreement of the parties.

#### 14.24 Hazardous Substances

If any product being offered, delivered or supplied to the Buyer in connection with this Agreement is listed in the Hazardous Substances List of the Regulations of the Director of Industrial Relations with the California Occupational Safety and Health Standards Board, or if the product presents a physical or health hazard as defined in the California Code of Regulations, General Industry Safety Order, Section 5194 (T8CCR), Hazard Communication, the Contractor must include a Material Safety Data Sheet (MSDS) with delivery, or shipment. Each MSDS must reference the contract/purchase order number, and identify the "Ship To Address". All shipments and containers must comply with the labeling requirements of Title 49, Code of Federal Regulations by identifying the hazardous substance, name and address of manufacturer, and appropriate hazard warning regarding potential physical safety and health hazard.

#### 14.25 Disentanglement

Seller shall cooperate with Buyer and Buyer's other Sellers to ensure a smooth transition at the time of termination of this Agreement, regardless of the nature or timing of the termination. Seller shall cooperate with Buyer's efforts to ensure that there is no interruption of Electricity and no adverse impact on the provision of services or Buyer's activities. Seller shall return to Buyer all Buyer assets or information in Seller's possession. Seller shall deliver to Buyer or its designee, at Buyer's request, all documentation and data related to Buyer, including, but not limited to, the Buyer Data and client files, held by Seller, and Seller shall destroy all copies thereof not turned over to Buyer, all at no charge to Buyer.

#### 14.26 Accountability

Seller will be the primary point of contact and assume the responsibility of all matters relating to the Agreement, including those involving the manufacturer and/or deliverer and/or any subcontractor, as well as payment issues. If issues arise, the Seller must take immediate action to correct or resolve the issues.

#### 14.27 Conflict of Interest

Seller warrants that it presently has no interest and shall not acquire any interest, direct or indirect, that would conflict in any manner or degree with the performance of services required under this Agreement.

#### 14.28 Damage and Repair by Seller

Any and all damages caused by Seller's negligence or operations shall be repaired, replaced or reimbursed by Seller at no charge to the Buyer. Repairs and replacements shall be completed within 72 hours of the incident unless the Buyer requests or agrees to an extension or another time frame. The cleanup of all damage related to accidental or intentional release of any/all nonhazardous or hazardous material (e.g. hydraulic fluid, fuel, grease, etc.) from Seller's vehicles or during performance shall be responsibility of the Seller. All materials must be cleaned up in a manner and time acceptable to Buyer (completely and immediately to prevent potential as well as actual environmental damage). Seller must immediately report each incident to the Buyer's Superintendent of Facilities. Damage observed by Seller, whether or not resulting from Seller's operations or negligence shall be promptly reported by Seller to Buyer. Buyer may, at its option, approve and/or dictate the actions that are in Buyer's best interests.

#### 14.29 Access and Retention of Records and Provision of Reports

Seller shall maintain financial records adequate to show that Buyer funds paid were used for purposes consistent with the terms of the contract between Seller and Buyer. Records shall be maintained during the terms of the Agreement and for a period of three (3) years from its termination, or until all claims have been resolved, whichever period is longer, unless a longer period is required under any contract.

#### 14.31 Cooperation with Review

Seller shall cooperate with Buyer's periodic review of Seller's performance. Such review may be conducted annually at the option of the Buyer. Seller shall make itself available to review the progress of the project and Agreement, as requested by the Buyer, upon reasonable advanced notice. Seller agrees to extend to the Buyer or his/her designees and/or designated auditor of the Buyer, the right to monitor or otherwise evaluate all work performed and all records, including service records and procedures to assure that the project is achieving its purpose, that all applicable Buyer, State, and Federal regulations are met, and that adequate internal fiscal controls are maintained. The Seller shall be responsible for receiving, replying to, and complying with any audit exceptions set forth in Buyer audits. The Seller shall pay to Buyer the full amount of any overcharge determined to be due as a result of audit. This provision is in addition to other inspection and access rights specified in this Agreement.

#### 14.30 Audit Rights Under State Law

Pursuant to California Government Code Section 8546.7, the parties acknowledge and agree that every contract involving the expenditure of public funds in excess of \$10,000 shall be subject to audit by the State Auditor.

#### 14.31 Debarment

Seller represents and warrants that it, its employees, Sellers, or agents are not suspended, debarred, or excluded from, or ineligible for, receiving Federal or state funds. Seller must within 30 calendar days advise the Buyer if, during the term of this Agreement, the Seller becomes suspended, debarred or excluded from, or ineligible for, receiving Federal or state funds.

#### 14.32 California Public Records Act

The Buyer is a public agency subject to the disclosure requirements of the California Public Records Act ("CPRA"). If Seller proprietary information is contained in documents or information submitted to Buyer, and Seller claims that such information falls within one or more CPRA exemptions, Seller must clearly mark such information "CONFIDENTIAL AND PROPRIETARY," and identify the specific lines containing the information. In the event of a request for such information, the Buyer will make best efforts to provide notice to Seller prior to such disclosure. If Seller contends that any documents are exempt from the CPRA and wishes to prevent disclosure, it is required to obtain a protective order, injunctive relief or other appropriate remedy from a court of law in Santa Clara County before the Buyer's deadline for responding to the CPRA request. If Seller fails to obtain such remedy within Buyer's deadline for responding to the CPRA request, Buyer may disclose the requested information. Seller further agrees that it shall defend, indemnify and hold Buyer harmless against any claim, action or litigation (including but not limited to all judgments, costs, fees, and attorney's fees) that may result from denial by Buyer of a CPRA request for information arising from any representation, or any action (or inaction), by the Seller.

#### 14.33 Debt Liability Disclaimer

The Buyer, including, but not limited to, any source of funding for Buyer, any General Fund or any special self-insurance program, is not liable for any debts, liabilities, settlements, liens, or any other obligations of the Seller or its heirs, successors or assigns. The Buyer shall not be liable for and shall be held harmless and indemnified by Seller for any claims or damages arising out of any other contract to which Seller is a party, tort, action or inaction, negligent error in judgment, act of negligence, intentional tort, negligent mistakes or other acts taken or not taken by the Seller, its employees, agents, servants, invitees, guests or anyone acting in concert with or on behalf of the Seller. The Buyer and its agencies and divisions, including, has no obligation to defend or undertake the defense on behalf of the Seller or its heirs, successors or assigns.

#### 14.34 Us of Buyer's Name for Commercial Purposes

Seller may not use the name of the Buyer or reference any endorsement from the Buyer in any fashion for any purpose, without the prior express written consent of the Buyer as provided by the Director of Parks and Public Works.

#### 14.35 Account Manager

Seller must assign an Account Manager to the Buyer to facilitate the contractual relationship, be fully responsible and accountable for fulfilling the Buyer's requirements. Seller represents and warrants that such person will ensure that the Buyer receives adequate support, problem resolution assistance and required information on a timely basis.

