

# **Board Energy Resources & Customer Services Committee Meeting and Special SMUD Board of Directors Meeting**

Date: Wednesday, May 14, 2025

Time: Scheduled to begin at 6:00 p.m.

Location: SMUD Headquarters Building, Auditorium  
6201 S Street, Sacramento, CA

Powering forward. Together.



# **AGENDA BOARD ENERGY RESOURCES & CUSTOMER SERVICES COMMITTEE MEETING AND SPECIAL SMUD BOARD OF DIRECTORS MEETING**

**Wednesday, May 14, 2025  
SMUD Headquarters Building, Auditorium  
6201 S Street, Sacramento, California  
Scheduled to begin at 6:00 p.m.**

This Committee meeting is noticed as a joint meeting with the Board of Directors for the purpose of compliance with the Brown Act. In order to preserve the function of the Committee as advisory to the Board, members of the Board may attend and participate in the discussions, but no Board action will be taken. The Energy Resources & Customer Services Committee will review, discuss and provide the Committee's recommendation on the following:

*Virtual Viewing or Attendance:*

Live video streams (view-only) and indexed archives of meetings are available at:  
<https://www.smud.org/Corporate/About-us/Company-Information/Board-Meetings/Watch-or-Listen-online>

**Zoom Webinar Link:** [Join Board Energy Resources & Customer Services Committee Meeting Here](#)

**Webinar/Meeting ID:** 160 700 7374

**Passcode:** 142990

**Phone Dial-in Number:** 1-669-254-5252 or 1-833-568-8864 (Toll Free)

*Verbal Public Comment:*

Members of the public may provide verbal public comment by:

- Completing a sign-up form at the table outside of the meeting room and giving it to SMUD Security.
- Using the “Raise Hand” feature in Zoom (or pressing \*9 while dialed into the telephone/toll-free number) during the meeting at the time public comment is called. Microphones will be enabled for virtual or telephonic attendees when the commenter's name is announced.

*Written Public Comment:*

Members of the public may provide written public comment on a specific agenda item or on items not on the agenda (general public comment) by submitting comments via email to [PublicComment@smud.org](mailto:PublicComment@smud.org) or by mailing or bringing physical copies to the meeting. Email is not monitored during the meeting. Comments will not be read into the record but will be provided to the Board and placed into the record of the meeting if received within two hours after the meeting ends.

## **DISCUSSION ITEM**

1. Chad Adair  
Discuss authorizing the Chief Executive Officer and General Manager to negotiate and execute the **Dry Creek Energy Storage, LLC (Dry Creek) Power Purchase Agreement (PPA)** for a 20-year term, with one optional five-year extension for a total of 25 years, for 160 MW of battery storage, substantially in form attached, and all other agreements necessary to facilitate the **Dry Creek Project**.  
Presentation: 5 minutes  
Discussion: 5 minutes

## **INFORMATIONAL ITEMS**

2. Arne Olson  
SENIOR PARTNER,  
ENERGY & ENVIRONMENTAL  
ECONOMICS (E3)  
  
Mark Rothleder  
SENIOR VICE PRESIDENT AND  
CHIEF OPERATING OFFICER,  
CALIFORNIA INDEPENDENT  
SYSTEM OPERATOR (ISO)  
  
Jon Olson  
  
3. Public Comment  
  
4. Brandon D. Rose  
Summary of Committee Direction.  
Discussion: 1 minute

*Members of the public shall have up to three (3) minutes to provide public comment on items on the agenda or items not on the agenda, but within the jurisdiction of SMUD. The total time allotted to any individual speaker shall not exceed nine (9) minutes.*

*Members of the public wishing to inspect public documents related to agenda items may click on the Information Packet link for this meeting on the [smud.org](http://smud.org) website or may call 1-916-732-7143 to arrange for inspection of the documents at the SMUD Headquarters Building, 6201 S Street, Sacramento, California.*

*ADA Accessibility Procedures: Upon request, SMUD will generally provide appropriate aids and services leading to effective communication for qualified persons with disabilities so that they can participate equally in this meeting. If you need a reasonable auxiliary aid or service for effective communication to participate, please email [Toni.Stelling@smud.org](mailto:Toni.Stelling@smud.org), or contact by phone at 1-916-732-7143, no later than 48 hours before this meeting.*



SSS No. ET&amp;C 25-023

# BOARD AGENDA ITEM

## STAFFING SUMMARY SHEET

Committee Meeting &amp; Date

ERCS – 05/14/25

Board Meeting Date

May 15, 2025

TO					TO				
1.	Jon Olson				6.	Frankie McDermott			
2.	Jon Anderson				7.	Brandy Bolden			
3.	Scott Martin				8.				
4.	Suresh Kotha				9.	<b>Legal</b>			
5.	Lora Anguay				10.	<b>CEO &amp; General Manager</b>			
<b>Consent Calendar</b>		<b>X</b>	<b>Yes</b>	<b>No</b> <i>If no, schedule a dry run presentation.</i>	<b>Budgeted</b>	<b>X</b>	<b>Yes</b>	<b>No</b> <i>(If no, explain in Cost/Budgeted section.)</i>	
FROM (IPR) Josh Gordon				DEPARTMENT Energy Trading & Contracts			MAIL STOP A404	EXT. 6389	DATE SENT 04/17/25

**NARRATIVE:**

**Requested Action:** Authorize the Chief Executive Officer and General Manager, or his designee, to negotiate and execute the Dry Creek Energy Storage, LLC (Dry Creek) Power Purchase Agreement (PPA) for a 20-year term, with one optional five-year extension for a total of 25 years, for 160 MW of battery storage, substantially in the form attached, and all other agreements necessary to facilitate the Dry Creek Project.

**Summary:** In 2024, SMUD received a competitive offer from DESRI, the parent company of Dry Creek Energy Storage, LLC, to construct and operate a battery storage project at SMUD's Rancho Seco property (Dry Creek Project). SMUD conducted an evaluation of the market and determined that the Dry Creek Project offer provided superior value versus alternatives. SMUD and DESRI negotiated a mutually beneficial PPA under which SMUD will purchase the energy, capacity, capacity attributes (including, but not limited to, resource adequacy), and ancillary services. The Dry Creek Project provides SMUD full dispatch rights to 160 MW/4-hour battery storage at a fixed contract price with an annual average cost of approximately \$25 million, subject to a price cap for any cost increase due to change in tariffs between April 2, 2025, and the commercial operation date. The Dry Creek Project will be co-located with Rancho Seco Solar II and share the existing Point of Interconnection to SMUD's transmission system. The scheduled commercial operation date is September 30, 2027. SMUD has an option to purchase the facility after year 8.

The Dry Creek PPA includes a contract price change mechanism if new tariffs impact the cost of the Dry Creek Project. Subject to an independent evaluator's determination of the project cost increase directly attributable to the tariffs, the increase in the total contract price is not to exceed the price cap, which limits SMUD's exposure and potential risk due to tariffs.

SMUD is additionally negotiating a Large Generator Interconnection Agreement, Lease Agreement, and a Reimbursement and Waiver Agreement (RWA) that define the requirements for interconnection, land use, and certain project development responsibilities and terms. The RWA terms include direct reimbursement or waiver of costs where this method is more beneficial to SMUD than DESRI paying and passing those costs back to SMUD through a higher PPA price.

**Board Policy:** Strategic Direction SD-2, Competitive Rates; Strategic Direction SD-7, Environmental Leadership; Strategic Direction SD-9, Resource Planning. This contract will be a key contributor to achieving our 2030 Zero Carbon Plan. It allows access to competitively priced and carbon-free capacity that is electrically connected to SMUD's territory and delivered directly to SMUD.

**Benefits:** Supports SMUD's 2030 Zero Carbon Plan by providing 160 MW of dispatchable energy storage for a four-hour duration.

**Cost/Budgeted:** The expenses for the Dry Creek Project have been included in our budget and financial forecast. The average annual cost for the PPA is approximately \$25 million. The expected cost for the RWA includes up to \$2 million for the reimbursement of environmental mitigation and fire safety mitigation.

**Alternatives:** Rely on other sources for capacity.

**Affected Parties:** Energy Trading & Contracts, Energy Settlements, Resource Planning, Budget Office, Grid Operations, Treasury, Real Estate, Power Generation, Transmission Planning, and Environmental

**Coordination:** Energy Trading & Contracts and Legal

**Presenter:** Chad Adair, Manager, Energy Contracts

**Additional Links:**

SUBJECT

**Execute a 20-year Power Purchase Agreement with  
Dry Creek Energy Storage, LLC**

ITEM NO. (FOR LEGAL USE ONLY)

ITEMS SUBMITTED AFTER DEADLINE WILL BE POSTPONED UNTIL NEXT MEETING.

**DRAFT**

**ENERGY STORAGE POWER PURCHASE AGREEMENT**

**BETWEEN**

**SACRAMENTO MUNICIPAL UTILITY DISTRICT**

**AND**

**DRY CREEK ENERGY STORAGE, LLC**

**DATED \_\_\_\_\_, 2025**

## TABLE OF CONTENTS

<b>1.</b>	<b>DEFINITION OF TERMS; RULES OF INTERPRETATION</b>	<b>5</b>
1.1	DEFINITION OF TERMS	5
1.2	RULES OF INTERPRETATION	18
<b>2.</b>	<b>PROJECT; PURCHASE AND SALE OF PRODUCTS</b>	<b>19</b>
2.1	Project and Expected Capacity	19
2.2	Product Purchased	20
2.3	Delivery Term, Delivery Point, and Commercial Operation	20
2.4	Payment for Product Purchased	23
<b>3.</b>	<b>ENERGY MARKETS, CONVEYANCE OF CAPACITY ATTRIBUTES</b>	<b>26</b>
3.1	Conveyance of Capacity Attributes	26
3.2	Reporting of Ownership of Capacity Attributes	26
3.3	Modification of Capacity Attribute Conveyance Procedure	26
3.4	Energy Market Participation	26
3.5	Change in Law, Energy Market Participation and Capacity Attributes	26
3.6	Change in Tariff and Change in Tax Law	27
<b>4.</b>	<b>INTERCONNECTION; TELEMETERING; STORAGE DISPATCH</b>	<b>29</b>
4.1	Interconnection Agreement	29
4.2	Station Service Load	29
4.3	No Additional Loads	29
4.4	Charging Energy Management	29
<b>5.</b>	<b>PERMITTING; STANDARD OF CARE; OPERATIONS; CURTAILMENT</b>	<b>30</b>
5.1	Permitting	30
5.2	Standard of Care	30
5.3	Dispatchability	31
5.4	Definitive Agreements	32



<b>6.</b>	<b>SCHEDULING; OUTAGES; ACCESS RIGHTS</b>	32
6.1	Scheduling	32
6.2	Scheduling Coordinator; CAISO Settlements	33
6.2.1	Scheduling Coordinator Fee	33
6.3	Energy Imbalance Market – EIM or other	33
6.4	Outage Coordination	33
6.5	Planned Outages	33
6.6	Forced Outages	34
6.7	Modification of Outage Coordination Process	34
6.8	Access Rights	34
<b>7.</b>	<b>TERM, TERMINATION EVENT AND TERMINATION</b>	34
7.1	Term	34
7.2	Events of Default; Remedies	34
7.3	Termination Rights	36
7.4	Termination Payment Calculation	37
<b>8.</b>	<b>CREDITWORTHINESS</b>	39
8.1	Project Development and Delivery Term Security	39
<b>9.</b>	<b>RESERVED</b>	40
<b>10.</b>	<b>FORCE MAJEURE</b>	40
10.1	Effect of Force Majeure	40
10.2	Notice of Force Majeure	40
10.3	Termination Due to Force Majeure Event	40
<b>11.</b>	<b>INDEMNITY</b>	40
11.1	Indemnity by Seller	40
11.2	Indemnity by SMUD	40
<b>12.</b>	<b>LIMITATION OF DAMAGES</b>	41
<b>13.</b>	<b>REPRESENTATION AND WARRANTIES; COVENANTS</b>	41
13.1	Representations and Warranties	41

13.2	General Covenants .....	42
13.3	SMUD Representations and Warranties .....	42
14.	<b>NOTICES</b> .....	42
15.	<b>RESERVED</b> .....	42
16.	<b>ASSIGNMENT</b> .....	43
17.	<b>[Reserved]</b> .....	43
18.	<b>PROJECT PURCHASE OPTION</b> .....	44
19.	<b>APPLICABLE LAW</b> .....	46
20.	<b>DISPUTE RESOLUTION</b> .....	46
21.	<b>SEVERABILITY</b> .....	46
22.	<b>COUNTERPARTS</b> .....	46
23.	<b>GENERAL</b> .....	46
24.	<b>MOBILE SIERRA</b> .....	47
25.	<b>SERVICE CONTRACT; FORWARD AGREEMENT</b> .....	47
26.	<b>ENTIRE AGREEMENT</b> .....	47

This ENERGY STORAGE POWER PURCHASE AGREEMENT (the “**Agreement**”) for a Battery Storage Resource is made and entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2025, (“**Effective Date**”), by and between the Sacramento Municipal Utility District (“**SMUD**” or “**Buyer**”), and Dry Creek Energy Storage, LLC (“**Seller**”). SMUD and Seller are sometimes referred to in this Agreement individually as a “Party” and collectively as the “Parties.”

- A. Seller desires to interconnect and operate a fully integrated battery storage facility (the “**Project**”), as described in Exhibit A, to be interconnected to the existing 34.5 kV bus located at the Rancho Seco Solar II substation, in parallel with the SMUD Transmission System.
- B. The Parties wish to enter into a power purchase agreement for the sale and purchase of all Discharging Energy, Capacity, Capacity Attributes, and Ancillary Services from the Project directly to SMUD.
- C. In conjunction with this Agreement, the Parties wish to execute the LGIA, the Land Lease Agreement, the Reimbursement and Waiver Agreement, and the Station Service Agreement (together these agreements are referred to as “**Definitive Agreements**”). This Agreement does not constitute an agreement by SMUD to interconnect the Project.
- D. This Agreement requires Seller to be a retail customer and to obtain retail electrical service from SMUD to serve certain electrical loads at the premises, except as otherwise permitted under SMUD’s tariffs. This Agreement does not constitute an agreement by SMUD to provide retail electrical service to Seller. Such arrangements are made separately between SMUD and Seller in the Station Service Agreement.

**NOW THEREFORE**, in consideration of the mutual covenants contained in this Agreement, and of other good and valuable considerations, the sufficiency of which are hereby acknowledged, the Parties agree as follows:

## **1. DEFINITION OF TERMS; RULES OF INTERPRETATION**

### **1.1 DEFINITION OF TERMS**

AC: alternating current

Accepted Compliance Expenditures: Has the meaning set forth in Section 3.5.3.

Affiliate: When used with reference to a specified Person, any other Person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, the specified Person.

Agreement: Has the meaning set forth in the Preamble.

Ancillary Services: Those services, including but not limited to operating reserves, regulation, reactive power, voltage control, frequency response, contingency reserves, that are necessary to support the transmission of capacity and energy from resources to loads while maintaining reliable operation of the Transmission Provider’s transmission system in accordance with Prudent Utility Practice.

Annual Average Battery Storage Availability: The average of each monthly Availability Percentage for the Project during a Contract Year.

Annual Battery Storage Capacity Test: Has the meaning given in Exhibit M.

Annual Contract Capacity: Has the meaning set forth in Exhibit A.

Available Battery Storage Capacity: The total capacity of the Project, expressed in megawatts (AC), that is available to store Energy, as specified by Seller, from time to time, in accordance with the Outage Coordination Process.

Availability: The average percentage of time that the Project is available to charge, store or discharge energy up to Pmax as corrected for ambient conditions. Availability shall be determined in accordance with Exhibit U.

Availability Percentage: The percentage determined in accordance with Exhibit U.

Availability System of Record: Seller's data historian or other automated tracking system that automatically tracks and reports all events affecting the availability of the Project, as validated by Seller's outage reporting into SMUD's ITOA system. The Availability System of Record shall be consistent with IEC 63019 record requirements, and Seller's SCADA system, and shall include a satisfactory description of each event affecting Availability.

Balancing Authority: Entity responsible for the reliable planning and operation of the bulk power system in a defined area.

Bankrupt: With respect to any entity, such entity that (a) files a petition or otherwise commences, authorizes or acquiesces in the commencement of a proceeding or cause of action under any bankruptcy, insolvency, reorganization or similar Law, (b) has any such petition filed or commenced against it which remains unstayed or undismissed for a period of ninety (90) days, (c) makes an assignment or any general arrangement for the benefit of creditors, (d) otherwise becomes bankrupt or insolvent (however evidenced), (e) has a liquidator, administrator, receiver, trustee, conservator or similar official appointed with respect to it or any substantial portion of its property or assets, or (f) is generally unable to pay its debts as they fall due.

Battery Storage Availability Requirement: Eighty-Five percent (85%).

Battery Storage Capacity Shortfall: The Annual Contract Capacity less the Expected Battery Storage Capacity that has been commissioned and is capable of reliably charging and discharging Energy.

Battery Storage Capacity Test: Any test or retest of the Capacity of the Project conducted in accordance with the testing procedures, requirements and protocols set forth in Exhibit M.

Battery Storage Commercial Operation Test: Has the meaning set forth in Section 2.3.9.

Battery Storage Meter: The bi-directional revenue quality meter or meters, along with a compatible data processing gateway or remote intelligence gateway, telemetering equipment and data acquisition services sufficient for monitoring, recording and reporting, in real time, the amount of Charging Energy delivered to the Project and the amount of Discharging Energy discharged from the Project to the Delivery Point. For clarity, (i) the Project will contain multiple measurement devices that will make up the Battery Storage Meter, and, unless otherwise indicated, references to the Battery Storage Meter shall mean all such measurement devices and the aggregated data of all such measurement devices, taken together, and (ii) the Battery Storage Meter will be located, and the Energy will be measured, at the low voltage side of the main step up transformer and will be subject to adjustment in accordance with any meter requirements of SMUD and Prudent Utility Practices to account for applicable Electrical Losses to the Delivery Point.

Battery Storage Operating Restrictions: Those rules, requirements and procedures set forth in Exhibit J.

Battery Storage Reliability: The average percentage of time that the Project is able to respond to a SMUD Setpoint. Battery Storage Reliability shall be determined in accordance with Exhibit S.

Battery Storage Reliability Percentage: Has the meaning set forth in Exhibit S.

Battery Storage Tests: Has the meaning set forth in Exhibit M.

Business Day: Any Monday through Friday, inclusive, but excluding days that are observed as business holidays by either Party or days that are NERC Holidays.

Buyer: The Party so identified in the preamble of this Agreement, and its successors and permitted assigns.

CAISO: The California Independent System Operator Corporation or its successor.

CAISO Balancing Authority Area: The system of transmission lines and associated facilities that is operated by the CAISO and for which the CAISO has operational control and responsibility for grid reliability.

CAISO Tariff: The California Independent System Operator Corporation Agreement and Tariff, Business Practice Manuals (BPMs), and operating restrictions, including the rules, protocols, procedures and standards attached thereto, as the same may be amended or modified from time to time and approved by FERC.

Capacity: The instantaneous ability of a storage facility to charge or discharge Energy (real power) at a specified input or output. Capacity is measured in MW or kW.

Capacity Attributes: Any current or future defined characteristic, status, certificate, tag, credit, or ancillary service attribute, whether general in nature or specific as to the location or any other attribute of the Project, intended to value any aspect of the capacity of the Project to charge and discharge energy or provide Ancillary Services, including, but not limited to, any accounting construct so that the full output of the Project may be counted toward a Resource Adequacy requirement or any other measure by an entity invested with the authority under federal or state law, to require SMUD to procure, or to procure at SMUD's expense, Resource Adequacy or other such products.

Capacity Subtotal Payment: Has the meaning set forth in Section 2.4.1(b).

CEQA Addendum: Addendum to the Rancho Seco Solar II Project, Environmental Impact Report (EIR), State Clearinghouse #2017092042

Change in Tariff: Any action by any Governmental Authority taking effect after April 1, 2025 that (a) increases the Tariff Rate that is assessed or imposed (via a cash deposit requirement or final duty payment requirement) on the importer of the Project equipment, (b) implements a new import tariff, cash deposit requirement or import duty of any type applicable to the Project equipment, or (c) commences an investigation by any Governmental Authority for antidumping duties, countervailing duties, or similar import tariffs, customs, duties, price supports or similar taxes or fees.

Change in Tax Law: (i) Any change in or amendment to the Tax Code or another applicable federal income tax statute; (ii) any change in, or issuance of, or promulgation of any temporary or final regulations by the U.S. Department of the Treasury that would result in any change to the interpretation of the Tax Code or existing temporary or final regulations promulgated by the U.S. Department of the Treasury; (iii) any IRS guidance published in the Internal Revenue Bulletin and/or Cumulative Bulletin, notice, announcement, revenue ruling, revenue procedure, technical advice memorandum, examination directive or similar authority issued by the IRS Large Business and International division, or any published advice, advisory, or legal memorandum issued by IRS Chief Counsel, that applies, advances or articulates a new or different interpretation or analysis of any provision of the Tax Code, any other applicable federal tax statute or any temporary or final Treasury Regulation promulgated thereunder; or (iv) any change in the interpretation of any of the authorities described in clauses (a)(i) through (iii) by a decision of the U.S. Tax Court, the U.S. Court of Federal Claims, a U.S. District Court, a U.S. Court of Appeals or the U.S. Supreme Court, that applies, advances or articulates a new or different interpretation or analysis of federal income tax law, and

(b) in the case of (a)(i) through (iv), such change or new or different interpretation, as applicable, occurs after the Effective Date.

Change of Control: Any circumstance in which Ultimate Parent ceases (i) to retain the ability to control, directly or indirectly, the decision-making of Seller, or (ii) to own, directly or indirectly through one or more intermediate entities, more than fifty percent (50%) of the outstanding equity interests (measured by either voting power or economic interests) in Seller; provided that in calculating ownership percentages for all purposes of the foregoing:

- a) any ownership interest in Seller held by Ultimate Parent indirectly through one or more intermediate entities shall not be counted towards Ultimate Parent's ownership interest in Seller unless Ultimate Parent directly or indirectly owns more than fifty percent (50%) of the outstanding equity interests (measured by either voting power or economic interests) in each such intermediate entity; and
- b) ownership interests in Seller owned directly or indirectly by any lender (including any tax equity provider and any agent acting for or on behalf of such lender) shall be excluded from the total outstanding equity interests in Seller;

Provided that any Permitted Transfer shall not constitute or be deemed a "Change of Control." Furthermore, a foreclosure by any lender on the direct or indirect ownership interests in Seller (including a transfer in lieu of foreclosure or any transfer to a Qualified Transferee) shall not constitute or be deemed a "Change of Control".

Charging Energy: Energy delivered by SMUD from Transmission Provider's electrical system and/or the Solar Facility for use in charging the Project and for discharge at a later time.

Charging Notice: The operating instruction, and any subsequent updates, given by SMUD to Seller, (i) directing the Project to charge at a specific MW rate and (ii) identifying the quantity of Charging Energy, provided that any such operating instruction or updates shall be in compliance with Section 4.4 and the Battery Storage Operating Restrictions. For the avoidance of doubt, any SMUD request to initiate a Battery Storage Capacity Test shall not be considered a Charging Notice.

Closing: Has the meaning set forth in Section 18.3.

Closing Date: Has the meaning set forth in Section 18.3.

COD Conditions: Has the meaning set forth in Section 2.3.4.

COD Notice: Has the meaning set forth in Section 2.3.4.

Commercial Operation: The period of operation of the Project once the Commercial Operation Date has occurred.

Commercial Operation Date (COD): The date specified in the Commercial Operation Date Confirmation Letter on which the Project satisfies the COD Conditions set forth in Section 2.3.4.

Commercial Operation Date Confirmation Letter: A letter that the Parties execute and exchange in accordance with this Agreement, the form of which is attached as Exhibit E.

Compliance Expenditures: Has the meaning set forth in Section 3.5.1.

Compliance Expenditure Cap: Has the meaning set forth in Section 3.5.1.

Community Benefits Plan: Has the meaning set forth in Exhibit W.

Contract Price: The price (\$/kW-month) paid by SMUD to Seller for delivery of Product. The Contract Price is shown in Exhibit B.

Contract Year: Any of the one-year periods during the Delivery Term, with the first Contract Year commencing on the Commercial Operation Date and ending on the last day of the twelfth (12th) full month thereafter and each subsequent Contract Year commencing on the first day of the month following the applicable anniversary date.

Costs: Has the meaning set forth in Section 7.4.1(e).

Day-Ahead Market: Has the meaning set forth in the CAISO Tariff.

Defaulting Party: Has the meaning set forth in Section 7.2.1.

Deficit Damages: Has the meaning set forth in Section 2.3.7.

Definitive Agreements: Has the meaning set forth in the Preamble.

Delay Damages: The compensation paid by Seller to SMUD due to a failure of Seller to meet the Scheduled Commercial Operation Date in accordance with Section 2.3.7.

Delay LD Start Date: Has the meaning set forth in Section 2.3.6.

Delivery Point: The specific location at the 230 kV disconnect switch, of the Rancho Seco Solar II 230 kV generation tie-line, inside the Rancho Seco 230 kV substation at which the Project interconnects with SMUD, as set forth in the LGIA. The Delivery Point is identified in Exhibit A and is the same location as the Point of Interconnection.

Delivery Term: Has the meaning set forth in Section 2.3.1.

Delivery Term Security: Has the meaning set forth in Section 8.1.

Development Security: Has the meaning set forth in Section 8.1.

Discharging Energy: All Energy delivered to the Delivery Point from the Project, net of the transformation and transmission losses, if any, as measured by the Battery Storage Meter. For the avoidance of doubt, all Discharging Energy will have originally been delivered to the Project as Charging Energy.

Discharging Notice: The operating instruction, and any subsequent updates, given by SMUD to Seller, directing the Project to discharge Discharging Energy at a specific MW rate; provided that any such operating instruction or update shall be in accordance with Section 4.4 and the Battery Storage Operating Restrictions. For the avoidance of doubt, the Plant Controller shall automatically determine the amount of Discharging Energy based on the SMUD Setpoint.

Dispatch; Dispatchability: The ability of a storage facility to be charged or discharged or to be brought online or shut down at the request of a utility's system operator.

Dispatch Instruction: Any direction, instruction, or order by SMUD to increase, maintain, or decrease the delivery of Energy consistent with the applicable SMUD Setpoint; provided that any such direction, instruction, or order shall be in accordance with Section 5.3 and the Battery Storage Operating Restrictions.

Dispatch Interval: Each of the twelve (12) five (5) minute time intervals beginning on any hour and ending on the next hour.

Distribution System: The relatively low voltage wires, transformers and related equipment generally used by an electric utility to deliver electric power to retail customers (as opposed to using it to move bulk quantities of power between different electric utilities or from large electric generators to a Distribution System).

Early Termination Date: Has the meaning set forth in Section 7.3.5.

Effective Date: Has the meaning set forth in the Preamble.

EIM: Shall mean the Western Energy Imbalance Market.

EIM Participating Resource: Has the meaning set forth in the CAISO Tariff.

Electric System: The integrated electric generation, transmission, and distribution facilities owned or controlled by an electric utility.

Electrical Losses: All transmission or transformation losses between the Project and the Delivery Point, including losses associated with (i) delivery of Charging Energy to the Project and (ii) delivery of Discharging Energy to the Delivery Point.

