

**POWER PURCHASE AND SALE AGREEMENT**

**between**

**SOUTHERN CALIFORNIA EDISON COMPANY**

**and**

**NORTH AMERICAN TRADING & MARKETING, INC.**

**COVER SHEET**

The attached *Master Power Purchase and Sale Agreement* (Edison Electric Institute Version 2.1; modified 4/25/00), General Terms and Conditions (the “Master Agreement”) together with this Cover Sheet, including Special Conditions, the Addendum to the Master Agreement attached hereto, and any exhibits, attachments, and/or any referenced collateral, credit support or margin agreement or similar arrangement between the Parties (collectively, the “Agreement”) is made as of the following date: December 20, 2002 (“Effective Date”). The Parties to this Agreement (each, a “Party,” collectively “Parties”) are the following:

**Parties:**

**Name: NORTH AMERICAN TRADING & MARKETING, INC. (“Seller” or “Party A”)**

**Name: SOUTHERN CALIFORNIA EDISON COMPANY (“Buyer”, “SCE” or “Party B”)**

All Notices are deemed provided in accordance with Section 10.7 if made to the address and/or facsimile numbers provided below:

All Notices are deemed provided in accordance with Section 10.7 if made to the address and/or facsimile numbers provided below:

Street: 8480 E. Orchard Rd., Suite 4000  
City: Greenwood Village, CO Zip: 80111  
Attn: Contract Administration

Street: 2244 Walnut Grove Ave., G.O. 1  
City: Rosemead, CA Zip: 91770  
Attn: Director, QF Resources

Phone: (303) 796-8600  
Facsimile: (303) 773-0461  
Duns: 79-501-2061  
Federal Tax ID Number: 84-1312083

Phone: (626) 302-8514  
Facsimile: (626) 302-1103  
Duns: 00-690-0818  
Federal Tax ID Number: 95-1240335

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**Invoices:**

Attn: Michelle DeTine  
Phone: (303) 796-8600  
Facsimile: (303) 773-0461

**Invoices:**

Attn: Paul Amero  
Phone: (626) 302-9567  
Facsimile: (626) 302-1102

**Scheduling:**

Attn: Power Dispatcher  
Phone: (303) 796-8600  
Facsimile: (303) 773-0461

**Scheduling:**

Attn: Manager of Energy  
Operations  
Phone: (626) 302-5730  
Facsimile: (626) 302-3254

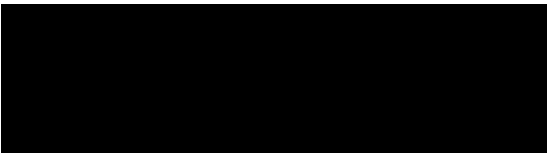
**Payments:**

Attn: Michelle DeTine  
Phone: (303) 796-8600  
Facsimile: (303) 773-0461

**Payments:**

Attn: Cindy Shindle  
Phone: (626) 302-9272  
Facsimile: (626) 302-1102

**Wire Transfer:**



**Wire Transfer:**



**Credit and Collections:**

Attn: Credit Manager  
Phone: (303) 796-8600  
Facsimile: (303) 773-0461

**Credit and Collections:**

Attn: Manager of Finance  
Phone: (626) 302-3242  
Facsimile: (626) 302-3276

With additional Notices of an Event of Default or Potential Event of Default to:

Attn: Michael J. Ruffatto  
Phone: (303) 796-8600  
Facsimile: (303) 773-0461

With additional Notices of an Event of Default or Potential Event of Default to:

Attn: General Counsel  
Phone: (626) 302-1903  
Facsimile: (626) 302-2970

**Special Conditions<sup>1</sup>**

**A. Seller and Project:**

- (i) Net Nameplate Capacity: Currently expected to be between **45.0 MW** and **49.9 MW**, provided, however, that Net Nameplate Capacity can be increased pursuant to Article Thirteen. [Net Nameplate Capacity is the net output available for sale to SCE after deducting auxiliary load/station use from the Generating Facility’s power production capacity and applicable transformer and electrical losses in accordance with Section 3.1(a), subject to the provisions in Special Condition A (ii) below for reducing Net Nameplate Capacity.]
- (ii) Reduction of Net Nameplate Capacity: If the Generating Facility consists of more than one electrical generator, the Net Nameplate Capacity of the Generating Facility shall be the sum of the Net Nameplate Capacity ratings of the electrical generators which are actually operating in parallel with the SCE electrical system and delivering power to the Point of Delivery as of the date of Firm Operation. Any installation at the Project by Seller of additional Net Nameplate Capacity after the date of Firm Operation, without the written consent of SCE, other than as provided in Article Thirteen, shall constitute an Event of Default.
- (iii) Project Name and Address (the “Site”):  
  
**Kern Biomass Project  
2401 Coffee Road  
Bakersfield, California 93308**
- (iv) This Agreement is Project and Site specific; however, Seller may adjust the location of Seller's Generating Facility specified in this Special Condition A if necessary for project development so long as the Project utilizes the same ISO Interface Delivery Point specified in Special Condition C.
- (v) Eligible Renewable Resource (“ERR”) Type: (Check one only)
  - Solar Photovoltaic
  - Solar Thermal
  - Wind

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<sup>1</sup> Capitalized terms, if not otherwise defined in these Special Conditions, shall have the meaning set forth in the attached Addendum and/or Master Power Purchase and Sale Agreement.

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- Small Hydroelectric (30 MW or less)
- Geothermal
- Solid Fuel Biomass
- Landfill Gas
- Digester Gas<sup>2</sup>

- (vi) Delivery of power to SCE shall be at a nominal **115,000/69,000** volts.
- (vii) Expected annual net Energy production is **350 GWh** per year, *except that*, if an Expanded Facility is installed pursuant to Article Thirteen, expected annual net Energy production will be **700 GWh** per year.

**B. Firm Contract Capacity:**

- (i) Firm Contract Capacity is currently expected to be between **45 MW** and **49.9 MW**, with the precise level to be determined at the time of the performance of the procedures set forth in Exhibit A and in accordance with the terms and procedures of Section 3.3(c) and Exhibit A (subject to the deration provisions in Section 3.3(e)), except that, if an Expanded Facility is installed pursuant to Article Thirteen, Firm Contract Capacity will be **99.8 MW**.
- (ii) Maximum Firm Contract Capacity for ERR projects shall be based on an ERR-specific factor applied to such project's Net Nameplate Capacity, as follows:

<u>Technology</u>	<u>ERR-Specific Factor</u>
Wind	0.10
Small Hydroelectric	0.50
Geothermal, Photovoltaic Solar Thermal, Solid-Fuel Biomass Landfill Gas, Digester Gas, Other Biogas	1.00

**C. ISO Interface Delivery Point:**

**SCENO**, or **ZP-26** at the Kern Substation.

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<sup>2</sup> Use of natural gas is limited as specified by the Federal Energy Regulatory Commission in 18 C.F.R 292.204(b)(2) for qualifying small power production facilities, as in effect on the date of execution of this Agreement. In addition Seller agrees to make available records demonstrating its compliance with the foregoing provision, as set forth in Section 3.7(c)(vi) below.

**D. Name and Location of SCE Designated Switching Center:**

**Kern Substation.**

**E. Term:**

(i)  5 Years  10 Years  15 Years (check one)

(ii) Subject to Article Eleven, the Term of this Agreement shall commence upon the date of Initial Operation of the Generating Facility. This Agreement shall terminate automatically as of the Startup Deadline if the Project does not achieve Initial Operation by the Startup Deadline.

(a) If the date of commencement of the Term of this Agreement is other than the first (1<sup>st</sup>) day of a calendar month, then the Term of this Agreement shall terminate on the last day of the calendar month which is five (5), ten (10), or fifteen (15) years, as applicable in accordance with Special Condition E (i), from the end of the calendar month in which the Term commences. Any such additional days shall be considered part of the last year of the Term of the Agreement.

(b) Each Party has certain rights to terminate the Agreement under the terms and conditions set forth in Article Twelve.

(c) In addition to its termination right under Special Condition E(ii)(b), SCE has the option to terminate the Agreement effective of the last day of the tenth (10<sup>th</sup>) year of the Term, by (i) providing Seller with thirty (30) calendar days' written Notice of such termination and (ii) prepaying Seller the net present value as of the last day of the tenth (10<sup>th</sup>) year of the Term of the Agreement the sum of all the capacity payments for years eleven (11) through fifteen (15) of the Term, discounted by SCE's at SCE's CPUC authorized cost of capital as of the last day of the tenth (10<sup>th</sup>) year of the Term.

**F. Fixed Energy Price and Fixed Energy Price Period:**

(i) Fixed Energy Price Period:  5 Years  10 Years (check one)

(ii) The Fixed Energy Price Period commences concurrently with the Term of this Agreement, as specified above in Special Condition E.

(iii) The Fixed Energy Price is **\$43.00** per MWh.

(iv)  [check if applicable]

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During any remaining Term of this Agreement as specified in Special Condition E, Seller will receive a monthly Energy payment equal to the sum of the Period Energy Payments for all TOD Periods in the month in accordance with Section 3.1(d).

**G. Public Goods Charge Funding Requirements:**

- (i)  Public Goods Charge Funding Required (check if applicable)
- (ii) The Agreement shall be subject to termination by either Party, as set forth in Article Twelve, in the event that Seller is unable to obtain a Satisfactory PGC Commitment.
- (iii) The PGC Funds level required shall be equal to the difference between (a) the market price of electricity calculated for the Term of the Agreement in accordance with the principles set forth in Senate Bill 1078 (Section 399.15), and (b) the price of electricity to be paid under this Agreement for all anticipated electrical deliveries from the Generating Facility. The minimum PGC Funds level required shall be \$10.00 per MWh for all anticipated electrical deliveries from the Generating Facility during the Term of this Agreement.

**Other Project – Specific Terms**

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**Article Two**

Transaction Terms and Conditions

Optional provision in Section 2.4. If not checked, inapplicable.

***[THIS SECTION IS NOT APPLICABLE]***

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**Article Four**

Remedies for Failure to Deliver or Receive

Accelerated Payment of Damages. If not checked, inapplicable.

***[THIS SECTION IS NOT APPLICABLE]***

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**Article Five**

Events of Default, Remedies

Cross Default for Party A:

Party A:\_\_\_\_\_

Cross Default Amount  
\$\_\_\_\_\_

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- Other Entity: \_\_\_\_\_ Cross Default Amount  
\$ \_\_\_\_\_
- Cross Default for Party B:
- Party B: \_\_\_\_\_ Cross Default Amount  
\$ \_\_\_\_\_
- Other Entity: \_\_\_\_\_ Cross Default Amount  
\$ \_\_\_\_\_

5.6 Closeout Setoff

- Option A (Applicable if no other selection is made.)
- Option B - Affiliates shall have the meaning set forth in the Agreement unless otherwise specified as follows: \_\_\_\_\_
- Option C (No Setoff.)

***[THIS SECTION IS NOT APPLICABLE]***

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**Article 8**

Credit and Collateral Requirements

8.1 Party A Credit Protection:

(a) Financial Information:

- Option A
- Option B Specify: \_\_\_
- Option C Specify: \_\_\_

(b) Credit Assurances:

- Not Applicable
- Applicable

(c) Collateral Threshold:

- Not Applicable
- Applicable

If applicable, complete the following:

Until Party B attains an investment grade credit rating (as evidenced by a credit rating on Party B's outstanding long term senior unsecured, unsubordinated debt of either BBB- from S&P or Baa3 from Moody's), Party B's Collateral Threshold will be zero (0). After Party B has attained an investment grade credit rating, Party B's

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Collateral Threshold shall be the amount set forth below opposite the applicable Credit Rating for Party B's outstanding long-term senior unsecured, unsubordinated debt, as determined by Moody's or S&P, as the case may be:

Collateral Threshold (in thousands of dollars)	Credit Rating (Moody's)	Credit Rating (S&P)
\$40,000	A3 or better	A- or better
\$30,000	Baa1	BBB+
\$20,000	Baa2	BBB
\$10,000	Baa3	BBB-
\$0	Below Baa3	Below BBB-

*provided, however,* that Party B's Collateral Threshold shall be zero if an Event of Default or Potential Event of Default with respect to Party B has occurred and is continuing.