#### 14.36 Title to System

Throughout the duration of the Agreement, Seller or Seller's Financing Party shall be the legal and beneficial owner of the Generating Facility at all times, and the System shall remain the personal property of Seller or Seller's Financing Party and shall not attach to or be deemed a part of, or fixture to, the Site. The System shall at all times retain the legal status of personal property as defined under Article 9 of the Uniform Commercial Code. Buyer covenants that it will use reasonable commercial efforts to place all parties having an interest in or lien upon the real property comprising the Site on notice of the ownership of the Generating Facility and the legal status or classification of the Generating Facility as personal property. If there is any mortgage or fixture filing against the Site which could reasonably be construed as attaching to the Generating Facility as a fixture of the Site, Buyer shall provide, at Seller's request, a disclaimer or release from such lien holder. If Buyer is the fee owner of the Site, Buyer consents to the filing by Seller, on behalf of Buyer, of a disclaimer of the System as a fixture of the Site in the office where real estate records are customarily filed in the jurisdiction of the Site. If Buyer is not the fee owner, Buyer will, at Seller's request, use commercially reasonable efforts to obtain such consent from such owner

*By signing below, signatory warrants and represents that he/she executed this Agreement in his/her authorized capacity, that he/she has the authority to bind the entity listed to contractual obligations and that by his/her signature on this Agreement, the entity on behalf of which he/she acted, executed this Agreement.*

**TOWN OF LOS GATOS by:**

**FRESH AIR ENERGY – II, LLC. by:**

\_\_\_\_\_  
Greg Larson, Town Manager

\_\_\_\_\_  
Erik Stuebe, President

**APPROVED AS TO FORM:**

\_\_\_\_\_  
Judith J. Propp, Town Attorney

## **EXHIBITS INCORPORATED INTO AGREEMENT**

1. Exhibit 1 – Termination Payment Form
2. Exhibit 2 – Description of Generating Facilities
3. Exhibit 3 – Sites Descriptions
4. Exhibit 4 – Base Contract Price
5. Exhibit 5 – Expected Contract Quantity Form
6. Exhibit 6 – Form of Attestation
7. Exhibit 7 – Insurance Requirements
8. Exhibit 8 – Right of Access
9. Exhibit 9 – Panel and Inverter Warranties
10. Exhibit 10 – General Conditions – Financing Parties
11. Exhibit 11 – Engineering and Construction Requirements



**Exhibit 1**

**Termination Payment Form**

Year of Contact	Contract Period, Months	Termination Payment (\$ per Watt DC)
1	1-12	\$6.90
2	13-24	\$6.67
3	25-36	\$6.44
4	37-48	\$6.21
5	49-60	\$5.98
6	61-72	\$5.75
7	73-84	\$5.52
8	85-96	\$5.29
9	97-108	\$5.06
10	109-120	\$4.83

## **Exhibit 2**

### **Description of Generating Facilities**

The Generating Facilities consist of the following:

1. An approx. 66KW solar photovoltaic roof and parking canopy Generating Facility, consisting of approx. of 236 panels, inverters, and racking, for LG-02, located at 41 Miles Avenue, Los Gatos, CA 95030.
2. An approx. 64KW solar photovoltaic rooftop Generating Facility for LG-03, consisting of approx. 286 panels, inverters, and racking, located at 15900 Los Gatos Blvd., Los Gatos, CA 95032.

**NOTE: Generating Facility sizes may change subject to final system design.**

### **Exhibit 3**

#### **Site Description**

The Generating Facility(ies) will be installed at the following Address(es):

1. LG-02: 41 Miles Avenue, Los Gatos, CA 95030
2. LG-03: 15900 Los Gatos Blvd., Los Gatos, CA 95032

**Exhibit 4**

**Base Contract Price**

The Contract Prices for the Generating Facilities are:

1. For LG – 02: \$0.185, escalating at 3% per Annum.
2. For LG – 03: \$0.195, escalating at 3% per Annum.

## Exhibit 5

### Expected Annual Contract Quantity Form

(Annual KWH projected output)

	LG-02	LG-03
YR 1	95,700	115,200
YR 2	95,222	114,624
YR 3	94,743	114,048
YR 4	94,265	113,472
YR 5	93,786	112,896
YR 6	93,308	112,320
YR 7	92,829	111,744
YR 8	92,351	111,168
YR 9	91,872	110,592
YR 10	91,394	110,016
YR 11	90,915	109,440
YR 12	90,437	108,864
YR 13	89,958	108,288
YR 14	89,480	107,712
YR 15	89,001	107,136
YR 16	88,523	106,560
YR 17	88,044	105,984
YR 18	87,566	105,408
YR 19	87,087	104,832
YR 20	86,609	104,256
<b>TOTAL</b>	<b>1,823,085</b>	<b>2,194,560</b>

NOTE: Expected Contract Quantity is subject to change pro-rata, based on final system sizes identified in Exhibit 2.

**Exhibit 6**

**Form of Attestation**

Environmental Attribute Attestation and Bill of Sale

Fresh Air Energy – II LLC. (“Seller”) hereby sells, transfers and delivers to the Town of Los Gatos (“Buyer”) the Environmental Attributes and Environmental Attributes Reporting Rights associated with the generation of the indicated energy for delivery to the grid (as such terms are defined in the Power Purchase Agreement (“Agreement”) dated January 20, 2011 between Buyer and Seller) arising from the generation for delivery to the grid of the energy by the Generating Facility described below:

Facility name and location: LG-02 at : 41 Miles Avenue, Los Gatos, CA 95030 and LG-03 at : 15900 Los Gatos Blvd., Los Gatos, CA 95032

Project Name: MV-02 and MV-03  
EIA ID #:                      TBD  
CEC ID#:                      TBD  
Meter ID#:                      TBD  
Fuel Type:                      Solar Photovoltaic  
Capacity (KW): LG-02 – approx. 66 KW and LG-03 – approx. 80 KW

Commercial Operation Date:                                      TBD  
Dates MWhs generated                                      Dates MWhs generated  
**TBD**                                     

In the amount of one Environmental Attribute for each megawatt hour generated; and Seller further attests, warrants and represents as follows:

1. To the best of its knowledge, the information provided herein is true and correct;
2. This transfer to Buyer is the one and only sale of the Environmental Attributes and associated Environmental Attributes Reporting Rights referenced herein;
3. The Facility generated and delivered to the grid the energy in the amount indicated as undifferentiated energy; and

(Check one)

  X   Seller owns the facility.

           To the best of Seller’s knowledge, each of the Environmental Attributes associated with the generation of the indicated energy for delivery to the grid have been generated and sold by the Facility.

This serves as a bill of sale, transferring from Seller to Buyer all of Seller's right, title and interest in and to the Environmental Attributes associated with the generation of the energy for delivery to the grid.

Contact Person: Name: \_\_\_\_\_ Phone: \_\_\_\_\_

WITNESS MY HAND,

Seller: \_\_\_\_\_

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

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

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

## Exhibit 7

### Insurance Requirements

#### 1. DESIGN PHASE INSURANCE REQUIREMENTS

##### Insurance

Without limiting the Seller's indemnification of the Town, the Seller shall provide and maintain at its own expense, during the term of this Agreement, or as may be further required herein, the following insurance coverage and provisions:

##### A. Evidence of Coverage

Prior to commencement of formal design and engineering process, the Seller shall provide a Certificate of Insurance certifying that coverage as required herein has been obtained. Individual endorsements executed by the insurance carrier shall accompany the certificate. In addition, a certified copy of the policy or policies shall be provided by the Seller upon request.

This verification of coverage shall be sent to the requesting Town department, unless otherwise directed. The Seller shall not receive a Notice to Proceed with the work under the Agreement until it has obtained all insurance required and such insurance has been approved by the Town. This approval of insurance shall neither relieve nor decrease the liability of the Seller.