Emergency Condition: A condition or situation: (1) that in the judgment of the Party making the claim is imminently likely to endanger life or property; or (2) that, in the case of a Transmission Provider, is imminently likely (as determined in a non-discriminatory manner) to cause a material adverse effect on the security of, or damage to, Transmission Provider's Transmission System, Transmission Provider's interconnection facilities or the electric systems of others to which the Transmission Provider's Transmission System is directly connected (including the conditions of System Operating Limit (SOL) (as referenced in the LGIA) exceedance where the pre-contingency or post-contingency mitigation actions are required by NERC Reliability Standards or WECC Reliability Standards); or (3) that, in the case of Seller, is imminently likely (as determined in a non-discriminatory manner) to cause a material adverse effect on the security of, or damage to, the Project or Interconnection Customer Interconnection Facilities.

EMS or Energy Management System: Has the meaning set forth in Section 4.5.

Energy: Electrical energy delivered with the voltage and quality required by SMUD in accordance with the LGIA, and measured in megawatt-hours (MWh) or kilowatt-hours (kWh).

Event of Default: Has the meaning set forth in Section 7.2.1.

Excusable Delay: Any delay that is caused by one or more of the following: (i) an event of Force Majeure, (ii) breach of this Agreement or any other agreement between SMUD and Seller (or Seller's Affiliates) by SMUD or any negligent or wrongful act or omission by SMUD that prevents Seller from fulfilling its obligations, in whole or in part, under this Agreement, (iii) a delay in the receipt of the CEQA Addendum beyond six (6) months from Buyer's approval of Seller's design deliverable required for the CEQA Addendum or any other non-CEQA Addendum delay in the Permit process (including any delay by a Governmental Authority in the issuance or maintenance of a Permit) to the extent caused by SMUD, or (iv) a delay in the completion of the interconnection facilities needed to reach COD, to the extent caused solely by SMUD.

Expected Battery Event (EBH): Has the meaning set forth in Exhibit U.

Excused Battery Storage Capacity: Has the meaning set forth in Section 2.4.4.

Extended Term: Has the meaning set forth in Section 2.3.1.

Fair Market Value: Has the meaning set forth in Section 18.6.



FERC: The Federal Energy Regulatory Commission or any successor government agency.

Final Purchase Option: Has the meaning set forth in Section 18.1.

Financing Documents: The loan and credit agreements, notes, bonds, indentures, security agreements, lease financing agreements, equity contribution agreements, mortgages, deeds of trust, interest rate exchanges, swap agreements, equity purchase agreements, purchase option agreements, tax credit purchase and sale agreements and other documents relating to the development, bridge, back-leverage, construction and/or permanent debt and/or equity (including tax equity) financing for the Project, including any credit enhancement, credit support, working capital financing, or refinancing documents, and any and all amendments, modifications, or supplements to the foregoing that may be entered into from time to time at the discretion of Seller (or its applicable Affiliates) in connection with development, construction, ownership, leasing, operation or maintenance of the Project.

Force Majeure: An event or circumstance occurring after the Effective Date that prevents or delays the ability of one Party from performing obligations under this Agreement, and which is not in the reasonable control of, or the result of negligence of, the Party claiming Force Majeure, and which the claiming Party is unable to overcome or cause to be avoided by the exercise of due diligence. Force Majeure may include the following events, to the extent consistent with the prior sentence: (a) An act of nature, riot, insurrection, epidemic or pandemic (including new governmental restrictions that are first imposed related to COVID-19 after the Effective Date), supply chain disruptions that are not directly caused by Seller or Seller's contractors or suppliers at any level in the chain of supply, import tariffs, border controls, war, explosion, labor dispute, fire, flood, earthquake, volcanic eruption, storm, lightning, tsunami, backwater caused by flood, act of the public enemy, terrorism, civil disturbances, strike, labor disturbances, labor or material shortage, national emergency, court order or other action by a Governmental Authority that prevents a Party from fulfilling its obligations under this Agreement (excluding, with respect to any claim by SMUD, any action or inaction of the SMUD Board of Directors or any Person with the authority to bind SMUD); (b) interruption of transmission services as a result of a physical Emergency Condition not caused by the fault or negligence of the Party claiming Force Majeure and reasonably relied upon and without a reasonable source of substitution to make or receive deliveries hereunder; or (c) delays in obtaining any Permits, authorizations, or entitlements to construct or operate the Project beyond the date as set forth in Exhibit N Project Milestone Schedule, except to the extent caused by Seller, and the requirement to obtain any additional Permit, authorization or entitlement to construct or operate the Project that is not included in Exhibit N Project Milestone Schedule that arises after the Effective Date if the timeline for obtaining such Permit, affects Seller's ability to achieve any milestone. Under no circumstances shall either Party's financial incapacity, Seller's ability to sell Product at a more favorable price or under more favorable conditions or SMUD's ability to acquire Product at a more favorable price or under more favorable conditions or other economic reasons constitute an event of Force Majeure. The term "Force Majeure" does not include Forced Outages to the extent such are not caused or exacerbated by an event of Force Majeure as described above, nor does it include Seller's inability to obtain financing or other equipment and instruments necessary to plan for, construct, or operate the Project.

Forced Outage: An unplanned outage of one or more of the Project's components that results in a reduction of the ability of the Project to charge, store or discharge Energy, and specifically excludes any planned maintenance or Planned Outage.

Full Access: Has the meaning set forth in Section 18.2.

Gains: Has the meaning set forth in Section 7.4.1(b).

Governmental Authority: The federal government of the United States, and any state, county, municipal or local government or regulatory department, body, political subdivision, commission, agency, instrumentality, ministry, court, judicial or administrative body, taxing authority, or other authority thereof (including any corporation or other entity owned or controlled by any of the foregoing) having jurisdiction over any Party, the Project, the site of the Project, or the rights or obligations of any Party under this Agreement, whether acting under actual or assumed authority, provided, however, that SMUD and Seller

shall not be considered a Governmental Authority hereunder. The CAISO shall be considered a Governmental Authority.

Guaranteed Availability: Ninety seven percent (97%).

Guaranteed Reliability: Ninety eight and one-half percent (98.5%).

Guaranteed Commercial Operation Date or Guaranteed COD: The date that is six (6) months after the Scheduled Commercial Operation Date, as specified in Exhibit A and subject to day-for-day extension to the extent the Scheduled Commercial Operation Date is extended for Excusable Delay, deferring the payment of Delay Damages as provided in Section 2.3.7.

Guaranteed Round Trip Efficiency: Has the meaning set forth in Exhibit O.

Independent Evaluator: Has the meaning provided in Section 3.6.2.

Interconnection Agreement or LGIA: The Standard Large Generator Interconnection Agreement (LGIA) between SMUD and Seller specific to the interconnection of the Project to the SMUD Transmission System.

Interconnection Capacity Limit: The maximum instantaneous amount of Energy that is permitted to be delivered to the Point of Interconnection under the LGIA, in the amount of 160 MW<sub>AC</sub>.

Interconnection Customer Interconnection Facilities: Has the meaning set forth in the LGIA.

Interest Rate: Shall be the lesser of (a) 2% plus the “prime rate” of interest as published on that date in the Wall Street Journal, and generally defined therein as “the base rate on corporate loans posted by at least 75% of the nation’s 30 largest banks,” or if the Wall Street Journal is not published on a date for which such interest rate must be determined, the “prime rate” published in the Wall Street Journal on the nearest-preceding date on which the Wall Street Journal was published, or if the Wall Street Journal is no longer in publication, such other similar interest rate reasonably agreed to by the Parties, and (b) the highest rate permitted under applicable law.

IRS: United States Internal Revenue Service.

ITC or Investment Tax Credit: The investment tax credit established pursuant to Section 48 of the Tax Code, as it may be amended from time to time.

ITC Recapture Amount: The amount payable (determined on an after-tax basis) to the IRS by Seller (or its Affiliate, tax equity investor, tax credit purchaser or other ultimate user of ITCs or other Tax Benefits) under Tax Code §50(a) due to Seller’s ineligibility for all or a portion of ITC or such other Tax Benefits after such time as Seller, its Affiliate, tax equity investor, tax credit purchaser or such ultimate user has claimed the ITC or such other Tax Benefits.

kW: Kilowatt(s) of alternating current.

Law: Any statute, law, treaty, rule, regulation, ordinance, code, enactment, injunction, order, writ, decision, authorization, judgment, decree or other written legal or regulatory determination or restriction by a court or Governmental Authority of competent jurisdiction.

Land Lease Agreement: The agreement between SMUD and Seller specific to the leasing of the Project site by Seller.

Letter of Credit: One or more irrevocable, standby letters of credit issued by a Qualified Issuer in substantially the form set forth in Exhibit Q.

Losses: Has the meaning set forth in Section 7.4.1(a).

Maximum power (Pmax): The maximum power in MW delivered to the Delivery Point.

Measurement Period: Any two consecutive Contract Year period during the Delivery Term.

Modified Price Increase: Has the meaning provided in Section 3.6.3.

Monthly Operating Report: Has the meaning set forth in Section 2.4.4 and is similar to the form of report in Exhibit V.

Monthly Settlement Amount: Has the meaning set forth in Section 2.4.1(b).

Moody's: Moody's Investors Service, Inc., or any successor organization thereto.

MW: Megawatt(s) of alternating current.

MWh (Megawatt-hours): A unit of energy measurement corresponding to 1,000 kilowatt-hours.

NERC: The North American Electric Reliability Corporation, or any successor organization.

NERC Reliability Standards: The reliability standards for the Bulk Electric System of North America (as defined by NERC), including the applicable regional reliability standards, as in effect from time to time.

NERC Holidays: Days that NERC establishes as holidays.

Non-Defaulting Party: Has the meaning set forth in Section 7.2.2(a).

NP-15: The zone within the CAISO Balancing Authority Area designated as North of Path 15 by the CAISO for congestion settlement purposes.

NP-15 EZ Gen Hub Price: The day-ahead hourly locational marginal price as published by the CAISO for generator transactions in the NP-15 zone of the CAISO.

Option Notice: Has the meaning set forth in Section 18.1.

Outage Coordination Process: Has the meaning set forth in Section 6.4.

Party/Parties: SMUD and Seller are referred to individually as a "Party" and collectively as "Parties."

Performance Metrics: The Battery Storage Reliability Percentage and Availability Percentage for Project.

Permits: Permits, licenses, certificates, concessions, consents, waivers, exemptions, variances, franchises, orders, decrees, rights, registrations, submissions, determinations, authorizations, approvals, registrations, orders, and filings that are required for construction, ownership or operation of the Project.

Permitted Transfer:

- a) Foreclosure by any lender on the direct or indirect ownership interests in Seller (including a transfer in lieu of foreclosure or any transfer to a Qualified Transferee);
- b) Any direct or indirect transfer of equity interests in Seller in connection with a financing (including a tax equity financing) (for purposes of clarity, this does not prohibit or otherwise restrict any transfer of interests in the Project);

- c) Any direct or indirect transfer of this Agreement or equity interests in Seller to an Affiliate of Seller (including any investment fund or partnership for which an Affiliate of Seller is the managing member), provided that in the case of a transfer of this Agreement only, such Affiliate's creditworthiness is equal to or better than that of Seller;
- d) Any direct or indirect transfer of this Agreement or any equity interests in Seller to a Person succeeding to all or substantially all of the assets of Seller; or
- e) Any direct or indirect transfer of this Agreement or any equity interests in Seller to a Qualified Transferee.

Person: Any individual, corporation, partnership, limited liability company, joint venture, trust, unincorporated organization or Governmental Authority or any business entity whose existence is authorized by Law or by a Governmental Authority.

Planned Outage: An outage that has been scheduled in advance pursuant to the Outage Coordination Process, of one or more of the Project's components that results in a reduction of the ability of the Project to charge, store, and discharge Energy.

Plant Controller: A device or compilation of devices used to take inputs either directly or indirectly from the Transmission Provider, power system operator, or other affiliated group and provide outputs or feedback in the implementation of controls of the Project, and that has the ability to interface with the Supervisory Control and Data Acquisition (SCADA) System using industry standard protocol such as DNP3.0.

Point of Interconnection or POI: The specific location at the 230 kV disconnect switch, of the Rancho Seco Solar II 230 kV generation tie-line, inside the Rancho Seco 230 kV substation at which the Project interconnects with SMUD, as set forth in the LGIA.

Principles for Renewable Energy Development: Has the meaning set forth in Exhibit W.

Product: Product shall include all Discharging Energy, Annual Contract Capacity, Capacity Attributes (including but not limited to Resource Adequacy) and Ancillary Services, in each case which are or can be produced by or associated with the Project. All Product specified herein are provided at the Delivery Point, and Seller is responsible for all losses to the Delivery Point. Any energy product or feature that can be valued intrinsically or extrinsically is included in Product. For the avoidance of doubt, there are no products or energy-related attributes retained by Seller.

Project: Seller's energy storage project referenced in the recitals of this Agreement, described in Exhibit A, located at the Project site and including the mechanical equipment and associated facilities and equipment required to deliver Product, as such Project may be modified from time to time in accordance with the terms hereof.

Project Debt: The obligations of Seller or its Affiliates to any lender or tax equity investor pursuant to the Financing Documents, including principal of, premium and interest on indebtedness, fees, expenses or penalties, amounts due upon acceleration, prepayment or restructuring, swap or interest rate hedging breakage costs and any fees or interest due with respect to any of the foregoing plus an amount sufficient to ensure that the tax equity investor recovers the greater of (1) its investment balance under generally accepted accounting principles (as determined immediately prior to exercise of the applicable purchase option) and any investment tax credit recaptured as result of such exercise and (2) the amount necessary to allow all tax equity investors to achieve their hurdle rate required for the partnership flip to occur under any tax equity financing (or if any tax equity financing has a fixed date as the flip date, the amount necessary to allow all tax equity investors to achieve a rate of return equal to the rate of return used to determine the flip date under such tax equity financing).

Proposed Pre-Approved Price: Has the meaning provided in Section 3.6.4.

Proposed Price Increase: Has the meaning provided in Section 3.6.1.

Proposed Product Purchase Notice: Has the meaning provided in Section 2.3.2.

Proposed Product Sale Notice: Has the meaning provided in Section 2.3.2.

Prudent Utility Practice: Those practices, methods and acts that would be implemented and followed by prudent operators of battery storage facilities in the Western United States, similar to the Project, during the relevant time period, which practices, methods and acts, in the exercise of prudent and responsible professional judgment in the light of the facts known at the time the decision was made, could reasonably have been expected to accomplish the desired result consistent with prudent business practices, reliability, and safety. Seller acknowledges that the use of Prudent Utility Practice by Seller does not exempt Seller from any obligations set forth in this Agreement.

Prudent Utility Practice includes, at a minimum, those professionally responsible practices, methods and acts described in the preceding paragraph that comply with manufacturers' warranties, restrictions in this Agreement, the LGIA, the requirements of Governmental Authorities, and WECC Reliability Standards and NERC Reliability Standards. Prudent Utility Practice is not required to be the optimum practice, method or act to the exclusion of all others.

Prudent Utility Practice also includes taking reasonable steps in accordance with the first sentence of this definition to ensure that:

- a) Equipment, materials, resources, and supplies, including reasonable spare parts inventories, are available to meet the Project's needs;
- b) Sufficient operating personnel are available at all times and are adequately experienced and trained and licensed as necessary to operate the Project properly and efficiently, and are capable of responding to reasonably foreseeable emergency conditions at the Project and emergencies whether caused by events on or off the Project site;
- c) Preventive, routine, and non-routine maintenance and repairs are performed on a basis that is designed to ensure reliable, long-term and safe operation of the Project, and are performed by knowledgeable, trained, and experienced personnel utilizing proper equipment and tools;
- d) Appropriate monitoring and testing are performed for the purpose of ensuring equipment is functioning as designed;
- e) Equipment is not operated in a reckless manner, in violation of manufacturer's guidelines, warranty requirements, or in a manner unsafe to workers, the general public, or the connecting utility's Electric System or contrary to environmental laws, permits or regulations or without regard to defined limitations such as, flood conditions, safety inspection requirements, operating voltage, current, volt ampere reactive (VAR) loading, frequency, rotational speed, polarity, synchronization, and control system limits; and
- f) Equipment and components are designed and manufactured to meet or exceed the standard of durability that is generally used for battery storage facilities operating in the Western United States and to function properly over the full range of ambient temperature and weather conditions reasonably expected to occur at the Project site and under both normal and emergency conditions.

PTC or Production Tax Credit: The production tax credit established pursuant to Section 45 of the Tax Code, as it may be amended from time to time.

Purchase Option: Has the meaning set forth in Section 18.1.

Purchase Option Due Diligence Period: Has the meaning set forth in Section 18.2.

Purchase Price: Has the meaning set forth in Section 18.1.

Qualified Issuer: Has the meaning set forth in Section 8.1.

Qualified Transferee: A Person that (a) for the three (3) preceding years, has owned or operated (or had access to the expertise required to operate through committed management agreements with its Affiliates or through a committed operations and maintenance agreement with any Person) at least two hundred fifty (250) MW of battery energy storage facilities and (b) either itself or its direct or indirect parent, has (i) a tangible net worth of at least \$50,000,000 or (ii) a credit rating of “BBB-” or higher by S&P or “Baa3” or higher by Moody’s.

Ramp Rate: Has the meaning set forth in Exhibit M.

Real-Time Market: Has the meaning as defined in the CAISO Tariff.

Reimbursement and Waiver Agreement: That certain Reimbursement and Waiver Agreement by and between Seller and SMUD dated as of the Effective Date.

Reporting Period: Has the meaning set forth in Exhibit U.

Required Percentage: Ninety-five percent (95%).

Resource Adequacy: A requirement by a Governmental Authority or in accordance with its FERC-approved tariff, or a policy approved by a local regulatory authority, that is binding upon either Party and that requires such Party procure a certain amount of electric generating capacity.

Resource ID: Has the meaning set forth in the CAISO Tariff.

Round Trip Efficiency: Has the meaning set forth in Exhibit O.

Round Trip Efficiency Liquidated Damages: Has the meaning set forth in Exhibit O.

RTU: Has the meaning set forth in Section 5.3.1.

S&P: Standard & Poor’s Ratings Group, or any successor organization thereto.

Scheduled Commercial Operation Date or Scheduled COD: The planned Commercial Operation Date of the Project set forth in Exhibit A, as such date may be extended as provided in Section 2.3.7.

Scheduled Battery Storage: The applicable SMUD Setpoint for Charging Energy and/or Discharging Energy for each Dispatch Interval, not to exceed the Available Battery Storage Capacity.

Scheduling: The act of producing, or relating to the production of, a schedule for the delivery, production or use of Energy, Capacity, and/or transmission that is in compliance with NERC Scheduling (NERC tagging) requirements.

Scheduling Coordination Fee: Has the meaning set forth in Section 7.2.1.

Scheduling Coordinator: Has the meaning set forth in the CAISO Tariff.

Seller: The Party so identified in the preamble of this Agreement, and its successors and permitted assigns.

Settlement Period: Has the meaning set forth in Section 2.4.1(b).

SMUD: Sacramento Municipal Utility District, as so identified in the preamble of this Agreement, and its successors and permitted assigns.

SMUD Service Territory: The geographical area in which SMUD is the provider of distribution service. This includes virtually all of Sacramento County and a small part of neighboring Placer and Yolo Counties.

SMUD Setpoint: SMUD's Dispatch Instruction to Seller communicated through the SMUD MW control signal to the Plant Controller, or if SMUD's communication system is not operating properly, SMUD's Dispatch Instruction to Seller communicated through SMUD system operator's verbal instruction on a recorded phone line, followed up with a written log, clearly identifying the start time, end time, and MW value.

Solar Facility: 160 MW<sub>AC</sub> solar facility, commonly referred to as the Rancho Seco Solar II project, located at 14440 Twin Cities, Road, Herald, CA 95638, at the closed Rancho Seco Nuclear Plant.

Solar Facility Meter: The bi-directional revenue quality meter or meters, along with a compatible data processing gateway or remote intelligence gateway, telemetering equipment and data acquisition services sufficient for monitoring, recording and reporting, in real time, the amount of Energy produced by the Solar Facility. For clarity, (i) the Solar Facility will contain multiple measurement devices that will make up the Solar Facility Meter, and, unless otherwise indicated, references to the Solar Facility Meter shall mean all such measurement devices and the aggregated data of all such measurement devices, taken together, and (ii) the Solar Facility Meter will be located, and the Energy will be measured, at the low voltage side of the main step up transformer and will be subject to adjustment in accordance with any meter requirements of SMUD and Prudent Utility Practices to account for the applicable Electrical Losses and station service load.

State of Charge (SOC): The portion of Energy stored by the Project relative to the Available Battery Storage Capacity.

Station Service Load: The electric energy used by the Project to power the lights, motors, control systems and other auxiliary electrical loads that are necessary for operation of the Project, as applicable to the Project's battery storage system design. Station Service Load includes all power consumed on-site at the Project and Project substation, including the primary and backup source of auxiliary power and backfeed power. Station Service Load does not include transformer losses, line losses, gen-tie losses, power consumed at a SMUD substation, Charging Energy, or Discharging Energy. Examples of Station Service Load include: All inverter conversion systems for the Project, control systems, power supplies, lighting, control building HVAC, SCADA, telecommunication equipment, enclosure cooling for the Project, and 120v outlets.

Station Service Agreement: That certain Station Service Agreement by and between Seller and SMUD entered into as of the Effective Date of this Agreement.

Stored Energy Level: At a particular time, the amount of electric energy stored in the Project, expressed in MWh.

Surety Bond: A surety bond issued for the benefit of the SMUD that (i) is provided by an issuer duly licensed or authorized in the State of California to issue bonds for the limits required and (ii) is substantially in the form of Exhibit T or in a form reasonably acceptable to Seller and Buyer.

Suspension Date: Has the meaning set forth in Section 7.2.2(b)(ii).



**Tariff Rate:** The aggregate *ad valorem* tariff rate applicable to the Project equipment (inclusive of all import tariffs, cash deposits and import duties, stated as a percentage of the entered value of the Project equipment). For the avoidance of doubt, the Tariff Rate shall be determined by dividing (i) the sum of all import tariffs, cash deposits and import duties paid on all imported Project equipment by (ii) the total entered value of all imported Project equipment.

**Tax Benefits:** Any state, local and/or federal tax benefit or incentive, effective as of the Effective Date, including energy credits determined under Section 45 or 48 of the Tax Code, as it may be amended from time to time, ITCs, PTCs, depreciation, amortization, deduction, expense, exemption, preferential rate, and/or other tax benefit or incentive associated with the production of renewable energy and/or the operation of, construction, investments in or ownership of the Project (including any cash payment or grant).

**Tax Code:** United States Internal Revenue Code of 1986.

**Term:** Has the meaning set forth in Section 7.1.

**Termination Event:** Has the meaning set forth in Section 7.3.

**Termination Payment:** Has the meaning set forth in Section 7.4.

**Test Report:** Has the meaning set forth in Exhibit M.

**Third-Party SC:** Has the meaning set forth in Section 6.2

**Transfer:** Has the meaning set forth in Section 16.1.

**Transmission Provider:** An entity that directs the operation of a Transmission System and provides transmission service.

**Transmission System:** The relatively high voltage wires, transformers and related equipment owned or controlled by a particular electric utility or grid operator, and generally used to move bulk quantities of power between different electric utilities or from large electric generators to a utility's Distribution System; as opposed to being used to make final delivery of electric power to retail customers.

**Ultimate Parent:** DESRI Holdings, L.P., a Delaware limited partnership.

**WECC:** The Western Electricity Coordinating Council, which is the regional entity responsible for coordinating and promoting bulk electric system reliability in the western United States and western Canada, or any successor organization.

**WECC Reliability Standards:** The reliability standards for WECC, as in effect from time to time.

## **1.2 RULES OF INTERPRETATION**

In this Agreement, except as expressly stated otherwise or unless the context otherwise requires:

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

**1.2.2** words importing the singular include the plural and vice versa and the masculine, feminine and neuter genders include all genders;

**1.2.3** the words "hereof", "herein", and "hereunder" and words of similar import shall refer to this Agreement as a whole and not to any particular provision of this Agreement;



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

**1.2.5** a reference to a document or agreement, including this Agreement shall mean such document, agreement or this Agreement including any amendment or supplement to, or replacement, novation or modification of this Agreement, but disregarding any amendment, supplement, replacement, novation or modification made in breach of such document, agreement or this Agreement;

**1.2.6** a reference to a Person or entity includes that Person's or entity's successors and permitted assignees;

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

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

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

**1.2.10** references to any amount of money shall mean a reference to the amount in United States Dollars;

**1.2.11** a reference to a "day" is to a calendar day unless the context indicates otherwise;

**1.2.12** the expression "and/or" when used as a conjunction shall connote "any or all of";

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

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

## **2. PROJECT; PURCHASE AND SALE OF PRODUCTS**

### **2.1 Project and Expected Capacity**

This Agreement governs SMUD's purchase of the Product from the Project as described in Exhibit A.

#### **2.1.1 Annual Contract Capacity**

The Annual Contract Capacity is shown in Exhibit A. Seller shall be permitted to modify, augment, overbuild and/or replace the Project and its equipment and components with other equipment and components, at

any time prior to or following Commercial Operation, so long as the Annual Contract Capacity, as measured at the Delivery Point, is not reduced. Notwithstanding the foregoing, at least ninety (90) days prior to the date on which Seller reasonably anticipates that Commercial Operation will occur, Seller will provide SMUD with a final version of Exhibit A, which shall identify any updates or changes to certain of the equipment and components set forth in Exhibit A as attached to this Agreement. During the Delivery Term, Seller may modify the Project and its equipment and components from time to time so long as Seller provides SMUD with reasonably prompt written notice setting forth any modifications to Exhibit A. Once provided by Seller, this Agreement shall be deemed amended to include such final or modified version of Exhibit A.

## **2.1.2 Project Configuration**

The Parties agree that the Project configuration will be initially “Co-located Resources”, consisting of separate CAISO Resource IDs for the Solar Facility and the Project. If requested by SMUD in writing not later than twelve (12) months prior to the Scheduled Commercial Operation Date, or during the Delivery Term following reasonable notice by SMUD to Seller, which notice shall be a minimum of three (3) months, and commensurate with the CAISO process for implementing the conversion from “Co-located Resource” to “Hybrid Resource”, or implement future conversions in accordance terms as specified herein, Seller shall exercise commercially reasonable efforts to convert the Project from a storage facility co-located with a solar facility to a Hybrid Resource with a single CAISO Resource ID in accordance with the CAISO Tariff, provided that such efforts and conversion (a) do not require Seller to incur any additional actual or potential obligations, liabilities or expenses (other than de minimis internal administrative expenses, including staff time and overhead) above a cap of \$10,000, unless SMUD agrees to compensate Seller for costs above \$10,000, (b) do not reduce Seller’s actual or expected compensation under this Agreement, unless SMUD agrees to compensate Seller for such reduction in actual or expected compensation, (c) do not require Seller to operate in a manner that is inconsistent with the Battery Storage Operating Restrictions unless agreed to by Seller in its sole discretion, and (d) are subject to the Parties’ mutual agreement on amendments to this Agreement that may be required to effectuate such conversion. Notwithstanding any of the above conversion conditions, Seller shall use commercially reasonable efforts to minimize costs and schedule duration associated with such conversion.

## **2.2 Product Purchased**

During the Delivery Term, Seller shall sell and deliver, or cause to be delivered, and SMUD shall purchase and receive, or cause to be received, Product in accordance with the terms of this Agreement. During the Delivery Term, all Product shall be supplied only from the Project and shall be supplied from the Project only to SMUD. Subject to Section 2.3.2 below, SMUD acknowledges that Seller shall have the right to supply Product from the Project to third parties upon the expiration or earlier termination of the Delivery Term.