Party B Independent Amount: **\$ 0**

Party B Rounding Amount: **\$ 250,000**

(d) Downgrade Event:

- Not Applicable  
 Applicable

If applicable, complete the following:

- It shall be a Downgrade Event for Party B if Party B's Credit Rating falls below \_\_\_\_\_ from S&P or \_\_\_\_\_ from Moody's or if Party B is not rated by either S&P or Moody's

- Other:  
Specify: \_\_\_\_\_

(e) Guarantor for Party B: Not Applicable

Guarantee Amount: Not Applicable

## 8.2 Party B Credit Protection:

(a) Financial Information:

- Option A  
 Option B Specify: \_\_\_\_



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Option C Specify: \_\_\_

(b) Credit Assurances:

Not Applicable

Applicable

(c) Collateral Threshold:

Not Applicable

Applicable

If applicable, complete the following:

Party A Independent Amount: **\$ 0**

Party A Rounding Amount: **\$ 250,000**

(d) Downgrade Event:

Not Applicable

Applicable

If applicable, complete the following:

It shall be a Downgrade Event for Party A if Party A's Credit Rating falls below \_\_\_\_\_ from S&P or \_\_\_\_\_ from Moody's or if Party A is not rated by either S&P or Moody's.

Other:  
Specify: \_\_\_\_\_

(e) Guarantor for Party A: Not Applicable

Guarantee Amount: Not Applicable

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### **Article 10**

Confidentiality

Applicable

If not checked, inapplicable.

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### **Schedule M**

Party A is a Governmental Entity or Public Power System.

Party B is a Governmental Entity or Public Power System.

Add Section 3.6. If not checked, inapplicable.

Add Section 8.6. If not checked, inapplicable.

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***[THIS SCHEDULE IS NOT APPLICABLE]***

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**Other Changes**

See attached Addendum

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**Agreement Execution**


In WITNESS WHEREOF, the Parties have caused this Agreement to be duly executed as of the date of last signature provided below:

**NORTH AMERICAN TRADING  
& MARKETING, INC.**, a Delaware  
corporation

By:   
\_\_\_\_\_  
Michael J. Ruffatto  
President

Date: 12-20-02

**SOUTHERN CALIFORNIA EDISON  
COMPANY**, a California corporation

By:   
\_\_\_\_\_  
Alan J. Fohrer  
Chairman and Chief Executive  
Officer

Date: 12/20/02

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**ADDENDUM**  
**TO**  
**MASTER POWER PURCHASE AND SALE AGREEMENT**  
**between**  
**SOUTHERN CALIFORNIA EDISON COMPANY**  
**and**  
**NORTH AMERICAN TRADING & MARKETING, INC.**

This Addendum modifies the General Terms and Conditions of the Master Agreement as set forth below.

**ARTICLE ONE: GENERAL DEFINITIONS**

The following definitions are deleted in their entirety.

- 1.6 “Call Option”
- 1.9 “Confirmation”
- 1.10 “Contract Price”
- 1.11 “Costs”
- 1.12 “Credit Rating”
- 1.13 “Cross Default Amount”
- 1.15 “Delivery Period”
- 1.17 “Downgrade Event”
- 1.24 “Gains”
- 1.26 “Interest Rate”
- 1.28 “Losses”
- 1.31 “NERC Business Day”
- 1.33 “Offsetting Transactions”
- 1.34 “Option”
- 1.35 “Option Buyer”

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- 1.36 “Option Seller”
- 1.43 “Party A Tariff”
- 1.44 “Party B Tariff”
- 1.46 “Potential Event of Default”
- 1.48 “Put Option”
- 1.49 “Quantity”
- 1.50 “Recording”
- 1.51 “Replacement Price”
- 1.53 “Sales Price”
- 1.56 “Settlement Amount”
- 1.57 “Strike Price”
- 1.58 “Terminated Transaction”

The following definitions are amended as follows:

1.5 “Buyer”

The definition of “Buyer” in the Master Agreement shall be deleted in its entirety and replaced with the following: “ ‘Buyer’ means the sole Party that is obligated to purchase and receive, or cause to be received, the Product as specified in this Agreement. As used in this Agreement, Buyer shall be Party B.”

1.7 “Claiming Party”

The definition of “Claiming Party” in the Master Agreement is deleted in its entirety and replaced with the following: “ ‘Claiming Party’ is the Party claiming that a Force Majeure event has occurred pursuant to the provisions of Section 3.5.”

1.16 “Delivery Point”

The definition of “Delivery Point” in the Master Agreement is deleted in its entirety and replaced with the following: “ ‘Delivery Point’ means the location on the ISO Grid within SCE's geographic service territory as set forth in Special Condition C at which title to the Product will transfer from Seller to Buyer.”

1.23 “Force Majeure”

The definition of “Force Majeure” in the Master Agreement is deleted in its entirety and replaced with the following: “ ‘Force Majeure’ means any occurrence that causes a Party

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to be unable to perform its obligations hereunder, other than Forced Outages, that was not anticipated as of the date the Agreement was entered into, that is not within the control of a Party and that a Party has been unable to overcome by the exercise of due diligence, including but not limited to flood, drought, earthquake, storm, fire, pestilence, lightning and other natural catastrophes, epidemic, war, riot, civil disturbance, or disobedience, governmental actions, strike, or labor dispute. Lack of wind, sun, or other fuel source of an inherently intermittent nature shall not constitute a Force Majeure under this Agreement. Damage or destruction of the facilities providing landfill gas to the Generating Facility Units, which prevent the delivery of landfill gas to the Generating Facility for the production of Energy and Firm Contract Capacity, that could not have been prevented by the exercise of due diligence, and that was not foreseeable and was caused by forces outside the control of Seller, shall be considered a qualifying Force Majeure event.”

#### 1.25 “Guarantor”

The definition of “Guarantor” in the Master Agreement is deleted in its entirety and replaced with the following: “ ‘Guarantor’ means, with respect to a Party, the guarantor, if any, specified for such Party under any security, collateral or similar agreement between the Parties as contemplated in Section 3.2.”

#### 1.47 “Product”

The definition of “Product” in the Master Agreement is deleted in its entirety and replaced with the following: “ ‘Product’ means all Energy and, if applicable, capacity generated by Seller’s Generating Facility and delivered to SCE for sale under this Agreement.”

#### 1.54 “Schedule” or “Scheduling”

The definition of “Schedule” or “Scheduling” in the Master Agreement is deleted in its entirety and replaced with the following: “ ‘Schedule’ or ‘Scheduling’ means the action of Seller, or its designated representatives, including any third party provider of transmission services, if applicable, of notifying, requesting, and confirming to each other and/or to the ISO, as appropriate the quantity of Product to be delivered on any given day, hour, or relevant period at the Delivery Point.”

#### 1.55 “Seller”

The definition of “Seller” in the Master Agreement is deleted in its entirety and replaced with the following: “ ‘Seller’ means the Party that is obligated to sell and deliver to the Delivery Point, or cause to be delivered to the Delivery Point, Energy and, if applicable, Firm Contract Capacity generated by Party’s Generating Facility as specified in this Agreement. As used in this Agreement, Seller shall be Party A.”

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1.59 “Termination Payment”

The definition of “Termination Payment” in the Master Agreement is deleted in its entirety and replaced with the following: “ ‘Termination Payment’ has the meaning used in Section 5.4.”

1.60 “Transaction”

The definition of “Transaction” in the Master Agreement is deleted in its entirety and replaced with the following: “ ‘Transaction’ means any sale of Energy and, if applicable, Firm Contract Capacity to SCE from Seller under this Agreement.”

1.61 “Transmission Provider”

The definition of “Transmission Provider” in the Master Agreement is deleted in its entirety and replaced with the following: “ ‘Transmission Provider’ means any entity or entities transmitting or transporting Energy or capacity on behalf of Seller to the Delivery Point pursuant to the terms of this Agreement.”

The following definitions are added to Article One:

“1.62 ‘Approval of Site Transfer’ means that each of the following has occurred; (i) Seller has complied with all conditions and orders contained in Executive Order D-44-01 by the Governor of the State of California for the transfer of the Site of the Generating Facility from Pacific Gas & Electric Company (“PG&E”) to Seller, including without limitation approval of the Bankruptcy Court presiding over the PG&E bankruptcy; (ii) Seller has furnished SCE with proof to SCE’s sole satisfaction of such compliance, and (iii) The CPUC has issued a final decision, no longer subject to appeal, and without condition or modification unacceptable to the Parties, that approves the sale and transfer of the Site, including the Generating Facilities, to Seller from PG&E and finds such sale and transfer in accordance with California Public Utilities Code Section 851.”

“1.63 ‘Capacity Attributes’ means any defined characteristic, certificate, tag, credit or accounting construct associated with a unit of generating capacity. An example of a Capacity Attribute would be an ACAP credit as defined in the ISO’s Market Design ‘02 Proposal.”

“1.64 ‘CPUC’ or ‘Commission’ means the California Public Utilities Commission.”

“1.65 ‘CPUC Approval’ means that the CPUC has issued a decision without conditions or modifications unacceptable to the Parties, or either of them, that: (1) approves as reasonable all aspects of the solicitation of renewable power (“RFP”) which was the basis for this Agreement, and of SCE’s conduct in respect of the RFP, (2) finds that any procurement pursuant to this Agreement is deemed transitional procurement by SCE from a renewable resource for purposes of determining SCE’s compliance with any obligation that it may have pursuant to CPUC Decisions (“D.”) 02-08-071 and 02-10-062, or other applicable law to procure an

- additional 1% of its annual electricity sales from renewable resources, (3) finds that any procurement pursuant to this Agreement be deemed part of SCE's "baseline" quantity of eligible renewable resources for purposes of Section 399.15 of the Public Utilities Code or other applicable law, and (4) approves this Agreement, or, in the alternative, any form agreement upon which this Agreement is substantially based if SCE submits that form instead to the CPUC, and contains findings to the effect that this Agreement (or any standardized form) and SCE's entry into this Agreement (or any agreement based substantially on the standardized form) are reasonable and prudent for all purposes, including, but not limited to, recovery of all payments made pursuant hereto in rates, subject only to review with respect to the reasonableness of SCE's administration of the Agreement."
- "1.66 'CPUC Final Approval' means that a decision of the CPUC has been rendered wherein CPUC Approval has been provided, without conditions or modifications unacceptable to the Parties, and has become final and is no longer subject to appeal."
- "1.67 'Designated Switching Center' means the SCE facility identified in Special Condition D."
- "1.68 'DLF' or 'Distribution Loss Factor' as approved by the CPUC (or such successor measure as may be determined from time-to-time) means a measure of all net electrical losses associated with the transmission of power through the SCE electric system from the high voltage side of the Generating Facility Substation to the interface with the ISO Grid."
- "1.69 'Emergency' means an actual or imminent condition or situation which jeopardizes SCE Electric System Integrity or the integrity of other systems to which SCE is connected, as determined by SCE in its sole discretion, or any condition so defined and declared by the ISO."
- "1.70 'Energy' means kilowatt-hours generated by the Generating Facility as measured in accordance with Sections 3.1(a) and 3.11 that are purchased by SCE and delivered to the Delivery Point."
- "1.71 'Environmental Attributes' means any and all credits, benefits, emissions reductions, offsets, and allowances, howsoever entitled, attributable to the Generating Facility. Environmental Attributes include, but are not limited to (1) any avoided emissions of pollutants to the air, soil or water such as sulfur oxides (SO<sub>x</sub>), nitrogen oxides (NO<sub>x</sub>), carbon monoxide (CO) and other pollutants; (2) any avoided emissions of carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>) and other greenhouse gases (GHGs) that have been determined by any legitimate governmental body or association of governmental representatives, such as, but not limited to, the United Nations Intergovernmental Panel on Climate Change, to contribute to the actual or potential threat of altering the Earth's climate by trapping heat in the atmosphere; and (3) the reporting rights, such as, but not

limited to, Green Tag Reporting Rights, to these avoided emissions. Environmental Attributes do not include any energy, capacity, reliability, or other power attributes from the Generating Facility nor production tax credits or certain other financial incentives existing now or in the future associated with the construction or operation of electric generating projects.”