##### B. Qualifying Insurers

All coverage, except surety, shall be issued by companies which hold a current policy holder's alphabetic and financial size category rating of not less than A- V, according to the current Best's Key Rating Guide or a company of equal financial stability that is approved by the Town's Insurance Manager.

##### C. Notice of Cancellation

All coverage as required herein shall not be canceled or changed so as to no longer meet the specified Town insurance requirements without 30 days' prior written notice of such cancellation or change being delivered to the Town of Los Gatos or their designated agent.

##### D. Insurance Required

1. Commercial General Liability Insurance for bodily injury (including death) and property damage which provides limits as follows:
  - a. Each occurrence - \$1,000,000
  - b. General aggregate - \$2,000,000



- c. Personal Injury - \$1,000,000
- 2. General liability coverage shall include:
  - a. Premises and Operations
  - b. Personal Injury liability
  - c. Severability of interest
- 3. General liability coverage shall include the following endorsement, a copy of which shall be provided to the Town:

Additional Insured Endorsement, which shall read:

“Town of Los Gatos, and members of the Town Council, and the officers, agents, and employees of the Town of Los Gatos, individually and collectively, as additional insureds.”

Insurance afforded by the additional insured endorsement shall apply as primary insurance, and other insurance maintained by the Town of Los Gatos, its officers, agents, and employees shall be excess only and not contributing with insurance provided under this policy. Public Entities may also be added to the additional insured endorsement as applicable and the Seller shall be notified by the contracting department of these requirements.

- 4. Automobile Liability Insurance

For bodily injury (including death) and property damage which provides total limits of not less than one million dollars (\$1,000,000) combined single limit per occurrence applicable to all owned, non owned and hired vehicles.
- 5. Workers' Compensation and Employer's Liability Insurance
  - a. Statutory California Workers' Compensation coverage including broad form all states coverage.
  - b. Employer's Liability coverage for not less than one million dollars (\$1,000,000) per occurrence.
- 6. Professional Errors and Omissions Liability Insurance
  - a. Coverage shall be in an amount of not less than two million dollars (\$2,000,000) per occurrence/aggregate.

- b. If coverage contains a deductible or self-retention, it shall not be greater than fifty thousand dollars (\$50,000) per occurrence/event.
- c. Coverage as required herein shall be maintained for a minimum of two years following termination or completion of this Agreement.

7. Claims Made Coverage

If coverage is written on a claims made basis, the Certificate of Insurance shall clearly state so. In addition to coverage requirements above, such policy shall provide that:

- a. Policy retroactive date coincides with or precedes the Consultant's start of work (including subsequent policies purchased as renewals or replacements).
- b. Policy allows for reporting of circumstances or incidents that might give rise to future claims.

E. Special Provisions

The following provisions shall apply to this Agreement:

- 1. The foregoing requirements as to the types and limits of insurance coverage to be maintained by the Seller and any approval of said insurance by the Town or its insurance consultant(s) are not intended to and shall not in any manner limit or qualify the liabilities and obligations otherwise assumed by the Seller pursuant to this Agreement, including but not limited to the provisions concerning indemnification.
- 2. The Town acknowledges that some insurance requirements contained in this Agreement may be fulfilled by self insurance on the part of the Seller. However, this shall not in any way limit liabilities assumed by the Seller under this Agreement. Any self insurance shall be approved in writing by the Town upon satisfactory evidence of financial capacity. Seller's obligation hereunder may be satisfied in whole or in part by adequately funded self-insurance programs or self-insurance retentions.
- 3. Should any of the work under this Agreement be sublet, the Seller shall require each of its subcontractors of any tier to carry the aforementioned coverages, or Seller may insure subcontractors under its own policies.
- 4. The Town reserves the right to withhold payments to the Seller in the event of material noncompliance with the insurance requirements outlined above.

## 2. CONSTRUCTION PHASE INSURANCE REQUIREMENTS

### Insurance

Without limiting the Seller's indemnification of the Town, the Seller shall provide and maintain at its own expense, during the term of this Agreement, or as may be further required herein, the following insurance coverage and provisions:

#### A. Evidence of Coverage

Prior to commencement of Construction, the Seller shall provide a Certificate of Insurance certifying that coverage as required herein has been obtained. Individual endorsements executed by the insurance carrier must accompany the certificate. In addition, a certified copy of the policy or policies shall be provided by the Seller upon request.

This verification of coverage shall be sent to the requesting Town department, unless otherwise directed. The Seller shall not receive a Notice to Proceed with the work under the Agreement until it has obtained all insurance required and such insurance has been approved by the Town. This approval of insurance shall neither relieve nor decrease the liability of the Seller.

#### B. Qualifying Insurers

1. All coverage, except surety, shall be issued by companies which hold a current policy holder's alphabetic and financial size category rating of not less than A- V, according to the current Best's Key Rating Guide or a company of equal financial stability that is approved by the Town's Insurance Manager.

#### C. Notice of Cancellation

All coverage as required herein shall not be canceled or changed so as to no longer meet the specified City insurance requirements without 30 days' prior written notice of such cancellation or change being delivered to the City of Los Gatos or their designated agent.

#### D. Insurance Required

1. Commercial General Liability Insurance for bodily injury (including death) and property damage which provides limits as follows:

- a. Each occurrence - \$2,000,000
- b. General aggregate - \$4,000,000
- c. Products/Completed Operations aggregate \*\* - \$4,000,000

- d. Personal Injury - \$2,000,000

A minimum of 50% of each of the aggregate limits must remain available at all times unless coverage is project specific.

2. General liability coverage shall include:

- a. Premises and Operations
- b. \*\*Products/Completed Operations with limits of four million dollars (\$4,000,000) per aggregate to be maintained for three (3) years following acceptance of the work by the Town.
- c. Contractual Liability expressly including liability assumed under this Agreement. If the Seller is working within fifty (50) feet of a railroad or light rail operation, any exclusion as to performance of operations within the vicinity of any railroad bridge, trestle, track, roadbed, tunnel, underpass or crossway shall be deleted, or a railroad protective policy provided.
- d. Personal Injury liability
- e. Owners' and Sellers' Protective liability
- f. Severability of interest
- g. Explosion, Collapse, and Underground Hazards (X, C and U)
- h. Broad Form Property Damage liability

3. General liability coverage shall include the following endorsements, copies of which shall be provided to the Town:

- a. Additional Insured Endorsement, which shall read:

“Town of Los Gatos, and members of the Town Council, and the officers, agents, and employees of the Town of Los Gatos, individually and collectively, as additional insureds.”

Insurance afforded by the additional insured endorsement shall apply as primary insurance, and other insurance maintained by the Town of Los Gatos, its officers, agents, and employees shall be excess only and not contributing with insurance provided under this policy. Public Entities may also be added to the additional insured endorsement as applicable and

the Seller shall be notified by the contracting department of these requirements.

b. Contractual Liability Endorsement:

Insurance afforded by this policy shall apply to liability assumed by the insured under written contract with the Town of Los Gatos.

c. X C & U (Explosion, Collapse and Underground) Endorsement:

Insurance afforded by this policy shall provide X, C and U Hazards coverage.

4. Claims Made Coverage

If coverage is written on a claims made basis, the Certificate of Insurance shall clearly state so. In addition to coverage requirements above, such policy shall provide that:

- a. Policy retroactive date coincides with or precedes the Seller's start of work (including subsequent policies purchased as renewals or replacements).
- b. Seller will make every effort to maintain similar insurance during the required extended period of coverage following project completion, including the requirement of adding all additional insureds.
- c. If insurance is terminated for any reason, Seller agrees to purchase an extended reporting provision of at least two years to report claims arising from work performed in connection with this Agreement or Permit.
- d. Policy allows for reporting of circumstances or incidents that might give rise to future claims.