## **2.3 Delivery Term, Delivery Point, and Commercial Operation**

### **2.3.1 Delivery Term**

The “**Delivery Term**” shall commence at the start of the hour ending 01:00 PST on the COD and shall expire at the completion of the hour ending 24:00 PST on the last day of the (i) twentieth (20<sup>th</sup>) Contract Year, unless this Agreement is terminated earlier as set forth herein, including for exercise of the Purchase Option; provided that either Party may extend the Delivery Term beyond the initial twenty (20) Contract Years for five (5) additional Contract Years (the “**Extended Term**”) by providing notice to the other Party within twelve (12) months prior to the end of the twentieth (20<sup>th</sup>) Contract Year; provided that an independent, licensed appraisal and valuation consultant that is mutually agreed upon by SMUD and Seller has determined that the Delivery Term and the Extended Term shall not extend for more than eighty percent (80%) of the estimated useful life of the Project and the estimated remaining residual value of the Project at the conclusion of the Extended Term shall be equal to at least twenty percent (20%) of the original cost of the Project.

### 2.3.2 Right of First Refusal

No later than twelve (12) months prior to the end of the twenty-fifth (25th) Contract Year, if Seller chooses to sell Product from the Project to any third party pursuant to an agreement with a term of one (1) year or longer after the expiration of the Delivery Term of the Project, Seller shall provide notice of such intended sale to SMUD ("**Proposed Product Sale Notice**"). Upon receipt of such Proposed Product Sale Notice, SMUD will have sixty (60) days in which to provide notice to Seller indicating SMUD's interest in negotiating with Seller to purchase Product from the Project, which notice shall include SMUD's proposed contract price for such continued purchase ("**Proposed Product Purchase Notice**"). If SMUD provides such Proposed Product Purchase Notice to Seller, then the Parties shall negotiate in good faith for a period of sixty (60) days from the date of SMUD's Proposed Product Purchase Notice to determine if they are able to reach mutual agreement on the terms and conditions of a sale to SMUD under a separate agreement after the end of the twenty-fifth (25th) Contract Year for the sale of Product. If SMUD does not timely provide a Proposed Product Purchase Notice to Seller or if the Parties are unable to agree upon the terms and conditions of any sale of such Product to SMUD within such sixty (60)-day negotiation period set forth above (subject to extension by mutual agreement), then, subject to SMUD's option to purchase the Project as provided in Section 18, Seller shall be free to negotiate for the sale of such Product from the Project to any third party thereunder. For the avoidance of doubt, Seller is not obligated to provide such Proposed Product Sale Notice if Seller determines in its reasonable discretion that sales to SMUD after the twenty-fifth (25th) Contract Year for Product would negatively impact its ability to qualify for the Investment Tax Credit, due to extension of the Delivery Term for the Project for more than eighty percent (80%) of the estimated useful life of the Project, or the estimated remaining residual value of the Project at the conclusion of the extended Delivery Term for the Project would be less than twenty percent (20%) of the original cost of the Project; and neither Party is obligated to enter into any agreement as a result of any negotiations after the Proposed Product Purchase Notice is provided; and this Section 2.3.2 shall be of no force and effect upon expiration of the applicable Delivery Term of the Project.

### 2.3.3 Scheduled Commercial Operation Date

The Scheduled Commercial Operation Date of the Project is shown in Exhibit A.

### 2.3.4 Requirements for Commercial Operation

Commercial Operation shall have been achieved when each of the following conditions have been satisfied or waived by the Parties ("**COD Conditions**"):

- a) The Required Percentage of the Annual Contract Capacity of the Project has been installed, fully commissioned, and satisfactorily completed all startup testing;
- b) An independent, professional engineer that is actively registered in California, has provided a certificate with a PE stamp, certifying that (i) the Required Percentage of the Annual Contract Capacity of the Project is installed and capable of charging and discharging Energy, and (ii) Seller has completed the Battery Storage Commercial Operation Test in accordance with Exhibit M.
- c) Seller has provided for and SMUD has successfully completed Pre-Commercial Operation Date Testing and Modifications as specified in Section 6, Appendix F and Appendix G of the LGIA;
- d) The Plant Controller (as defined in the LGIA) required pursuant to the LGIA is operational;
- e) Seller has provided documentation demonstrating a NERC Generator Owner (GO) registration and a NERC Generator Operator (GOP) registration are in process or

have been completed for the Project, such as a screenshot of the registration request demonstrating that the pertinent NERC registration is in process;

- f) Seller has provided official contact information, including direct telephone numbers and email addresses for the Project GOP's Control Center personnel and the corresponding Supervisor/Manager/Director responsible for the Control Center operations;
- g) A Permission To Operate (PTO) letter has been signed and executed by SMUD's Director of Grid Operations (consistent with Prudent Utility Practice and LGIA requirements), not to be unreasonably withheld, conditioned or delayed (it being understood and agreed that this condition shall be deemed to be achieved upon issuance of the permission to operate notice in accordance with Section 6 of the LGIA); and
- h) Seller has issued the COD Notice.

Seller shall issue a notice of Commercial Operation to SMUD when Seller believes that the Project has satisfied all COD Conditions (a "**COD Notice**"). A COD Notice shall include all necessary supporting documentation of the satisfaction or occurrence of all COD Conditions. SMUD shall have ten (10) Business Days to review the COD Notice and raise any reasonable objections to Seller's satisfaction of any COD Conditions; provided, however, that Seller's COD Notice shall be deemed accepted by SMUD if SMUD fails to object within such time period. The Commercial Operation Date will be the date upon which Seller submits its COD Notice to SMUD, unless SMUD timely objects to Seller's evidence of the COD Conditions, then the Commercial Operation Date will be the date upon which such evidence is provided to SMUD's reasonable satisfaction or is deemed to have been accepted by SMUD.

### **2.3.5 Commercial Operation Date Confirmation Letter**

Upon satisfaction of the COD Conditions, SMUD shall execute and then provide to Seller for execution, the "Commercial Operation Date Confirmation Letter." The fully executed version shall be attached as Exhibit E to this Agreement.

### **2.3.6 Payment for Delay of Commercial Operation; Extension of Scheduled COD**

If the Required Percentage of the Annual Contract Capacity of the Project fails to achieve Commercial Operation on or before the Scheduled Commercial Operation Date (as such date may be extended as provided herein) (the "**Delay LD Start Date**"), then Seller shall pay SMUD Delay Damages in the amount of \$300 per MW for each day following the Delay LD Start Date for each MW or portion thereof by which the Capacity of the Project that has been commissioned and capable of charging and discharging Energy is less than the Required Percentage of the Annual Contract Capacity until the earlier of (A) Commercial Operation, or (B) the Guaranteed Commercial Operation Date. The Parties agree that SMUD's receipt of Delay Damages shall be SMUD's sole and exclusive remedy for Seller's failure to achieve Commercial Operation prior to the Scheduled Commercial Operation Date.

The Scheduled Commercial Operation Date shall be extended on a day-for day basis and Seller shall not owe SMUD Delay Damages for any Excusable Delay, provided that the Parties shall exercise reasonable due diligence to overcome or mitigate the effects of any Excusable Delay. Within fifteen (15) Business Days of Seller providing written notice of any Excusable Delay to SMUD, SMUD shall provide a written acknowledgment of such notice.

### **2.3.7 Payment for Deficit Damages**

- a) If Seller achieves Commercial Operation with an Expected Battery Storage Capacity that is less than the Annual Contract Capacity, then Seller shall use

commercially reasonable efforts following the Commercial Operation Date to cause the remaining portion of the Annual Contract Capacity to achieve Commercial Operation. If Seller has not caused the delayed Capacity to achieve Commercial Operation on or before three hundred sixty-five (365) days after the COD, then Seller shall pay SMUD damages equal to the Battery Storage Capacity Shortfall multiplied by \$320,000/MW ("**Deficit Damages**"). However, if the reason for the Battery Storage Capacity shortfall is the result of permitting or local fire jurisdiction restrictions (e.g. reduced site size), not due to the breach of Seller, then Seller shall not be obligated to pay any Deficit Damages associated directly with the portion of Annual Contract Capacity not built because of such restrictions. Thereafter, the Annual Contract Capacity = will be reduced proportionately to account for the final Expected Battery Storage Capacity at the end of such three hundred sixty-five (365)-day period for all purposes under this Agreement. Thereafter, the Annual Contract Capacity will be equal to such final Expected Battery Storage Capacity for all purposes under this Agreement and all requirements and deliverables hereunder that are determined based upon the Annual Contract Capacity (including the required Delivery Term Security as set forth in Section 8.1) shall be reduced on a pro rata basis.

- b) Parties agree that SMUD's receipt of Deficit Damages shall be SMUD's sole and exclusive remedy for failure to achieve Commercial Operation with less than the Annual Contract Capacity.

### **2.3.8 Cap on Damages.**

Notwithstanding anything in this Agreement to the contrary, Delay Damages owed by Seller to SMUD hereunder shall not exceed the Development Security provided by Seller pursuant to Section 8.1.

### **2.3.9 Project Testing.**

Prior to the Commercial Operation Date, Seller shall schedule with SMUD and complete a commercial operation test that establishes the Expected Battery Storage Capacity of the Project, in accordance with Exhibit M ("**Battery Storage Commercial Operation Test**").

## **2.4 Payment for Product Purchased**

### **2.4.1 Settlement Payments**

- a) Once the Project has achieved Commercial Operation, SMUD shall pay Seller the Monthly Settlement Amount.
- b) Following the end of each calendar month ("**Settlement Period**"), Seller shall deliver to SMUD Seller's settlement calculations with respect to the Settlement Period within 25 days after the end of such Settlement Period. By 20 days after receipt of Seller's settlement calculation, SMUD shall deliver to Seller a settlement checkout statement which shall include a calculation of the Capacity Subtotal Payment (as defined below) as adjusted by the Performance Metrics for such Settlement Period. The total of such calculation shall be referred to herein as the "**Monthly Settlement Amount**". The Capacity Subtotal Payment for the Project shall be equal to the Contract Price multiplied by the Expected Battery Storage Capacity (the "**Capacity Subtotal Payment**"); and such payment shall cover payment for Product. The Monthly Settlement Amount shall be equal to the Capacity Subtotal Payment for the Project multiplied by the Battery Storage Reliability Percentage multiplied by the Availability Percentage for the Project, as demonstrated in the form below.

Contract Price	x	Expected Battery Storage Capacity	=	Capacity Subtotal Payment	x	Availability Percentage	x	Battery Storage Reliability Percentage	=	Total
\$				\$						\$
<b>Monthly Settlement Amount</b>										

- c) For purposes of the calculation of the Capacity Subtotal Payment, the Expected Battery Storage Capacity shall reflect the most recent Battery Storage Capacity Test results. SMUD shall pay the Monthly Settlement Amount with respect to such month on the 15<sup>th</sup> day of the second month following the relevant Settlement Period (or the next succeeding Business Day), subject to the provisions of this Section 2.4.1. Changes to the Expected Battery Storage Capacity shall become effective at the beginning of the next Settlement Period following such Battery Storage Capacity Test.
- d) A Party may in good faith, dispute the correctness or absence of any settlement or adjustment to a settlement rendered under this Agreement or adjust any settlement for any arithmetic or computational error within twenty-four (24) months after the settlement is rendered or any specific adjustment to the settlement is made. In the event a settlement or portion thereof, or any other claim or adjustment arising hereunder is disputed, payment of the undisputed portion of the settlement shall be required to be made when due in accordance with this Section 2.4.1, with notice of the objection given to the Party issuing such settlement. Any billing dispute or billing adjustment shall be in writing and shall state the basis for such dispute or adjustment. Payment of the disputed amount shall not be required until the dispute is resolved, however the Party in receipt of the dispute notice is required to respond to such dispute notice with reasonable supporting documentation no later than ten (10) Business Days following delivery of such notice. If it is determined that an adjustment to the settlement is appropriate or an underpayment was made, then such payment shall be required to be made within ten (10) Business Days of such determination along with interest accrued at the Interest Rate from and including the due date to but excluding the date paid. Overpayments by a Party shall, at the option of the Party making such overpayment, be returned upon request or deducted by the Party receiving such overpayment from subsequent payments, with interest accrued at the Interest Rate from and including the date of such overpayment to but excluding the date repaid or deducted by the Party receiving such overpayment. Any dispute with respect to a settlement is waived unless the other Party is notified in accordance with this Section 2.4.1 within twenty-four (24) months after the settlement is rendered or any specific adjustment to the settlement is made.
- e) The final monthly settlement checkout statement shall set forth, as applicable, (1) the Monthly Settlement Amount; and (2) any other fees, charges or other amounts due and owing to Buyer pursuant to this Agreement.
- f) Either Party may offset the payment due to the other Party under this Agreement against the amounts owing from such other Party to the offsetting Party pursuant to this Agreement.



#### **2.4.2 Title and Risk of Loss**

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

#### **2.4.3 SMUD Metering**

All Charging Energy from the grid and all Discharging Energy shall be measured at, or as of, the Point(s) of Interconnection as defined in the LGIA. All Charging Energy from the Solar Facility shall be measured at, or as of, the Solar Facility Meter. Consistent with the metering diagram set forth in Exhibit P, metering shall occur at the Battery Storage Meter and the Solar Facility Meter, respectively, and shall account for Electrical Losses between the meter location and the Point of Delivery. SMUD shall have the right, but not the obligation, to read the Project's meters on a daily basis.

#### **2.4.4 Capacity Testing**

The Expected Battery Storage Capacity is the result of the most recent Battery Storage Capacity Test, which shall be performed as described in Exhibit M ("**Expected Battery Storage Capacity**") and in a manner consistent with the Battery Storage Operating Restrictions. The Battery Storage Capacity Test will be performed upon request by either Party, when SMUD system conditions can allow for such testing, as reasonably determined by SMUD, not less than one (1) test every Contract Year, and not more than one (1) test per calendar quarter, except for (a) a single retest of each original test within approximately seven (7) days of the original test, or (b) not more than one (1) test per calendar month at the request of either Party if such Party reasonably determines that the Capacity of the Project has failed to conform to at least ninety five percent (95%) of the Annual Contract Capacity, and reasonably determined that the capacity of the Project deviates by more than three percent (3%) of the Expected Battery Storage Capacity, respectively, for more than five (5) days and continues to fail to conform, in each case when SMUD system conditions can allow for such testing.

#### **2.4.5 Availability Determination & Reporting**

Seller shall generate a comprehensive operating report for each month, containing Seller's record of Availability for the Project at the POI, utilizing data originating from the Availability System of Record, and the monthly report generated by the operations & maintenance provider of the Project, unless Buyer agrees to utilize data from an alternate system ("**Monthly Operating Report**"). The Monthly Operating Report shall be substantially in the form attached herein as Exhibit V. The timing of the Monthly Operating Report shall be synchronized with the monthly settlement process, and due to Buyer by the twenty-fifth (25<sup>th</sup>) day following the end of the Settlement Period, in support of the Monthly Settlement Amount pursuant to Section 2.4.1. Buyer and Seller shall discuss and resolve any disputes involving the Monthly Operating Report by the fifth (5<sup>th</sup>) day of the second month following the end of the Settlement Period, in accordance with Section 2.4.1.b. The final Monthly Operating Report shall be used as part of the Monthly Settlement Amount determination in Section 2.4.1.

#### **2.4.7 Battery Storage Availability**

Within forty-five (45) days after the end of each Contract Year, Seller shall submit its determination of the Annual Average Battery Storage Availability from the Availability System of Record.

#### **2.4.8 Round Trip Efficiency**

Within forty-five (45) days after the end of each Contract Year, Seller shall submit its calculation of the Round Trip Efficiency in accordance with Exhibit O. During the Delivery Term, the Project shall maintain a

Round Trip Efficiency of no less than the Guaranteed Round Trip Efficiency. If the Round Trip Efficiency following the Annual Battery Storage Capacity Test is less than the Guaranteed Round Trip Efficiency, then Seller shall pay Round Trip Efficiency Liquidated Damages, as defined and determined in accordance with Exhibit O. Such Round Trip Efficiency Liquidated Damages shall be SMUD's sole and exclusive remedy for Seller's failure to satisfy the Guaranteed Round Trip Efficiency. For the avoidance of doubt, Round Trip Efficiency Liquidated Damages shall only be calculated from data obtained during an Annual Battery Storage Capacity Test conducted within thirty (30) days after the end of each Contract Year.

### **3. ENERGY MARKETS, CONVEYANCE OF CAPACITY ATTRIBUTES**

#### **3.1 Conveyance of Capacity Attributes**

Seller shall provide to SMUD any attestation SMUD reasonably requires in order for SMUD to show evidence that it has procured the Capacity Attributes associated with the Project in accordance with the procedure in Exhibit F. At SMUD's reasonable request, provided that no such request may impose any material additional costs on Seller, Seller shall execute such documents and instruments as may be reasonably required to affect recognition and transfer of the Capacity Attributes.

#### **3.2 Reporting of Ownership of Capacity Attributes**

Seller shall not report to any person or entity that the Capacity Attributes sold and conveyed hereunder to SMUD belong to anyone other than SMUD, and SMUD may report under any such program that such Capacity Attributes purchased hereunder belong to it.

#### **3.3 Modification of Capacity Attribute Conveyance Procedure**

SMUD may revise Exhibit F as appropriate, give written notice to Seller regarding the revision, and issue a new Exhibit F which shall then become part of this Agreement, provided that no such modification may impose any material additional costs or obligations on Seller, reduce Seller's compensation hereunder, or impair Seller's ability to perform its obligations under this Agreement, in order to reflect changes necessary in the Capacity Attribute conveyance procedure for SMUD to be able to receive and report the Capacity Attributes purchased under this Agreement as belonging to SMUD.

In no event will such revised Exhibit F cause Seller to incur any category of cost for which it is not already otherwise responsible under this Agreement without prior notice by SMUD and agreement of the Parties as to the appropriateness of such cost belonging with Seller.

#### **3.4 Energy Market Participation**

The Parties acknowledge and agree that as of the date hereof, SMUD is participating in the EIM and/or other energy markets. The Parties have agreed to a structure in this Agreement to facilitate SMUD's use of the Project to participate in such markets. Notwithstanding anything herein to the contrary, SMUD's joining or continued participation in such markets shall not require Seller to perform any additional measures or incur any additional or increased cost, liability or obligation, in each case other than what Seller is already otherwise expressly obligated under this Agreement, unless compensated by SMUD. If in the future, market rules or policies change, then without limiting Seller's and SMUD's rights under Section 3.4, the Parties shall meet and confer to discuss the new market rules and whether updates to the scheduling, settlements, or other procedures are required and to preserve the economic "benefit of the bargain" to both Parties to this Agreement.

#### **3.5 Change in Law, Energy Market Participation and Capacity Attributes**

**3.5.1** The Parties agree that expenditures to comply with the obligations set forth in this Article 3 that Seller shall bear with respect to energy market participation or the conveyance of Capacity Attributes to SMUD ("**Compliance Expenditures**") shall be capped at a total



of \$150,000 per Contract Year and \$2,000,000 in the aggregate over the Delivery Term of the Project ("**Compliance Expenditure Cap**").

**3.5.2** If a change in Law occurs after the Effective Date that affects Seller's compliance with its obligations under this Article 3, Seller shall not be in breach of such obligations if Seller has used commercially reasonable efforts to comply with such change in Law as it pertains to such obligations. For purposes of this Section 3.5.2, the term "commercially reasonable efforts" shall not require additional out-of-pocket expenditures in the aggregate in excess of the Compliance Expenditure Cap in complying with the changes in Law described in this Section 3.5.2 unless SMUD and Seller have agreed in writing for SMUD to reimburse Seller for or to pay directly such excess expenditures.

**3.5.3** Within thirty (30) days after the end of each calendar quarter during the Delivery Term for the Project, Seller shall provide SMUD with a report describing the Compliance Expenditures that Seller incurred during that calendar quarter and the total Compliance Expenditures incurred during the Contract Year that includes such calendar quarter. Prior to incurring Compliance Expenditures that are anticipated to exceed \$150,000, Seller shall notify SMUD of such expected Compliance Expenditures. Following such notice, the Parties shall attempt to agree to limit such Compliance Expenditures to the extent practicable; provided, however, that nothing herein limits Seller's right to incur Compliance Expenditures that Seller believes in good faith must be incurred for Seller to comply with its obligations under this Agreement, as long as the above notification provisions are met. If Seller determines that costs in excess of the Compliance Expenditure Cap will have to be incurred, then Seller shall notify SMUD and provide documentation and calculations to support the expected excess costs. Within thirty (30) Business Days of Seller's delivery of such notice, SMUD may then: (1) approve the expected excess costs and notify Seller of such approval, and Seller shall comply upon receipt of notice of SMUD's approval and SMUD's payment for the expected excess costs (such costs, "**Accepted Compliance Expenditures**"); or (2) elect not to pay Seller for the expected excess costs and notify Seller of such decision, in which case this Agreement shall continue in full force and effect and Seller shall continue to be excused from performing any obligation that causes, or would cause, the incurrence of such Compliance Expenditures in excess of the Compliance Expenditure Cap. SMUD is not required to reimburse Seller for any Compliance Expenditures unless and until SMUD agrees to the expected Compliance Expenditures in excess of the Compliance Expenditure Cap. To the extent that SMUD has not agreed to reimburse, or has not reimbursed, Seller for any Accepted Compliance Expenditures, then SMUD is deemed to have waived Seller's obligation that causes, or would cause, the incurrence of such Compliance Expenditures in excess of the Compliance Expenditure Cap and (x) Seller will not be in default under this Agreement for failure to satisfy any such obligation and (y) payments to Seller under this Agreement during the entirety of the Delivery Term will not decrease as a result of such change in Law and will be maintained as if all such obligations were taken.

### **3.6 Change in Tariff and Change in Tax Law**

- 3.6.1 If a Change in Tariff or a Change in Tax Law occurs before the Commercial Operation Date, Seller may deliver written notice to Buyer proposing an increase in the Contract Price to reasonably reflect, as applicable, (x) the increase in the total costs over the remaining useful life of the Project during the Term directly attributable to such Change in Tariff or (y) the economic value of the lost Tax Benefits over the remaining useful life of the Project during the Term directly attributable to such Change in Tax Law, as reasonably calculated by Seller using a discount rate, not to exceed six percent (6%), that reflects Seller's good faith estimate of Seller's cost of capital (a "**Proposed Price Increase**"). Any Proposed Price Increase shall (a) be limited to the economic impact to the Project resulting from such Change in Tariff or Change in Tax Law, (b) exclude general market fluctuations or other unrelated cost increases and (c) be supported by documentation which reasonably demonstrates the economic impact to the Project of such

Change in Tariff or Change in Tax Law.

- 3.6.2 Within fifteen (15) Business Days of Seller's delivery of a Proposed Price Increase, Buyer shall provide written notice to Seller that (a) Buyer accepts the Proposed Price Increase or (b) Buyer rejects the Proposed Price Increase (which will include an explanation of Buyer's reasonable objections to the Proposed Price Increase) and requests that the Proposed Price Increase be submitted for review by KPMG, Deloitte, PwC, or EY (the "**Independent Evaluator**"). Within ten (10) Business Days after Buyer's request to submit the Proposed Price Increase to an Independent Evaluator, Seller will select the Independent Evaluator. Buyer shall have ten (10) Business Days after Seller's selection of the Independent Evaluator to confirm that such Independent Evaluator is acceptable (such confirmation not to be unreasonably withheld, conditioned, or delayed). If Buyer fails to respond to Seller regarding the selection of the Independent Evaluator within such ten (10) Business Day period, then Buyer shall be deemed to have accepted the Independent Evaluator proposed by Seller. If Buyer objects to the selection of the Independent Evaluator within such ten (10) Business Day Period, then the selection of the Independent Evaluator shall be resolved pursuant to Article 20.
- 3.6.3 Seller shall provide the applicable Independent Evaluator a copy of the Proposed Price Increase and any supporting documentation reasonably requested by the Independent Evaluator. The Independent Evaluator shall be directed to complete its review and verification of the Proposed Price Increase and deliver a written determination to the Parties as soon as reasonably practicable, but no later than ten (10) Business Days after the Independent Evaluator receives all documentation that is reasonably required to deliver its written determination. With respect to any Proposed Price Increase directly resulting from a Change in Tariff, the Independent Evaluator shall complete its review and verification of the Proposed Price Increase after the applicable Project equipment has been imported into the United States. The Independent Evaluator's written determination shall include its proposed increase to the Contract Price, which, in the opinion of the Independent Evaluator, represents an accurate increase in the Contract Price to reasonably reflect, as applicable, (x) the increase in the total costs over the remaining useful life of the Project during the Term directly attributable to such Change in Tariff or (y) the economic value of the lost Tax Benefits to Seller directly attributable to such Change in Tax Law over the remaining useful life of the Project during the Term, using a discount rate, not to exceed six percent (6%), that reflects the Independent Evaluator's good faith estimate of Seller's cost of capital (the "**Modified Price Increase**").
- 3.6.4 Notwithstanding anything to the contrary in this Section 3.6, if Seller delivers a Proposed Price Increase directly resulting from a Change in Tariff, Buyer hereby pre-approves any Proposed Price Increase resulting in the Contract Price being no greater than \$ [REDACTED] kW-month (the "Proposed Pre-Approved Price"), subject to the Independent Evaluator's determination pursuant to Section 3.6.3. If the Independent Evaluator's Modified Price Increase would result in the Contract Price being no greater than \$ [REDACTED] kW-month, then the Contract Price shall be automatically increased by such Modified Price Increase. If the Independent Evaluator's Modified Price Increase would result in the Contract Price being greater than \$ [REDACTED] kW-month, then Seller may elect to (x) set the Contract Price at the Proposed Pre-Approved Price or (y) terminate this Agreement on a "no-fault" basis. Following any termination of this Agreement pursuant to this Section 3.6.4, neither Party shall have any liability or obligation to the other Party arising out of such termination, and Buyer shall return to Seller the full amount of Development Security then outstanding in favor of Buyer within five (5) Business Days following such termination.

## **4. INTERCONNECTION; TELEMETERING; STORAGE DISPATCH**

### **4.1 Interconnection Agreement**

Seller shall execute the LGIA with SMUD at the same time as execution of this Agreement. The LGIA specifies the obligations of the parties thereto with respect to the construction, operation and maintenance of certain interconnection facilities.

### **4.2 Station Service Load**

Station Service Load for the Project shall be governed by the Station Service Agreement. The use of Energy charged, stored, or discharged by the Project for any Station Service Load other than the battery auxiliary load is prohibited. The amount of metered Charging Energy delivered by SMUD and measured at the Battery Storage Meter and the amount of Discharging Energy delivered to SMUD and measured at the Battery Storage Meter shall not be separately adjusted to reflect Station Service Load, other than the battery auxiliary load.

### **4.3 No Additional Loads**

Seller shall not connect any loads not associated with Station Service Load at the location of the Project in a manner that would reduce the Energy provided from the Project to SMUD hereunder. Seller shall obtain separate retail electric service under existing tariffs for the service of any such additional loads. Retail electric service may be obtained from SMUD or other retail electric service provider for the Project site, as applicable.

### **4.4 Charging Energy Management**

**4.4.1** Upon receipt of a valid Charging Notice, Seller shall take all actions necessary to allow Charging Energy to be delivered to the Project in accordance with the SMUD Setpoint. SMUD shall be responsible for arranging, managing, purchasing, scheduling and paying all costs and charges, including any CAISO market costs and charges, associated with all of the Charging Energy for the Project in accordance with the terms of this Section 4.4 and the Battery Storage Operating Restrictions. SMUD shall be responsible for delivery of, and shall be deemed in control of, Charging Energy to and at the Delivery Point, and Seller shall be responsible for accepting and transferring, and shall be deemed in control of, Charging Energy from the Delivery Point to the Project. Seller shall be responsible for delivering all Discharging Energy to the Delivery Point in accordance with the SMUD Setpoint. SMUD shall be responsible for accepting and transferring all Discharging Energy at and from the Delivery Point.