“1.72 ‘ERR’ or ‘Eligible Renewable Resource’ means any of the following, all of which must be located in California, or near California and having a first point of connection to the Western Electricity Coordinating Council transmission system located in California, and which are not providing energy or capacity under an existing power purchase agreement with SCE or any other party that does not terminate by its own terms, without further action of the Parties, on or before December 31, 2003:

- A. a photovoltaic generating facility,
- B. a wind generating facility,
- C. a geothermal generating facility,
- D. a solar thermal generating facility,
- E. a hydroelectric generating facility of 30 MW or less, provided that a new hydroelectric generating facility will not require a new or increased appropriation or diversion of water under Part 2 (commencing with Section 1200) of Division 2 of the Water Code,
- F. a thermal electric generating facility whose thermal energy input comes from the combustion of biomass fuel, digester gas, or landfill gas (see footnote 2, above),
- G. an ocean wave, ocean thermal, or tidal current generating facility, or
- H. a municipal solid waste conversion generating facility as defined by Senate Bill 1038.”

“1.73 ‘Firm Contract Capacity’ means, if Firm Contract Capacity is specified in Special Condition B to this Agreement, the electric power producing capability of the Generating Facility which is committed to SCE as specified in Special Condition B as may be modified from time to time pursuant to Section 3.3 of this Agreement or increased pursuant to Article Thirteen of this Agreement.”

“1.74 ‘Firm Operation’ means, if Seller is providing Firm Contract Capacity from the Generating Facility as specified in Special Condition B to this Agreement, the date on or after Initial Operation upon which Seller, having performed the required testing in accordance with the procedures described in Exhibit A, passes such tests or, otherwise, the date SCE, in its sole judgment, determines that Seller’s Generating Facility has the ability to provide and deliver to the Delivery Point the Firm Contract Capacity specified in this Agreement (or any reduced level of Firm Contract Capacity pursuant to the provisions of Section 3.3(c)) in accordance with the procedures described in Exhibit A attached hereto. A Seller electing to provide Firm Contract Capacity pursuant to Special Condition B that does not achieve Firm Operation within one (1) year of Initial Operation shall not



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be entitled to be paid for Capacity pursuant to this Agreement and is subject to the deration/damage provisions in Sections 3.3(e) and 3.3(f).”

- “1.75 ‘Forced Outage’ means any outage of the Generating Facility or Seller's Interconnection Facilities resulting from a design defect, inadequate construction, operator error, or a breakdown of the mechanical or electrical equipment that fully or partially curtails the electrical output of the Generating Facility.”
- “1.76 ‘Generating Facility’ means all of Seller’s generators, including any Expanded Facilities installed in accordance with Article Thirteen unless otherwise noted, together with all protective and other associated equipment and improvements necessary to produce electrical power at Seller’s Project, excluding associated land, land rights and interests in land.”
- “1.77 ‘GMMs’ or ‘Generation Meter Multipliers,’ as determined by the ISO, (or such successor factor as the ISO may develop from time-to-time) means the calculation of all electrical losses associated with the transmission of power delivered by the Generating Facility over the ISO Grid.”
- “1.78 ‘Initial Operation’ means any date selected by Seller and provided in a written Notice to Buyer at least 72 hours in advance of 12:01 am on the date selected (the “Selected Time”), *provided that*, as of the Selected Time, the Generating Facility (or, in the case of a Generating Facility with more than one electrical generator, at least one electrical generator installed at the Generating Facility) is: (i) actually operating in parallel with the ISO Grid or SCE electrical system, *and* (ii) delivering Product to the Delivery Point. “Generating Facility” as used in this Section 1.78 does not include the Expanded Facilities as such term is defined in Article Thirteen.”
- “1.79 ‘ISO’ means the California Independent System Operator Corporation, a state chartered, nonprofit, public benefit corporation that controls certain transmission facilities of all participating transmission owners and dispatches certain electric generation units and loads.”
- “1.80 ‘ISO Control Area’ means the electrical regions under operational control of the ISO.”
- “1.81 ‘ISO Grid’ means the system of transmission lines and associated facilities of the Participating Transmission Owners that have been placed under the ISO’s operational control.”
- “1.82 ‘Interconnection Facilities’ means all means required, and apparatus installed, to interconnect and deliver power from the Generating Facility to the Delivery Point by means of either the SCE electric system or the ISO Grid, including, but not limited to, connection, transformation, switching, metering, communications, control, and safety equipment, such as equipment required to protect (a) the SCE electric system (or other systems to which the SCE electric system is connected, including the ISO Grid) and SCE’s customers from faults occurring at the

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Generating Facility, and (b) the Generating Facility from faults occurring on the SCE electric system or on the systems of others to which the SCE electric system is directly or indirectly connected. Interconnection Facilities also include any necessary additions and reinforcements by SCE to the SCE electric system required as a result of the interconnection of the Generating Facility to the SCE system, the ISO Grid, or systems of others to which the SCE electric system is directly or indirectly connected.”

- “1.83 ‘KVAR’ means reactive kilovolt-ampere, a unit of measure of reactive power.”
- “1.84 ‘Lease’ means an agreement whereby Seller leases the site described in Special Condition A (iii) (the “Site”) and/or the Generating Facility from a third party, the term of which lease begins on or before the Term of this Agreement and extends at least through the last day of the Term.”
- “1.85 ‘Market Quotation Average Price’ means the average of the quotations solicited in good faith from not less than three (3) Reference Market Makers; provided, however, that the Party soliciting such quotations shall use reasonable efforts to obtain good faith quotations from at least five (5) Reference Market Makers and, if at least five (5) such quotations are obtained, the Market Quotation Average Price shall be determined by disregarding the highest and lowest quotations and averaging the remaining quotations. The quotations shall be based on the midpoint (average) of firm and transactable offers to sell and bids to buy. The quote must be obtained assuming that the Party obtaining the quote will provide sufficient credit support for the proposed transaction. In the event the Parties are unable to obtain such quotations, the Parties shall negotiate in good faith to reach agreement on a valuation of the relevant product. In the event the Parties calculate differing Market Quotation Average Prices based on the above procedure for the equivalent relevant product, then the average of the two (2) Market Quotation Average Prices shall be used in implementing provisions of this Agreement that reference Market Quotation Average Prices.”
- “1.86 ‘Notice’ means notices, requests, statements or payments provided in accordance with the Cover Sheet and Section 10.7.”
- “1.87 ‘Operate’ means to provide the engineering, purchasing, repair, supervision, training, inspection, testing, protection, operation, use, management, replacement, retirement, reconstruction, and maintenance of or for the Generating Facility in accordance with applicable California electric utility standards and Prudent Electrical Practices.”
- “1.88 ‘Participating Transmission Owner’ or ‘Participating TO’ means an entity that (i) owns, operates, and maintains transmission lines and associated facilities and/or has entitlements to use certain transmission lines and associated facilities and (ii) has transferred to the ISO operational control of such facilities and/or entitlements to be made part of the ISO Grid.”

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- “1.89 ‘Peak Months’ means those months defined as summer months in SCE Tariff Schedule No. TOU-8, Special Condition 15, ‘Qualifying Facilities Time Periods.’”
- “1.90 ‘PGC Funds’ means any Public Goods Charge funding as such term is used in CPUC Decision 02-03-056 dated March 21, 2002 (Rulemaking 01-08-028).”
- “1.91 ‘Project’ means Seller’s Generating Facility and Interconnection Facilities required to permit operation of Seller’s Generating Facility in parallel with the SCE electric system or the ISO Grid, as applicable.”
- “1.92 ‘Project Fee’ means the fee paid as described in Section 3.9(a).”
- “1.93 ‘Protective Apparatus’ means all relays, meters, power circuit breakers, synchronizers, and other control devices as shall be agreed to by the Parties in accordance with the requirements of SCE as necessary for proper and safe operation of the Generating Facility in parallel with the SCE electric system and/or the ISO Grid.”
- “1.94 ‘Prudent Electrical Practices’ means those practices, methods, and equipment, as changed from time to time, that are commonly used in prudent electrical engineering and operations to design and operate electrical equipment lawfully and with safety, dependability, efficiency, and economy.”
- “1.95 ‘Qualifying Facility’ has the same meaning as in the Public Utility Regulatory Policies Act of 1978 (16 U.S.C.A § 796 *et seq.*) (“PURPA”) and regulations of the Federal Energy Regulatory Commission implementing PURPA.”
- “1.96 ‘Reference Market-Maker’ means any unaffiliated (a) marketer, trader, or dealer in energy products (1) whose long-term senior unsecured debt is rated BBB- or better by S&P and Baa3 or better by Moody’s, or (2) who is providing sufficient credit support such that the Party obtaining the quote has included, and currently includes, such marketer, trader, or dealer among the companies with which it has management pre-approval to transact for the relevant products, or (b) broker representing quotes from such marketers, traders, or dealers meeting the foregoing criteria.”
- “1.97 ‘Satisfactory PGC Commitment’ means that Seller has obtained from the California Energy Commission or other applicable governmental entity, in a form acceptable to SCE in its sole discretion, a binding commitment without material conditions to pay to Seller or SCE PGC Funds in at the level specified in Special Condition G for all anticipated deliveries from the Generating Facility under this Agreement.”
- “1.98 ‘SCE Creditworthiness’ means that following execution of this Agreement, both of the following have occurred: (i) S&P has issued a credit-rating of at least BBB- for SCE’s senior unsecured debt instruments and (ii) Moody’s has issued a credit rating of at least Baa3 for SCE’s senior unsecured debt instruments.”

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- “1.99 ‘SCE Electric System Integrity’ means the state of operation of the SCE electric system in a manner which is deemed to minimize the risk of injury to persons and/or property and enables SCE to provide adequate and reliable electric service to its customers.”
- “1.100 ‘Site Control’ means that Seller satisfies one or more subcategories of Section 3.9(c)(i)(1).”
- “1.101 ‘Startup Deadline’ means the later of (i) 11:59 p.m. Pacific Time on December 31, 2003; or (ii) the last day of the twelfth (12<sup>th</sup>) calendar month after the month that (a) Seller obtains a Satisfactory PGC Commitment, (b) CPUC Final Approval of the Section 851 Transfer is attained, or (c) SCE Creditworthiness is attained.”
- “1.102 ‘Tariff Schedule No. TOU-8’ means SCE's time-of-use tariff for retail electric service provided to those customers with demand exceeding 500 kW or any successor thereto as updated from time to time by the CPUC, as now in effect or as may hereafter be authorized by the CPUC.”
- “1.103 ‘Term’ has the meaning used in Special Condition E to this Agreement.”
- “1.104 ‘SCE Outage’ has the meaning set forth in Section 3.4(a).”
- “1.105 ‘Station Use’ means energy produced by the Generating Facility that is used to operate the Generating Facility’s auxiliary equipment. The auxiliary equipment includes, but is not limited to, forced and induced draft fans, cooling towers, boiler feed pumps, lubricating oil systems, plant lighting, fuel handling systems, control systems, and sump pumps.”

## **ARTICLE TWO: TRANSACTION TERMS AND CONDITIONS**

Article Two is deleted in its entirety and replaced with the following:

### **2.1 Transaction.**

- (a) The only Transaction contemplated in this Agreement is the sale to SCE from Seller of all Energy and, if applicable, Firm Contract Capacity from the Generating Facility during the Term of this Agreement all as set forth herein. This Agreement is intended to govern only the terms of SCE’s power purchases from Seller and is not intended to provide interconnection, scheduling, distribution, and/or transmission services.
- (b) Seller agrees to dedicate the entire electrical output of the Generating Facilities during the Term of this Agreement, net of Station Use and electrical losses as provide in Section 3.1(a), to SCE and, accordingly, Seller may not sell, deed, grant, convey, transmit, or otherwise provide any energy, capacity, ancillary services, or any other related electricity product, including Environmental Attributes as set forth in Section 3.3,

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or Capacity Attributes associated with the Generating Facility to a party other than SCE. This Agreement does not govern the sales of generation from generators other than the Generating Facility that may be at the same site, so long as such other generators are separately metered.

- (c) The Parties intend that Seller will arrange and pay independently for any and all necessary electrical interconnection, scheduling, distribution and/or transmission (and any regulatory approvals required for the foregoing), sufficient to allow Seller to deliver power to the Delivery Point.”