5. Automobile Liability Insurance

For bodily injury (including death) and property damage which provides total limits of not less than one million dollars (\$1,000,000) combined single limit per occurrence applicable to all owned, non owned and hired vehicles.

6. Workers' Compensation and Employer's Liability Insurance

- a. Statutory California Workers' Compensation coverage including broad form all states coverage.
- b. Employer's Liability coverage for not less than one million dollars (\$1,000,000) per occurrence.

7. Sellers' Equipment Insurance

On an "all risk" basis covering equipment owned, leased, or used by the Seller. If the total value of equipment is less than \$100,000 Seller may self-insure this exposure. If total equipment value is \$100,000 or more, insurance is required. Such insurance shall include an insurer's waiver of subrogation in favor of the Town. Seller shall indemnify, defend, and hold harmless the Town for any loss or damage to its equipment. This coverage may be waived by the Insurance Manager, but the Seller hereby releases and holds harmless the Town for any loss or damages to its equipment.

E. Special Provisions

The following provisions shall apply to this Agreement:

1. The foregoing requirements as to the types and limits of insurance coverage to be maintained by the Seller and any approval of said insurance by the Town or its insurance consultant(s) are not intended to and shall not in any manner limit or qualify the liabilities and obligations otherwise assumed by the Seller pursuant to this Agreement, including but not limited to the provisions concerning indemnification.
2. The Town acknowledges that some insurance requirements contained in this Agreement may be fulfilled by self-insurance on the part of the Seller. However, this shall not in any way limit liabilities assumed by the Seller under this Agreement. Any self-insurance shall be approved in writing by the Town upon satisfactory evidence of financial capacity. Sellers obligation hereunder may be satisfied in whole or in part by adequately funded self-insurance programs or self-insurance retentions.
3. Should any of the work under this Agreement be sublet, the Seller shall require each of its subcontractors of any tier to carry the aforementioned coverage, or Seller may insure subcontractors under its own policies.
4. The Town reserves the right to withhold payments to the Seller in the event of material noncompliance with the insurance requirements outlined above.

3. OPERATIONS AND MAINTENANCE PHASE INSURANCE REQUIREMENTS

Insurance

Without limiting the Seller's indemnification of the Town, Seller, shall at its own expense, provide and maintain the following insurance coverage in full force and effect after the Commercial Operation Date:

#### A. Evidence of Coverage

Prior to Commercial Operation Date, Seller shall provide a Certificate of Insurance certifying that coverage as required has been obtained. Individual endorsements executed by the insurance carrier shall accompany the certificate. In addition, a copy of the policy or policies shall be provided by Seller upon request.

A periodic review/change of insurance requirements may be made every five years to ensure appropriate coverage by Town standards is in place.

#### B. Qualifying Insurers

All policies shall be issued by companies which hold a current policy holder's alphabetic and financial size category rating of not less than A- V, according to the current Best's Key Rating Guide, unless otherwise approved by Town's Insurance Manager.

#### C. Notice of Cancellation

All coverage as required herein shall not be canceled or changed so as to no longer meet the specified Town insurance requirements without 30 days' prior written notice of such cancellation or change being delivered to the Town of Los Gatos or their designated agent.

#### D. Insurance Required

1. Commercial General Liability Insurance - for bodily injury (including death) and property damage which provides limits as follows:
  - a. Each occurrence - \$2,000,000
  - b. General aggregate - \$4,000,000
  - c. Personal Injury - \$2,000,000
2. General liability coverage shall include:
  - a. Premises and Operations
  - b. Personal Injury liability
  - f. Severability of interest
3. General liability coverage shall include the following endorsement, a copy of which shall be provided to the Town:

Additional Insured Endorsement, which shall read:

“Town of Los Gatos, and members of the Board of Supervisors of the Town of Los Gatos, and the officers, agents, and employees of the Town of Los Gatos, individually and collectively, as additional insured’s.”

Insurance afforded by the additional insured endorsement shall apply as primary insurance, and other insurance maintained by the Town of Los Gatos, its officers, agents, and employees shall be excess only and not contributing with insurance provided under this policy.

4. Automobile Liability Insurance

For bodily injury (including death) and property damage which provides total limits of not less than one million dollars (\$1,000,000) combined single limit per occurrence applicable to all owned, non-owned and hired vehicles.

5. Workers' Compensation and Employer's Liability Insurance

- a. Statutory California Workers' Compensation coverage including broad form all-states coverage.
- b. Employer's Liability coverage for not less than one million dollars (\$1,000,000) per occurrence.



## **EXHIBIT 8**

### **RIGHT OF ACCESS**

1. Buyer hereby grants to Seller and to Seller's agents, employees, contractors and subcontractors throughout the Term (as defined in the PPA), and for a reasonable period after the Term, but in no case later than one hundred eighty (180) calendar days after the Term, to remove the applicable Generating Facility or Generating Facilities and restore the Site(s) pursuant to this PPA, a right of access irrevocable during the Term of the Agreement for the installation, operation, maintenance, replacement and removal of the applicable Generating Facility or Generating Facilities, including commercially reasonable access to, on, over, under and across the Site(s) during reasonable business hours, and during non-business hours in the event of any event or circumstance that poses an imminent risk to human health, the environment, the applicable Generating Facility or Generating Facilities or the Site(s).
2. Buyer also grants to Seller, on a non-exclusive basis, the right to make necessary connections to the local electric utility system.
3. Seller or its designee (including any Financing Party) shall have the non-exclusive right without cost to access the Site(s) in order to perform its obligations under the Agreement. Buyer will not charge Seller any rent for such right to access the Site(s). Seller shall provide the Buyer reasonable notice of its proposed access and shall comply with all reasonable Buyer requirements if presented to Seller from time to time. Notwithstanding anything to the contrary in this Right of Access, Buyer shall use commercially reasonable efforts to provide access to the sites to Seller twenty-four (24) hours a day, seven (7) days a week for emergency purposes. Within twenty-four (24) hours of such emergency access, Seller shall provide Buyer with a written explanation of the nature of the emergency. All such emergency work shall be diligently prosecuted to completion in order that such work shall not remain in a partly finished condition any longer than necessary for completion.
4. The Generating Facilities are the personal property of Seller and shall not be considered the property (personal or otherwise) of Buyer upon installation of the applicable Systems at the applicable Sites. Each Generating Facility is more particularly described in the PPA.
5. The Generating Facilities are the personal property of Seller and shall not be considered a fixture of the applicable Sites. Accordingly, Buyer hereby grants Seller and any Lender (as defined in the PPA) the right to file any UCC-1 financing statement or fixture filing that confirms its interest in the applicable Generating Facility.
6. During the Term, Seller's access rights are preserved and Buyer shall not interfere with or permit any third party to interfere with such rights or access. The Right of Access granted hereunder shall be irrevocable except upon expiration or earlier

termination of an applicable PPA, in which case, this Right of Access shall only be revocable as it relates to the applicable PPA, which has expired or earlier terminated. Seller shall have access to the Buyer's Sites beyond the Term of the PPA for the purpose of removing the applicable Generating Facility or Facilities, remediation or other purposes as provided in the PPA.