**4.4.2** SMUD will have the right to charge the Project seven (7) days per week and twenty-four (24) hours per day (including holidays), by providing Charging Notices to Seller electronically, subject to the availability of the Project and the requirements and limitations set forth in this Agreement, including the Battery Storage Operating Restrictions and the provisions of Section 4.4.1. Each Charging Notice issued in accordance with this Agreement will be effective unless and until SMUD modifies such Charging Notice by providing Seller with an updated Charging Notice.

**4.4.3** Seller shall not charge the Project during the Delivery Term other than (a) pursuant to a valid Charging Notice, (b) in connection with a Battery Storage Capacity Test or other test required in accordance with Prudent Utility Practices, or (c) pursuant to a notice from SMUD under the LGIA, or any Governmental Authority. If, during the Delivery Term, Seller (i) charges the Project to a Stored Energy Level greater than the Stored Energy Level provided for in the Charging Notice or (ii) charges the Project in violation of the first sentence of this Section 4.4.3, then (A) Seller shall be responsible for all energy costs

associated with such charging of the Project, and (B) SMUD shall be entitled to discharge such energy and entitled to all of the benefits (including Product) associated with such discharge.

**4.4.4** SMUD will have the right to discharge the Project seven (7) days per week and twenty-four (24) hours per day (including holidays), by providing Discharging Notices to Seller electronically, subject to the availability of the Project and the requirements and limitations set forth in this Agreement, including the Battery Storage Operating Restrictions. Each Discharging Notice issued in accordance with this Agreement will be effective unless and until SMUD modifies such Discharging Notice by providing Seller with an updated Discharging Notice.

**4.4.5** The Plant Controller shall automatically determine the amount of Charging Energy or Discharging Energy based on the SMUD Setpoint.

Notwithstanding any other provision of this Agreement, **at any and all times** the Project may not be, and SMUD shall not issue any instruction, order, Charging Notice, Discharging Notice or other communication requesting or requiring the Project to be charged, discharged, or operated in any manner which results in, or gives rise to any inconsistency with the Battery Storage Operating Restrictions, or any inconsistency with or breach of the Interconnection Agreement; and in the event of any conflict or inconsistency between the Battery Storage Operating Restrictions or the other terms of this Agreement, the Battery Storage Operating Restrictions will prevail.

**4.4.6** If requested by SMUD, Seller and SMUD shall enter into good faith discussions to amend this Agreement to modify the Battery Storage Operating Restrictions in Exhibit J and to make any related amendments. Each Party acknowledges and agrees that this Section 4.4.6 does not create any legally binding obligation on either Party to enter into such amendment.

## **4.5 Telemetry**

The Project will require telemetry equipment connected to SMUD's energy management system ("**EMS**") including the CAISO automated Dispatch system (ADS) as provided in the Data Points List in Appendix G of the LGIA.

## **5. PERMITTING; STANDARD OF CARE; OPERATIONS; CURTAILMENT**

### **5.1 Permitting**

With the exception of the CEQA Addendum and any permits required in connection with any Transmission Provider interconnection facilities, Seller shall be responsible for securing all discretionary permits (including land use and building permits) and any other regulatory approvals required for the Project.

### **5.2 Standard of Care**

Seller shall pay and be responsible for designing, installing, operating, and maintaining the Project in accordance with all applicable Laws and Prudent Utility Practice. Seller acknowledges SMUD's Principles for Renewable Energy Development as expressed in Exhibit W. Seller will provide, implement, and maintain throughout the Term, a Community Benefits Plan that addresses how the Project will achieve the key objectives identified in Exhibit W. Prior to start of construction of the Project, Seller shall provide the Community Benefits Plan to SMUD for review and approval.

Seller shall: (a) operate and maintain the Project in a safe manner in accordance with Prudent Utility Practice and (b) maintain any governmental authorizations and Permits required for the construction and operation thereof.

SMUD shall: (a) operate and maintain its Transmission System in a safe manner in accordance with Prudent Utility Practice and all applicable Laws, as such Laws may be amended from time to time; and (b) maintain any governmental authorizations and Permits required for the construction and operation thereof.

### **5.3 Dispatchability**

Subject to the terms of this Agreement and the Availability of the Project as specified in accordance with the Outage Coordination Process, Seller shall at all times follow the SMUD Setpoint and respond to Dispatch Instructions from SMUD, as provided for in Section 4.4 and this Section 5.3.

**5.3.1** Subject to the foregoing and subject to the Battery Storage Operating Restrictions, Seller grants SMUD the authority to Dispatch the charging or discharging of the Project from 0% to 100% of nominal capability up to the Annual Contract Capacity, by sending a control signal to the Project's Plant Controller for a specific level of power dispatch (MW), at any time as reflected in the SMUD Setpoint. Seller shall install a Plant Controller with the ability to accept a control signal from SMUD's Energy Management System (EMS) through a local SMUD remote terminal unit ("RTU") to dispatch the Project. The Plant Controller shall run in mutually exclusive local or remote control modes. In local control mode, controller modes and setpoints can be selected by an operator from the plant SCADA. In remote control mode, controller modes and setpoints are selected via the SMUD remote terminal unit. Transition between local and remote modes shall be initiated by the SMUD operator via SMUD's EMS. In remote control mode the controller shall track remote setpoint and provide seamless transitioning from remote to local control mode.

**5.3.2** The Plant Controller shall have the capability to limit the instantaneous energy delivered to the Point of Interconnection by the Project to not higher than the Interconnection Capacity Limit. When the Plant Controller detects that the instantaneous energy delivered to the Point of Interconnection is higher than the Interconnection Capacity Limit, the Plant Controller shall take automatic action to immediately reduce the Discharging Energy from the Project such that the instantaneous energy delivered to the Point of Interconnection is no more than the Interconnection Capacity Limit.

**5.3.3** Active power ramp rate control shall provide for the transition between charge or discharge levels at a controlled ramp rate. The controller shall support a ramp rate in compliance with LGIA requirements.

**5.3.4** Battery Dispatchability control accuracy shall be better than a +/- 2 MW average over a five (5) minute interval. Seller shall provide SMUD evidence of this accuracy upon SMUD's request.

**5.3.5** Notwithstanding any other provision of this Agreement, the Project shall not be required to comply with any instructions, requests or directions for the Project to perform or operate in a manner inconsistent with the Battery Storage Operating Restrictions. For the avoidance of doubt, Seller shall not be required to adhere to SMUD's instruction to charge or discharge the Project in the case of:

- a) An Emergency Condition;
- b) Any abnormal situation or condition that in the reasonable judgment of Seller, is imminently likely to cause a material adverse effect on the security of, or damage to, the Project or the Interconnection Customer Interconnection Facilities. System restoration or black start shall be considered an Emergency

Condition; provided, however, the Project shall not be obligated to possess black start capability;

c) Any direction, instruction, or order given by RC West (whether directly or through the scheduling coordinator or SMUD) for warnings of an Emergency Condition, or imminent condition or situation, which jeopardizes SMUD's Electric System or other Electric System integrity or the integrity of other systems to which they are connected, or any warning, forecast, or anticipated over-generation conditions, including a request to manage over-generation conditions;

d) Any direction, instruction or order given by SMUD or the Transmission Provider for reasons to prevent equipment damage, loss of load, abnormal voltage conditions, or any warning, forecast or anticipation of conditions or situations that jeopardize SMUD's or Transmission Provider's system integrity or due to scheduled or unscheduled maintenance or construction on SMUD's or Transmission Provider's transmission or distribution facilities that prevent the SMUD from receiving or Seller from delivering Energy at the Delivery Point; or

e) Any discharge instruction that would cause curtailment of the Solar Facility.

#### **5.4 Definitive Agreements**

Concurrently with the execution of this Agreement, the Parties are executing the other Definitive Agreements. Neither Party shall have any liability, and each Party shall be excused from its performance obligations under this Agreement, to the extent that such Party fails to perform due to the failure of the other Party to perform its obligations under the Definitive Agreements.

In the event that one of the Definitive Agreements is terminated as a result of a default by SMUD or Seller thereunder, the non-defaulting Party under such Definitive Agreement may terminate this Agreement; provided that such non-defaulting Party shall not be entitled to multiple monetary remedies as a direct payment to the non-defaulting Party for the same damages caused by such breaches under the Definitive Agreements. Under these circumstances, the non-defaulting Party shall have all remedies available to it at law and in equity, including the right to terminate this Agreement except where such remedies are limited hereunder or under any other Definitive Agreement. For purposes of clarity, nothing in this paragraph shall limit or affect the defaulting Party's requirement, if any, to undertake any applicable non-monetary actions (e.g. corrective action) under the Definitive Agreements.

### **6. SCHEDULING; OUTAGES; ACCESS RIGHTS**

#### **6.1 Scheduling**

The Project is interconnected to the SMUD Service Territory, and SMUD will optimize the dispatch, or contract with a third party for optimization of Energy for use in its Scheduling process; provided that all such optimization must be consistent with the Battery Storage Operating Restrictions. SMUD shall (1) be responsible for all costs, charges and penalties associated with SMUD's bidding and scheduling rights under this Agreement for Scheduling of the Project's Products, and all imbalance energy costs, charges and penalties and (2) be entitled to all revenues assessed or provided associated with SMUD's bidding and scheduling of the Project's Products.



## 6.2 Scheduling Coordinator; CAISO Settlements

SMUD shall be the Scheduling Coordinator for scheduling services for the Project, and for both the delivery and receipt of the Product at the Delivery Point, or contract with a third party for Scheduling Coordinator responsibilities (any such third party, a **“Third-Party SC”**). The Scheduling Coordinator requirements include, but are not limited to, SMUD's participation in the CAISO's EIM and day-ahead market or other energy markets. As between Seller and SMUD, SMUD is responsible for all acts and omissions of any Third-Party SC and for all cost, charges and liabilities incurred by Third-Party SC to the same extent that SMUD would be responsible under this Agreement for such acts, omissions, costs, charges and liabilities if taken, omitted or incurred by SMUD directly. Seller shall have no liability to a Third-Party SC for any reason under this Agreement. SMUD (as the Scheduling Coordinator) shall be responsible for all settlement functions with the CAISO related to the Project, and shall submit bids to the CAISO in accordance with this Agreement, the applicable CAISO Tariff, protocols and scheduling practices for Product on a day-ahead, hour-ahead, fifteen-minute market, real-time or other market basis that may develop after the Effective Date, as determined by Buyer consistent with the CAISO Tariff.

### 6.2.1 Scheduling Coordinator Fee

As consideration for Buyer's services as Scheduling Coordinator, Seller shall pay Buyer a fee for Scheduling equal to \$100,000 per Contract Year (**“Scheduling Coordination Fee”**). This fee shall escalate at an annual rate of two percent (2.0%), as shown in Exhibit G, commencing on the first day of the second Contract Year and continuing throughout the Delivery Term or until the earlier termination of this Agreement. The pro rata share of the Scheduling Coordination Fee will be included with each monthly settlement statement. The amount owed by Seller to Buyer under this section for services rendered may be set off from amounts owed by Buyer to Seller.

## 6.3 Energy Imbalance Market – EIM or other

SMUD participates in the EIM, and the Parties acknowledge that the Project will be an EIM Participating Resource and such participation will incur imbalance deviation charges. Extensions of the EIM into the Extended Day-Ahead Market (EDAM) may result in additional imbalance deviations, the responsibility for which shall be governed by Section 6.1.

## 6.4 Outage Coordination

Seller shall comply with SMUD's Outage Coordination Process. All electrical or mechanical testing of the Project, or related facilities that may have an impact on Availability or could result in a change to the normal state of the facility, shall be coordinated with SMUD in accordance with current, as of the Effective Date (subject to Section 6.7), version of “SMUD Transmission Generation Outage Coordination Process” posted to the smud.org website under “Interconnection Information” to ensure bulk power system reliability in accordance with Federal standards (**“the Outage Coordination Process”**).

## 6.5 Planned Outages

Planned Outages may only be taken upon thirty (30) days written notice to SMUD and SMUD approval. Seller shall use commercially reasonable efforts to not schedule or take any Planned Outages from 6:00 a.m. through 10:00 p.m. Pacific Prevailing Time during the months of June through September unless required by Prudent Utility Practice or applicable Law. Seller shall use commercially reasonable efforts in accordance with Prudent Utility Practice to minimize the frequency and actual duration of Planned Outages and optimize the availability of Energy from the Project. Seller shall provide Planned Outage notifications in accordance with the Outage Coordination Process. Seller is allowed to perform maintenance on the system after peak hours from 12:00 AM to 5:00 AM without penalty to the Availability calculation upon SMUD's approval of the Planned Outage request, not to be unreasonably withheld, conditioned or delayed. Seller is allowed to perform maintenance on two (2) medium voltage transformers as long as it does not impact the Annual Contract Capacity of the Project at a time during this period, at any time of day upon

SMUD's approval of the Planned Outage request, not to be unreasonably withheld, conditioned or delayed. SMUD has the right to cancel or terminate the Planned Outage, at least twenty-four (24) hours prior to such Planned Outage, early for system emergency conditions.

## **6.6 Forced Outages**

Seller shall provide Forced Outage notifications in accordance with the Outage Coordination Process. When Seller desires to return the Project to service, Seller shall notify SMUD of the same. SMUD shall use commercially reasonable efforts to accommodate the return to service as soon as practicable after such request; provided that SMUD shall permit the Project to return to service no later than the estimated time of return. When Seller provides notice to SMUD that Seller desires to return the Project to service and the Project is actually capable of returning to service, the Project shall be deemed to be available for all purposes under this Agreement, notwithstanding any delay caused by SMUD.

## **6.7 Modification of Outage Coordination Process**

SMUD may, from time to time, revise the Outage Coordination Process by providing reasonable notice to Seller, in accordance with Prudent Utility Practice, prior to the effectuation of such change, provided that no change to the Outage Coordination Process shall (i) require Seller to incur costs or suffer liabilities other than de minimis administrative internal costs or (ii) impair Seller's ability to perform its obligations under this Agreement.

## **6.8 Access Rights**

SMUD, its authorized agents, employees and inspectors, upon advance notice to Seller and at their own cost and expense and subject to Section 11.2, shall have the right to reasonably, periodically visit the Project site and inspect the Project in accordance with the Definitive Agreements.

# **7. TERM, TERMINATION EVENT AND TERMINATION**

## **7.1 Term**

The term of this Agreement (the "**Term**") shall commence upon the last execution by the duly authorized representatives of each of SMUD and Seller, and shall remain in effect until the conclusion of the Delivery Term, unless terminated sooner pursuant to the terms of this Agreement. All indemnity rights shall survive the termination of this Agreement for twelve (12) months.

## **7.2 Events of Default; Remedies**

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

- a) the Defaulting Party fails to make, when due, any payment required under this Agreement if such failure is not remedied within ten (10) days after receipt of notice from the Non-Defaulting Party;
- b) any representation or warranty made by such Defaulting Party herein is false or misleading in any material respect when made, and such failure is not cured within thirty (30) days after receipt of notice from the Non-Defaulting Party, or such longer period not to exceed sixty (60) days if the failure is not capable of being cured within such thirty (30) days with the exercise of reasonable diligence, so long as the Defaulting Party has commenced and is diligently pursuing a cure during such initial thirty (30)-day period;



- c) the Defaulting Party fails to perform any material covenant or obligation set forth in this Agreement (except to the extent constituting a separate default under this Section 7.2.1 or otherwise has a specific remedy provided in this Agreement), if such failure is not remedied within thirty (30) days of receipt of notice from the Non-Defaulting Party, or such longer period not to exceed ninety (90) days if the failure is not capable of being cured within such thirty (30) days with the exercise of reasonable diligence, so long as the Defaulting Party has commenced and is diligently pursuing a cure during such initial thirty (30)-day period; and/or
- d) the Defaulting Party becomes Bankrupt.

### 7.2.2 Remedies

- a) Termination for Default. Except as otherwise expressly provided in this Agreement, an Event of Default by a Defaulting Party, the other Party (the “**Non-Defaulting Party**”) shall have the right to (a) terminate this Agreement by providing notice of such termination to the Defaulting Party, which termination shall be effective on a day no earlier than five (5) days after such notice is deemed to be received (as provided in Section 14) and no later than twenty (20) days after such notice is deemed to be received (as provided in Section 14) and, except as provided in Section 7.3 to the contrary, the Defaulting Party shall pay the Non-Defaulting Party a Termination Payment calculated in accordance with Section 7.4, or (b) pursue any other remedies available at law or in equity, including where appropriate, specific performance or injunctive relief, except to the extent such remedies are expressly limited under this Agreement. If the Non-Defaulting Party fails to terminate this Agreement under clause (a) of this paragraph by notice to the Defaulting Party within six (6) months following the Non-Defaulting Party’s notice of an Event of Default, then the Non-Defaulting Party shall be deemed to have waived its rights to terminate this Agreement pursuant to clause (a) of this paragraph with respect to such Event of Default. If the Non-Defaulting Party elects to terminate this Agreement under clause (a) of this paragraph, then the sole and exclusive remedy available to the Non-Defaulting Party shall be the Termination Payment calculated in accordance with Section 7.4. Notwithstanding any provision herein to the contrary, if Seller commits an Event of Default under this Agreement prior to the Commercial Operation Date, SMUD’s sole and exclusive remedy in respect of such Event of Default shall be to terminate this Agreement and retain the Development Security then-held by SMUD pursuant to Section 8.1 of this Agreement (less any Delay Damages already paid by Seller).
- b) Suspension.
  - i) Duty to Mitigate Damages. In addition to (and without limiting) the remedies for an Event of Default otherwise available at law or in equity, during the existence of an Event of Default, the Non-Defaulting Party shall use commercially reasonable efforts to mitigate the damages incurred as a result of such Event of Default.
  - ii) Right to Suspend. In addition, during the existence of an Event of Default, the Non-Defaulting Party may, by notice to the Defaulting Party, suspend (the date of such notice, the “**Suspension Date**”) in whole or in part its payment (excluding accrued payment obligations prior to such Suspension Date) or performance under this Agreement, in either case, not to exceed thirty (30) days.

- iii) Responsibility for damages during Suspension. Such suspension shall not relieve the Defaulting Party of its obligations to pay damages arising out of such Event of Default.
  - iv) Resumption of Performance Following Suspension. After the Defaulting Party's cure of such Event of Default, and provided there is no other Event of Default by such Defaulting Party then occurring and this Agreement has not been terminated, the Non-Defaulting Party will resume performance of its obligations under this Agreement.
- c) Termination or Suspension without Cause. Except for the rights to terminate and suspend expressly set forth in this Agreement, neither Party shall have any right to terminate this Agreement or suspend its performance for any reason.

### **7.3 Termination Rights**

SMUD shall have the right but not the obligation to terminate this Agreement, in whole or in part, if any of the following occur, each of which is a **"Termination Event"**:

#### **7.3.1 Failure to achieve Commercial Operation**

If the Required Percentage of the Annual Contract Capacity of the Project does not achieve Commercial Operation by the Guaranteed COD for a reason other than an Excusable Delay, Buyer has the right but not the obligation to terminate this Agreement and Seller liability is capped at the sum of the Development Security minus the amount of any Delay Damages that have been paid.

If the Required Percentage of the Annual Contract Capacity of the Project does not achieve Commercial Operation by the Guaranteed COD as a result of an Excusable Delay and the delay in Commercial Operation exceeds one (1) year, either Party may terminate this Agreement, SMUD and Seller shall have no further liability under this Agreement, and SMUD shall return any security provided by Seller; provided that the foregoing does not excuse SMUD from any liability under this Agreement associated with an Excusable Delay that is a default under this Agreement or that is caused by the negligence of SMUD.

If an Excusable Delay results in Seller's failure to meet the "Commercial Operation Date" milestone under the Interconnection Agreement, and as a result the Interconnection Agreement is terminated, either Party may terminate this Agreement, SMUD and Seller shall have no further liability under this Agreement and SMUD shall return any security provided by Seller; provided that the foregoing does not excuse SMUD from any liability under this Agreement associated with an Excusable Delay that is a SMUD default under this Agreement or that is caused by the negligence of SMUD.

To exercise the right to terminate, the terminating Party shall provide the other Party with a ten (10) day advance written notice. If Seller achieves the Commercial Operation Date prior to the end of the ten (10) day notice period, SMUD shall not exercise its right to terminate the Agreement.

#### **7.3.2 Failure to sell or deliver Product**

If, after the Commercial Operation Date, Seller has not sold or delivered Product from the Project to SMUD for a period of twelve (12) consecutive months, except due to Force Majeure events and/or SMUD breaches that prevent or excuse Seller from delivering Product, then SMUD shall have the right to terminate this Agreement.

#### **7.3.3 Availability below Requirements**

Beginning on the first day of the second full Contract Year of this Agreement, and annually thereafter, if the Annual Average Battery Storage Availability during any Measurement Period is less than the respective

Battery Storage Availability Requirement, then, subject to the cure rights set forth below, SMUD shall have the right to terminate this Agreement.

Notice of such termination for this Event of Default shall be given in writing a minimum of sixty (60) days prior to the effectiveness of such termination and within one hundred twenty (120) days following the end of the second of the applicable two (2) Contract Years.

SMUD's ability to exercise such termination right in respect of any Measurement Period shall be deferred for up to one year if Seller has reasonably demonstrated to SMUD, and is actively implementing in good faith, a cure plan for any such failure as described below.

A cure plan may include, but is not limited to, the addition of batteries to the system at Seller's sole expense. A cure plan that reasonably shows the Project's ability to achieve the Battery Storage Availability Requirement in that current Measurement Period must be submitted to SMUD within sixty (60) days of Seller's receipt of SMUD's notice of termination. SMUD shall then have thirty (30) days after receipt of the cure plan to inform Seller in writing of any reasonable objections to the cure plan. SMUD's non-objection to, or requested modifications to, Seller's cure plan does not waive SMUD's termination rights in the event that Seller does not remedy the Annual Average Battery Storage Availability by the end of the following Contract Year. Any disagreements regarding the cure plan will be resolved in accordance with the dispute resolution provisions in Section 20 hereof.

#### **7.3.4 Termination of Land Lease or LGIA**

If the Land Lease Agreement is terminated for a "Tenant" default pursuant to the terms of such agreement, or if Seller elects to terminate the LGIA and/or Land Lease Agreement under the terms of those agreements, this Agreement shall terminate automatically without any further action of the Parties, effective upon the date of the subject agreement termination.

#### **7.3.5 Notice of Termination Event**

If a Termination Event has occurred, SMUD shall have the right to: (a) send notice, designating a day, no earlier than five (5) days after such notice is deemed to be received (as provided in Section 14) and no later than twenty (20) days after such notice is deemed to be received (as provided in Section 14) (unless, in each case, a longer notice period is set forth in Section 7.3), as an early termination date of this Agreement ("**Early Termination Date**") unless the Parties have agreed to resolve the circumstances giving rise to the Termination Event; (b) except for a termination pursuant to Section 7.3.1 or as elsewhere provided in this Agreement to the contrary, calculate the Termination Payment in accordance with Section 7.4 owed in connection with such Termination Event; and (c) terminate this Agreement and end the Delivery Term effective as of the Early Termination Date. With respect to any Termination Event prior to the Commercial Operation Date, including pursuant to Section 7.3.1, Seller's sole and exclusive liability and SMUD's sole and exclusive remedy aside from terminating this Agreement shall be the forfeiture of Seller's Development Security to SMUD less any Delay Damages already paid by Seller.

### **7.4 Termination Payment Calculation**

If a Termination Event occurs or if this Agreement is terminated following a breach or default as provided in Section 7.2 of this Agreement, in each case ultimately resulting in termination of this Agreement, a "**Termination Payment**" shall be determined in accordance with this Section 7.4. Notwithstanding any provision herein to the contrary, prior to the Commercial Operation Date, the Termination Payment shall be zero dollars (\$0.00).

**7.4.1** The Termination Payment payable by the Defaulting Party to the Non-Defaulting Party shall equal: (i) Non-Defaulting Party's Losses as calculated under Section 7.4.1(a) below and discounted to present value as set forth under Section 7.4.1(d) below; plus (ii) Non-Defaulting Party's Costs as calculated under Section 7.4.1(e) below; minus (iii) Non-

Defaulting Party's Gains as calculated under Section 7.4.1(b) below and discounted to present value as set forth under Section 7.4.1(d) below; which will then be aggregated with any amounts owed to the Non-Defaulting Party as of the Early Termination Date. If the Termination Payment as so calculated would be less than zero, it shall be deemed to be zero, provided that notwithstanding anything herein to the contrary, each Party shall compensate the other Party for amounts due in respect of prior performance rendered under this Agreement.

- a) The Parties intend that Non-Defaulting Party's "**Losses**" shall be the present value of the economic loss (exclusive of Costs), if any, resulting from the termination of this Agreement, determined in a commercially reasonable manner as calculated in accordance with this Section 7.4. The Losses, if any, suffered by Non-Defaulting Party shall be determined by comparing the value of the remaining Term, applying the Annual Contract Capacity, as shown in Exhibit A, multiplied by twelve (12), multiplied by the Contract Price for each year of the remaining Term under this Agreement had it not been terminated, against the market price of equivalent replacement Product. For clarity, if SMUD is the Non-Defaulting Party, the Non-Defaulting Party's Losses equal the amount by which the market price of replacement Products exceeds the Contract Price therefor, and if Seller is the Non-Defaulting Party, the Non-Defaulting Party's Losses equal the amount by which the Contract Price hereunder exceeds the market price of such replacement Products, less the expenses saved by Seller due to SMUD's default (if any), which includes, but is not limited to, the cost of production of the Products.
- b) The Parties intend that Non-Defaulting Party's "**Gains**" shall be the present value of the economic benefit (exclusive of Costs), if any, resulting from the termination of this Agreement, determined in a commercially reasonable manner as calculated in accordance with this Section 7.4. The Gains, if any, received by Non-Defaulting Party shall be determined by comparing the value of the remaining Term, applying the Annual Contract Capacity, as shown in Exhibit A, multiplied by twelve (12), multiplied by the Contract Price for each year of the remaining Term under this Agreement had it not been terminated, against the price of equivalent replacement Product. For clarity, if SMUD is the Non-Defaulting Party, the Non-Defaulting Party's Gains equal the amount by which the Contract Price hereunder exceeds the price of equivalent replacement Product, and if Seller is the Non-Defaulting Party, the Non-Defaulting Party's Gains equal the amount by which the price of equivalent replacement Product exceeds the Contract Price therefor, plus the expenses saved by Seller due to SMUD's default (if any), which includes, but is not limited to, the cost of production of the Product.
- c) To ascertain the market price of a replacement contract, Non-Defaulting Party may consider, among other valuations, quotations from leading dealers in capacity contracts, and other bona fide third party offers, all adjusted for the length of the remaining Term and differences in transmission. It is expressly agreed that Non-Defaulting Party shall not be required to enter into replacement transactions in order to determine the Termination Payment. For the avoidance of doubt, if this Agreement is terminated as a result of a SMUD Event of Default and the Interconnection Agreement is also terminated, then the Parties agree it shall be reasonable for Seller to assume no replacement sales will occur in calculating the Termination Payment and therefore, in calculating Seller's Loss, the "market price of replacement Products" shall be deemed to be zero.
- d) The Losses calculated under paragraph (a) and Gains calculated under paragraph (b) shall be discounted to present value using a reasonably appropriate market discount rate for the Non-Defaulting Party as of the time of termination (to take into

account the period between the time notice of termination was effective and when such amount would have otherwise been due pursuant to this Agreement).