### **ARTICLE THREE: OBLIGATIONS AND DELIVERIES**

Article Three is deleted in its entirety and replaced with the following:

#### **“3.1 Energy and Capacity; Payments.**

- (a) Seller shall sell and deliver, and Buyer shall purchase and receive, Firm Contract Capacity, if any, and Energy generated by the Generating Facility and delivered to the Delivery Point. SCE will make separate monthly payments to Seller for Firm Contract Capacity, if any, and Energy actually delivered by Seller during the Term of this Agreement. These payments shall be calculated in the manner described below. SCE shall not be obligated to pay Seller for Firm Contract Capacity and Energy that is not delivered as a result of any circumstance, including, without limitation, an Interruption of Deliveries under Section 3.4 or a Force Majeure under Section 3.5, or Firm Contract Capacity and Energy that was not generated by the Generating Facility. Firm Contract Capacity, if any, and Energy delivered by Seller to SCE will be measured by meters installed at the Generating Facility as set forth in Section 3.11 adjusted for (i) transformer and electrical losses to the high voltage side of the Generating Facility substation, if applicable, (ii) electrical losses between the Generating Facility substation and the ISO Grid Delivery Point, if applicable, (iii) application of a Distribution Loss Factor (“DLF”), if applicable, and (iv) electrical losses at and from the Delivery Point as calculated by the GMM assigned to the Delivery Point or the Generating Facility’s resource identification, notwithstanding that title to the Product passes to the Buyer at the Delivery Point. Seller shall provide Buyer access to all meter data both in real time, and at later times as may be required.
- (b) The Firm Contract Capacity, if any, and Energy payments shall be time-differentiated according to the time-of-delivery and season as those terms are defined in Tariff Schedule No. TOU-8, Special Conditions 1 and 15. Each time-of-delivery and seasonal period defined in Tariff Schedule No. TOU-8 is referred to in this Agreement as a “TOD Period.”

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The Energy and capacity allocation factors used to time-differentiate the Firm Contract Capacity and Energy payments shall be the factors approved by the CPUC for use in SCE's standard power purchase contracts with Qualifying Facilities for each TOD Period, as such factors are updated from time-to-time by the CPUC ("Allocation Factor").

- (c) During the Fixed Energy Price Period specified in Special Condition F to this Agreement, Seller will receive a monthly Energy payment equal to the sum of the Period Energy Payments for all TOD Periods in the month. Seller shall not earn an Energy payment prior to the commencement of the Fixed Energy Price Period as set forth in Special Condition F. During the Fixed Energy Price Period, for each TOD Period in the month, a Monthly Period Energy Payment shall be calculated pursuant to the following formula:

$$\text{MONTHLY PERIOD ENERGY PAYMENT} = A \times B \times C \times D \times E$$

Where A = Fixed Energy price specified in Special Condition F to this Agreement in \$/kWh (i.e., \$/MWh/1000).

B = Energy payment Allocation Factor for the TOD Period.

C = Generation-weighted average GMM for all hours of the TOD Period in the month.

D = DLF for Seller's Project (if applicable).

E = Sum of all kWh of energy delivered by Seller to the Delivery Point in all hours of the TOD Period in the month, adjusted for transformer and electrical losses as may be applicable in accordance with Section 3.1(a), but not including the adjustment for GMM which is included as variable C.

- (d) In accordance with Special Condition F (iv), during the remaining Term, if any, Seller will receive a monthly Energy payment equal to the sum of the Period Energy Payments for all TOD Periods in the month. For each TOD Period in the month, a monthly Period Energy Payment shall be calculated pursuant to the formula set forth in Section 3.1(c), above, except that:

A = The price for Energy in the preceding month, multiplied by the most recent average California Consumer Price Index available as of the first day of the then current month, divided by the average California Consumer Price Index available as of the first day of the prior month. The parties shall use reasonable efforts to negotiate a cost of service tariff in lieu of an adjustment tied to the California

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Consumer Price Index, provided that such tariff does not produce payments in excess of the payments that would result from the use of the California Consumer Price Index.

- (e) During the Term, if Seller has a Firm Contract Capacity level greater than zero (0) kW and meets the performance requirements set forth in Section 3.3, below, then Seller will receive a monthly Firm Contract Capacity payment equal to the sum of the Period Capacity Payments for all TOD Periods in the month. Seller shall not earn a Firm Contract Capacity payment prior to the later of the commencement of the Term of this Agreement or the first day of the month following the date of Firm Operation. For each TOD Period in the month, a Monthly Period Capacity Payment shall be calculated pursuant to the following formula:

$$\text{MONTHLY PERIOD CAPACITY PAYMENT} = A \times B \times C \times D$$

Where A = The Annual Capacity Price of \$95.00/kW-year.

B = Capacity Allocation Factor to convert annual capacity prices to monthly payments for the TOD Period.

C = Firm Contract Capacity specified in Special Condition B (i) (or as may be adjusted pursuant to Section 3.3(c) in kW (i.e. MW times 1000).

D = Period Capacity Performance Factor, calculated pursuant to the formula for Capacity Performance Factor as set forth in Section 3.3(a) below for each TOD Period in the month where the variable "D" in the equation in Section 3.3(a) is equal to the TOD Period hours in the month *without* adjustment for SCE Outages or Force Majeure."

"3.2 Security. The terms of security agreements and arrangements between the Parties with respect to Energy and firm capacity payments under this Agreement shall be as set forth in Article Eight, and any other security agreements between the Parties relating to this Agreement, if any, that are attached hereto and made a part hereof as Exhibit B."

"3.3 Seller's Capacity Performance Obligations. If Seller has agreed to deliver Firm Contract Capacity as specified in Special Condition B, then following Firm Operation of the Generating Facility, Seller shall be subject to the following capacity performance requirements:

(a) Seller shall achieve a Capacity Performance Factor in each Peak Month for all on-peak hours (as defined in Tariff Schedule No. TOU-8,

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Special Conditions 1 and 15) of at least eighty percent (80%). Seller shall not be subject to such performance requirements for the remaining hours of the year. For each on-peak period in each Peak Month, the Capacity Performance Factor shall be calculated pursuant to the following formula:

$$\text{CAPACITY PERFORMANCE FACTOR} = [A \times B \times C] / [D \times E]$$

Where A = Sum of all kWh of Energy delivered by Seller to the Delivery Point during the on-peak period during the peak month, adjusted for transformer and electrical losses as may be applicable in accordance with Section 3.1(a) (not including the adjustment for GMM which is included as variable B), limited in each hour of delivery by the level of Firm Contract Capacity.

B = Generation-weighted average GMM for all hours of the TOD Period in the month.

C = DLF for Seller's Project (if applicable).

D = Adjusted Period Hours as defined below.

E = Firm Contract Capacity specified in Special Condition B in kW (i.e., MW times 1000).

Adjusted Period Hours = TOD Period hours in the month  
less SCE Outage hours allowed in accordance with Section 3.4(a)  
less Force Majeure hours allowed in accordance with Section 3.5(b).

- (b) If after the first (1<sup>st</sup>) year of the Term, Seller fails to meet the requirements specified in Section 3.3(a), above, SCE may, in its sole discretion, place Seller on probation for a period of fifteen (15) months (as the same may be extended in SCE's sole discretion due to Force Majeure events during such period) ("Probationary Period"), effective as of the first (1<sup>st</sup>) date of Seller's failure. If Seller fails to meet the requirements specified in Section 3.3(a) at any time during the Probationary Period, then SCE may, in its sole discretion, elect to derate Seller's Firm Contract Capacity in accordance with the provisions of Sections 3.3(e) and (f).
- (c) Seller shall not be entitled to earn a Firm Contract Capacity payment unless and until Seller achieves Firm Operation in accordance with the procedures described in Exhibit A attached hereto. In the event SCE, in applying such procedures, determines that the Generating Facility has the ability to provide and deliver to the Delivery Point a level of firm capacity *less than* the Firm Contract Capacity level specified in Special Condition



B, then SCE may temporarily derate the Firm Contract Capacity in accordance with the procedures set forth in Section 3.3 (e) and such temporarily derated level of Firm Contract Capacity will be used to calculate Firm Contract Capacity Payments under Section 3.2( c). However, at any time during the first (1<sup>st</sup>) year of the Term, Seller may attempt to cure its inability to provide full Firm Contract Capacity, as demonstrated according to the procedures described in Exhibit A. If Seller has not, by the first (1<sup>st</sup>) day of the second (2<sup>nd</sup>) year of the Term, demonstrated its ability to deliver the full Firm Contract Capacity level specified in Special Condition B using the procedures set forth in Exhibit A, then the deration will be permanent and Seller shall be subject to the Capacity Replacement Damage Amount provisions set forth in Section 3.3(f). Moreover, at least once a year after the first (1<sup>st</sup>) year of the Term, at SCE's request, Seller shall demonstrate the ability to provide Firm Contract Capacity in accordance with the procedures attached to this Agreement as Exhibit C (the "Capacity Demonstration Test"). Seller's Capacity Demonstration Test shall be conducted at Seller's expense. If Seller fails to demonstrate the ability to provide Firm Contract Capacity pursuant to the procedures in Exhibit C, the provisions of Sections 3.3(e) and (f) shall apply. The provisions of this Section 3.3(c) shall apply in addition to, and not as any alternative to, the provisions of Section 3.3(b).

- (d) At SCE's request, Seller shall achieve a Capacity Performance Factor (pursuant to the formula set forth in Section 3.3(a)) of one hundred percent (100%) during periods of Emergency. If Seller has previously scheduled an outage, in accordance with the provisions of Section 3.7(c)(xi) and 3.7(c)(xii), coincident with an Emergency, Seller shall make all reasonable efforts to reschedule the outage. If Seller fails to deliver Firm Contract Capacity during an Emergency (other than an Emergency before Firm Operation), and there are no circumstances that in SCE's sole judgment excuse the failure, then the provisions of Sections 3.3(e) and (f) shall apply.
- (e) If Seller fails to (i) meet the requirements specified in Section 3.3(a) during a Probationary Period, (ii) demonstrate the ability to provide Firm Contract Capacity by application of the Initial Firm Operation Demonstration Test procedures set forth in Exhibit A or during a Capacity Demonstration Test pursuant to Section 3.3(c), or (iii) deliver Firm Contract Capacity during an Emergency pursuant to Section 3.3(d), then SCE may, in its sole discretion, derate the Firm Contract Capacity effective immediately upon written Notice to Seller ("Effective Date of Deration"). The new Firm Contract Capacity shall be the highest of (i) the lowest level of capacity actually delivered in any hour during any month of the Probationary Period, (ii) the lowest level of capacity actually delivered in any applicable metering interval of the Initial Firm Operation Demonstration Test, (iii) the lowest level of capacity actually delivered during applicable metering interval of the Capacity Demonstration Test,

(iv) the lowest level of capacity during the period of Emergency, as appropriate, or (v) the level of Firm Contract Capacity that, in SCE's sole judgment, Seller may reasonably be expected to deliver for the remainder of the Agreement Term.

- (f) In the event Seller's Firm Contract Capacity is derated pursuant to Sections 3.3(a) through (e), the Parties acknowledge that the damages sustained by SCE associated with deration would be difficult or impossible to determine and/or that obtaining an adequate remedy would be unreasonably time consuming or expensive, and therefore agree that Seller shall pay SCE as liquidated damages the "Capacity Replacement Damage Amount," which is intended to compensate SCE for its cost to replace the Firm Contract Capacity that will not be purchased by SCE under this Agreement as a result of the deration. It is expressly agreed that Seller shall be required to pay the Capacity Replacement Damage Amount, irrespective of whether SCE actually purchases such replacement capacity by reason of the deration. The Capacity Replacement Damage Amount shall be calculated as of the Effective Date of Deration using the present value over the remainder of the Agreement's Term of the annual difference, if any, of the assumed annual payments for the quantity of capacity that is the difference between the original quantity of Firm Contract Capacity and the quantity of Firm Contract Capacity after the deration (the "Derated Capacity Quantity") based on the going-forward market price of firm capacity,  $A_i$ , (calculated as set forth below), and the annual payments,  $B_i$ , that would be made under this Agreement for the Derated Capacity Quantity for the remainder of the Agreement's term, but for the deration. All present value calculations shall use a discount rate of ten percent (10%) and all annual dollar amounts shall be discounted to the Effective Date of Deration as set forth in Section 3.3(f)(i) below. For purposes of the above calculation, these quantities are determined as follows:

Capacity Replacement Damage Amount = sum of the present value amounts of the annual difference in capacity payments [ $A_i - B_i$ ] for each year for the remainder of the Term of the Agreement after the Effective Date of Deration, provided this present value is greater than zero (0).