7. Upon any rejection or other termination of any one or more of the PPAs pursuant to any process undertaken with respect to Seller under the United States Bankruptcy Code, at the request of any Financing Party made within ninety (90) days of such termination or rejection, Buyer shall grant a new right of access in favor of the Financing Parties or their designees on substantially the same terms as this Right of Access.
8. Buyer will not take any action inconsistent with the foregoing.

**TOWN OF LOS GATOS by:**

**FRESH AIR ENERGY – II, LLC. by:**

---

Greg Larson, Town Manager

---

Erik Stuebe, President

**APPROVED AS TO FORM:**

---

Judith J. Propp, Town Attorney

**Exhibit 9**

**Panel and Inverter Warranties**

Seller hereby represents the following with regard to equipment warranties:

- 1) Generating Facility Warranty will comply with CSI Warranty and CPUC Code 387.5(d)(4) requirements
- 2) Solar PV Panels utilized in Generating Facilities will include 20 – 25 Year performance Warranty.
- 3) Inverters utilized in Generating Facilities will include minimum 10 Year Warranty.
- 4) After Buyer's notice that it elects to exercise its option to purchase, or otherwise assumes ownership of the Facility, and upon payment of the Purchase Price, Seller shall transfer Solar PV Panel and Inverter Warranties to Buyer.

## Exhibit 10

### General Conditions – Financing Parties

Buyer acknowledges that Seller will be financing the installation of the System either through a lessor, lender or with financing accommodations from one or more financial institutions and that the Seller may sell or assign the System and/or may secure the Seller's obligations by, among other collateral, a pledge or collateral assignment of this Agreement and a first security interest in the System. In order to facilitate such necessary sale, conveyance, or financing, and with respect to any such financial institutions of which Seller has notified Buyer in writing Buyer agrees as follows:

- (a) Consent to Collateral Assignment. Buyer consents to either the sale or conveyance to a lessor or the collateral assignment by Seller to the a lender that has provided financing of the System, of the Seller's right, title and interest in and to this Agreement.
- (b) Notices of Default. Buyer will deliver to the Financing Party, concurrently with delivery thereof to Seller, a copy of each notice of default given by Buyer under the Agreement, inclusive of a reasonable description of Seller default. No such notice will be effective absent delivery to the Financing Party. Buyer will not mutually agree with Seller to terminate the Agreement without the written consent of the Financing Party.
- (c) Rights Upon Event of Default. Notwithstanding any contrary term of this Agreement:
  - i. The Financing Party, as collateral assignee, shall be entitled to exercise, in the place and stead of Seller, any and all rights and remedies of Seller under this Agreement in accordance with the terms of this Agreement and only in the event of Seller's or Buyer's default, the Financing Party shall also be entitled to exercise all rights and remedies of secured parties generally with respect to this Agreement and the System.
  - ii. The Financing Party shall have the right, but not the obligation, to pay all sums due under this Agreement and to perform any other act, duty or obligation required of Seller thereunder or cause to be cured any default of Seller thereunder in the time and manner provided by the terms of this Agreement. Nothing herein requires the Financing Party to cure any default of Seller under this Agreement or (unless the Financing Party has succeeded to Seller's interests under this Agreement) to perform any act, duty or obligation of Seller under this Agreement, but Buyer hereby gives it the option to do so.
  - iii. Upon the exercise of remedies under its security interest in the System, including any sale thereof by the Financing Party, whether by judicial proceeding, or under any power of sale contained therein, or any conveyance from Seller to the Financing Party (or any assignee of the Financing Party) in lieu thereof, the Financing Party shall give notice to Buyer of the transferee or assignee of this Agreement. Any such exercise of remedies shall not constitute a default under this Agreement.
  - iv. Upon any rejection or other termination of this Agreement pursuant to any process

undertaken with respect to Seller under the United States Bankruptcy Code, at the request of the Financing Party made within ninety (90) days of such termination or rejection, Buyer shall enter into a new agreement with the Financing Party or its assignee having the same terms and conditions as this Agreement.

(d) Right to Cure.

i. Buyer will not exercise any right to terminate or suspend this Agreement unless it shall have given the Financing Party prior written notice by sending notice to the Financing Party (at the address provided by Seller) of its intent to terminate or suspend this Agreement, specifying the condition giving rise to such right, and the Financing Party shall not have caused to be cured the condition giving rise to the right of termination or suspension within thirty (30) days after such notice or (if longer) the periods provided for in this Agreement. The Parties respective obligations will otherwise remain in effect during any cure period; provided that if such Seller default reasonably cannot be cured by the Financing Party within such period and the Financing Party commences and continuously pursues cure of such default within such period, such period for cure will be extended for a reasonable period of time under the circumstances, such period not to exceed additional ninety (90) days.

ii. If the Financing Party (including any Buyer or transferee), pursuant to an exercise of remedies by the Financing Party, shall acquire title to or control of Seller's assets and shall, within the time periods described in Subsection (c)(i). above, cure all defaults under this Agreement existing as of the date of such change in title or control in the manner required by this Agreement and which are capable of cure by a third person or entity, then such person or entity shall no longer be in default under this Agreement, and this Agreement shall continue in full force and effect.

**Schedule 1**

**Notice Information**

**Buyer:**

**Seller:**

**Financing Party**

[To be provided by Seller when known.]

## **Exhibit 11**

### **DESIGN AND CONSTRUCTION PHASE SERVICES**

#### **1. DESIGN PHASE**

##### **1.1. Standard of Care**

- Seller must perform Services in accordance with those standards of care that are generally recognized as being used by competent persons in its area of specialty in the State of California.
- Seller must perform Services in compliance with all applicable federal, state and local codes, statutes, laws, regulations and ordinances, including environmental, energy conservation, and disabled access requirements.
- All designs must comply with all regulations and standards of the Fire Marshal having jurisdiction over the Project.
- Seller must use its best efforts to verify interpretations of applicable law, codes, regulations, and ordinances, from the appropriate Government Agency(s) and authorities having jurisdiction over the Project. Such efforts will be undertaken in accordance with the acceptable standard of care for this type of Project.

##### **1.2. Signing and Stamping Documents**

- Final Construction Documents and other submittal documents must be signed and stamped by the Design Professional(s) as appropriate to the discipline of Work.

##### **1.3. Insurance Requirements**

- Seller's must meet the insurance requirements as set forth in Exhibits 7 (A and B) for design and construction phases of the Work.

#### **2. PERMITS FROM THE BUILDING DEPARTMENT (BUILDING OFFICIAL)**

##### **2.1. Overview**

- Installation and Acceptance permits are required from the Building Department (Building Official), having the jurisdiction of the project.
- The Seller is responsible for completing the installation permit application, submitting the permit application to the Building Official, and receiving the approved permit before proceeding with Work. The Building Official shall conduct compliance inspections, and final acceptance inspections, of the Seller's work related above items of work. The "compliance inspections" are for Fire Marshal compliance only and do not relieve the Seller from performing all work to the standards established by the entirety of the contract documents.

##### **2.2. Submittals**

- 2.2.1. A completed permit application to the Building Official; and
- 2.2.2. A copy of the Plans and Specifications to the Buyer for information.
- 2.3. Fees
- 2.3.1. The Seller is responsible for payment of all fees for the permit.