- e) Non-Defaulting Party's "**Costs**" shall be calculated as the sum of the brokerage fees, commissions and other similar transaction costs and expenses reasonably incurred in terminating and replacing this Agreement (if applicable), including, reasonable transmission costs associated with any replacement contract, if any, incurred in connection with Non-Defaulting Party enforcing its rights with regard to this Agreement. Non-Defaulting Party shall use reasonable efforts to mitigate or eliminate Costs. Consistent with Section 20.2, each Party shall pay and be responsible for their own attorney fees.
- f) The Non-Defaulting Party shall add any amounts owed by the Defaulting Party to the Non-Defaulting Party as of the Early Termination Date as part of the Termination Payment calculation. The Non-Defaulting Party may set-off any amounts owing by the Non-Defaulting Party to the Defaulting Party as of the Early Termination Date against the Termination Payment so that all such amounts are aggregated and/or netted to a single amount. The net amount due to or from the Non-Defaulting Party shall be paid within thirty (30) Business Days following the effective date of termination, or, if the Parties disagree regarding the calculation of the Termination Payment, the date that the calculation of the Termination Payment is resolved pursuant to Section 7.4.2 below.
- g) In no event, however, shall the calculation of Loss or Costs include any penalties or similar charges imposed by the Non-Defaulting Party.

**7.4.2** If the Defaulting Party reasonably disagrees with the calculation of the Termination Payment and the Parties cannot otherwise resolve their differences, the calculation issue shall be resolved in accordance with Section 20 of this Agreement.

## **8. CREDITWORTHINESS**

### **8.1 Project Development and Delivery Term Security**

Within ten (10) Business Days of the Effective Date, Seller shall provide security in the amount equal to the product of \$45/kW<sub>AC</sub> multiplied by the Annual Contract Capacity, in the form of: (a) cash or (b) letter of credit from a Qualified Issuer, to be maintained until the start of the Delivery Term ("**Development Security**").

Prior to commencement of the Delivery Term, Seller shall provide security in the amount equal to the product of \$75/kW<sub>AC</sub> multiplied by the Annual Contract Capacity at COD, in the form of: (a) cash, (b) surety bond in a form reasonably acceptable to Buyer or (c) letter of credit, and either (b) or (c) shall be from a Qualified Issuer ("**Delivery Term Security**"), and SMUD shall return the Development Security provided pursuant to this Section 8.1 to Seller. Seller shall maintain the Delivery Term Security for the duration of the Delivery Term.

No lien or other security will be required and SMUD's recourse against Seller shall be limited to the security provided.

"**Qualified Issuer**" is (A) with respect to a letter of credit, a major U.S. commercial bank or a U.S. branch of a foreign bank that, at the time of delivery of a letter of credit, (i) has a combined capital surplus of \$10,000,000,000 and (ii) has a senior unsecured long-term credit rating of at least "A-" by S&P or "A3" by Moody's or (iii) is reasonably acceptable to Buyer, and (B) with respect to a Surety Bond, an issuer rated not lower than A-/IX by the A.M. Best Company. If Qualified Issuer fails to meet the foregoing capital surplus and unsecured long-term credit rating requirements, Seller must provide replacement security.

## **9. RESERVED**

## **10. FORCE MAJEURE**

### **10.1 Effect of Force Majeure**

Buyer or Seller, as the case may be, shall be excused from performance under this Agreement to the extent, but only to the extent, that performance hereunder is prevented or delayed by an act or event of Force Majeure. The Party invoking Force Majeure shall exercise due diligence to overcome or mitigate the effects of such an act or event of Force Majeure; *provided*, however, that nothing in this Agreement shall be deemed to obligate the Party invoking Force Majeure (a) to forestall or settle any strike, lock-out or other labor dispute against its will; or (b) for Force Majeure affecting Seller only, to purchase electric power to cure the event of Force Majeure.

### **10.2 Notice of Force Majeure**

In the event of any delay or nonperformance resulting from an event of Force Majeure, the Party invoking Force Majeure shall, as soon as practicable under the circumstances, notify the other Party in writing of the nature, cause, date of commencement thereof and the anticipated extent of any delay or interruption in performance.

### **10.3 Termination Due to Force Majeure Event**

If a Party is prevented from performing its material obligations under this Agreement for a period of twelve (12) consecutive months or longer due to Force Majeure, the unaffected Party may terminate this Agreement, without liability of either Party to the other, upon thirty (30) days written notice at any time during the Force Majeure event.

## **11. INDEMNITY**

### **11.1 Indemnity by Seller**

Seller shall defend, release, indemnify and hold harmless SMUD, its directors, officers, employees, agents, and representatives against and from any and all losses, claims, demands, liabilities and expenses, actions or suits, including reasonable costs and attorney's fees, resulting from, or arising out of or in any way connected with claims by third parties associated with the acts or omissions of Seller, its directors, officers, employees, contractors, agents and representatives relating to: (i) the Energy delivered at the Delivery Point; (ii) Seller's operation and/or maintenance of the Project; or (iii) this Agreement; excepting only such loss, claim, action or suit to the extent caused by the willful misconduct or gross negligence of SMUD, its agents, employees, directors or officers.

### **11.2 Indemnity by SMUD**

SMUD shall defend, release, indemnify and hold harmless Seller, its directors, officers, employees, agents, and representatives against and from any and all losses, claims, demands, liabilities and expenses, actions or suits, including reasonable costs and attorney's fees resulting from, or arising out of or in any way connected with claims by third parties associated with acts or omissions of SMUD, its directors, officers, employees, contractors, agents, invitees and representatives, relating to: (i) the Energy delivered by Seller under this Agreement after the Delivery Point, (ii) SMUD's operation and/or maintenance of its Electric System; or (iii) this Agreement; excepting only such loss, claim, action or suit to the extent caused by the willful misconduct or gross negligence of Seller, its agents, employees, directors or officers.



## **12. LIMITATION OF DAMAGES**

EXCEPT AS OTHERWISE PROVIDED IN THIS AGREEMENT THERE IS NO WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND ANY AND ALL IMPLIED WARRANTIES ARE DISCLAIMED. LIABILITY SHALL BE LIMITED TO DIRECT ACTUAL DAMAGES ONLY; SUCH DIRECT ACTUAL DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED UNLESS EXPRESSLY HEREIN PROVIDED. EXCEPT WITH REGARD TO INDEMNIFICATION OF THIRD PARTY CLAIMS IN ACCORDANCE WITH SECTION 11, NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY FOR CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY OR INDIRECT DAMAGES, LOST PROFITS OR OTHER BUSINESS INTERRUPTION DAMAGES, BY STATUTE, IN TORT OR CONTRACT, OR OTHERWISE. UNLESS EXPRESSLY HEREIN PROVIDED, AND SUBJECT TO THE PROVISIONS OF SECTION 11, IT IS THE INTENT OF THE PARTIES THAT THE LIMITATIONS HEREIN IMPOSED ON REMEDIES AND THE MEASURE OF DAMAGES BE WITHOUT REGARD TO THE CAUSE OR CAUSES RELATED THERETO, INCLUDING THE NEGLIGENCE OF ANY PARTY, WHETHER SUCH NEGLIGENCE BE SOLE, JOINT OR CONCURRENT, OR ACTIVE OR PASSIVE. THE TERMINATION PAYMENT UNDER SECTION 7.4.1 IS NOT SUBJECT TO THE LIMITATION OF DAMAGES PROVISION SET FORTH IN THIS SECTION 12. THE PARTIES EXPRESSLY ACKNOWLEDGE AND AGREE THAT THE LIMITATION OF DAMAGES PROVISIONS CONTAINED IN THIS SECTION 12 WILL NOT LIMIT THE RECOVERY BY SELLER OF DAMAGES BASED ON THE VALUE OF ANY ITC (AS DEFINED IN DEFINITIONS) OR OTHER TAX BENEFITS THAT ARE LOST, UNAVAILABLE, DISALLOWED, REDUCED OR RECAPTURED AND ITC RECAPTURE AMOUNTS (AS DEFINED IN DEFINITIONS) THAT ARE REQUIRED TO BE REPAID, DETERMINED ON AN AFTER-TAX BASIS, BY SELLER, SELLER'S DIRECT OR INDIRECT OWNERS, A LENDER, A TAX EQUITY INVESTOR, A TAX CREDIT PURCHASER OR TRANSFEROR OR ANY OF THEIR AFFILIATES DUE TO AN EVENT OF DEFAULT BY SMUD THAT SELLER HAS NOT BEEN ABLE TO MITIGATE AFTER USE OF COMMERCIALY REASONABLE EFFORTS (WHICH SUCH AMOUNTS WILL BE DEEMED TO BE DIRECT DAMAGES RECOVERABLE BY SELLER).

## **13. REPRESENTATION AND WARRANTIES; COVENANTS**

### **13.1 Representations and Warranties**

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

**13.1.1** It is duly organized, validly existing and in good standing under the laws of the jurisdiction of its formation;

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

**13.1.3** This Agreement and each other document executed and delivered in accordance with this Agreement constitutes its legally valid and binding obligation enforceable against it in accordance with its terms;

**13.1.4** It is not Bankrupt and there are no proceedings pending or being contemplated by it or, to its actual knowledge, threatened against it which would result in it being or becoming Bankrupt;

**13.1.5** There are not pending or to its actual knowledge threatened legal proceedings against it or any of its affiliates that could materially adversely affect its ability to perform its obligations under this Agreement; and

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

### **13.2 General Covenants**

Each Party covenants that throughout the Term of this Agreement:

**13.2.1** It shall continue to be duly organized, validly existing and in good standing under the laws of the jurisdiction of its formation;

**13.2.2** It shall maintain (or obtain from time to time as required, including through renewal, as applicable) all regulatory authorizations necessary for it to legally perform its obligations under this Agreement; and

**13.2.3** It shall perform its obligations under this Agreement in a manner that does not violate any of the terms and conditions in its governing documents, any contracts to which it is a party or any law, rule, regulation, order or the like applicable to it.

### **13.3 SMUD Representations and Warranties**

**13.3.1** As of the Effective Date and throughout the Delivery Term, SMUD represents and warrants to Seller that:

**13.3.2** SMUD is subject to claims and to suit for damages in connection with its obligations under this Agreement pursuant to and in accordance with the laws of the State of California applicable to municipal utility districts;

**13.3.3** SMUD is a "local public entity" as defined in Section 900.4 of the Government Code of the State of California.

## **14. NOTICES**

Notices shall, unless otherwise specified herein, be in writing and may be delivered by hand delivery, United States mail, overnight courier service, facsimile or electronic messaging (e-mail). Whenever this Agreement requires or permits delivery of a "notice" (or requires a Party to "notify"), the Party with such right or obligation shall provide a written communication in the manner specified below. A notice sent by facsimile transmission or email will be recognized and shall be deemed received on the Business Day on which such notice was transmitted if received before 5 p.m. Pacific prevailing time (and if received after 5 p.m., on the next Business Day) and a notice by overnight mail or courier shall be deemed to have been received two (2) Business Days after it was sent or such earlier time as is confirmed by the receiving Party unless it confirms a prior oral communication, in which case any such notice shall be deemed received on the day sent. A Party may change its addresses by providing notice of same in accordance with this provision. All written notices shall be directed as shown in Exhibit I. Either Party may request a change to Exhibit I as necessary to keep the Exhibit I information current without amendment to this Agreement.

## **15. RESERVED**



## 16. ASSIGNMENT

**16.1** There shall be no Change of Control of any interest in the Project or sale, transfer or assignment of this Agreement (collectively, a “**Transfer**”) without the prior written consent of the other Party, which consent shall not be unreasonably withheld; provided, however;

**16.1.1** A Transfer of (i) this Agreement or (ii) any direct or indirect ownership interests in Seller, in each case to any lender or its designee as collateral for any financing or refinancing of the Project, shall not constitute an assignment, Change of Control or Transfer requiring the consent of SMUD under this Agreement. Any such Transfer shall not relieve Seller of its obligations under this Agreement arising prior to the effective date of such Transfer. To facilitate Seller’s obtaining of financing in connection with the Project, SMUD shall provide such consents to assignments, certifications, estoppels, opinions, representations, information or other documents as may be reasonably requested by Seller or the lenders in connection with the debt or tax equity financing of the Project, as applicable; provided that in responding to any such request, SMUD shall have no obligation to (a) provide any consent, certification, representation, information or other document, or enter into any agreement, that materially and adversely affects, or that could reasonably be expected to have or result in a material adverse effect on, any of SMUD’s rights, benefits, risks and/or obligations under this Agreement (other than terms customary in connection with the applicable financing) or (b) incur any unreimbursed third-party expense. Seller shall reimburse or shall cause the lender(s) to reimburse, SMUD for the incremental direct third party expenses (including the reasonably documented fees and expenses of SMUD’s counsel) incurred by SMUD in the preparation, negotiation, execution and/or delivery of any documents requested by Seller or the lenders, and provided by SMUD, pursuant to this Section 16.1.1. Upon written request of Seller, SMUD will negotiate a Consent and Agreement substantially in the form attached herein as Exhibit K and/or an Estoppel substantially in the form attached herein as Exhibit L, in each case between Seller and Seller’s lender and/or tax equity investor and as such form may be modified to reflect reasonable changes requested by Seller, Seller’s lender and/or tax equity investor.

**16.1.2** Without limitation as to other reasonable grounds for withholding consent, the Parties hereby agree that it shall be reasonable under this Agreement and under any applicable Law for SMUD to withhold consent to any proposed Transfer, where at the time of the Transfer, the assignee is not concurrently assuming all of the future obligations under the LGIA as well as the future obligations under this Agreement; provided that if Seller is not in default under the this Agreement and notwithstanding the foregoing, no consent shall be required for any Permitted Transfer. Any such Transfer shall not relieve Seller of its obligations under this Agreement arising prior to the effective date of such Transfer. Notwithstanding the foregoing, to the extent not prohibited by applicable Law, Seller shall, within thirty (30) days prior to such Transfer, provide SMUD with written notice of any Transfer permitted under this Section, which notice shall identify the transferee and contain evidence that the transferee has assumed or will assume all of the obligations under this Agreement arising after the date of the Transfer, and reasonable proof that the Transfer qualifies as an exempt transfer under this Section. The term “Affiliate” as used herein means, with respect to Seller, any corporation or limited liability company that directly or indirectly controls, is controlled by, or is under common control with, Seller.

## 17. [Reserved]

## 18. PROJECT PURCHASE OPTION

Seller hereby grants to SMUD the right and option to purchase all of Seller's right, title and interest in and to the Project and Product pursuant to the terms set forth herein.

**18.1** SMUD shall have the option (the "**Purchase Option**") to terminate this Agreement and purchase from Seller the Project and Products for the greater of (a) the Fair Market Value of the Project and Product, as described in Section 18.6 and (b) the amount of Project Debt as of the date of the issuance of the Purchase Option (the "**Purchase Price**"), in accordance with this Article 18. SMUD may exercise the Purchase Option upon (i) the eighth (8th) or twelfth (12th) anniversary of the Commercial Operation Date, or (ii) the expiration of the Delivery Term. In the event that SMUD desires to exercise the Purchase Option, SMUD shall deliver to Seller a notice indicating SMUD's intent to exercise the Purchase Option (an "**Option Notice**") on or before the date which is no less than six (6) months prior to the eighth (8th) or twelfth (12th) anniversary of the Commercial Operation Date (the "**8 and 12-year Purchase Options**"), or no less than six (6) months prior to the end of the Delivery Term (the "**Final Purchase Option**"), respectively.

**18.2** For a period of six (6) months following delivery of the Option Notice with respect to the 8 and 12-year Purchase Options and the Final Purchase Option (the "**Purchase Option Due Diligence Period**"), SMUD and its representatives shall have the right to conduct any and all due diligence which SMUD may reasonably deem necessary with respect to the Project and Product. Seller shall, during the Purchase Option Due Diligence Period, make available to SMUD and its representatives full access to the Project, related title work, surveys, contracts, data and records and operating personnel ("**Full Access**"). The Purchase Option Due Diligence Period will be extended day-for-day to the extent that, due to Seller's default, Force Majeure or any other reason not attributable to Seller, Full Access cannot be provided.

**18.3** SMUD and Seller shall execute a purchase and sale agreement under which Seller will sell and SMUD, or its assignee, will purchase the Project at a closing for the purchase and sale of the Project (the "**Closing**") to be held on a date which is within six (6) months following the 8 or 12-year Purchase Option, or Final Purchase Option, as applicable, (the "**Closing Date**") at a location selected by SMUD.

**18.4** Between the date of the Option Notice and the Closing Date, Seller may not take any actions that would materially adversely affect the Project site, the Project and Products or SMUD's interest in purchasing the Project and Product. Under this Agreement, among other standard provisions, effective as of the Closing:

**18.4.1** Seller shall transfer the purchased Project and any related Product to SMUD on an as-is, where-is basis, and Seller shall not be required to make any representations or warranties with regard to such Project and Product; *provided, however*, that Seller shall remove any encumbrances placed on the purchased Project and Products by Seller at Seller's expense. No such transfer shall relieve Seller of any liability whatsoever arising from the violation, breach or default by Seller of this Agreement, any transferred contract, transferred permit, transferred intellectual property or other transferred asset, or resulting from any act or omission by Seller that occurred prior to the Closing Date.

**18.4.2** Seller shall transfer the purchased Project and any related Product to SMUD, free and clear of all liens and encumbrances. Seller shall assign and transfer to SMUD all of its right, title and interest in the following: (a) all raw materials, consumables and spare parts, in each case, to the extent relating to the purchased Project and related Product; (b) all tangible personal property to the extent relating to the purchased Project and related Product; (c) all intangible personal property, including permits, patents, patent licenses, patent applications, trade names, trademarks, trademark registrations and applications therefore, trade secrets, copyrights, know-how, secret formulae and any other intellectual property rights, in each case, to the extent exclusively used by Seller in the operation of

the purchased Project and related Product; (d) all buildings and fixtures to the extent relating to the purchased Project and related Product; (e) computerized and non-computerized records, reports, data, files, and information, in each case, to the extent exclusively used by Seller in the operation of the purchased Project and related Product; (f) all design, construction and equipment warranties and guarantees related to the purchased Project and related Product in which Seller has any remaining rights against engineers, contractors, suppliers, equipment manufacturers or other persons; and (g) all permits and entitlements; (h) any and all interests in real property associated with the purchased Project. Notwithstanding this Section 18.4.2, Seller shall have the right to retain copies of, and shall have the right to use, any and all records, reports, data, files and information assigned and transferred by Seller to SMUD pursuant to Section 18.4.2(e) for its internal business use, which may include by way of illustration and not be way of limitation: (i) use in accordance with Seller's standard document retention policies; (ii) responding to or otherwise complying with regulatory audits or requests; (iii) responding to third party due diligence requests; (iv) complying with applicable Laws; (v) responding to or defending third party claims or allegations; or (vi) enforcing, defending or interpreting Seller's rights, claims or remedies under this Agreement. SMUD is specifically prohibited from purchasing the LLC, necessitating the descriptions in Section 18.

**18.4.3** All items relating to the ownership and operation of the purchased Project and related Products, which are customarily prorated, shall be prorated as of the Closing Date. Seller shall be liable with respect to items or obligations that relate to any time period prior to the Closing Date and SMUD shall be liable with respect to items or obligations relating to time periods after the Closing Date, and to the extent practicable, shall be credited to Seller's settlement account.

**18.5** This Agreement shall terminate upon the Closing Date, and (a) the payment in full to Seller of the Purchase Price and (b) the satisfaction or payment of all other obligations due to either Party under this Agreement. Note that the LGIA has specified agreement terms that extend past the term of the PPA.

**18.6** The "**Fair Market Value**" of the Project and related Product shall be the value determined by the mutual agreement of SMUD and Seller after receipt by Seller of SMUD's Option Notice requesting a determination of the Fair Market Value, or if there is no such agreement, the value determined by an independent appraiser as provided under this Section 18.6. Within ten (10) days of Seller's receipt of an Option Notice, SMUD and Seller shall jointly select a recognized independent appraiser, with experience and expertise in the energy storage industry to value such Project and related Product with whom the Parties will discuss methods and assumptions. Such appraiser shall act reasonably and in good faith to determine the Fair Market Value and shall set forth such determination in a written opinion delivered to the Parties within a timeframe established upon appointment of the appraiser, no later than thirty (30) days after the date of appointment. The valuation made by the appraiser shall be the Fair Market Value in the absence of fraud or manifest error. The costs of the appraisal shall be borne equally by both Parties. If the Parties are unable to agree on the selection of an appraiser, such appraiser shall be jointly selected by the appraiser firm proposed by SMUD and the appraiser firm proposed by Seller. The appraiser shall determine the Fair Market Value as the amount a willing buyer would pay for the Project and related Product and all rights and interests associated therewith, in an arm's-length transaction, to a willing seller under no compulsion to sell, assuming that this Agreement remains in full force and effect, and that the Project is able to generate revenue for the then-remaining Term at the prices set forth in this Agreement, assuming that thereafter the Project is able to generate revenue at a rate equal to the then fair market rates for the Products and any other products and services associated with and/or produced by the Project, based on the performance history of the Project, and assuming that the Project will remain in place on the site for the remaining useful life of the Project.

## **19. APPLICABLE LAW**

THIS AGREEMENT AND THE RIGHTS AND DUTIES OF THE PARTIES HEREUNDER SHALL BE GOVERNED BY AND CONSTRUED, ENFORCED AND PERFORMED IN ACCORDANCE WITH THE LAWS OF THE STATE OF CALIFORNIA, WITHOUT REGARD TO PRINCIPLES OF CONFLICTS OF LAW.

## **20. DISPUTE RESOLUTION**

### **20.1 Trial; Venue**

The Parties agree that any suit, action or other legal proceeding by or against any party (or its affiliates or designees) with respect to or arising out of this Agreement shall be brought in the federal and state courts located in Sacramento County, California.

### **20.2 Dispute Resolution**

If the Parties are unable to resolve a dispute with respect to this Agreement, either Party shall send a notice to the other requesting a meeting at which senior officers or officials of the Parties shall attempt to resolve the dispute. If the Parties are unable to resolve the dispute within ten (10) days after the meeting notice is received by the Party to whom it is directed, or such longer period as the Parties may agree, then either Party may elect to resolve such dispute in the federal and state courts located in Sacramento County, California. The venue shall be the Superior Court in the County of Sacramento, California. Each Party shall pay and be responsible for their own attorney fees.

## **21. SEVERABILITY**

If any provision in this Agreement is determined to be invalid, void or unenforceable by any court or arbitration panel having jurisdiction, such determination shall not invalidate, void, or make unenforceable any other provision, agreement or covenant of this Agreement and the Parties shall use commercially reasonable efforts to modify this Agreement to give effect to the original intention of the Parties.

## **22. COUNTERPARTS**

This Agreement may be executed in one or more counterparts each of which shall be deemed an original and all of which shall be deemed one and the same Agreement. Delivery of an executed counterpart of this Agreement by facsimile, PDF, or electronic transmission will be deemed as effective as delivery of an originally executed counterpart. Each Party delivering an executed counterpart of this Agreement by facsimile, PDF, or electronic transmission will also deliver an originally executed counterpart, but the failure of any Party to deliver an originally executed counterpart of this Agreement will not affect the validity or effectiveness of this Agreement. The preceding sentence does not apply in the case of electronically signed documents.

## **23. GENERAL**

No amendment to, modification of, or waiver under this Agreement shall be enforceable unless reduced to writing and executed by both Parties. This Agreement shall not impart any rights enforceable by any third party other than a permitted successor or assignee bound to this Agreement. Waiver by a Party of any default by the other Party shall not be construed as a waiver of any other default. The term "including" when used in this Agreement shall be by way of example only and shall not be considered in any way to be in limitation. The headings used herein are for convenience and reference purposes only.

## **24. MOBILE SIERRA**

Notwithstanding any provision of this Agreement, neither Party shall seek, nor shall they support any third party in seeking, to prospectively or retroactively revise the rates, terms or conditions of service of this Agreement through application or complaint to FERC pursuant to the provisions of Section 205, 206 or 306 of the Federal Power Act, or any other provisions of the Federal Power Act, absent prior written agreement of the Parties. Further, absent the prior agreement in writing by both Parties, the standard of review for changes to the rates, terms or conditions of service of this Agreement proposed by a Party, a non-Party or the FERC acting *sua sponte* shall be the “public interest” application of the “just and reasonable” standard of review set forth in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 US 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 US 348 (1956) and clarified by *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1 of Snohomish*, 554 U.S. 527, 128 S. Ct. 2733 (2008) and *NRG Power Mktg., LLC v. Maine Pub. Util. Comm’n*, 130 S. Ct. 503 (2010).

## **25. SERVICE CONTRACT; FORWARD AGREEMENT**

The Parties intend that this Agreement will be treated as a service contract pursuant to Section 7701(e)(3) of the Tax Code for the sale to SMUD of energy produced at an alternative energy Project, and the Parties shall not file any tax returns inconsistent with such treatment. The Parties agree that this Agreement constitutes a ‘forward contract’ as defined in the United States Bankruptcy Code and that each Party is a “Forward Contract Merchant” within the meaning of the United States Bankruptcy Code.

## **26. ENTIRE AGREEMENT**

The Definitive Agreements, inclusive of this Agreement, constitutes the entire agreement between the Parties with reference to the subject matter hereof, and supersedes all prior and contemporaneous understandings or agreements, oral or written, between the Parties with respect to the subject matter hereof and thereof. Other than the Definitive Agreements, there are no other agreements, representations, warranties, or covenants which constitute any part of the consideration for, or any condition to, either Party’s compliance with its obligations under this Agreement.

**IN WITNESS WHEREOF**, each Party has caused this Agreement to be duly executed by its authorized representative as of the date of last signature provided below.

**SACRAMENTO MUNICIPAL UTILITY  
DISTRICT**

**DRY CREEK ENERGY STORAGE, LLC**

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

**Name:**

**Title:** Chief Legal and Government Affairs  
Officer

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

**Name:** Hy Martin

**Title:** Chief Development Officer

Date:

Date:

## **EXHIBITS**

**Exhibit A – Description and Location of Project**

**Exhibit B – Contract Price**

**Exhibit C – Reserved**

**Exhibit D – Reserved**

**Exhibit E – Commercial Operation Date Confirmation Letter**

**Exhibit F – Capacity Attribute Reporting and Conveyance Procedure**

**Exhibit G – Scheduling Coordination Fee**

**Exhibit H – Reserved**

**Exhibit I – Notices**

**Exhibit J – Battery Storage Operating Restrictions**

**Exhibit K – Form of Consent and Agreement to Collateral Assignment**

**Exhibit L – Form of Estoppel**

**Exhibit M – Battery Storage Testing**

**Exhibit N – Project Milestone Schedule**

**Exhibit O – Round Trip Efficiency Guaranty**

**Exhibit P – Metering Diagram**

**Exhibit Q – Form of Letter of Credit**

**Exhibit R – Reserved**

**Exhibit S – Battery Storage Reliability Percentage**

**Exhibit T – Form of Surety**

**Exhibit U – Battery Storage Availability Calculations**

**Exhibit V – Monthly Operating Report**

**Exhibit W – Principles of Renewable Energy Development**

## Exhibit A

### DESCRIPTION AND LOCATION OF PROJECT

- A.1 The Project is described as a battery storage facility, comprised of inverters, battery cells, and associated facilities and equipment. Final inverter count to be provided after commissioning testing.
- A.2 The Project is located in Sacramento County at 14440 Twin Cities, Road, Herald, CA 95638, at the closed Rancho Seco Nuclear Plant.
- A.3 The “**Annual Contract Capacity**” is 160 MW<sub>AC</sub> at the Delivery Point for Contract Years 1-20 and shall be reduced by 2% annually in Contract Years 21-25. The duration of the battery shall be four (4) hours of continuous discharge at 160 MW<sub>AC</sub> for Contract Years 1-20 and shall be reduced by 2% annually in Contract Years 21-25.
- A.4 The Delivery Point is the specific location at the 230 kV disconnect switch, of the Rancho Seco Solar II 230 kV generation tie-line, inside the Rancho Seco 230 kV substation at which the Project interconnects with SMUD, as set forth in the LGIA.
- A.5 As described, and subject to Section 2.1.2, the Project shall be configured as a co-located resource with the Solar Facility.
- A.6 The Scheduled Commercial Operation Date is September 30, 2027.
- A.7 The Guaranteed COD for Commercial Operation is five (5) months after the Scheduled COD; i.e., February 29, 2028, subject to day-for-day extension to the extent the Scheduled COD is extended.
- A.8 The operating characteristics and operating restrictions of Project are as described in Exhibit J Battery Storage Operating Restrictions.
- A.9 Meters are as described in Exhibit P Meter Diagram.
- A.10 Design Standards  
Electrical subsystems shall comply with relevant IEEE, NESC, NEC, ANSI, NFPA, ASCE, IBC, ASTM, CPUC General Orders, and SMUD specific design standards set forth in the LGIA and Exhibit J of the Land Lease. Operator shall operate the Project as required by its registration as NERC Generator Owner and Generator Operator under the NERC Functional Model or successor models.