Where,

$A_i$  (Going-Forward Market Payments for Derated Capacity Quantity) are the annual payments in dollars that SCE would otherwise have to make to purchase the Derated Capacity Quantity, without regard to whether or not SCE actually procures such replacement capacity, from a source other than Seller for the remainder of the Agreement's Term after the Effective Date of

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Deration. In each such year, the value of  $A_i$  in that year shall be based on the following:

$$A_i = [A_1 - (A_2 + A_3)]/100 * [\text{Derated Capacity Quantity in kW}] * 8760, \text{ where}$$

$A_1$  = Forward market electricity price in \$/kWh, which is the Market Quotation Average Price solicited by or on behalf of SCE for firm SP-15 (7x24) electric energy for the remainder of the Agreement's Term after the Effective Date of Deration,

$A_2$  = Fuel cost component in \$/kWh, which equals  $(F_1 + F_2 + F_3) \times 0.0072$ , where

$F_1$  = Basin gas forward price (\$/MMBtu), which is the Market Quotation Average Price solicited by or on behalf of SCE for natural gas at the San Juan and Permian producing basins for the remainder of the Agreement's Term after the Effective Date of Deration,

$F_2$  = Firm interstate transportation charge (\$/MMBtu), which is the average of El Paso Natural Gas Company's firm tariff rates, plus corresponding fuel charges, to move gas from the San Juan and Permian basins to the California border. For purposes of this calculation, and for all years, SCE shall use the rates in effect on the Effective Date of the Deration, and

$F_3$  = Intrastate transportation charge (\$/MMBtu), which is the sum of the GT-F5 rates pursuant to Southern California Gas Company's Tariff Schedule GT-F5 (including the Interstate Transition Cost Surcharge provided therein) and the rate pursuant to Southern California Gas Company's Tariff Schedule G-MSUR. For purposes of this calculation, SCE shall use the rates in effect on the Effective Date of the Deration for all years,

$A_3$  = Variable Operation and Maintenance Component in \$/kWh, which shall be equal to \$0.002 /kWh in all years for purposes of this calculation;

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and B; (Contract Payments For Derated Capacity Quantity) are the annual capacity payments in dollars that SCE would have made to Seller at the price set forth in Section 3.1(e) of this Agreement to purchase the Derated Contract Quantity for the remaining Term of this Agreement, assuming Seller would have operated at a Period Capacity Performance Factor of 1.0 for all TOD Periods during each of these years.

- (i) For purposes of Section 3.3(f), the calculations described above shall be performed using whole years, assuming, for calculation purposes only, that the annual difference in capacity payments is due and payable to SCE as of July 1<sup>st</sup> of each year, but prorating the year in which the deration occurs based on the Effective Date of the Deration. The sum of the present value amounts of the annual difference in capacity payments for each year shall be calculated as of the Effective Date of Deration using the Excel spreadsheet “XNPV” function. A sample calculation illustrating the determination of the Capacity Replacement Damage Amount is attached as Exhibit D to the Agreement.
- (ii) Seller shall pay SCE the Capacity Replacement Damage Amount within thirty (30) calendar days of Seller’s receipt of SCE’s invoice for the Capacity Replacement Damage Amount calculated under Section 3.3(f). SCE may, but is not required to, collect the Capacity Replacement Damage Amount by withholding it from future payments under Sections 3.1(c), 3.1(d), and/or 3.1 (e).
- (iii) Notwithstanding any deration in accordance with this Section 3.3, Seller shall remain obligated to sell all Energy and Firm Contract Capacity produced by the Project (net of Station Use and electrical losses as provide in Section 3.1(a)) including all Environmental Attributes and Capacity Attributes to SCE as set forth in Section 2.1(b).”

“3.4 Interruption of Deliveries.

- (a) Consistent with ISO protocols and Prudent Electrical Practices, SCE may require Seller to interrupt or reduce deliveries of Energy and, if applicable, capacity, and shall not be obligated to accept or pay for such deliveries under any of the following circumstances (these circumstances are referred to in this Agreement as an “SCE Outage” or “SCE Outages”):
  - (i) when the interruption or reduction is necessary to construct, install, maintain, repair, replace, remove, investigate, or inspect any of SCE’s equipment or any part of the SCE electric system;
  - (ii) when such interruption or reduction is necessary due to congestion, voltage, or stability conditions occurring on the SCE electric system or the ISO Grid, provided that SCE shall not interrupt or reduce deliveries pursuant to this

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Section 3.4 solely in order to take advantage, or make purchases, of less expensive energy from another source; or (iii) if SCE determines, in its sole judgment, that interruption or reduction is necessary because of an Emergency, Forced Outage, Force Majeure, or compliance with Prudent Electrical Practices.

- (b) Notwithstanding any other provision of this Agreement, SCE shall have the right to disconnect the Generating Facility from the SCE system and/or the ISO Grid if at any time SCE determines that, (i) continued parallel operation of the Generating Facility may endanger SCE personnel, (ii) continued parallel operation of the Generating Facility may endanger SCE Electric System Integrity, or the integrity of the ISO Grid, (iii) Seller's Protective Apparatus is not fully in service. The Generating Facility shall remain disconnected until such time as SCE is satisfied that the condition(s) referenced in this Section 3.4 have been corrected.
- (c) Whenever reasonably possible, SCE shall give Seller reasonable Notice of the possibility that interruption or reduction of deliveries may be required.”

“3.5 Effect of Force Majeure.

- (a) Neither Party shall be considered to be in default in the performance of any of its obligations set forth in this Agreement, except for obligations to pay money, when and to the extent failure of performance shall be caused by a Force Majeure.
- (b) If either Party because of a Force Majeure is rendered wholly or partly unable to perform its obligations under this Agreement (the “Claiming Party”), the Claiming Party shall be excused from whatever performance is affected by the Force Majeure to the extent so affected, provided that:
  - (i) The Claiming Party, within two (2) weeks after the initial occurrence of the claimed Force Majeure, gives the other Party written Notice describing the particulars of the occurrence;
  - (ii) The Claiming Party, within thirty (30) calendar days of providing Notice of occurrence of the Force Majeure under Section 3.5(b)(i) above, provides evidence reasonably sufficient to establish that the occurrence constitutes a Force Majeure as defined in this Agreement;
  - (iii) The suspension of performance is of no greater scope and of no longer duration than is required by the Force Majeure;
  - (iv) The Claiming Party uses its best efforts to remedy its inability to perform. This subsection shall not require the settlement of any

strike, walkout, lockout or other labor dispute on terms which, in the sole judgment of the Party involved in the dispute, are contrary to its interest. It is understood and agreed that the settlement of strikes, walkouts, lockouts or other labor disputes shall be at the sole discretion of the Party having the difficulty;

- (v) When the Claiming Party is able to resume performance of its obligations under this Agreement, the Claiming Party shall give the other Party prompt written Notice to that effect; and
- (vi) In the event that either Party's ability to perform cannot be corrected when the Force Majeure is caused by the actions or inactions of legislative, judicial, or regulatory agencies or other proper authority, this Agreement may, upon the mutual agreement of the Parties, be amended to comply with the legal or regulatory change which caused the nonperformance.”

### “3.6 Payment and Billing.

- (a) SCE shall mail to Seller not later than thirty (30) calendar days after the end of each monthly billing period: (i) a statement showing the Energy and, if applicable, Firm Contract Capacity delivered to SCE during each TOU Period during the monthly billing period; (ii) SCE's computation of the amount due Seller; and (iii) SCE's check in payment of said amount. If within thirty (30) calendar days of receipt of the statement Seller does not make a report in writing to SCE of an error, Seller shall be deemed to have waived any error in SCE's statement, computation and payment, and they shall be considered correct and complete.
- (b) Seller shall pay any amount owing for electric service provided by SCE to Seller in accordance with applicable tariff schedules. SCE reserves the right to apply amounts that would otherwise be due Seller under this Agreement for the purchase of Energy and, if applicable, Firm Contract Capacity as an offset in payment of any bill for electric service provided by SCE to Seller at the Generating Facility or any bill to Seller for any charges under this Agreement owing and unpaid by Seller. Nothing in this Section 3.6 shall limit SCE's rights under applicable tariff schedules.
- (c) In the event adjustments to payments are required as a result of inaccurate meters, SCE shall use the corrected measurements, including those described in Section 3.11(b)(ii) if applicable, to recompute the amount due from SCE to Seller for the capacity and Energy delivered under this Agreement during the period of inaccuracy. Any refund due and payable to SCE resulting from inaccurate metering shall be made within thirty (30) calendar days of written Notice to Seller by SCE of the amount due. Any additional payment to Seller resulting from inaccurate metering shall be made within thirty (30) calendar days of SCE's recomputation of the

amount due from SCE.”

“3.7 Generating Facility.

Seller shall all times during the Term of this Agreement own or Lease the Generating Facility. If at any time during the Term of this Agreement, Seller does not own or Lease the Generating Facility, it shall be an Event of Default under Article Five hereof. Moreover, during the entire Term of this Agreement, the Generating Facility shall consist solely of the ERR Type set forth in Section 1.72.F. If at any time during the Term of this Agreement the Generating Facility consists of generators employing a technology other than a single ERR type set forth in Section 1.72.F, it shall be an Event of Default under Article Five.

(a) Design:

Seller, at no cost to SCE, shall be responsible to:

- (i) Design and construct the Generating Facility.
- (ii) Acquire all permits and other approvals necessary for the construction, operation, and maintenance of the Generating Facility.
- (iii) Complete all environmental impact studies necessary for the construction, operation, and maintenance of the Generating Facility.
- (iv) Furnish and install the relays, meters, power circuit breakers, synchronizer, and other control and Protective Apparatus as SCE, in its sole judgment, determine to be reasonably necessary for proper and safe operation of the Generating Facility in parallel with the SCE electric system.
- (v) In the event that construction of Seller’s Generating Facility has not commenced upon the date of execution of this Agreement, at SCE’s request, Seller shall provide to SCE Seller's electrical specifications and design drawings pertaining to Seller's Generating Facility for SCE's review prior to finalizing design of the Generating Facility and before beginning construction work based on such specifications and drawings. Seller shall provide to SCE reasonable advance written Notice of any changes in Seller's Generating Facility and provide to SCE specifications and design drawings of any such changes for SCE's review and approval.
- (vi) The total installed capacity of Seller's Generating Facility shall not exceed the Net Nameplate Capacity set forth in Special Condition A (i) (or any reduced Net Nameplate Capacity established pursuant

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Special Condition A (ii)) of this Agreement. Any installation at the Project by Seller of additional Net Nameplate Capacity after Firm Operation, without the written consent of SCE, shall constitute an Event of Default.

- (b) SCE shall have the right to:
  - (i) Review the design of the Generating Facility's electrical system. Such review may include, but not be limited to, the Generating Facility, governor, excitation system, synchronizing equipment, protective relays, and neutral grounding.
  - (ii) Notify Seller in writing of the results of the review within thirty (30) calendar days of SCE's receipt of all specifications for the Generating Facility, including a description of any flaws perceived by SCE in the design.
  - (iii) Request modifications to the design of the Generating Facility's electrical system. Such modifications shall be required if necessary, in SCE's sole judgment, to maintain SCE or ISO Electric System Integrity when the Generating Facility is operating in parallel with the SCE electric system.
- (c) Operation and Maintenance:
  - (i) Seller shall operate the Generating Facility in accordance with Prudent Electrical Practices.
  - (ii) Seller shall operate the Generating Facility to generate such reactive power or provide individual power factor correction as necessary to maintain voltage levels and reactive power support as may be required by either SCE or ISO in its sole judgment. Seller shall not deliver excess reactive power to SCE or ISO unless otherwise agreed upon by the Parties. If Seller fails to provide reactive power support, SCE may do so at Seller's expense.
  - (iii) The Generating Facility shall be operated with all of Seller's Protective Apparatus in service whenever the Generating Facility is connected to, or is operated in parallel with, the SCE electric system or the ISO Grid. Any deviation shall require SCE's or ISO's consent, as the case may be.
  - (iv) Seller shall maintain operating communications with either the SCE Designated Switching Center identified in Special Condition D or the SCE Grid Operations Center, as requested by SCE. The Grid Operations Center can be reached at any time at 626-302-3285 or 626-302-3205. The operating communications shall include, but not be limited to, system parallel operation or



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separation, scheduled and unscheduled outages, equipment clearances, protective relay operations, levels of operating voltage and reactive power, and daily capacity and generation reports. For coordination of switching and SCE grid operations, the supplier may be referred to the Designated Switching Center.