### 3. FIRE PROTECTION PLAN

### 4. GENERAL

#### 4.1. Definitions

- 4.1.1. Hot Work - Hot work includes any operations capable of initiating fires or explosions, including cutting, welding, brazing, soldering, grinding, thermal spraying, thawing pipe, torch applied roofing, or any other similar activity.
- 4.1.2. Fire Marshal – Office of the Fire Marshal, Santa Clara County
- 4.1.3. SD&S No. SI-7 – Fire Marshal Standard Details & Specifications Number SI-7 (Construction Site Fire Safety)

#### 4.2. Fire Protection Plan Requirements

- 4.2.1. Seller must prepare and submit a written Fire Protection Plan. Submission of the Plan may be phased. See 1.06 below.
- 4.2.2. The written Fire Protection Plan must meet the requirements of the Contract Documents and be consistent with the fire safety precautions specified in SD&S No. SI-7.
- 4.2.3. At a minimum, the fire protection plan must include:
  - 4.2.3.1. The name and contact phone number of the person(s) responsible for compliance with the Fire Protection Plan.
  - 4.2.3.2. Procedures for:
    - Reporting emergencies to the fire department.
    - Emergency notification, evacuation and/or relocation of all persons at Project Site.
    - Hot Work operations
    - Management of hazardous materials
    - Removal of combustible debris
    - Emergency ingress and egress



#### 4.3. Implementation

- 4.3.1. Seller is responsible for implementation of the requirements and provisions of the approved Fire Protection Plan.
- 4.3.2. Seller is responsible for communicating the requirements of the Fire Protection Plan to all SubSellers and other personnel working at the Project Site.

#### 4.4. Submission

- 4.4.1. Submit two (2) copies of a Fire Protection Plan to Buyer.
- 4.4.2. Submission of the Plan may be phased. County Fire Marshal and Buyer must approve the Fire Protection Plan prior to Seller performing Work at the Project Site. Fire Marshal review time is 15 working days.

#### 4.5. Inspection and Testing

- 4.5.1. The Seller is required to commission all systems of these documents.

#### 4.6. Use of Project Site

- 4.6.1. Seller must confine operations at the Project Site to areas permitted by law, ordinances, permits and the Contract Documents, and must not unreasonably encumber the Project Site with any materials, equipment, temporary structures, or temporary measures.
- 4.6.2. Seller's employees, or others subject to the Seller's control, are not permitted to reside on the Project Site in temporary living facilities.

#### 4.7. Workplace Environment

- 4.7.1. The use or possession of alcohol, weapons, or illegal controlled substances by the Seller, or others subject to the Seller's control, on Town property is prohibited.
- 4.7.2. The Seller must ensure and maintain a workplace environment free of personal harassment and intimidation.
- 4.7.3. Conduct that creates an intimidating, hostile, or offensive workplace environment is prohibited. Such conduct includes, but is not limited to, the following:
  - Verbal harassment, e.g., epithets, derogatory comments, or slurs;
  - Physical harassment, e.g., assault, impeding or blocking movement, gestures, staring, or any physical interference with normal work or movement;
  - Visual forms of harassment, e.g., derogatory posters, letters, poems, graffiti, cartoons, or drawings.
- 4.7.4. Unwelcome and unwanted sexual advances constitute sexual harassment that is prohibited. For example, requests for sexual favors and verbal or physical conduct of a sexual nature are prohibited.
- 4.7.5. It is the responsibility of the Seller to:
  - Inform its employees and SubSellers that behavior that creates an intimidating, hostile, or offensive workplace environment is prohibited;

- Create a workplace environment that is free from harassment; and,
- Take corrective action to stop prohibited behavior/conduct.

4.7.6. If in the opinion of the Buyer's Authorized Representative, any employee of the Seller or Seller's SubSellers violate the prohibitions per this section, Seller must immediately remove that person or SubSeller from the Project upon Buyer's request, and such person or SubSeller must not be permitted to perform further Work on the Project Site.

#### 4.8. Disruption of Buyer's Normal Operations

4.8.1. Seller must give timely advance notice to Buyer of Work that is likely to be disruptive to Buyer's normal operations at or near the Project Site. If Seller does not so advise Buyer, Buyer has the right to temporarily suspend Seller's Work or to require Seller to modify its Work operations to eliminate any disruption, and Seller is not entitled to any adjustment in the Contract Sum or Contract Time for any delay or additional costs associated therewith.

#### 4.9. Cleanup

4.9.1. Seller must continuously keep the Project Site and surrounding areas free from waste materials and/or rubbish caused by its operations or rubbish from any source that accumulates within the Project Site and any other area designated by the Buyer's Project Manager for use by the Seller.

4.9.2. When cleanup is paid for as a separate Bid item, full compensation for such work must be included in the Bid price for cleanup.

4.9.3. When the Bid price is a lump sum, or there is no unit price item for cleanup, full compensation for cleanup will be considered to have been included in the various items of Work.

4.9.4. Seller must, before certifying that the entire Work of the Project is complete and/or requesting Milestone Completion inspection, clean material storage sites and all ground occupied or affected in connection with the Work or designated portion of the Work, and must leave all parts of the Project in a neat and presentable condition satisfactory to Buyer's Project Manager.

4.9.5. Upon completion of the Work or any designated part thereof, Seller must promptly remove all its waste materials, rubbish and debris, and all its tools, construction equipment, machinery and surplus materials from the Project area or the completed part.

4.9.6. If the Seller fails to clean up as required by the Contract Documents, Buyer may do so and the cost thereof will be charged to the Seller and deducted from progress payments due or to become due to the Seller.

#### 4.10. Disposal of Material Outside Project Area

4.10.1. Seller is responsible for making all arrangements and paying all costs for disposal of materials outside the Project area.

- 4.10.2. When any material is to be disposed of outside the Project area, at other than a public disposal site, Seller must first obtain a written consent from the property Buyer of the proposed disposal site, and furnish Buyer a copy of said consent. Property Buyer's written consent must acknowledge receipt of the soils testing report, if any, for the materials to be disposed.
- 4.10.3. Disposal of Hazardous Materials must comply with all legal requirements, including but not limited to containerization, labeling, manifesting, transportation, disposal site, and use of properly trained personnel. No later than 15 Days after Seller's request for Final Inspection, Seller must submit copies of all Hazardous Waste Manifests signed by Toxic Substances Disposal Facilities ("TSDF's") and certificates of disposal, to prove that Seller has legally disposed of such materials. Submit four (4) copies of each manifest.

#### 4.11. Hazardous Materials

- 4.11.1. Seller must comply with all Federal, State, County and local laws, statutes, ordinances and other regulations covering the use, storage, transportation and disposal of any Hazardous Materials on the Project. Seller must obtain all permits and pay all fees and taxes for all services and materials required to perform the Project.
- 4.11.2. The term "Hazardous Materials" as used herein means any material that, because of its quantity, concentration, or physical or chemical characteristics, poses a significant present or potential hazard to human health and safety or to the environment if released into the workplace of the environment.
- 4.11.3. Prior to starting Work, Seller must submit to Buyer six (6) copies of a list of all Hazardous Materials expected to be used on the Project. Seller must keep a copy of the list at the Project Site. This list must include but not be limited to any cleaners, solvents, paints or explosive charges used in the Work. Seller must submit one (1) copy of OSHA Form 20 – Material Safety Data Sheet ("MSDS") for each material listed and must advise every person at or near the Project Site of these materials, of proper handling, and of proper action in case of accident or exposure.
- 4.11.4. Seller must safely contain and store all its Hazardous Materials, and in the event of spill or discharge, must immediately notify all required Federal, State, County and local agencies including the fire department. Seller must protect personnel from exposure and provide treatment as necessary.
- 4.11.5. Seller must immediately advise Buyer of any potentially Hazardous Materials encountered at the Project Site and must take all necessary action to prevent exposure of personnel until the material is identified and proper action can be taken.
- 4.11.6. Seller must not store or use any Hazardous Materials near air intakes or doors and windows serving persons on or off the Project Site without proper protection and safeguards to prevent exposure.
- 4.11.7. Seller must exercise all required precautions and safeguards in the storage, use and disposal of Hazardous Materials. Nothing in this, relieves Seller of

responsibility for compliance with all applicable laws and statutes, or other provisions of the Contract, particularly Seller's responsibility for damage and preservation of life and property.