Upon mutual agreement of both Parties, a new Exhibit A may be issued. When updated, the Parties will insert a new effective date for this Exhibit A, which will replace the prior Exhibit A.

Effective Date: [Month, Day, Year]

\_\_\_\_\_  
Signature of Seller

\_\_\_\_\_  
Signature of SMUD



**Exhibit B**

**Contract Price**

The “Contract Price” with respect to each Contract Year is set forth in the table immediately below:

Contract Year	Contract Price
1 – 25	\$[REDACTED]/kW-mo. (flat) with no escalation

**Exhibit C**

**[Reserved]**

**Exhibit D**

**[Reserved]**

**Exhibit E**

**COMMERCIAL OPERATION DATE CONFIRMATION LETTER**

In accordance with the terms of that certain Power Purchase Agreement dated \_\_\_\_\_ ("Agreement") by and between the Sacramento Municipal Utility District ("SMUD") and Dry Creek Energy Storage, LLC ("Seller"), this letter serves to document the parties further agreement that (i) the COD Conditions for the occurrence of the Commercial Operation Date have been satisfied, and (ii) the Commercial Operation Date occurred on \_\_\_\_.

This letter shall confirm the Commercial Operation Date, as defined in the Agreement, as the date referenced in the preceding sentence.

IN WITNESS WHEREOF, each Party has caused this Agreement to be duly executed by its authorized representative as of the date of last signature provided below:

Dry Creek Energy Storage, LLC

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

Name:

Title:

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

Sacramento Municipal Utility District

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

Name:

Title: Director, Energy Trading &  
Contracts

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

## Exhibit F

### CAPACITY ATTRIBUTE REPORTING AND CONVEYANCE PROCEDURE

F.1 Additional Definitions for the Conveyance of Capacity:

None.

F.2 Reporting of Capacity Attributes. SMUD will report the Capacity Attributes acquired herein in any regulatory filing that SMUD is required to make in order to declare or determine the Capacity of the Project (or any portion thereof) as meeting SMUD's Capacity planning requirement (also known as Resource Adequacy).

F.3 Changes in Capacity Attribute Conveyance Procedure. Subject to Section 4.3, SMUD may revise this Exhibit F as appropriate, give written notice to Seller regarding the revision, and issue a new Exhibit F, which shall then become part of the Agreement in the event that the method for reporting and conveying Capacity Attributes changes from the process described herein provided that no update to this Exhibit F shall be permitted to impose any material additional costs on Seller or impair Seller's ability to perform its obligations under this Agreement.

**Exhibit G**

**SCHEDULING COORDINATION FEE**

Year of Term	Coordination Fee (\$)
1	100,000
2	102,000
3	104,040
4	106,121
5	108,243
6	110,408
7	112,616
8	114,869
9	117,166
10	119,509
11	121,899
12	124,337
13	126,824
14	129,361
15	131,948
16	134,587
17	137,279
18	140,024
19	142,825
20	145,681
21	148,595
22	151,567
23	154,598
24	157,690
25	160,844

**Exhibit H**

**[Reserved]**

## **Exhibit I**

### **NOTICES**

All notices shall be directed as follows:

#### **I.1 For Contract Administration**

**To SMUD:**

Sacramento Municipal Utility District  
Power Contracts Administration

6301 S Street  
Sacramento, CA 95817-1899

Or,

P.O. Box 15830  
Sacramento, CA 95852-1830

Phone: (916) 732-6244

Email: [PowerContractsAdministration@smud.org](mailto:PowerContractsAdministration@smud.org)

**To Seller:**

Dry Creek Energy Storage, LLC  
575 Fifth Avenue, 24th Floor  
New York, NY 10017  
c/o DESRI

Attn: Hy Martin, Chief Development Officer

Phone: 929-263-0000

Fax: 212-478-0100

Email: [desri-notices@world.desri.com](mailto:desri-notices@world.desri.com), [hy.martin@desri.com](mailto:hy.martin@desri.com)

#### **I.2 For Billing and Settlements**

**To SMUD:**

Energy Settlements

Phone: (916) 732-6751

Email: [EnergySettlements@smud.org](mailto:EnergySettlements@smud.org)

**To Seller:**

Dry Creek Energy Storage, LLC  
575 Fifth Avenue, 24th Floor  
New York, NY 10017  
c/o DESRI

Attn: Hy Martin, Chief Development Officer

Phone: 929-263-0000

Fax: 212-478-0100

Email: [desri-notices@world.desri.com](mailto:desri-notices@world.desri.com), [hy.martin@desri.com](mailto:hy.martin@desri.com)

#### **I.3 For Scheduling**



**To SMUD:**

Day Ahead Trading Desk

Phone: (916) 732-5669

Email: [dayaheadtrading@smud.org](mailto:dayaheadtrading@smud.org)

**To Seller:**

Dry Creek Energy Storage, LLC

575 Fifth Avenue, 24th Floor

New York, NY 10017

c/o DESRI

Attn: Hy Martin, Chief Development Officer

Phone: 929-263-0000

Fax: 212-478-0100

Email: [desri-notices@world.desri.com](mailto:desri-notices@world.desri.com), [hy.martin@desri.com](mailto:hy.martin@desri.com)

**I.4 For Planned Outages****To SMUD:**

Day Ahead Trading Desk

Phone: (916) 732-5669

Real Time Trading Desk

(916)732-5177

Email: [psoc@smud.org](mailto:psoc@smud.org), [rtt1@smud.org](mailto:rtt1@smud.org), [rtt2@smud.org](mailto:rtt2@smud.org), [dayaheadtrading@smud.org](mailto:dayaheadtrading@smud.org)

Power System Operations Outage Coordination

Phone: (916) 732-5242

**To Seller:**

Dry Creek Energy Storage, LLC

575 Fifth Avenue, 24th Floor

New York, NY 10017

c/o DESRI

Attn: Hy Martin, Chief Development Officer

Phone: 929-263-0000

Fax: 212-478-0100

Email: [desri-notices@world.desri.com](mailto:desri-notices@world.desri.com), [hy.martin@desri.com](mailto:hy.martin@desri.com)

**I.5 For Forced Outages****To SMUD:**

Real Time Scheduling Desks

Phone: (916) 732-5177

And

Power System Grid Operations

916-732-6225 (Generation Desk), or 916-732-6730 (Shift Senior Power System Operator)

Email: [psoc@smud.org](mailto:psoc@smud.org), [rtt1@smud.org](mailto:rtt1@smud.org), [rtt2@smud.org](mailto:rtt2@smud.org), [dayaheadtrading@smud.org](mailto:dayaheadtrading@smud.org)

**To Seller:**

Dry Creek Energy Storage, LLC  
575 Fifth Avenue, 24th Floor  
New York, NY 10017  
c/o DESRI  
Attn: Hy Martin, Chief Development Officer  
Phone: 929-263-0000  
Fax: 212-478-0100  
Email: desri-notices@world.desri.com, hy.martin@desri.com

**I.6 Same-day Phone Notification of Outages**

**To SMUD:**

Power System Grid Operations  
916-732-6225 (Generation Desk), or 916-732-6730 (Shift Senior Power System Operator)

**To Seller:**

Dry Creek Energy Storage, LLC  
575 Fifth Avenue, 24th Floor  
New York, NY 10017  
c/o DESRI  
Attn: Hy Martin, Chief Development Officer  
Phone: 929-263-0000  
Fax: 212-478-0100  
Email: desri-notices@world.desri.com, hy.martin@desri.com

**I.7 Notification Requirements for Start/Completion of Planned Outages & Normal Start-up/Shutdown**

Prior to starting, and at the completion of, a Planned Outage, contact the Power System Operator to report and coordinate the start or completion time of the Planned Outage.

Prior to paralleling or after disconnection from the SMUD transmission system, always contact the Power System Operator with the following as applicable:

- Intent to parallel before any start-up,
- After the unit has paralleled, report the parallel time and intended unit output,
- After any separation, report the separation time as well as the date and time estimated for return to service.

**Power System Operations**

916-732-6225 (Generation Desk) or 916-732-6730 (Shift Senior Power System Operator)

**I.8 Changes to Exhibit I**

Either Party may request a change to Exhibit I as necessary to keep the information current. The Parties shall update Exhibit I prior to COD to ensure consistency with other notice provisions in this Agreement, subject to mutual agreement of the Parties.

Upon mutual agreement of both Parties, a new Exhibit I may be issued. When updated, the Parties will insert a new effective date for this Exhibit I, which will replace the prior Exhibit I.

Effective Date: Month, Day, Year

\_\_\_\_\_  
Signature of Seller

\_\_\_\_\_  
Signature of SMUD

**Exhibit J**  
**Battery Storage Operating Restrictions**

The Battery Storage Operating Restrictions include the limitations, conditions and restrictions set forth in this Exhibit J. Prior to the Commercial Operation Date and from time to time during the Delivery Term, by mutual written agreement the Parties may amend these Battery Storage Operating Restrictions.

The operation of the Project shall be subject to the following limitations:

- a. If the year-to-date average State of Charge exceeds 50% at any time during the second half of a Contract Year, then the maximum allowed State of Charge shall be limited to the State of Charge that, if held for the rest of the Contract Year, would equal an annual average State of Charge of 50%. If the allowable State of Charge has been limited, the State of Charge limitation will be released once the year-to-date State of Charge is less than 49%. Seller shall be permitted to reject or deviate from any Dispatch Instruction and may operate the Project as reasonably necessary to ensure that the annual average State of Charge in any Contract Year does not exceed 50%; provided that Seller must operate the Project in a manner consistent with Prudent Utility Practice.
- b. The limitations set forth in the table below.

#	OPERATING PARAMETER	VALUES	OPERATING RESTRICTIONS
1	Charging method	Constant Power (CP), Constant Voltage (CV)	
2	Discharging method	Constant Power (CP)	
3	Maximum CP-rate for Charging and Discharging the Battery Storage Facility	160 MW <sub>AC</sub> for Contract Years 1-20, subject to reduction by 2% annually in Contract Years 21-25, which can be adjusted accordingly, as reasonably agreed upon by the Parties, based up on the final design of the Project	Battery shall charge and discharge at the maximum capacity available for the Project while not exceeding the maximum project electrical facility rating for the Project.
4	Operational State of Charge limits	0%-100%	As reflected in the Energy Management System. The 100% State of Charge represents the amount of Expected Battery Storage Capacity available to SMUD.
5	Maximum State of Charge during Charging	100%	In the event State of Charge during charging exceeds the Maximum State of Charge, then the battery system is out of compliance.
6	Minimum State of Charge during Discharging	0%	Minimum State of Charge to obtain contractual energy capacity. In the event State of Charge during charging is less than the Minimum State of Charge, then the battery system is out of compliance. Value of State of Charge shall not violate operating parameters established by the manufacturer for the Project. It is recommended but not required to maintain an SOC above 0% for healthy battery operation.
7	Maximum number of Cycles per Contract Year	365	Notwithstanding any other provision of this Agreement, SMUD will not be

			permitted to utilize more than 365 Cycles per Contract Year.
8	Daily Dispatch Limits	Maximum of Two Cycles per operating day	This limit applies to each Project container, individually and collectively.
9	Charge/Discharge Hold Period	To be determined (TBD) by Battery Original Equipment Manufacturer (OEM)	Seller shall use commercially reasonable efforts to, but is not required to, rest the System for 30 minutes following charge and discharge of greater than 80% in the case of shifting energy.
10	Maximum charging capacity (MW)	160 MW <sub>AC</sub> for Contract Years 1-20, subject to reduction by 2% annually in Contract Years 21-25	Project shall charge at the maximum capacity available for the Project while not exceeding the maximum project electrical facility rating for the Project.
11	Minimum Charging Capacity	0 MW	
12	Maximum discharging capacity (MW)	160 MW <sub>AC</sub> for Contract Years 1-20, subject to reduction by 2% annually in Contract Years 21-25	Project shall discharge at the maximum capacity available for the Project while not exceeding the maximum project electrical facility rating for the Project.
13	Maximum Discharge Energy per Cycle (MWh)	640 MWh <sub>AC</sub> / Cycle	As measured at the Delivery Point and equal to the Expected Battery Storage Capacity.
14	Minimum Discharging Capacity	0 MW	
15	Minimum Stored Energy Level	0 MWh	
16	Ramp Rate Limitation	5-20% of rated capacity/min	Default to be 10%/min at the plant controller and 20%/min at the inverters. Ramp rates should also apply in anticipation of the battery reaching 100% or 0% State of Charge to minimize impact at the Point of Interconnection.
17	Maximum ambient operating temperature with de-rate	Project de-rate ambient temperature is 45°C (113 F) and shut-down ambient temperature is 50°C (122 F), or as allowed by Battery OEM.	The rated power of the Project will be reduced linearly from the derate to the shutdown ambient temperature; the Project may shut down in Seller's discretion.

18	Minimum ambient operating temperature with de-rate	De-rate below -30° C	Below -40° C, the Project may shut down in Seller's discretion.
19	Annual Average State of Charge	20-50%	The Project shall be operated to maintain an annual average State of Charge between 20% and 50%.
20	Battery Balancing Activities	As recommended by Battery OEM	Seller is required to perform battery balancing activities as recommended by the Battery OEM. Consistent balancing activities when at high or low SOC is required for optimal performance. Balancing shall be performed during a time agreed upon by both parties.
21	Resting	Near 30%	Seller shall use commercially reasonable efforts to rest the Project near 30% SOC when planned non-use for more than 2 days

As used in this Exhibit J, "Cycle" means the Project is charged, then discharged at a MWh quantity equal to the energy capacity in MWh. For example, SOC starts at 1%, the Project is charged to 100% and then discharged to 1%.

Upon mutual agreement of both Parties, a new Exhibit J may be issued. When updated, the Parties will insert a new effective date for this Exhibit J, which will replace the prior Exhibit J.

Effective Date: [Month, Day, Year]

\_\_\_\_\_  
Signature of Seller

\_\_\_\_\_  
Signature of SMUD

## Exhibit K

### **FORM OF CONSENT AND AGREEMENT TO COLLATERAL ASSIGNMENT**

This CONSENT AND AGREEMENT (this "Consent"), dated as of \_\_\_\_\_, 20\_\_\_\_, is entered into by and among the Sacramento Municipal Utility District, a California Municipal Utility District formed and existing under the laws of the State of California (together with its successors and permitted assigns, "SMUD") ("Buyer"), \_\_\_\_\_ (together with its successors, designees and assigns in its capacity, "Lender"), Dry Creek Energy Storage, LLC, a limited liability company formed and existing under the laws of the State of XX (together with its successors and permitted assigns, "Seller"). Unless otherwise defined, all capitalized terms have the meaning given in the Power Purchase Agreement (as hereinafter defined).

### **RECITALS**

A. Seller intends to develop, construct, install, test, own, operate and use an approximately 160 MW<sub>AC</sub> battery energy storage system (the "Project"), located in Sacramento County XXXX.

B. In order to partially finance the development, construction, installation, testing, operation and use of the Project, Seller and/or one or more of its Affiliates has entered into that certain **[Financing Agreement,]** dated as of \_\_\_\_\_ (as amended, amended and restated, supplemented or otherwise modified from time to time, the "Financing Agreement"), among Seller and/or one or more of its Affiliates, the financial institutions from time to time parties thereto as lenders and/or issuing banks, and Lender as agent on behalf of such financial institutions, pursuant to which, among other things, such financial institutions have extended commitments to make loans and other financial accommodations to, and for the benefit of, Seller.

C. Buyer and Seller have entered into that certain Energy Storage Power Purchase Agreement, dated as of \_\_\_\_\_ (attached hereto and incorporated herein by reference, as amended, amended and restated, supplemented or otherwise modified from time to time in accordance with the terms thereof and hereof, the "Power Purchase Agreement").

D. Pursuant to a [security agreement] executed by Seller and Lender (as amended, amended and restated, supplemented or otherwise modified from time to time, the "Security Agreement"), Seller has agreed, among other things, to assign, as collateral security for [its] [their] obligations under the Financing Agreement and related documents (collectively, the "Financing Documents"), all of its right, title and interest in, to and under the Power Purchase Agreement to Lender for the benefit of Lender and each other entity or person providing collateral security under the Financing Documents.

E. It is a requirement under the Financing Agreement that SMUD and the other parties hereto execute this Consent.

### **AGREEMENT**

NOW THEREFORE, for good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, and intending to be legally bound, the parties hereto hereby agree as follows:

1. CONSENT TO ASSIGNMENT. Subject to the terms and conditions below, SMUD consents to a complete assignment of all rights and obligations of the Power Purchase Agreement by Seller to Lender pursuant to the Financing Documents.

2. LIMITATIONS ON ASSIGNMENT.

(a) Lender shall be entitled (but not obligated) to exercise all rights and to cure any defaults of Seller under the Power Purchase Agreement, subject to applicable notice and cure periods provided in the Power Purchase Agreement and as set forth herein. Upon receipt of notice from Lender, SMUD agrees to accept such exercise and cure by Lender if timely made by Lender under the Power Purchase Agreement and this Consent. Upon receipt of Lender's written instructions and to the extent allowed by law, SMUD agrees to make directly to such account as Lender may direct SMUD in writing from time to time, all payments to be made by SMUD to Seller under the Power Purchase Agreement from and after SMUD's receipt of such instructions, and Seller consents to any such action. SMUD shall have no liability to Seller under the Power Purchase Agreement or this Consent for directing such payments to Lender in accordance with this subsection (a).

(b) SMUD agrees to deliver duplicates or copies of all notices of default delivered by SMUD under or pursuant to the Power Purchase Agreement to Lender in accordance with the notice provisions of this Consent. SMUD shall deliver any such notices concurrently with delivery of the notice to Seller under the Power Purchase Agreement. In the event of a default or breach by Seller in the performance of any of its obligations under the Power Purchase Agreement, or upon the occurrence or non-occurrence of any event or condition under the Power Purchase Agreement which would immediately or with the passage of any applicable grace period or the giving of notice, or both, enable Buyer to terminate the Power Purchase Agreement or to suspend performance of its obligations thereunder (hereinafter, a "Default"), Buyer shall not terminate the Power Purchase Agreement or suspend performance of its obligations thereunder until it first gives written notice of such Default to Lender and affords Lender a period of time until (i) the expiration of Seller's cure period under the Power Purchase Agreement, if any, plus (ii) (x) thirty (30) days after expiration of such cure period if such Default is the failure to pay amounts to Buyer which are due and payable under the Power Purchase Agreement, or (y) sixty (60) days after expiration of such cure period if such Default is a non-payment Default, in each such case, to cure such Default (provided that during the applicable cure period Lender or Seller continues to perform each of Seller's other obligations under the Power Purchase Agreement). If (i) possession of the Project is necessary to cure such Default or (ii) if the Default can only be cured by Seller and is not curable by Lender, such as the insolvency, bankruptcy, general assignment for the benefit of the secured parties under the Financing Agreement, or appointment of a receiver, trustee, custodian or liquidator of Seller or its properties, and, in each such case, Lender or its successor(s), assignee(s) and/or designee(s) declares an "Event of Default" under the Financing Agreement and Lender commences foreclosure proceedings or any other proceedings necessary to take possession of the Project, Lender or its successors(s), assignee(s) and/or designee(s) will be allowed a reasonable period to complete such proceedings; provided that, once commenced, Lender, or its successor(s), assignee(s) and/or designee(s) shall pursue such proceedings with due dispatch; and provided further, that if the Default can only be cured by Seller and is not curable by Lender, such as the insolvency, bankruptcy, general assignment for the benefit of the secured parties under the Financing Agreement, or appointment of a receiver, trustee, custodian or liquidator of Seller or its properties, Lender shall be entitled to assume in writing the rights and obligations of Seller under the Power Purchase Agreement and provided such assumption occurs, Buyer shall not be entitled to terminate the Power Purchase Agreement or suspend its performance thereunder as a result of such Default so long as Lender or its successor(s), assignee(s) and/or designee(s) continue to perform all of Seller's obligations (other than those that can only be performed by Seller). If either the Lender or its successor(s), assignee(s) and/or designee(s) is prohibited by any court order or bankruptcy or insolvency proceedings of Seller from curing the Default or from commencing or prosecuting such proceedings, the foregoing time periods shall be extended by the period of such prohibition, provided that Lender or its successor(s), assignee(s) and/or designee(s) is pursuing relief from such prohibition with due dispatch. SMUD shall recognize the Lenders or their designee(s) or assignee(s) as the applicable party under the Power Purchase Agreement provided that such Lender or their designee(s) or assignee(s) assume in writing the obligations of Seller under the Power Purchase Agreement, including, without limitation, satisfaction and compliance with all credit provisions of the Power Purchase Agreement and provided further that such Lender or their designee(s) or assignee(s) has a creditworthiness and total credit support at least equal to that of Seller as of the date hereof. Seller shall pay Buyer \$20,000 per assignment of the PPA and/or the LGIA to cover Buyer's internal and external costs associated with such assignment. For the avoidance of doubt, Seller's payment of \$20,000 is the full reimbursement of expenses for assignment of both the PPA and the LGIA.



I In the event that the Agreement is rejected by a trustee or debtor-in-possession in any bankruptcy or insolvency proceeding, and if, within thirty (30) days after such rejection, the Lender shall so request, SMUD will execute and deliver to Lender a new power purchase agreement, which shall be on the same terms and conditions as the original Agreement for the remaining term of the original Power Purchase Agreement before giving effect to such rejection, and which shall require Lender to cure any defaults then existing under the original Power Purchase Agreement. Notwithstanding the foregoing, the execution of any new power purchase agreement will be subject to approval by SMUD's Board of Directors to the extent required by SMUD's policies and receipt of all regulatory approvals required by law, including those associated with any renewable energy or environmental objectives met by, or required of, the original Power Purchase Agreement. SMUD will use good faith efforts to promptly obtain (if applicable) such Board of Directors approval and any necessary regulatory approvals.

(c) In the event Lender or its designee(s) or assignee(s) elect(s) to perform Seller's obligations under the Agreement, succeed to Seller's interest under the Power Purchase Agreement, or enter into a new power purchase agreement as provided in subparagraph 2(b)I above, the recourse of SMUD against Lender or its designee(s) and assignee(s) shall be limited to such party or parties' interests in the Project, the credit support required under the Power Purchase Agreement, and any currently existing guaranties made to the benefit of SMUD by Seller, Seller's Affiliates or Seller's insurers to the extent such guaranties have not been exhausted at the time of assignment.

I In the event Lender or its designee(s) or assignee(s) succeed to Seller's interest under the Power Purchase Agreement, Lender or its designee(s) or assignee(s) shall cure any then-existing payment and performance defaults under the Power Purchase Agreement, except any performance defaults of Seller itself, which by their nature are not susceptible of being cured. Lender and its designee(s) or assignee(s) shall have the right to assign their interest in the Power Purchase Agreement to a person or entity to whom Seller's interest in the Project is transferred, provided such transferee assumes in writing the obligations of Seller under the Power Purchase Agreement and has a creditworthiness and total credit support at least equal to that of Seller as of the date hereof. Upon such assignment and assumption in writing, Lender and its designee(s) or assignee(s) (including their agents and employees) shall be released from any further liability thereunder accruing from and after the date of such assignment, to the extent of the interest assigned.

### 3. REPRESENTATIONS AND WARRANTIES.

(a) SMUD hereby represents and warrants that as of the date of this Consent:

- i. It (1) is duly formed and validly existing under the laws of the State of California, and (2) has all requisite power and authority to enter into and to perform its obligations hereunder and under the Power Purchase Agreement, and to carry out the terms hereof and thereof and the transactions contemplated hereby and thereby;
- ii. the execution, delivery and performance of this Consent and the Power Purchase Agreement have been duly authorized by all necessary action on its part and do not require any approvals, material filings with, or consents of any entity or person which have not previously been obtained or made;
- iii. this Consent and the Power Purchase Agreement are in full force and effect;
- iv. this Consent and the Power Purchase Agreement have been duly executed and delivered on its behalf and constitutes its legal, valid and binding obligation, enforceable against it in accordance with its terms,

except as the enforceability thereof may be limited by (1) bankruptcy, insolvency, reorganization or other similar laws affecting the enforcement of creditors' rights generally and (2) general equitable principles (whether considered in a proceeding in equity or at law);

- v. there is no litigation, investigation or other proceeding pending for which SMUD has received service of process or, to SMUD's actual knowledge, threatened against SMUD relating solely to this Consent, the Power Purchase Agreement and the transactions contemplated hereby and thereby;
- vi. the execution, delivery and performance by it of this Consent, the Agreement, and the consummation of the transactions contemplated hereby, will not result in any violation of, breach of or default under any term of any material contract or material agreement to which it is a party or by which it or its property is bound, or of any material requirements of law presently in effect having applicability to it, the violation, breach or default of which could have a material adverse effect on its ability to perform its obligations under this Consent;
- vii. neither SMUD nor, to SMUD's actual knowledge, any other party to the Power Purchase Agreement, is in default of any of its obligations thereunder, and no disputes exist between Buyer and Seller thereunder; and
- viii. to SMUD's actual knowledge, (1) no Force Majeure event exists under, and as defined in, the Power Purchase Agreement and (2) no event or condition exists which would either immediately or with the passage of any applicable grace period or giving of notice, or both, enable either SMUD or Seller to terminate or suspend its obligations under the Power Purchase Agreement.

4. CONFIRMATION. SMUD will not, without the prior written consent of Lender (such consent not to be unreasonably withheld), (i) cancel or terminate the Power Purchase Agreement, or consent to or accept any cancellation, termination or suspension thereof by Seller, (ii) sell, assign or otherwise dispose (by operation of law or otherwise) of any part of its interest in the Power Purchase Agreement, except as provided in the Power Purchase Agreement, or (iii) amend or modify the Power Purchase Agreement.