- (v) Seller shall keep a daily operations log for the Generating Facility which shall include information on availability, maintenance outages, circuit breaker trip operations requiring a manual reset, and any significant events related to the operation of the Generating Facility, including but not limited to: real and reactive power production; changes in operating status and protective apparatus operations; and any unusual conditions found during inspections. Changes in setting shall also be logged for Seller's generator(s) if it is "block-loaded" to a specific kW capacity.
- (vi) Seller shall maintain complete daily operations records applicable to the Generating Facility, including but not limited to, fuel consumption (including all records typically maintained by Qualifying Facilities to demonstrate compliance with natural gas use limitations contained in regulations of the Federal Energy Regulatory Commission implementing PURPA, including 18 C.F.R. § 292.204(b)(2) as it is in effect on the date of execution of this Agreement), maintenance performed, kilowatts, kilovars and kilowatt-hours generated, and settings or adjustments of the generator control equipment and protective devices. Such information shall be available to SCE upon twenty (20) calendar days' written request.
- (vii) If Seller's Generating Facility has a Net Nameplate Capacity greater than one (1) megawatt and up to and including ten (10) megawatts, SCE may require Seller to report to the Designated Switching Center, twice a day at agreed upon times for the current day's operation, the hourly readings of capacity in kW delivered and the Energy in kWh delivered since the last report.
- (viii) If Seller's Generating Facility has a Net Nameplate Capacity greater than ten (10) megawatts, SCE shall provide, at Seller's expense, telemetering equipment.
- (ix) SCE or ISO may require Seller, at Seller's expense, to demonstrate to SCE's satisfaction the correct calibration and operation of Seller's Protective Apparatus at any time SCE or ISO has reason to believe that said Protective Apparatus may impair SCE's or ISO's Electric System Integrity.

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- (x) Seller shall maintain the Generating Facility in accordance with Prudent Electrical Practices.
- (xi) Seller shall notify SCE in writing (1) by January 1, May 1, and September 1 of each year during the Term of this Agreement, of the estimated scheduled maintenance and estimated daily Energy and capacity deliveries for the following four month period, and (2) by September 1 of each year during the Term of this Agreement, of the estimated scheduled maintenance and estimated daily Energy and capacity deliveries for the following calendar year.
  - (xii) Seller shall provide SCE written Notice of actual outages, whether scheduled or forced, with as much notice as practicable. Seller shall notify SCE of any scheduled outages by providing at least twenty-four (24) hours Notice in writing and in addition by use of SCE's automated telephone-based Interactive Voice Response System (IVR), or its replacement, which can be accessed at 626-302-1145.
  - (xiii) Seller shall install and maintain, at its sole expense, all communication, metering, telemetering, and associated equipment deemed necessary by the ISO.
- (d) No Representation by SCE:

Any review by SCE of the design, construction, operation, or maintenance of the Project is solely for SCE's information. By making such review, SCE makes no representation as to the economic and technical feasibility, operational capability, or reliability of the Project. Seller shall in no way represent to any third party that any such review by SCE of the Project, including, but not limited to, any review of the design, construction, operation, or maintenance of the Project by SCE, is a representation by SCE as to the economic and/or technical feasibility, operational capability, or reliability of the Generating Facility or the Project. Seller is solely responsible for economic and technical feasibility, operational capability, and reliability of the Generating Facility and the Project."

3.8 Transmission and Scheduling.

Seller shall have sole responsibility for arranging and paying for transmission service to the Delivery Point and shall Schedule or arrange and pay for Scheduling services for that purpose with its Transmission Providers in accordance with the practice of the Transmission Provider."

3.9 Project Fee and Milestones.

(a) Project Fee:

Within fifteen (15) calendar days after CPUC Final Approval, Seller shall post and thereafter maintain a Project Fee equal to ten dollars (\$10) for each kilowatt of Net Nameplate Capacity of the Generating Facility specified in Special Condition A (i). SCE may in its sole discretion either extend the fifteen (15) day deadline to pay or waive the requirement that payment be made. The Project Fee shall be held by SCE as security for Seller maintaining adequate progress in the development of the Generating Facility. The Project Fee shall be established by either a cash deposit or by an irrevocable Letter of Credit with terms and conditions acceptable to SCE in its sole judgment. If Seller establishes the Project Fee by means of an irrevocable Letter of Credit, such Letter of Credit shall provide for the disbursement of the Project Fee in accordance with Section 3.9(b), below.

(b) Disbursement of Project Fee:

SCE shall disburse the Project Fee in the following manner, and shall provide Notice of such disbursement to Seller as set forth below.

- (i) The Project Fee shall be returned to Seller if: (1) the Generating Facility begins Initial Operation at the Net Nameplate Capacity level initially designated in Special Condition A (i) on or before the Startup Deadline, (2) this Agreement terminates because CPUC Final Approval is not obtained and SCE, in its sole discretion, does not waive CPUC Final Approval, (3) this Agreement terminates because Approval of Site Transfer is not obtained, or (4) either Party exercises its termination rights in accordance with Article Twelve.
- (ii) Notwithstanding the above, in the event that Seller fails to complete and/or comply with each Project Development Milestone and Development Warranty set forth below, and subject to Section 3.9(c)(ii) below, Seller shall forfeit the entire Project Fee to SCE, including any interest earned thereon, and the Agreement shall be subject to termination under Article Five: Events of Default: Remedies. Nothing in this Section 3.9 shall limit SCE's remedies at law and/or under this Agreement regarding any failure by Seller to complete each Project Development Milestone.

(c) Milestones/Development Warranties

(i) Site Control/Lease:

- (1) Seller warrants that it either possessed Site Control of the site described in Special Condition A (iii) or that it was the lessee under a Lease as of the date Seller executed this

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Agreement and that Seller shall maintain continuous Site Control or the Lease will continue in effect for the Term of this Agreement under at least one of the following possessory interests:

- Seller's fee ownership of the location of Seller's Generating Facility specified in Special Condition A (iii);
  - Seller is the lessee under a Lease;
    - Seller's leasehold interest in the location specified in Special Condition A (iii), which leasehold interest shall specifically include the right to construct and operate the Generating Facility at such location during the Term of this Agreement;
    - Seller's exclusive and irrevocable contractual right to construct and operate the Generating Facility at the location specified in Special Condition A (iii), during the Term of this Agreement;
  - Seller's exclusive and irrevocable option to obtain any of the rights described above. This alternative shall only constitute Site Control prior to the commencement of construction of Seller's Generating Facility;
  - Other form of Site Control acceptable to SCE in its sole judgment; or
    - Seller's right to acquire from PG&E the site of the Kern Power Plant.
- (2) Seller shall provide SCE with prompt written Notice of any change in the status of Seller's Site Control.
- (3) If, at any time during the Term of this Agreement, SCE believes in its sole judgment that Seller has lost Site Control, SCE may send Seller a written request for confirmation of Site Control. Whether or not SCE has sent Seller a written request as set forth in the preceding sentence, if Seller does not have Site Control for the full

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Term of this Agreement, Seller shall advise SCE in writing at least sixty (60) calendar days before Site Control is scheduled to expire and Seller shall provide to SCE, no later than twenty (20) calendar days before Seller's Site Control is scheduled to expire, evidence that Seller's Site Control has been renewed or extended. If Seller fails to provide evidence to SCE's sole satisfaction within twenty (20) calendar days before Site Control was originally set to expire that Seller's Site Control has been renewed or extended, or Seller fails to provide SCE with confirmation to SCE's sole satisfaction of Site Control within twenty (20) calendar days of a written request for confirmation of same, then SCE may, at any time after such twenty (20) day period, declare an Event of Default and terminate this Agreement in accordance with Article Five: Events of Default: Remedies.

(ii) Initial or Firm Operation:

Seller shall achieve Initial Operation of the full Net Nameplate Capacity set forth in Special Condition A (i) on or before the Startup Deadline. In the event Seller achieves Initial Operation at a reduced Net Nameplate Capacity pursuant to the provisions of Special Condition A (ii), and Seller does not demonstrate its ability to deliver the full Net Nameplate Capacity by the first (1<sup>st</sup>) day the second (2<sup>nd</sup>) year of the Term in accordance with the protocols described in Exhibit A, Seller shall forfeit that portion of the Project Fee equal to \$10 per kW, multiplied by the kW of Net Nameplate Capacity that was reduced pursuant to Special Condition A(ii) ("Reduced Net Nameplate Capacity"), plus any interest earned on the Project Fee paid by Seller in respect of the Reduced Net Nameplate Capacity. Subject to Seller's completion of all other Project Milestones and compliance with all other warranties set forth in this Section 3.9, Seller shall be entitled to a return of the balance of the Project Fee."

"3.10 Electric Lines and Associated Easements.

- (a) SCE shall, as it deems necessary or desirable, and at Seller's expense, build electric lines, facilities, and other equipment, both overhead and underground, on and off the site of Seller's Project, for the purpose of effectuating the terms of this Agreement. The physical location of such electric lines, facilities, and other equipment as may be located on the site of Seller's Project shall be determined by agreement of the Parties.

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- (b) Seller shall reimburse SCE for the cost of acquiring property rights at the site of Seller's Project as may be required by SCE to meet its obligations under this Agreement.
- (c) Seller shall grant to SCE, without cost to SCE, and by an instrument of conveyance, acceptable to SCE in its sole judgment, rights of way, easements, and other property interests necessary to construct, reconstruct, use, maintain, alter, add to, enlarge, repair, replace, inspect, and remove, at any time, the electric lines, facilities or other equipment, both overhead and underground, which are required by SCE to effectuate the terms of this Agreement. Seller shall also provide the rights of ingress and egress at all reasonable times necessary for SCE to perform its duties generally and the activities contemplated in this Agreement.
- (d) The electric lines, facilities, or other equipment referred to in this Section 3.10 installed by SCE on or off the site of Seller's Project shall be and remain the property of SCE.
- (e) SCE shall have no obligation to Seller for any delay in the commencement or cancellation of Seller's sales under this Agreement due to inability to build required facilities as set forth in Section 3.10(a) above, or to acquire a satisfactory right of way, easements, or other property interests."

“3.11 Metering.

- (a) If Seller's Transmission Provider requires use of an ISO revenue quality meter and such meter has been installed at the Project, then SCE may in its sole discretion elect to use the readings from such meter under this Agreement, including without limitation, for payment purposes. If SCE elects to use such a meter, Seller shall grant SCE reasonable access to the meter for meter readings, testing, and any purpose necessary to effectuate this Agreement. Seller shall provide Buyer access to all meter data both in real time, and at later times as may be required.
- (b) If an ISO revenue quality meter is not installed at the Project as contemplated in Section 3.11(a) or SCE elects, in its sole judgment, not to use the readings from such meter, then SCE shall provide, own, and maintain meters at Seller's sole expense in accordance with SCE's Tariff Rules Nos. 17 and 21, as such tariffs may be modified from time-to-time by the CPUC and the following Sections shall apply:
  - (i) SCE's meters shall be sealed and the seals shall be broken only when the meters are to be inspected, tested, or adjusted by SCE. Seller shall be given reasonable Notice of testing and, to the extent reasonably feasible, shall have the right to have a representative present on such occasions. SCE may inspect and test all meters upon their installation and annually thereafter. At Seller's request

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and expense, SCE shall inspect or test a meter more frequently in accordance with SCE's Tariff Rule 17.

- (ii) SCE shall repair, adjust, or replace any metering equipment that SCE determines, in its sole judgment, to be inaccurate or defective, such that the metering accuracy of said equipment shall be within one (1) percent. If a meter fails to register, or if the measurement made by a meter during a test varies by more than one (1%) percent from the metering standard used in the test, an adjustment shall be made correcting all measurements made by the inaccurate meter for (A) the actual period during which inaccurate measurements were made, if the period can be determined, or if not (B) the period immediately preceding the test of the meter equal to one-half the time from the date of the last previous test of the meter, provided that the period covered by the correction shall not exceed six (6) months.”