#### 4.12. Air Pollution Control

- 4.12.1. Seller and each Sub Seller must comply with all air pollution control rules, regulations, ordinances, statutes, and Project specific permit requirements of the Bay Area Air Pollution Control District and all other regulatory agencies that apply to any Work performed. If there is a conflict between the Bay Area Air Pollution Control District rules, regulations, ordinances, and statutes and the rules, regulations, ordinances, and statutes of other regulatory agencies, the most stringent shall govern.
- 4.12.2. Seller must not discharge smoke, dust or any other air contaminants into the atmosphere in such quantity as will violate any regulations.
- 4.12.3. Seller must minimize dust nuisances resulting from performance of the Work, both inside and outside the Project limits, by applying either water or dust palliative, or both.

#### 4.13. Water Pollution Control

- 4.13.1. Seller must comply with all Federal, State and local water pollution prevention and storm drain pollution prevention rules, regulations, ordinances, statutes, guidelines, and Project specific permit requirements.
- 4.13.2. If required by law, ordinance, regulation, code, permit or the requirements of the Contract Documents, Seller must prepare a Project Specific Storm Water Pollution Prevention Program (SWPPP).
- 4.13.3. Seller must exercise every reasonable precaution to protect storm drains, channels and all bodies of water from pollution, and must conduct and schedule operations so as to avoid or minimize muddying and silting of any waters. Seller must construct whatever facilities are necessary or requested by Buyer to provide prevention, control and abatement of water pollution.
- 4.13.4. No provision of the Contract Documents relieves Seller of responsibility for compliance with California Fish and Game Code §5650 et seq, and §12015 et seq, and applicable regulations of the Regional Water Quality Control Board, Santa Clara County flood control and water district requirements, or other applicable statutes relating to prevention and removal of water pollution.
- 4.13.5. Compliance with water pollution requirements does not relieve Seller from responsibility to comply with all provisions of the Contract Documents, particularly Seller's responsibilities for damage and preservation of property.

#### 4.14. Sound Control

- 4.14.1. The Seller must comply with all CAL OSHA requirements.

- 4.14.2. The Seller must comply with all local sound control and noise level rules, regulations, and ordinances that apply to any Work performed pursuant to the requirements of the Contract Documents.
- 4.14.3. Each internal combustion engine, used for any purpose on the Project or related to the Project, must be equipped with a muffler of a type recommended by the Manufacturer. No internal combustion engine shall be operated on the Project without said muffler
- 4.14.4. Noise level from and hours of Seller's operations, that are located within town limits, must comply with city ordinances or requirements.
- 4.14.5. Noise level requirements apply to all equipment used in the Project including, but not limited to, trucks, transit mixers, generators, air-tools, or equipment that may or may not be owned by the Seller. The use of loud sound signals must be avoided in favor of warning lights except those required by safety laws for the protection of personnel.

#### 4.15. Worker's Sanitary Provisions & Use of Buyer's Facilities

- 4.15.1. Seller must conform to the rules and regulations for sanitary provisions established by the State, the Town of Los Gatos, and any other applicable jurisdictions.
- 4.15.2. Seller must Provide and maintain toilets for use by its employees and the employees. These accommodations must be maintained in a neat and sanitary condition, and must comply with all applicable laws, ordinances and regulations pertaining to public health and sanitation.
- 4.15.3. Seller's personnel must not use Buyer's facilities without Buyer's express written permission, which will be at Buyer's sole discretion. Such Buyer's facilities include but are not limited to toilet facilities, food service facilities (cafeteria and coffee shop), utilities services of any kind, carts, fire extinguishers (except in emergencies), parking, storage space and any other facilities and services.

#### 4.16. Recycling of Materials

- 4.16.1. The California Department of Resources Recycling and Recovery (CalRecycle) requires all Cities and Counties to develop a Source Reduction and Recycling Program (SRRP) for all development projects such that solid waste intake to landfills is reduced. This project is included in the CalRecycle/SRRP requirements; therefore, the Seller is required to ensure that debris generated from demolition or construction activities is recycled or salvaged in accordance with all state and local requirements.

#### 4.17. Submittals

##### 4.17.1. General

Seller must submit copies of the shop drawings, product data, and other construction documents to Buyer for information. Buyer may provide comments to safe guard the operations of the facility at which the Generating Facility is being installed.

#### 4.18. Compliance with Laws and Regulations

- 4.18.1. Seller must keep informed of governmental regulations that may affect the Work. Seller must observe and comply with, and must cause all agents, employees, SubSellers and Suppliers to observe and comply with said regulations. Seller shall hold harmless and indemnify Buyer and all its officers, employees and consultants against any liability or claim arising from or based upon the violation of any such regulations by Seller, its agents, employees, representatives or SubSellers and Suppliers.

#### 4.19. Taxes, Utilities, Permits, and Fees

- 4.19.1. Taxes: Seller must pay any or all taxes imposed by Federal, State, or local governments, that were legally enacted as of the Bid date or subsequently enacted during the Contract Time, including but not limited to Federal excise tax and all State and local sales and use taxes solely attributable to the Generating Facilities. Buyer will not furnish any tax exemption certificate or any document designed to exempt Seller from payment of any tax on labor, services, materials, transportation, or any other items Provided by Seller pursuant to the Contract Documents.

##### Utilities:

- 4.19.2. Seller shall be responsible for all temporary power, water, and other utilities for completion of its construction operations.

- 4.19.3. Permits & Fees: Seller must obtain and pay for all building permits, encroachment permits, and all other permits and governmental fees, licenses and inspections necessary for the proper execution and completion of the Work, unless otherwise provided in the Contract Documents.

- Sellers must give all necessary notices and comply with all laws, ordinances, rules, regulations and lawful Orders relating to the Work, and to the preservation of the public health and safety.
- If Seller performs any work contrary to such laws, ordinances, Orders, rules and regulations, Seller shall bear all costs attributable thereto.

- Seller must arrange, coordinate, and pay for all permit related inspections.

- 4.19.4. Royalties & License Fees: Seller must pay all royalties and license fees, and must defend all suits or claims for infringement of any patent rights and save Buyer and its Consultants on this Project harmless from loss on account thereof.