5. NOTICES. All notices required or permitted hereunder shall be in writing and shall be effective (a) upon receipt if hand delivered, (b) upon telephonic verification of receipt if sent by facsimile and (c) if otherwise delivered, upon the earlier of receipt or seven (7) Business Days after being sent registered or certified mail, return receipt requested, with proper postage affixed thereto, or by private courier or delivery service with charges prepaid, and addressed as specified below:

If to SMUD:

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

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

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

Telephone No.: [\_\_\_\_\_]

Telecopy No.: [\_\_\_\_\_]

Attn: [\_\_\_\_\_]

If to Lender:

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

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

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

Telephone No.: [\_\_\_\_\_]

Telecopy No.: [\_\_\_\_\_]

Attn: [\_\_\_\_\_]

If to Seller:

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

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

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

Telephone No.: [\_\_\_\_\_]

Telecopy No.: [\_\_\_\_\_]

Attn: [\_\_\_\_\_]

Any party shall have the right to change its address for notice hereunder to any other location within the United States by giving thirty (30) days' written notice to the other parties in the manner set forth above.

6. ASSIGNMENT, TERMINATION, AMENDMENT. This Consent shall be binding upon and benefit the successors and assigns of the parties hereto and their respective successors, transferees and assigns (including without limitation, any entity that refinances all or any portion of the obligations under the Financing Agreement). SMUD agrees (a) to confirm such continuing obligation in writing upon the reasonable request of (and at the expense of) Seller, Lender or any of their respective successors, transferees or assigns, and (b) to cause any successor-in-interest to SMUD with respect to its interest in the Power Purchase Agreement to assume, in writing in form and substance reasonably satisfactory to Lender, the obligations of SMUD hereunder. Any purported assignment or transfer of the Power Purchase Agreement not in conjunction with the written instrument of assumption contemplated by the foregoing clause (b) shall be null and void. No termination, amendment, or variation of any provisions of this Consent shall be effective unless in writing and signed by the parties hereto. No waiver of any provisions of this Consent shall be effective unless in writing and signed by the party waiving any of its rights hereunder.

7 **GOVERNING LAW.** This Consent shall be governed by the laws of the State of California applicable to contracts made and to be performed in such State. THE STATE COURTS SITUATED IN THE STATE OF CALIFORNIA SHALL HAVE EXCLUSIVE JURISDICTION TO RESOLVE ANY DISPUTES WITH RESPECT TO THIS CONSENT AND AGREEMENT WITH SMUD, SELLER, ASSIGNOR, AND LENDER IRREVOCABLY CONSENTING TO THE JURISDICTION THEREOF FOR ANY ACTIONS, SUITS, OR PROCEEDINGS ARISING OUT OF OR RELATING TO THIS CONSENT.

8 **COUNTERPARTS.** This Consent may be executed in one or more duplicate counterparts, and when executed and delivered by all the parties listed below, shall constitute a single binding agreement.

9 **SEVERABILITY.** In case any provision of this Consent or the obligations of any of the parties hereto, shall be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions, or the obligations of the other parties hereto, shall not in any way be affected or impaired thereby.

10. **ACKNOWLEDGMENTS BY SELLER.** Seller, by its execution hereof, acknowledges and agrees that neither the execution of this Consent, the performance by SMUD of any of the obligations of SMUD hereunder, the exercise of any of the rights of SMUD hereunder, or the acceptance by SMUD of performance of the Power Purchase Agreement by any party other than Seller shall (1) release Seller from any obligation of Seller under the Power Purchase Agreement, (2) constitute a consent by SMUD to, or impute knowledge to SMUD of, any specific terms or conditions of the Financing Agreement, the Security Agreement or any of the other Financing Documents, or (3) except as expressly set forth in this Consent, constitute a waiver by SMUD of any of its rights under the Power Purchase Agreement. Seller and Lender acknowledge hereby for the benefit of SMUD that this Consent does not alter, amend, modify or impair (or purport to alter, amend, modify or impair) any provisions of the Power Purchase Agreement except as provided herein.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

[SIGNATURE PAGES FOLLOW]

IN WITNESS WHEREOF, the parties hereto by their officers thereunto duly authorized, have duly executed this Consent as of the date first set forth above.

SACRAMENTO MUNICIPAL UTILITY DISTRICT

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

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

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

a \_\_\_\_\_

[LENDER]

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

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

Title: \_\_\_\_\_, as Lender

Dry Creek Energy Storage, LLC

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

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

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

**Exhibit L**

**FORM OF ESTOPPEL**

**ESTOPPEL CERTIFICATE**

Addressees:

[Financing parties to be added]

RE:     Status of Energy Storage Power Purchase Agreement

Ladies and Gentlemen,

This letter is being delivered at the request of [\_\_\_\_\_] in connection with that certain Energy Storage Power Purchase Agreement, dated as of [\_\_\_\_\_] (the "Agreement"), by and between Sacramento Municipal Utility District ("Buyer") and Dry Creek Energy Storage, LLC ("Seller"). This letter is also being delivered in connection with [financing arrangements to be described]. Capitalized terms not defined herein shall have the meanings set forth in the Agreement.

Buyer hereby confirms to each of the Addressees as of the date hereof that:

1.     The copy of the Agreement, attached hereto as Exhibit A, constitutes a true, correct and complete copy of the Agreement.
2.     The Agreement is in full force and effect and has not been modified, supplemented or amended in any way, except as set forth on Exhibit A hereto, and constitutes the entire agreement between Buyer and Seller relating to the matters set forth therein.
3.     Buyer represents that it was formed and is operating in accordance with the laws of the State of California and has all requisite power and authority to execute, deliver and perform its obligations under the Agreement and this letter.
4.     The execution, delivery and performance by Buyer of the Agreement and this letter have been duly authorized by all necessary company action on the part of Buyer and do not require any approvals, filings with or consents of any entity or person which have not previously been obtained or made.
5.     Buyer has not transferred, pledged or assigned, in whole or in part, any of its right, title, interest in, to and under the Agreement.
6.     Buyer is not and, to the knowledge of Buyer, Seller is not, subject to an Event of Default under the Agreement, and to the knowledge of Buyer no facts or circumstances currently exist which, with the passage of time or the giving of notice or both, would constitute an Event of Default by either such party under the Agreement.
7.     There are no actions pending against Buyer under the bankruptcy or any similar laws of the United States or any state.
8.     Buyer has not provided any notice to Seller that it is unable to perform its obligations under the Agreement due to a Force Majeure event, and to Buyer's knowledge, there is currently no Force Majeure event affecting Buyer under the Agreement, as defined therein, and Buyer has not received any notice from Seller that Seller is unable to perform its obligations to Buyer under the Agreement due to a Force Majeure event.

9. Seller has not received or, to Buyer's knowledge, claimed any amounts under the indemnification obligations of Buyer set forth in the Agreement.
10. No payments have been due under the Agreement to Buyer through the period ending on the date hereof.
11. To Buyer's actual knowledge, Seller is not in default of any of its obligations under the Agreement.
12. To Buyer's knowledge, there are no disputes or proceedings between Buyer on the one hand and Seller on the other hand.
13. This letter may be executed and delivered by facsimile or other electronic means (e.g., e-mail transmission of version in .pdf format) and shall be legally binding on the party so executing and delivering such counterpart.
14. Buyer acknowledges that each of the addressees is a financing party under the Agreement.

## **Exhibit M Battery Storage Testing**

### **I. GENERAL**

#### **a. Overview**

The purpose of this Exhibit M is to describe the requirements for each of the following tests, collectively the “**Battery Storage Tests**”:

- Battery Storage Commercial Operation Test
- Annual Battery Storage Capacity Test
- Battery Storage Capacity Test
- Battery Storage AGC Discharge Test
- Battery Storage AGC Charge Test
- Battery Storage Response Time and Ramp Rate Test
- Battery Storage Reactive Power Capability Test

All Battery Storage Tests described in this Exhibit M shall conform to the requirements herein as may be superseded by the approved Test Procedure (as defined below) for each test. All Battery Storage Tests shall be performed using Prudent Utility Practice.

#### **b. Test Procedures**

Seller shall submit a Test Procedure for each Battery Storage Test. As used in this Exhibit M, a “Test Procedure” is a detailed test procedure document and shall at a minimum describe, for each Battery Storage Test, the purpose, starting state, measured variables, step by step test procedure, conditions for pausing or restarting, ending state, calculation of results, and reporting requirements. Seller shall submit Test Procedures to SMUD for approval no later six (6) months prior to initial testing, in accordance with LGIA Exhibit F requirements, or as otherwise agreed between the Parties, and SMUD’s approval shall not be unreasonably withheld or delayed. For any recurring Battery Storage Test and after the first occurrence of any such test, the previously approved Test Procedure shall be utilized unless Seller or SMUD requests a revised Test Procedure 60 days prior to the beginning of such test, or such timeframe mutually agreed between the Parties.

#### **c. Witnessing of Tests**

SMUD or its representative shall be provided the opportunity to be present for any Battery Storage Test and may, for information only, separately utilize its own metering equipment so long as such use does not interfere with the test or Seller’s operation of the Project. SMUD shall be responsible for any incremental costs associated with SMUD’s witnessing of Battery Storage Tests including the use of SMUD’s own metering equipment.

#### **d. Test Reports**

Seller shall provide to SMUD a written report (“Test Report”) of the results of any completed Battery Storage Test no later than ten (10) Business Days after the completion of the test or such other timeframe as may be defined in the approved Test Procedure. Each Test Report shall include the following, in addition to any additional requirement of a specific test as described in the applicable Test Procedure:



1. A record of the personnel present during the test that served in an operating, testing, monitoring, or other such participatory role.
2. The measured data for the test as well as each parameter set forth in the relevant Test Procedure.
3. Copies of the raw data taken during the test and plant log sheets verifying the operating conditions.
4. Summary of relevant final results of the test, including the results described in the sections below, as applicable.
5. Any anomalous observations made during the test.
6. Test uncertainty.
7. Seller's statement of acceptance or rejection of the test results and reasons therefore.

**e. Retests**

Retesting is allowable in accordance with Section 2.4.4 of the Agreement.

**f. Cessation of Tests**

Seller may at its sole discretion immediately cease any Battery Storage Test if Seller determines that continuation of the test would pose risk of damage or adverse effect to equipment or becomes aware of any circumstance for which continuing the test would violate Prudent Utility Practice.

**g. Incomplete Tests**

If any Battery Storage Test is not completed in accordance with this Exhibit M, SMUD may in its sole discretion: (i) accept the results up to the time the Battery Storage Test was stopped without any modification to the results; (ii) require that the incomplete portion of the Battery Storage Test be completed within a reasonable and specified time period; or (iii) require that the Battery Storage Test be entirely repeated within a reasonable and specified time period. Notwithstanding the above, if Seller is unable to complete a Battery Storage Test due to a Force Majeure event or the actions or inactions of SMUD or the CAISO or the Transmission Provider, Seller shall be permitted to retest in accordance with the requirements of this Exhibit M and on an expedited timeframe as may be agreed by both Seller and SMUD.

**h. Data Capture**

All measurements necessary to calculate the results for each Battery Storage Test described in this Exhibit M shall be collected at a rate of one (1) minute resolution or less unless higher resolution measurements are specified in the applicable approved Test Procedure.

Battery Storage Test measurements shall be made using instrumentation provided by Seller and, where appropriate, using instruments present at the Project during normal operation. All instruments providing measurements for a Battery Storage Test shall be calibrated according to the instrument manufacturer's recommendations and certificates provided with the applicable Test Report if required by the Test Procedure.

Ambient conditions including temperature and relative humidity shall be recorded during the test.

**i. Responsibilities**

Seller is responsible for executing all Battery Storage Tests. SMUD shall provide reasonable operational support during any Battery Storage Test. SMUD shall have the right to participate and witness all Battery Storage Tests. All Energy for Battery Storage Tests shall be provided by SMUD.

**j. Test Uncertainty**

Uncertainties shall be addressed by a test tolerance of 0.5% applied to the results of any Battery Storage Test with respect to any guarantee in this Agreement.

**k. Dispute Resolution**

At the request of either Party, an independent, professional engineer shall be retained by the Parties to resolve any dispute under this Exhibit M. The requesting Party may select an expert from the following pre-approved independent, professional engineers: Leidos, Luminata, DNV, and Black & Veatch. An expert not on this pre-approved list will need to be agreed to by both Parties. Each Party shall cooperate reasonably with the other and with the selected expert to resolve the dispute expeditiously and efficiently. Each Party shall, within 30 days of the selection of the expert, provide to the expert in writing its position on the dispute and any back-up material supporting its position. The expert must agree with the position of one Party and may not implement a resolution to the dispute that differs from the proposal of a Party. The expert shall, within 30 days of the submission of Parties' positions, choose the Party position that, in the expert's determination, best reflects the appropriate resolution of the dispute. The Party whose position is not accepted by the expert shall pay all of the costs for the expert.

**II. BATTERY STORAGE CAPACITY TEST**

**a. Purpose**

The Battery Storage Capacity Test is designed to establish the Expected Battery Storage Capacity and Round Trip Efficiency prior to COD and to provide annual updates and supplemental updates to the Annual Contract Capacity and Round Trip Efficiency. The Battery Storage Capacity Test conducted prior to COD is referred to as the "Battery Storage Commercial Operation Test".

**b. Scheduling**

Battery Storage Capacity Tests shall be scheduled at the following times:

- i. As required to meet the conditions for Commercial Operation of Section 2.3.4 of the Agreement.
- ii. Within thirty (30) days of the end of each Contract Year unless waived or delayed by mutual agreement between Seller and SMUD. The Battery Storage Capacity Test conducted per this Section II.B shall be the "**Annual Battery Storage Capacity Test**".
- iii. Within ten (10) Business Days of either Party's request for additional Battery Storage Capacity Test, but not more than one (1) such additional test per calendar quarter, except as described in Section 2.4.4 of the Agreement. Seller shall be required to balance the batteries according to Battery OEM recommendations before any test or retest shall occur.
- iv. As otherwise provided in the Agreement.

Seller shall provide Notice to SMUD of intent to conduct a Battery Storage Capacity Test no less than ten (10) Business Days prior to the planned test date, and in accordance with requirements of

the Outage Coordination Process. SMUD shall confirm the dates in writing prior to commencement of the test. All Battery Storage Capacity Tests shall be conducted when SMUD system conditions can allow for such testing, as reasonably determined by SMUD.

**c. Procedure**

i. Starting state:

Any scheduled Battery Storage Capacity Test shall be rescheduled and any in-progress Battery Storage Capacity Test restarted, if ambient temperature is expected to be below 10°C or above 50°C during any portion of the test.

The Project SOC shall be 0% and shall have rested for at least 10 minutes since the last instruction to charge or discharge prior to the start of any Battery Storage Capacity Test.

- ii. Charging: Instruct the Project to charge from 0% SOC to 100% SOC at the Expected Battery Storage Capacity. The energy in MWh metered at the Battery Storage Meter during this step is the “Capacity Test Charging Energy”. Record the time required to complete this charging step. The “Capacity Test Average Charging Power” is the Capacity Test Charging Energy divided by the number of hours required to complete this charging step, expressed as a decimal. Record the time required to complete this charging step.
- iii. Resting: Allow the Project to remain at 100% SOC for a duration of time specified by battery manufacturer and confirm the Project remains grid-connected during the rest period.
- iv. Discharging: Instruct the Project to discharge from 100% SOC to 0% SOC at the Expected Battery Storage Capacity for a maximum of four (4) hours. The energy in MWh metered at the Battery Storage Meter during this step is the “Capacity Test Discharging Energy”. The “Capacity Test Average Discharging Power” is the Capacity Test Discharging Energy divided by the number of hours required to complete this discharging step, expressed as a decimal.
- v. Ending state: The Project is reconfigured to normal operation.

**d. Results**

Seller shall include the following key results among the other information in the Test Report.

i. Expected Battery Storage Capacity equals:

Total amount of discharged energy from the Battery Storage Meter divided by four (4) hours

ii. Round Trip Efficiency

The Round Trip Efficiency shall be calculated as follows:

$$100\% \times \frac{\text{Capacity Test Discharging Energy}}{\text{Capacity Test Charging Energy}}$$

**e. Additional Requirements**

- i. Both real and reactive power shall be measured and reported as measured by the Battery Storage Meter for any Battery Storage Capacity Test.

### **III. BATTERY STORAGE AGC DISCHARGE TEST**

#### **a. Purpose**

This test will demonstrate the ability of the facility to receive, acknowledge, and begin responding to AGC commands in less than 4 seconds.

#### **b. Scheduling**

- i. As required to meet the conditions for Commercial Operation of Section 2.3.4 of the Agreement.
- ii. As otherwise provided in the Agreement.

#### **c. Procedure**

System starting state: The facility will be in the on-line state at 50% SOC and at an initial active power level of 0 MW and reactive power level of 0 MVAR. The EMS will be configured to follow a predefined agreed-upon active power profile.

- i. Record the facility active power level at the Battery Storage Meter.
- ii. Command the facility to follow a simulated control signal of Pmax at .95 power factor for ten (10) minutes.
- iii. Record and store the facility active power response (in seconds).

System end state: The facility will be in the on-line state and at a commanded active power level of 0 MW.

### **IV. BATTERY STORAGE AGC CHARGE TEST**

#### **a. Purpose**

This test will demonstrate the ability of the facility to receive, acknowledge, and begin responding to AGC commands in less than 4 seconds.

#### **b. Scheduling**

- i. As required to meet the conditions for Commercial Operation of Section 2.3.4 of the Agreement.
- ii. As otherwise provided in the Agreement.

#### **c. Procedure**

System starting state: The facility will be in the on-line state at 50% SOC and at an initial active power level of 0 MW and reactive power level of 0 MVAR. The facility control system will be configured to follow a predefined agreed-upon active power profile.

- i. Record the facility active power level at the Battery Storage Meter.
- ii. Command the facility to follow a simulated control signal of Pmax at .95 power factor for ten (10) minutes.

- iii. Record and store the facility active power response (in seconds).

System end state: The facility will be in the on-line state and at a commanded active power level of 0 MW.

## **V. BATTERY STORAGE RESPONSE TIME AND RAMP RATE TEST**

### **a. Purpose**

This test measures time for the Project to responds to dispatch setpoints.

### **b. Scheduling**

- i. As required to meet the conditions for Commercial Operation of Section 2.3.4 of the Agreement.
- ii. As otherwise provided in the Agreement.

### **c. Procedure**

- i. The Project will be placed into Idle Mode.
- ii. The Project shall be placed into Manual Mode and dispatched at full power rating.
- iii. Overall Response Time consists of two parts, as follows:
  - d. The time from when the command is written to Seller's controller, according to Seller's EMS, until the Project starts to move power toward the new setpoint as witnessed on the Battery Storage Meter; and
  - e. The rate at which the Project can change power output ("Ramp Rate") from when the Project starts to move power toward the new setpoint as witnessed on Battery Storage Meter to the time when the dispatch power point is reached.
- i. The communication latency time period is considered ended as soon as the meter registers a power value that is 100% +/-2.0% (of nameplate) different from the value it was at the start of the Response Time test.
- ii. The ramping time period is considered ended as soon as the meter registers a power value that is within 100% +/- 2.0% (of nameplate) of the dispatch power value.

### **f. Results**

- i. Trend from EMS showing dispatch signal and power throughout the testing period.
- ii. Results matrix (data download from EMS).

### **g. Pass Criteria**

The Project must satisfy the Response Time as well as the Ramp Rate, expressed in MW/min, and according to Prudent Utility Practices.

## **VI. BATTERY STORAGE REACTIVE POWER CAPABILITY TEST**

**a. Purpose**

This test will demonstrate the reactive power production capability of the facility.

**b. Scheduling**

- i. As required to meet the conditions for Commercial Operation of Section 2.3.4 of the Agreement.
- ii. As otherwise provided in the Agreement.

**c. Procedure**

System starting state: The facility will be in the on-line state at 50% SOC and at an initial active power level of 0 MW and reactive power level of 0 MVAR. The EMS will be configured to follow an agreed-upon predefined reactive power profile.

- i. Record the facility reactive power level at the Battery Storage Meter.
- ii. Command the facility to follow 15 MW for ten (10) minutes.
- iii. Record and store the facility reactive power response.

System end state: The facility will be in the on-line state and at a commanded reactive power level of 0 MVAR.

**VII. BATTERY STORAGE REACTIVE POWER CONSUMPTION TEST**

**a. Purpose**

This test will demonstrate the reactive power consumption capability of the facility.

**b. Scheduling**

- i. As required to meet the conditions for Commercial Operation of Section 2.3.4 of the Agreement.
- ii. As otherwise provided in the Agreement.

**c. Procedure**

System starting state: The facility will be in the on-line state at 50% SOC and at an initial active power level of 0 MW and reactive power level of 0 MVAR. The facility control system will be configured to follow an agreed-upon predefined reactive power profile.

- i. Record the facility reactive power level at the Battery Storage Meter.
- ii. Command the facility to follow 15 MW for ten (10) minutes.
- iii. Record and store the facility reactive power response.

System end state: The facility will be in the on-line state and at a commanded reactive power level of 0 MVAR.

Upon mutual agreement of both Parties, a new Exhibit M may be issued. When updated, the Parties will insert a new effective date for this Exhibit M, which will replace the prior Exhibit M.

Effective Date: [Month, Day, Year]

\_\_\_\_\_  
Signature of Seller

\_\_\_\_\_  
Signature of SMUD

## Exhibit N

### PROJECT MILESTONE SCHEDULE

Below is a list of key project milestones and the targeted completion date for each.

In the case that a milestone is not achieved by the listed completion date the following actions will be required:

1. An updated project schedule which shows the recovery needed to achieve COD and GCOD
2. Report provided to Buyer detailing the cause for delay, its impact to the Project overall and the plan moving forward
3. An updated Exhibit N submitted and signed by Seller

Milestone	Responsible Party	Date	Contract
Pre-Energization Testing for Transmission Provider Interconnection Facilities—indoor/outdoor Equipment Testing (energy source is station service)	SMUD/Seller	2/28/2027	LGIA Section 6.1
Initial Energization Date (Permission to energize for Transmission Provider Interconnection Facilities (energy source is 230kV to allow for back feed))	SMUD	3/31/2027	LGIA Section 6.1
Start Pre-commercial Energy & Operation Testing (Must start five months prior to scheduled COD)	SMUD/Seller	4/30/2027	LGIA Section 6.2
CEQA Addendum	SMUD	12/31/2025	PPA Section 5.1
Other Discretionary Permits	Seller	4/30/2026	PPA Section 5.1
Development Security Submittal	Seller	10 business days from Effective Date	PPA Section 8.1
Delivery Term Security Submittal	Seller	9/30/2027	PPA Section 8.1
Scheduled COD	Seller	9/30/2027	PPA Exhibit A
Guaranteed COD	Seller	2/29/2028	PPA Exhibit A

Upon mutual agreement of both Parties, a new Exhibit N may be issued. When updated, the Parties will insert a new effective date for this Exhibit N, which will replace the prior Exhibit N.

Effective Date: [Month, Day, Year] \_\_\_\_\_

\_\_\_\_\_  
Signature of Seller

\_\_\_\_\_  
Signature of SMUD



**Exhibit O**  
**ROUND TRIP EFFICIENCY GUARANTY**

For purposes of the Agreement and this Exhibit O, the term “**Guaranteed Round Trip Efficiency**” means, for each Contract Year, the corresponding value set forth in the Round Trip Efficiency Guaranty Table set forth below.

Round Trip Efficiency Guaranty Table

Contract Year	Guaranteed Round Trip Efficiency (%)
1	86.00%
2	85.83%
3	85.66%
4	85.49%
5	85.31%
6	85.14%
7	84.97%
8	84.80%
9	84.63%
10	84.46%
11	84.30%
12	84.13%
13	83.96%
14	83.79%
15	83.62%
16	83.46%
17	83.29%
18	83.12%
19	82.96%
20	82.79%
21	82.62%
22	82.45%
23	82.28%
24	82.11%
25	81.94%

For purposes of the Agreement and this Exhibit O, the term “**Round Trip Efficiency**” is the amount set forth in the following formula, as determined in the Battery Storage Capacity Test performed under Exhibit M.

$$\text{Round Trip Efficiency} = \frac{\text{Discharging Energy}}{\text{Charging Enregy}}$$

**Round Trip Efficiency Liquidated Damages**

If, for any Contract Year, the Round Trip Efficiency determined by the Annual Battery Storage Capacity Test (or any retest conducted within seven days of the initial Battery Storage Capacity Test) conducted for such Contract Year is less than the corresponding Guaranteed Round Trip Efficiency for such Contract Year, the following “**Round Trip Efficiency Liquidated Damages**” will apply on an annual basis:

$$\text{RTELD} = \text{LMP} \times \text{RTES} \times \text{CE}$$

Where:

RTELD = Round Trip Efficiency Liquidated Damages

LMP = the simple average of the Locational Marginal Price (as defined in the CAISO Tariff) at the Project pNode (as defined in the CAISO Tariff) in the Day-Ahead Market for the hours that the Project is either charging or discharging in response to a Dispatch Instruction during the Contract Year

RTES = Guaranteed Round Trip Efficiency minus the Round Trip Efficiency determined by the relevant Annual Battery Storage Capacity Test (or, if a retest is taken within seven days of the initial Battery Storage Capacity Test conducted for such Contract Year, then such retest)

CE = the amount of Charging Energy used to charge the Project during the Contract Year

Upon mutual agreement of both Parties, a new Exhibit O may be issued. When updated, the Parties will insert a new effective date for this Exhibit O, which will replace the prior Exhibit O.

Effective Date: [Month, Day, Year] \_\_\_\_\_

\_\_\_\_\_  
Signature of Seller

\_\_\_\_\_  
Signature of SMUD

## EXHIBIT P [METERING DIAGRAM]

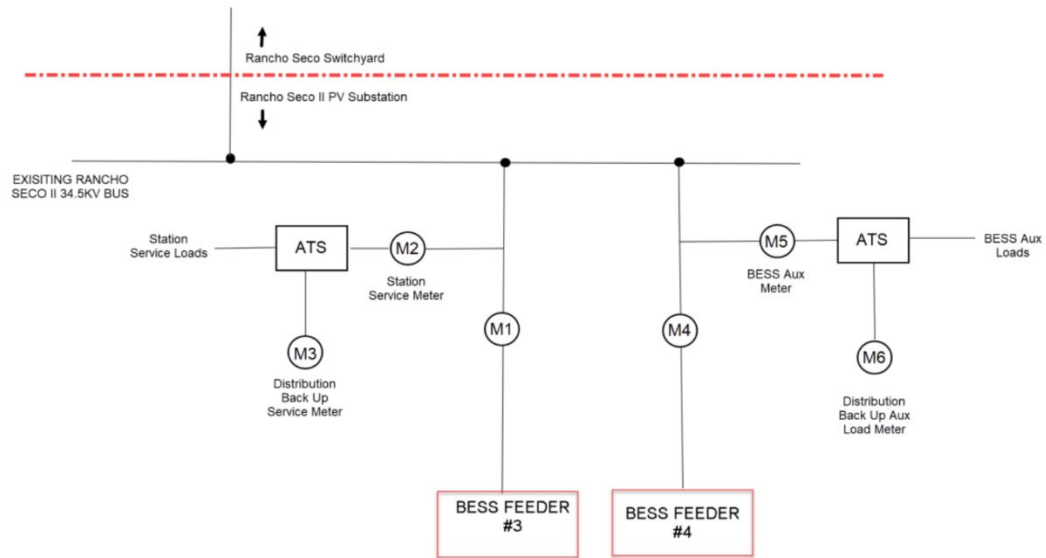


Figure 7.1.1 - Q22 Metering Diagram

Upon mutual agreement of both Parties, a new Exhibit P may be issued. When updated, the Parties will insert a new effective date for this Exhibit P, which will replace the prior Exhibit P.