“3.12 Real Property Rights.

- (a) SCE shall have the right of ingress and egress with respect to Seller's Project at all reasonable hours for any purpose reasonably connected with this Agreement or the exercise of any and all rights secured to SCE by law or its tariff schedules and rules on file with the CPUC.
- (b) Nothing in this Section 3.12 shall be construed to require SCE to acquire land rights through condemnation or any other means for Seller either inside or outside of SCE's service territory, unless SCE shall in its sole discretion elect to do so.”

“3.13 Environmental and Capacity Attributes.

- (a) The Environmental and Capacity Attributes shall not in any way be unbundled or otherwise separated from the capacity and Energy generated by the Generating Facility, except in SCE's sole discretion, so that the purchase of Energy and, if applicable, capacity, by SCE under this Agreement shall entitle SCE to all Environmental and Capacity Attributes associated with the Generating Facility.
- (b) In order to take advantage of the actual or perceived value of the Environmental and Capacity Attributes, SCE shall be given sole title to all Environmental and Capacity Attributes associated with the Generating Facility and will have the exclusive right, at any time or from time-to-time during the Term of this Agreement, to sell, convey, transfer, allocate, designate, award, or otherwise provide any and all such Environmental and Capacity Attributes to third parties.”

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#### **ARTICLE FOUR: REMEDIES FOR FAILURE TO DELIVER/RECEIVE**

Article Four is deleted in its entirety.

#### **ARTICLE FIVE: EVENTS OF DEFAULT: REMEDIES**

Section 5.1(a) is deleted in its entirety.

Section 5.1(c) is amended to read as follows: “the failure to perform any material covenant or obligation set forth in this Agreement (except to the extent constituting a separate Event of Default or to the extent excused by a Force Majeure) if such failure is not remedied within five (5) Business Days after written Notice.”

A new section 5.1(i) is added as follows:

- “(i) subject to Seller’s assignment rights under this Agreement, if at any time during the Term of this Agreement, Seller fails to retain ownership or the Lease of the Generating Facility and does not remedy such failure within fifteen (15) Business Days after written Notice;”

Section 5.1(g) is deleted in its entirety.

A new section 5.1(j) is added as follows:

- “(j) with respect to Seller, excluding periods of Force Majeure, if at any time during the Term of this Agreement, Seller fails to deliver in any six (6) month period, at least the number of kilowatt-hours derived from the product of four hundred and thirty-eight (438) hours times the Net Nameplate Capacity (as that Net Nameplate Capacity may have been reduced pursuant to Special Condition E), times the ERR-Specific factor applicable to the Project, and Seller fails to demonstrate to SCE’s satisfaction, within five (5) Business Days after written Notice from SCE, a legitimate reason for Seller’s failure to deliver;”

A new section 5.1(k) is added as follows:

- “(k) Seller fails to complete or maintain each Project Development Milestone or to possess and maintain continuous Site Control in the time and manner provided in Section 3.9(c);”

A new section 5.1(l) is added as follows:

- “(l) if at any time during the Term of this Agreement, Seller delivers or attempts to deliver to the Delivery Point for sale under this Agreement electrical power that was not generated by the Generating Facility;”

A new section 5.1(m) is added as follows:



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“(m) if at any time during the Term of this Agreement, the Generating Facility consists of an ERR Type different than that specified in Section 1.72.F. of this Agreement;”

A new section 5.1(n) is added as follows:

“(n) if at any time during the Term of this Agreement, SCE has elected to have PGC Funds sent to it by Seller under Section 12.4 and Seller fails to do so within five (5) Business Days of Seller’s receipt of same;”

A new section 5.1(o) is added as follows:

“(o) if at any time during the Term of this Agreement, Seller fails to maintain and/or make available to SCE natural gas use records as provided in Section 3.7(c)(vi); or”

A new section 5.1(p) is added as follows:

“(p) if at any time during the Term of this Agreement, either Party assigns its rights or delegates its duties under this Agreement in violation of Section 10.5.”

Section 5.2 is deleted in its entirety and replaced with the following:

“5.2 If an Event of Default with respect to a Defaulting Party shall have occurred and has not been cured within thirty (30) calendar days or, if specified, such other cure period provided in the applicable section(s) of this Agreement, the other Party (the “Non-Defaulting Party”) shall have the right to (i) designate a day, no earlier than the day the applicable Notice of the Event of Default is effective and no later than twenty (20) calendar days after the Notice is effective, as an “Early Termination Date,” and (ii) to suspend performance under the Agreement.”

Section 5.3 is deleted in its entirety.

Section 5.4 is deleted in its entirety and replaced with the following:

“5.4 As soon as practicable after an Early Termination Date is declared, the Non-Defaulting Party shall provide Notice to the Defaulting Party of the sum of all amounts owed by the Defaulting Party to the Non-Defaulting Party under the Agreement, less any amounts owed by the Non-Defaulting Party to the Defaulting Party (the “Termination Payment”). If the Termination Payment is positive, the Defaulting Party shall pay such amount to the Non-Defaulting Party within ten (10) Business Days after the Notice is provided. If the Termination Payment is negative (i.e., the Non-Defaulting Party owes the Defaulting Party more than the Defaulting Party owes the Non-Defaulting Party) then the Non-Defaulting Party shall

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pay such amount to the Defaulting Party within thirty (30) calendar days after the Notice is provided.”

Section 5.6 is deleted in its entirety.

Section 5.7 is deleted in its entirety and replaced with the following:

“5.7 Notwithstanding any other provision of this Master Agreement, if an Event of Default with respect to a Defaulting Party shall have occurred and has not been cured within ten (10) calendar days or other cure period provided in the applicable section(s) of this Agreement, the Non-Defaulting Party, upon written Notice to the Defaulting Party, shall, in addition to any other remedy available at law or in equity, have the right to suspend performance under the Agreement; provided, however, in no event shall any such suspension continue for longer than ten (10) business days unless an Early Termination Date shall have been declared and Notice thereof pursuant to Section 5.2 given.

## **ARTICLE SIX: PAYMENT AND NETTING**

Article Six is deleted in its entirety.

## **ARTICLE SEVEN: LIMITATIONS**

The third sentence of Article Seven shall be amended to read as follows:

“FOR BREACH OF ANY PROVISION FOR WHICH AN EXPRESS REMEDY OR MEASURE OF DAMAGES IS PROVIDED, SUCH EXPRESS REMEDY OR MEASURE OF DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY, THE OBLIGOR’S LIABILITY SHALL BE LIMITED AS SET FORTH IN SUCH PROVISION AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED, UNLESS THE PROVISION IN QUESTION PROVIDES THAT THE EXPRESS REMEDIES ARE IN ADDITION TO OTHER REMEDIES THAT MAY BE AVAILABLE.”

The first clause of the fifth sentence of Article Seven shall be amended to read,

“UNLESS EXPRESSLY HEREIN PROVIDED, AND SUBJECT TO THE PROVISIONS OF SECTION 10.4 (INDEMNITY), . . .”

## **ARTICLE EIGHT: CREDIT AND COLLATERAL REQUIREMENTS**

Sections 8.1(c), 8.1(d), 8.2(c) and 8.2(d) shall be deleted in their entirety and a new Section 8.4 and 8.5 shall be added as follows:

“8.4 Performance Assurance Owed by Seller to SCE.

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- (a) During the Term of the Agreement, SCE shall calculate the Seller's Performance Assurance Amount as set forth in Section 8.4(c) below. If at any time and from time to time during the Term of this Agreement (and notwithstanding whether an Event of Default has occurred), the Seller's Performance Assurance Amount less any Performance Assurance already posted with SCE by Seller is greater than the corresponding Seller's Collateral Threshold, then upon written Notice by SCE, Seller shall provide Performance Assurance as set forth in Section 8.4(b), below, within three (3) Business Days of the request. However, requests under this Section 8.4(a) can be made no more frequently than once per week.
- (b) If the Seller's Performance Assurance Amount calculated pursuant to Section 8.4(c) below, less any Performance Assurance already posted with SCE by Seller, is positive, Seller shall deliver to SCE Performance Assurance in the amount of the Seller's Performance Assurance Amount less the Seller's Collateral Threshold and less any Performance Assurance already posted with SCE by Seller. In each case, the amount of Performance Assurance to be delivered will be rounded upwards for any fractional amount to the next Seller Rounding Amount, as applicable. Under no circumstance shall the Seller's Performance Assurance Amount used in the above calculation exceed \$5,000,000 (or \$10,000,000 upon the commencement of operation of an Expanded Facility pursuant to the provisions of Article Thirteen).
- (c) The Seller's Performance Assurance Amount shall be equal to the sum of the present value amounts as of the date of such calculation of the annual Performance Assurance Amounts ("PAA<sub>i</sub>") offset by any amount owed by SCE, all as set forth below, over the remaining Term of the Agreement discounted in accordance with Section 8.4(d). Any negative Performance Assurance Amount ("PPA") shall be set equal to zero (0).

$$PAA = [(\text{Sum of the present value amounts of } PAA_i \text{ for the remaining Term of the Agreement}) - (A)], \text{ where}$$

$$PAA_i = \{[P_i - P_0] \times B \times C\}, \text{ for each calendar year, or partial calendar year "i" remaining under the Term of the Agreement as of the day the PAA is being computed, where}$$

$$A = \text{All amounts owed by SCE to Seller less any amounts owed by Seller to SCE under this Agreement, but not yet paid, whether or not such amounts are billed or due, for performance already provided pursuant to the Agreement.}$$

$$i = \text{Each calendar year or partial calendar year remaining under the Term of the Agreement.}$$

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$P_0$  = Performance Assurance threshold price equal to the Fixed Energy Price as specified in Special Condition F (iii) plus \$10.84 per MWh.

$P_i$  = The Market Quotation Average Price \$ per MWh for SP-15 (7 x 24) energy for each calendar year or partial calendar year “i” remaining on the Term of the Agreement *as of the day the PAA is being computed*. However, when i = the current year, the Market Quotation Average Price will be for the calendar year i + 1 in \$ per MWh. In the last year, the price will be year i – 1.

B = The Firm Contract Capacity in MW (i.e., kW/1000) times the number of hours in the year (or remaining in the year, if “i” is the current year, or remaining in the Agreement if “i” is the last year of the Agreement).

C = 0.80 [the Generating Facility’s Capacity Factor for the purposes of calculating Performance Assurance].

- (d) For purposes of this Section 8.4, the calculations described above shall be performed using whole years, with partial years rounded to the nearest whole year (but not less than one (1) year), assuming that the annual amount of Performance Assurance Amount is due as of July 1<sup>st</sup> of each whole year and on the midpoint date of any partial year. The present value of the annual amounts for each year shall be calculated using a discount rate of ten (10) percent and discounted to the date that the Performance Assurance Amount is being calculation using the Excel spreadsheet “XNPV” function. A sample calculation illustrating determination of the Performance Assurance Amount is attached as Exhibit E to the Agreement.
- (e) Any Performance Assurance due to SCE by Seller under Sections 8.4(a) and (b), above, will be delivered or adjusted within three (3) Business Days of the date that the calculation of the Performance Assurance Amount is delivered to Seller under Section 8.4(a). In the event that Seller fails to provide the Performance Assurance within three (3) Business Days of the date such calculation is delivered to the Seller under Section 8.4(a), then an Event of Default under Article Five shall be deemed to have occurred and the Non-Defaulting Party will be entitled to the remedies set forth in Article Five.”

“8.5 Performance Assurance Owed by SCE to Seller.

- (a) During the Term of the Agreement, Seller shall calculate the SCE’s Performance Assurance Amount as set forth in Section 8.5 (c) below. If at

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any time and from time to time during the Term of this Agreement (and notwithstanding whether an Event of Default has occurred), SCE's Performance Assurance Amount less any Performance Assurance already posted with Seller by SCE is greater than the corresponding SCE's Collateral Threshold, then upon written Notice by Seller, SCE shall provide Performance Assurance as set forth in Section 8.5(b), below, within three (3) Business Days of the request. However, requests under this Section 8.5(a) can be made no more frequently than once per week.