#### 4.20. Equal Opportunity Requirements

- 4.20.1. The Town of Los Gatos is an equal opportunity employer. Seller must comply with all applicable Federal, State, and local laws and regulations including the Town of Los Gatos's equal opportunity requirements. Such laws include but are not limited to the following: Title VII of the Civil Rights Act of 1964 as amended; Americans with Disabilities Act of 1990; The Rehabilitation Act of 1973 (§503 and 504); California Fair Employment and Housing Act (Government Code §12900 et seq.); California Labor Code §1101 and §1102. Seller must not discriminate against

any SubSeller, employee, or applicant for employment because of age, race, color, national origin, ancestry, religion, sex/gender, sexual orientation, mental disability, physical disability, medical condition, political beliefs, organizational affiliations, or marital status in the recruitment, selection for training including apprenticeship, hiring, employment, utilization, promotion, layoff rates of pay or other forms of compensation.

## 5. CONSTRUCTION BY BUYER OR BY SEPARATE CONTRACTORS

### 5.1. Buyer's Right to Perform Construction and Award Separate Contracts

5.1.1. Buyer has the right to perform work at any time related to the Project with its own forces and/or to Award separate contracts in connection with other portions of the Project or other work on the site pursuant to these or similar conditions of this Contract.

### 5.2. Cooperation with Buyer's Forces and Other Contractors Employed by Buyer

5.2.1. Buyer will cooperate and coordinate its work with that of the work of Buyer's own forces and of each separate contractor with the Work of the Seller, who must cooperate therewith as provided herein.

5.2.2. When one or more other contractors are employed by Buyer on related or adjacent work, Seller must not cause any unnecessary delay or hindrance to the other contractors.

5.2.3. If the performance of the Work of this Contract is likely to be interfered with by the simultaneous performance of the work of some other separate contract or contracts, the Buyer and Seller must mutually coordinate with little or no impact to either party's work.

### 5.3. Mutual Responsibility

5.3.1. The Seller must cooperate fully with Buyer and all separate contractors including utility companies with regard to the execution of their Work as follows:

- The Seller must cooperate fully with Buyer and all separate contractors with regard to introduction and storage of their materials and equipment.
- The Seller must coordinate with Buyer, all separate contractors, and all utility companies with regard to construction scheduling, sequence of operations and site access

## 6. PROTECTION OF PERSONS AND PROPERTY

### 6.1. Safety Provisions

6.1.1. Seller is solely and completely responsible for conditions of the job site, including safety of all persons and property during performance of work. This requirement applies continuously and is not limited to Normal Hours Of Work. No act, service, drawing or construction review, acceptance or other act by Buyer, Buyer's Project Inspector, Consultant or any other representative of Buyer is intended to include review of the adequacy of Seller's safety measures at or near the Project Site, at any place of Fabrication, or anywhere else.

6.1.2. Seller must take all necessary precautions on the Work for the safety of its workers, of Buyer's employees and the public, and must comply with all applicable Federal, State, and local safety laws and codes to prevent accidents or injury to persons on, about, or adjacent to where the Work is being performed.

6.1.3. Seller must erect and properly maintain at all times, as required by the conditions and progress of the Work, all appropriate safeguards for the protection of workers and the public, and post danger signs warning against construction hazards, such as fire, toxics, pesticides, chemicals, odors, noise, vibration, equipment operations, obstructions, falling objects, falls and all other construction related hazards.

6.1.4. Seller must designate a responsible member of its organization who will be present on the Project Site and who has the duty for prevention of accidents. Prior to starting Work, Seller must submit a letter to the Buyer providing the name and position of the person so designated.

## 6.2. Public Safety and Convenience

6.2.1. Seller must provide for the safety of the public during construction and conduct its operations to minimize the amount of work posing potential hazards to the public.

6.2.2. Seller must keep all walkways clear. Seller must protect pedestrians from falling objects and water runoff.

6.2.3. Seller's equipment must enter and leave the Project area via access routes designated or accepted in writing by Buyer, and move in the direction of public traffic at all times. All movements on or across public traveled ways must not endanger public traffic.

6.2.4. Seller must immediately remove any spillage, debris, dirt, or mud resulting from hauling operations along or across any public traveled way.

6.2.5. Seller must minimize inconvenience or obstruction to the public. When Seller's operations create a condition hazardous to the public, Seller must furnish, erect, and maintain such Temporary Fencing, barricades, lights, signs, and other devices as are necessary for direction of the public or to avoid accidents, damage, or injury to the public. Seller must furnish such flagmen and guards as are necessary to direct the public or to give adequate warning of any hazardous conditions.

## 6.3. Protection and Restoration of Property

6.3.1. Seller must immediately repair any damage, arising from or in consequence of the performance of the Contract, to improvements or property, whether above or below the ground, private or public, within or adjacent to the Project.

6.3.2. In an Emergency affecting the safety of life or property, including adjoining property, Seller must act at its discretion, with notice to Buyer, to prevent such threatened loss or injury. Seller must maintain adequate protection against damage to life and property involved in Project and on property adjacent.



#### 6.4. Preservation of Cultural Resources

- 6.4.1. Pursuant to the National Historic Preservation Act of 1966, State laws and Town ordinances, the following procedures are implemented to ensure historic preservation of cultural resources discoveries.
- 6.4.2. In the event potentially historical, architectural, archaeological or cultural resources (hereinafter "resources") are discovered during subsurface excavations at the Project Site, the following procedures apply:
- 6.4.3. Seller to temporarily suspend all operations at the location of such potential resources.
- 6.4.4. A qualified Consultant must be utilized to assess the value of such resources and make recommendations.
- 6.4.5. If the Consultant determines that the potential find is indeed a cultural resource, Buyer will, as expeditiously as possible, advise Seller in writing of the action to be taken regarding the find, and the anticipated time frame and extent of any Work suspension.

#### 6.5. Buyer's Building Official ("Building Official") Approval

- References
  - All applicable codes and standards.
- Overview
  - The Seller's Work, including submission of Seller-required designs and calculations, and actual on-site Work, is subject to approval by the Buyer's Building Official ("Building Official"). The Seller's Work is subject to code-compliance inspections by the Building Official. These inspections are for code compliance only and do not relieve the Seller from performing all work required.
  - The Seller must obtain all Permit and subsequent revisions as needed prior to construction work.
- Fees
  - All Plan Check and Building Permit fees as well as all trade permit fees, i.e.: plumbing, electrical, mechanical, etc., will be paid for by the Seller directly to the Building Official.
- Execution
  - No work shall commence until the Seller has secured from the Building Official and posted a Building Permit Record Card at the jobsite. This card shall be maintained available at the jobsite by the Seller until the project has been signed off as "complete" by the Building Official or his designated representative. A sample card has been included at the end of this section.

- Work shall not proceed beyond the point indicated in each successive milestone section of the Building Card without obtaining the approval of the Building Official. The Building Official, when requested by the Buyer, shall make the requested inspections and shall indicate that portion of the Work that is satisfactory as completed, or shall notify the Seller wherein the same fails to comply with the CBC or other related Code. Any portions that do not comply shall be corrected by the Seller at the Seller's expense, and a request for re-inspected made.
- The process of obtaining Building Official approval of specific Work takes place as follows:
  - The Seller shall inspect the Work prior to requesting inspection by Building Official.
  - The Seller will request and coordinate the inspection by Building Official.
  - The Seller shall notify the Buyer's project representative to be present at the time of inspection by the Building Official.
- Special Inspections. In addition to the inspections specified above, the Seller is responsible for contracting for Special Inspection Services to provide inspections during construction as delineated in the California Building Code, Chapter 17 and the Contract Documents, specifically, but not limited to Division 1, Section 01450. All costs for these Special Inspections will be included in the Seller's Proposal for the performance of the Work.