Effective Date: [Month, Day, Year] \_\_\_\_\_

\_\_\_\_\_  
Signature of Seller

\_\_\_\_\_  
Signature of SMUD

**EXHIBIT Q**  
**[FORM OF LETTER OF CREDIT]**

**LETTER OF CREDIT**

To: Sacramento Municipal Utility District  
Energy Contracts Administration  
6301 S Street, MS A404  
Sacramento, CA 95817-1899

Re: Our Irrevocable Standby Letter of Credit No. [\_\_\_\_\_]   
In the Amount of US\$ [\_\_\_\_\_] ([\_\_\_\_\_] and [ ]/100 U.S. Dollars) for [Development/Delivery  
Term] Security

Gentlemen:

We hereby open our irrevocable standby Letter of Credit Number No.[\_\_\_\_\_] in favor of the Sacramento Municipal Utility District ("Beneficiary"), by order and for account of Dry Creek Energy Storage, LLC ("Account Party"), 575 Fifth Avenue, 24th Floor, New York, NY 10017, c/o D. E. Shaw Renewable Investments, L.L.C, available at sight upon demand at our counters, at [\_\_\_\_\_] , for an amount of US\$ [\_\_\_\_\_] ([\_\_\_\_\_] and [ ]/100 U.S. Dollars) and against presentation one of the following documents:

1- Statement signed by a person purported to be an authorized representative of Beneficiary stating that: "Dry Creek Energy Storage, LLC (the "Seller") is in default under the Energy Storage Power Purchase Agreement between Beneficiary and Seller, dated [\_\_\_\_\_] , or under any transaction contemplated thereby (whether by failure to perform or pay any obligation thereunder or by occurrence of a "default", "event of default" or similar term as defined in such agreement, any other agreement between Beneficiary and Seller, or otherwise). The amount due to Beneficiary is US \$[\_\_\_\_\_]."

Or

2. Statement signed by a person purported to be an authorized representative of Beneficiary stating that: "Dry Creek Energy Storage, LLC ("Seller") has terminated the Energy Storage Power Purchase Agreement between Beneficiary and Seller dated [\_\_\_\_\_] pursuant to such agreement. The amount due to Beneficiary is US \$[\_\_\_\_\_]."

Or

3. Statement signed by a person purported to be an authorized representative of Beneficiary stating that: "as of the close of business on [\_\_\_\_\_] [insert date, which is less than forty-five (45) days prior to the expiration date of the Letter of Credit] you have provided written notice to us indicating your election not to permit extension of this Letter of Credit beyond its current expiry date. The amount due to Beneficiary, whether or not a default has occurred, is U.S. \$[\_\_\_\_\_]."

Special Conditions:

- All costs and banking charges pertaining to this Letter of Credit are for the account of Account Party.
- Partial and multiple drawings are permitted.
- Presentation of the Letter of Credit and Documents 1, 2 or 3 above may be made (i) in person, (ii) by first class certified and registered U.S. mail, or (iii) overnight mail on or before the expiration date.

This Letter of Credit expires on [one year anniversary of date of issuance] at our counters.

We hereby engage with Beneficiary that upon presentation or facsimile transmission of a document as specified under and in compliance with the terms of this Letter of Credit, this Letter of Credit will be duly honored in the amount stated in Document 1, 2 or 3 above. If a document is so presented by 1:00 pm New York time on any banking day, we will honor the same in full in immediately available funds on the next banking day and, if so presented after 1:00 pm New York time on a banking day, we will honor the same in full in immediately available funds by noon on the second succeeding banking day.

It is a condition of this Letter of Credit that it shall be deemed automatically extended without an amendment for a one year period beginning on the present expiry date hereof and upon each anniversary of such date, unless at least ninety (90) days prior to any such expiry date we have sent you written notice by registered mail or overnight courier service that we elect not to permit this Letter of Credit to be so extended beyond the then current expiry date, and it will expire on its then current expiry date. No presentation made under this Letter of Credit after such expiry date will be honored.

Except as stated herein, this letter of credit is not subject to any condition or qualification and is our individual obligation which is in no way contingent upon reimbursement or any right of subrogation. We irrevocably waive any and all rights of subrogation, whether as provided by statute or otherwise, now or hereafter that might, but for such waiver exist, in respect to this letter of credit or any payment we make under it, as to Dry Creek Energy Storage, LLC, Beneficiary, or the transaction between Beneficiary and Dry Creek Energy Storage, LLC. We further give irrevocable notice that we are not now and will not be the secondary obligor or co-obligor of Dry Creek Energy Storage, LLC's obligation and liabilities to Beneficiary for any purpose. Our obligations to Beneficiary under this letter of credit are our primary obligations and are strictly as stated herein

We agree that if this Letter of Credit would otherwise expire during, or within 30 days after, an interruption of our business caused by an act of god, riot, civil commotion, insurrection, act of terrorism, war or any other cause beyond our control or by any strike or lockout, then this Letter of Credit shall expire on the 30<sup>th</sup> day following the day on which we resume our business after the cause of such interruption has been removed or eliminated and any drawing on this Letter of Credit which could properly have been made but for such interruption shall be permitted during such extended period.

This Letter of Credit shall be governed by the International Standby Practices 1998, International Chamber of Commerce Publication No. 590 ("ISP98"), except to the extent that the terms hereof are inconsistent with the provisions of the ISP98, in which case the terms of this Letter of Credit shall govern.

[\_\_\_\_], a [\_\_\_\_\_]

\_\_\_\_\_  
Authorized Signature(s)

**EXHIBIT R**

**RESERVED**

**EXHIBIT S**  
**BATTERY STORAGE RELIABILITY PERCENTAGE**

**1. General**

**a. Introduction and Purpose**

The purpose of the Battery Storage Reliability Percentage calculation is to quantify the extent to which the Project is shown to reliably follow the SMUD Setpoint during a given Settlement Period.

It is the intent of the Battery Storage Reliability Percentage calculation of this Exhibit S to avoid double counting the same event as contributing both to a reduced Availability Percentage and a reduced Battery Storage Reliability Percentage. The Availability Percentage calculations of Exhibit U must be calculated prior to beginning the Battery Storage Reliability Percentage calculations of this Exhibit S. The Battery Storage Reliability Percentage calculation of this Exhibit S shall be adjusted to avoid counting, as a reduction to the Battery Storage Reliability Percentage, any interval for which a reduced Availability Percentage has already been calculated.

To the extent that the Battery Storage Reliability Percentage and the Availability Percentage are measured as less than one hundred percent (100%) as a result of the same event(s) or facts and circumstances, the Battery Storage Reliability Percentage shall be deemed to be one hundred percent (100%) for purposes of calculating the Monthly Settlement Amount in Section 2.4.1. Notwithstanding anything herein to the contrary, in the event that the calculated Battery Storage Reliability Percentage is equal to or greater than the Guaranteed Reliability, the Battery Storage Reliability Percentage shall be deemed to be one hundred percent (100%) for all purposes hereunder.

**b. Technical Disputes**

At the request of either Party, an independent, professional engineer shall be retained by the Parties to resolve any dispute under this Exhibit S. The requesting Party may select an expert from the following pre-approved independent, professional engineers: Leidos, Luminate, DNV, and Black & Veatch. An expert not on this pre-approved list will need to be agreed to by both Parties. Each Party shall cooperate reasonably with the other and with the selected expert to resolve the dispute expeditiously and efficiently. Each Party shall, within 30 days of the selection of the expert, provide to the expert in writing its position on the dispute and any back-up material supporting its position. The expert must agree with the position of one Party and may not implement a resolution to the dispute that differs from the proposal of a Party. The expert shall, within 30 days of the submission of Parties' positions, choose the Party position that, in the expert's determination, best reflects the appropriate resolution of the dispute. The Party whose position is not accepted by the expert shall pay all of the costs for the expert. For avoidance of doubt, the resolution of the dispute shall not apply to aspects of settlement that are included in other sections or exhibits of this PPA beyond this Exhibit S.

**2. Battery Storage Reliability Percentage**

**a. Prerequisite Conditions for Reliability Percentage Intervals**

The following conditions are required for any time interval to be included in the Battery Storage Reliability Percentage calculation:

- (i) Battery Storage Meter is operational and properly calibrated
- (ii) SCADA system for Project is operational and providing valid data
- (iii) SMUD Setpoint for Scheduled Battery Storage is valid, provided in accordance with this Agreement and is achievable consistent with the State of Charge, subject to the Battery Storage Operating Restrictions.

**b. Calculation**

Battery Storage Reliability Percentage is calculated using the following equation, averaged over all valid 5-minute intervals within a given Settlement Period.

$$BSRP = 100\% * \left[ 1 - \left| \frac{SBS - MTR}{X} \right| \right]$$

When  $|SBS| > 25\%$  of CP,  $X = SBS$ , otherwise  $X = 25\%$  of CP

Where:

BSRP = Battery Storage Reliability Percentage  
SBS = SMUD Setpoint for Scheduled Battery Storage  
MTR = Charging Energy or Discharging Energy, as applicable, recorded at the Battery Storage Meter  
CP = Available Battery Storage Capacity

Any interval where MTR deviates from SBS by less than 2% of the Expected Battery Storage Capacity shall be adjusted to set MTR equal to SBS.

The Battery Storage Reliability Percentage calculation shall account for deviations from SBS caused by failure to control ramp rate in accordance with Exhibit J.

Upon mutual agreement of both Parties, a new Exhibit S may be issued. When updated, the Parties will insert a new effective date for this Exhibit S, which will replace the prior Exhibit S.

Effective Date: [Month, Day, Year]

\_\_\_\_\_  
Signature of Seller

\_\_\_\_\_  
Signature of SMUD



**EXHIBIT T**  
**FORM OF SURETY**

**EXHIBIT U**  
**AVAILABILITY PERCENTAGE CALCULATIONS**

**1. General**

**a. Introduction and Purpose**

The purpose of the Availability Percentage calculation is to measure the Availability of the equipment associated with the Project, and to allow the Availability for the facility to be compared with the Guaranteed Availability. Such Availability Percentage calculations are carried out with respect to a “Reporting Period” which is equal to the Settlement Period according to the requirements of the Agreement.

The Project Availability Percentage calculation generally follows the International Electrotechnical Commission (IEC) Technical Specification 63019 (Edition 1.0 2019-05) titled “Photovoltaic power systems (PVPS) – Information model for availability”.

Notwithstanding anything herein to the contrary, in the event that the calculated Availability Percentage is equal to or greater than the Guaranteed Availability, the Availability Percentage shall be deemed to be one hundred percent (100%) for all purposes hereunder.

**b. Methods and Updates**

The Project Availability Percentage calculation shall assess the component Availability based upon the measured AC power for each inverter.

**2. Project Availability Percentage Calculation**

**a. Prerequisite Conditions for Availability Intervals**

The following condition is required for any time interval to be included in the Project Availability Percentage calculation:

- (a) Notwithstanding Excused Battery Events, the Project is able, in whole or in part, to provide Product as a result of the Battery Storage Operating Restrictions.

**b. Valid Availability Data Conditions**

The following conditions are required for any time interval to be valid with respect to the Project Availability Percentage calculation and therefore included in the resulting calculations to determine the Availability Percentage. Any time interval lacking any one of these requirements shall be considered a “Storage Invalid Data Time Interval” and therefore not included in the calculation to determine the Project Availability:

- (a) The Battery Storage Meter is operational and properly calibrated
- (b) SCADA system is operational and providing valid data

Storage Invalid Data Time Intervals shall be excluded from the Project Availability Percentage calculation provided, however, that if more than 10% of potential time intervals meeting the requirements of Section 2(a) of this Exhibit U fail to meet the requirements of

this Section 2(b), and if Seller is unable to provide an estimate of Availability from the available data, Buyer may at its reasonable discretion require Seller to include all Storage Invalid Data Time Intervals and assume 90% Availability in all such intervals. For non-communicating inverters and batteries, or inverters and batteries providing invalid data, such inverters and batteries shall be treated on a pro-rated basis for the purpose of determining the percent of time intervals qualifying as Storage Invalid Data Time Intervals.

### c. Calculation

For each Reporting Period, the Availability Percentage is calculated as:

$$BSAP = 100\% \times \left(1 - \frac{TOH - EBH}{PH}\right)$$

Where:

BSAP = Availability Percentage for the Project

PH = total period hours in the relevant Reporting Period meeting the conditions of Sections 2(a) and 2(b) of this Exhibit U.

EBH = equivalent hours of battery unavailability due to an Excused Battery Event

TOH = equivalent hours of battery unavailability below the Expected Battery Storage Capacity due to any cause

All calculations shall utilize up to 60-minute averaged data derived from raw data collected at one-minute or smaller time increments where the conditions of Section 3(a) of this Exhibit U are satisfied.

“Excused Battery Event (EBH)” shall mean the total number of hours or partial hours in the Reporting Period (PH) that are not included as available hours due to a Planned Outage, a Force Majeure event, any Buyer dispatched tests scheduled in accordance with the Agreement, any circumstances at the high voltage-side of the Delivery Point or beyond that may limit Seller’s delivery of Product, any failure of Buyer to perform its obligations under this Agreement, Buyer breach or default, or any period when Expected Battery Storage Capacity is equal to one hundred percent (100%) or more of the Annual Contract Capacity as a result of any modification, augmentation, overbuild and/or replacement of the Project pursuant to Section 2.1.1.

For the purpose of identifying equivalent unavailable hours among EBH and TOH, the fractional Availability shall be calculated for each time interval as the average of the ratio of available Capacity in MW to Expected Battery Storage Capacity.

#### Example calculation:

Duration: a full hour consisting of 1-minute time intervals

Derated power and energy:

- 0.6 MW power derate due to offline PCS inverters in all intervals (not excused)
- 8.0 MWh energy derate due to Planned Outage in 30 1-minute intervals (excused)

$$TOH = \frac{1}{2} \left[ \left( \frac{60}{60} \text{ minutes} \times \frac{0.6}{1.0} \text{ MW} \right) + \left( \frac{30}{60} \text{ minutes} \times \frac{8.0}{100} \text{ MWh} \right) \right] = 0.004651 \text{ hours}$$

$$EBH = \frac{1}{2} \left[ \left( \frac{60}{60} \text{ minutes} \times \frac{0.004651}{1} \text{ MW} \right) + \left( \frac{30}{60} \text{ minutes} \times \frac{0.002907}{1} \text{ MWh} \right) \right] = 0.002907 \text{ hours}$$

PH = 1 hours

The Availability for this hour is:

$$100\% \times \left( 1 - \frac{0.004651 - 0.002907}{1} \right) = 99.83\%$$

Upon mutual agreement of both Parties, a new Exhibit U may be issued. When updated, the Parties will insert a new effective date for this Exhibit U, which will replace the prior Exhibit U.

Effective Date: [Month, Day, Year]

\_\_\_\_\_  
Signature of Seller

\_\_\_\_\_  
Signature of SMUD

**EXHIBIT V**  
**MONTHLY OPERATING REPORT**

The Monthly Operating Report shall include the following content, to the extent applicable and as may be revised by the Parties by mutual agreement.

1. Summary
  - a. Safety & Environmental Summary
  - b. Maintenance Summary
  - c. Performance Summary
2. Plant Performance
  - a. Charging and Discharging Energy
  - b. Performance Metrics
    - i. Battery Storage Reliability Percentage
    - ii. Availability Percentage
  - c. Performance Summary
  - d. Equivalent full cycles per day, per month
  - e. Average Battery SOC
  - f. Total Energy throughput (all energy in and out) for Battery
  - g. Capacity for Period
    - i. Last Capacity test date
    - ii. Actual Capacity v Budget Capacity
3. Lost Energy and Outage Events
  - a. Forced Outage Events
    - i. Summary and Planned Resolution
  - b. Planned Outage Events
  - c. Planned Outage(s) Next Month
  - d. Top 10 Historic Outage & Downtime Events
4. Inverter & Battery Power Conversion Station (PCS) Availability
  - a. Actual v Budget for reporting period
  - b. Total hours for reporting period
  - c. Excused event hours for reporting period
5. Health, Safety, & Environmental
  - a. Safety Statistics
  - b. Health, Safety, & Environmental Notes
  - c. Environmental Incidents
6. Maintenance
  - a. Reactive Maintenance Log
  - b. Preventative Maintenance Log
  - c. Preventative Maintenance Inspection Schedule
  - d. Work Orders
  - e. BESS thermal management downtime including HVAC system, air flow obstruction(s), etc.
7. Inventory
  - a. Owners Inventory, Consumed & On-Order
8. Warranties
  - a. Battery Supply Agreement Warranty Claims
  - b. Inverter & PCS Warranty Claims
  - c. EPC Warranty Claims
  - d. Warranty Work Orders
9. Visitors Log
10. Alarms & Maintenance Updates

- a. Top Five Inverter & Battery Alarms
- b. Top Ten SCADA Alarms
- c. Annual Maintenance Plan Updates

Upon mutual agreement of both Parties, a new Exhibit V may be issued. When updated, the Parties will insert a new effective date for this Exhibit V, which will replace the prior Exhibit V.

Effective Date: [Month, Day, Year]

\_\_\_\_\_  
Signature of Seller

\_\_\_\_\_  
Signature of SMUD

## **Exhibit W**

### **PRINCIPLES OF RENEWABLE ENERGY DEVELOPMENT**

SMUD is committed to developing carbon free renewable energy in a manner that supports the community, protects the environment, and respects human rights. This document provides guidance on the key objectives that SMUD expects to achieve associated with this commitment. Developers of renewable energy projects engaged in a commercial relationship with SMUD such as a Power Purchase Agreement will use commercially reasonable efforts to provide, implement, and maintain throughout the Term, a Community Benefits Plan that addresses how the project will achieve the key objectives identified herein.

#### **Key objectives:**

1. **Land Use:** Prioritize previously developed lands. Avoid or minimize impacts on sensitive environmental resources, including but not limited to cultural resources, Tribal cultural resources, and biological resources such as endangered species habitat, vernal pools and other sensitive habitats, Waters of the US, Waters of the State and waters identified by CDFW as Streambed. Provide additional mitigation measures if avoidance and minimization measures cannot fully eliminate impacts. Applicants are expected to discuss these topics with both SMUD and the lead agency as early as possible to identify potential associated issues in advance of the purchase power agreement being finalized.
2. **Land Use:** All projects should employ commercially reasonable techniques for maintaining and/or restoring ecosystem function to the site in conjunction with renewable energy outcomes, including establishment of native vegetation, restricting use of herbicides and pesticides, use of grazing for vegetation management and seasonally appropriate maintenance practices. Where development is on or surrounded by agricultural lands the project should use commercially reasonable efforts to employ agricultural practices on the property during operations including sheep grazing, dry crop farming and irrigated food production where feasible.
3. **Land Use:** Employ design and construction practices that minimize ground disturbance to the extent practicable. This is especially critical in areas where cultural, Tribal cultural and biological resources are of significant concern.
4. **Sustainable Life Cycle Management:** Include plans for commercially reasonable sustainable life cycle management of construction materials and project components during construction and operation that provides for recycling and reuse of construction waste and waste during operation including but not limited to the solar panels.
5. **Community Benefits:**
  - (a) **Inclusive Economic Development:** Leverage SMUD's Supplier Education & Economic Development (SEED) team to connect with certified small business vendors/contractors in SMUD's service territory to support the project. Submit requests to [seed.mgr@smud.org](mailto:seed.mgr@smud.org).
1. **Zero Carbon Workforce Development:** SMUD seeks to galvanize and prepare the region for an inclusive, diverse, creative, and empowered future workforce. Leverage SMUD's existing workforce development agreements, programs, and partnerships throughout the Project to support the development of a clean energy labor force. The Project Team will work reasonably with SMUD to engage various elements of the labor supply chain via pre-apprentice and apprenticeship programs, internships, informational sessions, and mentorship opportunities by leveraging the following strategies

- Have primes, contractors visit SMUD-identified training programs and communicate applicable job postings (to instructors and SMUD Regional Workforce Development staff)
- Make some non-union positions available for workforce training opportunities
- Host a pre-job meeting with organized labor to discuss opportunities for focusing on local, equitable hiring
- Require that all organized labor draw/hire will happen from local pools unless not enough labor can be found locally.

2.

Sustainable Materials & Equipment: Use commercially reasonable efforts to source materials and equipment from companies that have a human rights policy and statement of supply chain ethics commitment that expresses the corporation's commitment to meet the responsibility to respect human rights and uphold ethical business practices in their operations and value chains.





# BOARD AGENDA ITEM

## STAFFING SUMMARY SHEET

TO				TO			
1.	Bryan Swann			6.	Lora Anguay		
2.	Josh Langdon			7.	Brandy Bolden		
3.	Jon Anderson			8.	Suresh Kotha		
4.	Chris Hofmann			9.	Legal		
5.	Frankie McDermott			10.	CEO & General Manager		
<b>Consent Calendar</b>		<b>Yes</b>	<input checked="" type="checkbox"/>	<b>No</b>		<i>If no, schedule a dry run presentation.</i>	
<b>Budgeted</b>		<b>Yes</b>	<input checked="" type="checkbox"/>	<b>No</b> <i>(If no, explain in Cost/Budgeted section.)</i>			
FROM (IPR)		DEPARTMENT		MAIL STOP		EXT.	
Jon Olson		Energy Trading & Contracts		A404		7378	
						DATE SENT	
						04/15/25	
<b>NARRATIVE:</b>							
<p><b>Requested Action:</b> Provide the Board presentations by external and internal experts regarding Resource Adequacy and 2025 Summer Readiness followed by a discussion on the topic.</p> <p><b>Summary:</b> Presenters from SMUD and an executive from the California Independent System Operator (CAISO) will provide an overview on Summer 2025 readiness and resource outlooks for the near and mid-term. Additionally, a speaker from E3 will provide a general grid-wide update on resource transitions.</p> <p>Content and discussion will include western energy markets, the Western Energy Imbalance Market (EIM), and the Extended Day-Ahead Market (EDAM).</p> <p><b>Board Policy:</b> Strategic Direction SD-2, Competitive Rates; Strategic Direction SD-4, Reliability; and Strategic Direction SD-9, Resource Planning.  <i>(Number &amp; Title)</i></p> <p><b>Benefits:</b> The presentation will inform the Committee on regional Summer 2025 readiness as well as the associated resource and market outlooks.</p> <p><b>Cost/Budgeted:</b> This informational item has no direct budgetary impact.</p> <p><b>Alternatives:</b> Provide information to the Board via written report through the Chief Executive Officer &amp; General Manager.</p> <p><b>Affected Parties:</b> Zero Carbon, Grid Operations, Resource Planning, Finance, Energy Trading &amp; Contracts, Legal</p> <p><b>Coordination:</b> Energy Trading &amp; Contracts</p> <p><b>Presenter:</b> Arne Olson, Senior Partner, Energy &amp; Environmental Economics (E3)  Mark Rothleder, Senior Vice President and Chief Operating Officer, California Independent System Operator (CAISO)  Jon Olson, Director, Energy Trading &amp; Contracts (SMUD)</p>							

### Additional Links:

SUBJECT

Resource Adequacy &amp; 2025 Summer Readiness

ITEM NO. (FOR LEGAL USE ONLY)

ITEMS SUBMITTED AFTER DEADLINE WILL BE POSTPONED UNTIL NEXT MEETING.

**Arne Olson**  
**Energy + Environmental Economics (E3)**  
**Senior Partner**

Arne leads E3's Integrated System Planning practice helping clients navigate changes to bulk electric system operations and investment needs brought about by higher levels of clean and renewable energy production. He has led a number of landmark studies of the feasibility and cost of achieving deep decarbonization and high renewable penetration goals for electric utilities, including studies of 100% renewable and net zero energy systems in New England, California, the Pacific Northwest, Hawai'i, and Atlantic Canada. His work in electricity market design is helping modernize markets in critical areas such as resource adequacy, ancillary services, and environmental attributes. Other areas of focus include retail rate design, distributed energy resources, and electricity – natural gas coordination.

Arne has over 30 years of experience in the energy industry. He is a frequent speaker at energy industry conferences and has provided expert witness testimony in over a dozen jurisdictions. His clients include utilities, asset owners, market operators, government agencies and environmental organizations. Prior to joining E3 in 2002, he served for six years in the Energy Policy Division of the Washington State Energy Office and its successor agencies.

**Education:** MS, international energy management and policy, University of Pennsylvania and the Institut Français du Pétrole; BS, statistics, and BS, mathematical sciences, University of Washington.

**Mark Rothleder**  
**California Independent System Operator (CAISO)**  
**Senior Vice President and Chief Operating Officer**

Mark Rothleder is the senior vice president and Chief Operating Officer at the California Independent System Operator (ISO), leading a multi-divisional management team that integrates market policy, planning, operations, technology and program management.

Mr. Rothleder previously served as the vice president of Market Policy and Performance, executive director of Market Analysis and Development, principal market developer, and director of Market Operations. As a member of the original start-up team in 1997, Mr. Rothleder is now the longest serving ISO employee.

In spring 2009, Mr. Rothleder led the design and implementation of market rules and software modifications for the ISO's Market Redesign and Technology Upgrade (MRTU). During his career at the ISO, Mr. Rothleder has worked extensively to develop and incorporate the approved market rules for California's competitive wholesale energy and reserves markets.

Prior to joining the ISO, Mr. Rothleder worked for eight years at Pacific Gas & Electric in its Electric Transmission Department where his responsibilities included operations engineering, transmission planning, and substation design.

Mr. Rothleder is a registered Professional Electrical Engineer in the state of California, and holds a Bachelor's of Science in Electrical Engineering from the California State University, Sacramento. He has completed post-graduate coursework in Power System Engineering from Santa Clara University, and earned a Master's in Science in Information Systems from the University of Phoenix.





SSS No.  
BOD 2025-005

# BOARD AGENDA ITEM

## STAFFING SUMMARY SHEET

Committee Meeting & Date  
ERCS - 2025  
Board Meeting Date  
N/A

TO				TO								
1.	Frankie McDermott			6.								
2.	Suresh Kotha			7.								
3.	Brandy Bolden			8.								
4.	Lora Anguay			9.	Legal							
5.				10.	CEO & General Manager							
Consent Calendar		Yes	x	No		If no, schedule a dry run presentation.		Budgeted	x	Yes	No (If no, explain in Cost/Budgeted section.)	
FROM (IPR) Brandon Rose / Crystal Henderson				DEPARTMENT Board Office				MAIL STOP B307	EXT. 5424	DATE SENT 12/31/24		

### NARRATIVE:

**Requested Action:** A summary of directives is provided to staff during the committee meeting.

**Summary:** The Board requested an on-going opportunity to do a wrap up period at the end of each committee meeting to summarize various Board member suggestions and requests that were made at the meeting to make clear the will of the Board. The Energy Resources & Customer Services (ERCS) Committee Chair will summarize Board member requests that come out of the committee presentations for this meeting.

**Board Policy:** Governance Process GP-4, Board/Committee Work Plan and Agenda Planning states the Board will focus on the results the Board wants the organization to achieve.  
(Number & Title)

**Benefits:** Having an agendized opportunity to summarize the Board's requests and suggestions that arise during the committee meeting will help clarify the will of the Board.

**Cost/Budgeted:** Included in budget for internal labor.

**Alternatives:** Not to summarize the Board's requests at this meeting.

**Affected Parties:** Board of Directors, Board Office and Executive Office

**Coordination:** Crystal Henderson, Special Assistant to the Board

**Presenter:** Brandon Rose, ERCS Committee Chair

### Additional Links:

SUBJECT

Summary of Committee Direction –  
Energy Resources & Customer Services (ERCS) Committee

ITEM NO. (FOR LEGAL USE ONLY)

ITEMS SUBMITTED AFTER DEADLINE WILL BE POSTPONED UNTIL NEXT MEETING.