- (b) If the SCE's Performance Assurance Amount calculated pursuant to Section 8.5(c) below, less any Performance Assurance already posted with Seller by SCE, is positive, SCE shall deliver to Seller Performance Assurance in the amount of the SCE's Performance Assurance Amount less the SCE's Collateral Threshold and less any Performance Assurance already posted with Seller by SCE. In each case, the amount of Performance Assurance to be delivered will be rounded upwards for any fractional amount to the next SCE Rounding Amount, as applicable. Under no circumstance shall the SCE's Performance Assurance Amount used in the above calculation exceed \$5,000,000 (or \$10,000,000 upon the commencement of operation of an Expanded Facility pursuant to the provisions of Article Thirteen).
- (c) The SCE's Performance Assurance Amount shall be equal to the sum of the present value amounts as of the date of such calculation of the annual Performance Assurance Amounts ("PAA<sub>i</sub>") offset by any amount owed by Seller, all as set forth below, over the remaining Term of the Agreement discounted in accordance with Section 8.5(d). Any negative Performance Assurance Amount ("PPA") shall be set equal to zero (0).

$$PAA = [A + (\text{Sum of the present value amounts of } PAA_i \text{ for the remaining Term of the Agreement})], \text{ where}$$

$$PAA_i = \{[P_0 - P_i] \times B \times C\}, \text{ for each calendar year, or partial calendar year "i" remaining under the Term of the Agreement as of the day the PAA is being computed, where}$$

A = All amounts owed by Seller to SCE less any amounts owed by SCE to Seller under this Agreement, but not yet paid, whether or not such amounts are billed or due, for performance already provided pursuant to the Agreement.

i = Each calendar year or partial calendar year remaining under the Term of the Agreement.

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$P_0$  = Performance Assurance threshold price equal to the Fixed Energy Price as specified in Special Condition F (iii) minus \$6.00 per MWh.

$P_i$  = The Market Quotation Average Price \$ per MWh for SP-15 (7 x 24) energy for each calendar year or partial calendar year “i” remaining on the Term of the Agreement *as of the day the PAA is being computed*. However, when i = the current year, the Market Quotation Average Price will be for the calendar year i + 1 in \$ per MWh. In the last year, the price will be year i – 1.

B = The Firm Contract Capacity in MW (i.e., kW/1000) times the number of hours in the year (or remaining in the year, if “i” is the current year, or remaining in the Agreement if “i” is the last year of the Agreement).

C = 0.80 [the Generating Facility’s Capacity Factor for the purposes of calculating Performance Assurance].

- (d) For purposes of this Section 8.5, the calculations described above shall be done using whole years, with partial years rounded to the nearest whole year (but not less than one (1) year) assuming that the annual amount of Performance Assurance Amount is based on a date of July 1<sup>st</sup> of each whole year and on the midpoint date of any partial year. The present value of the annual amounts for each year shall be calculated using a discount rate of ten percent (10%) and discounted to the date that the Performance Assurance Amount is being calculation using the Excel spreadsheet “XNPV” function. A sample calculation illustrating determination of the Performance Assurance Amount is attached as Exhibit E to the Agreement.
- (e) Any Performance Assurance due to a Seller by SCE under Sections 8.5. (a) and (b), above, will be delivered or adjusted within three (3) Business Days of the date that the calculation of the Performance Assurance amount is delivered to SCE under Section 8.5(a). In the event that SCE fails to provide the Performance Assurance within three (3) Business Days of the date such calculation is delivered to SCE under Section 8.5(a), then an Event of Default under Article Five shall be deemed to have occurred and the Non-Defaulting Party will be entitled to the remedies set forth in Article Five.”

## **ARTICLE NINE: GOVERNMENTAL CHARGES**

Section 9.2 is deleted in its entirety and replaced with the following:

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“9.2 Governmental Charges.

Seller shall pay or cause to be paid all taxes imposed by any governmental authority (“Governmental Charges”) on or with respect to the Product or the Transaction arising prior to the Delivery Point, including but not limited to, *ad valorem* taxes and other taxes attributable to the Project, land, land rights or interests in land for the Project. SCE shall pay or cause to be paid all Governmental Charges on or with respect to the Product or the Transaction at and from the Delivery Point. In the event Seller is required by law or regulation to remit or pay Governmental Charges which are SCE’s responsibility hereunder, SCE shall promptly reimburse Seller for such Governmental Charges. If SCE is required by law or regulation to remit or pay Governmental Charges which are Seller’s responsibility hereunder, SCE may deduct such amounts from payments to Seller made pursuant to Sections 3.1(c), 3.1(d) and/or 3.1(e); if SCE elects not to deduct such amounts from Seller’s payments, Seller shall promptly reimburse SCE for such amounts upon request. Nothing shall obligate or cause a Party to pay or be liable to pay any Governmental Charges for which it is exempt under the law.”

A new Section 9.3 is added as follows:

“9.3 Providing Information.

Seller and/or SCE shall provide information concerning the Project to any requesting taxing authority.”

**ARTICLE TEN: MISCELLANEOUS**

Section 10.1 is deleted in its entirety and replaced by the following:

“10.1 Term of Agreement.

Subject to Article Eleven, the Agreement’s Term commences on the date specified in Special Condition E to this Agreement and, unless terminated sooner pursuant to another provision of the Agreement, shall terminate automatically at the conclusion of the Term specified in Special Condition E. Unless otherwise provided herein, any rights vested as of the termination of this Agreement shall survive the termination.”

Section 10.2(ii) is amended to read as follows: “Except for CPUC Final Approval in the case of SCE, final approval of the CPUC under PUC Section 851 to transfer the Site to Seller from PG&E in the case of Seller, and acceptance of the rates in this Agreement by the Federal Energy Regulatory Commission in the case of Seller, it has all regulatory authorizations necessary for it to legally perform its obligations under this Agreement;”

Section 10.2(iii) is amended to read as follows: “the execution, delivery and performance of this Agreement are within its powers, have been duly authorized by all necessary action and do not violate any of the terms and conditions in its governing documents, any

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contracts to which it is a party or any law, rule, regulation, order or the like applicable to it;”

Section 10.2(iv) is amended to read as follows: “this Agreement constitutes its legally valid and binding obligation enforceable against it in accordance with its terms, subject to any Equitable Defenses;”

Section 10.2(vi) is amended to read as follows: “there is not pending, or to its knowledge, threatened against it (or any of its Affiliates in the case of Seller) any legal proceedings that could materially adversely affect its ability to perform under the Agreement;”

Section 10.2(vii) is amended to read as follows: “no Event of Default with respect to it has occurred and is continuing and no such event or circumstance would occur as a result of its entering into or performing its obligations under this Agreement;”

Section 10.2(viii) is amended to read as follows: “it is acting for its own account and its decision to enter into this Agreement is based upon its own judgment, not in reliance upon the advice or recommendations of the other Party and it is capable of assessing the merits of and understanding, and understands and accepts the terms, conditions and risks of this Agreement;”

Section 10.2(ix) is deleted in its entirety.

Section 10.2(x) is amended to read as follows: “it has entered into this Agreement in connection with the conduct of its business and it has the capacity or ability to make or take delivery of the Product as contemplated in this Agreement;”

Section 10.2(xi) is deleted in its entirety.

Section 10.2(xii) is deleted in its entirety.

A new Section 10.2(xiii) is added as follows:

“10.2(xiii) Seller warrants that, throughout the entire Term of this Agreement, and subject to the terms of this Agreement, Seller shall maintain site control as provided for in Section 3.9(c)(i);”

A new Section 10.2(xiv) is added as follows:

“10.2(xiv) Seller warrants that all conditions to the transfer of the Site to Seller from PG&E set forth in Executive Order D-44-01 by the Governor of the State of California have been complied with; and”

A new Section 10.2(xv) is added as follows:

“10.2(xv) Seller warrants that, throughout the entire Term of this Agreement, Seller shall either maintain site control or remain a lessee under a Lease as provided for in Section 3.9(c)(i).”



Section 10.4 is deleted in its entirety and replaced with the following:

“10.4 Indemnity.

- (a) Each Party as indemnitor shall defend, save harmless and indemnify the other Party and the directors, officers, employees, and agents of such Party against and from any and all loss, liability, damage, claim, cost, charge, demand, or expense (including any direct, indirect, or consequential loss, liability, damage, claim, cost, charge, demand, or expense, including attorneys' fees) for injury or death to persons, including employees of either Party, and damage to property including property of either Party arising out of or in connection with (a) the indemnifying Party's engineering, design, construction, maintenance, repair, operation, supervision, inspection, testing, protection, or ownership of the indemnifying Party's facilities, or (b) the indemnifying Party's making of replacements, additions, betterments to, or reconstruction of the indemnifying Party's facilities; provided, however, Seller's duty to indemnify SCE hereunder shall not extend to loss, liability, damage, claim, cost, charge, demand, or expense resulting from interruptions in electrical service to SCE's customers other than Seller or electric customers of Seller. This indemnity shall apply notwithstanding the active or passive negligence of the indemnitee. However, neither Party shall be indemnified hereunder for its loss, liability, damage, claim, cost, charge, demand, or expense resulting from its sole negligence or willful misconduct.
- (b) Notwithstanding the indemnity of Section 10.4(a) and except for a Party's willful misconduct or sole negligence, each Party shall be responsible for damage to its facilities resulting from electrical disturbances or faults.
- (c) Seller releases and shall defend, save harmless and indemnify SCE from any and all loss, liability, damage, claim, cost, charge, demand, or expense arising out of or in connection with any representation made by Seller inconsistent with Section 3.7(d).
- (d) The provisions of this Section 10.4 shall not be construed to relieve any insurer of its obligations to pay any insurance claims in accordance with the provisions of any valid insurance policy.
- (e) Except as otherwise provided in Section 10.4(a) and 10.4(f), neither Party shall be liable to the other Party for consequential damages incurred by that Party.
- (f) Notwithstanding anything to the contrary in this Agreement, if Seller fails to comply with the provisions of Section 10.12, Seller shall, at its own cost, defend, save harmless, and indemnify SCE, its directors, officers, employees, and agents, assigns, and successors in interest, from and

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against any and all loss, liability, damage, claim, cost, charge, demand, or expense of any kind or nature (including any direct, indirect, or consequential loss, damage, claim, cost, charge, demand, or expense, including attorneys' fees and other costs of litigation), resulting from injury or death to any person or damage to any property, including the personnel or property of SCE, to the extent that SCE would have been protected had Seller complied with all of the provisions of Section 10.12. The inclusion of this Section 10.4(f) is not intended to create any express or implied right in Seller to elect not to provide the insurance required under Section 10.12.

- (g) Except to the extent inconsistent with the provisions of Sections 10.4(a) through (f), above, each Party shall indemnify, defend and hold harmless the other Party from any and all Claims arising from or out of any event, circumstance, act, or incident first occurring or existing during the period when control and title to Product is vested in such Party as provided in Section 10.3.
- (h) Each Party shall indemnify, defend, and hold harmless the other Party against any Governmental Charges for which such Party is responsible under Article Nine.”

Section 10.5 is deleted in its entirety and replaced with the following:

“10.5 Assignment.

Neither Party shall voluntarily assign its rights nor delegate its duties under this Agreement, or any part of such rights or duties, without the written consent of the other Party, which shall not be unreasonably withheld. Any such assignment or delegation made without such written consent shall be null and void, provided, however, either Party may, without the consent of the other Party (and without relieving itself of liability hereunder), (i) transfer, sell, pledge, encumber, or assign this Agreement or the accounts, revenues, or proceeds hereof in connection with any financing or other financial arrangements, (ii) transfer or assign this Agreement to an Affiliate of such Party which Affiliate’s creditworthiness (as reasonably determined in accordance with generally accepted industry practices) is equal to or higher than that of such Party, or (iii) transfer or assign this Agreement to any person or entity succeeding to all or substantially all of the assets whose creditworthiness is equal to or higher than that of such Party; provided, however, that in each such case, any such assignee shall agree in writing to be bound by the terms and conditions hereof and so long as the transferring Party delivers such tax and enforceability assurance as the non-transferring Party may reasonably request”

Section 10.6 is amended by substituting “California” for “New York.”

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Section 10.8 is deleted in its entirety and replaced with the following:

“10.8 General.

This Agreement constitutes the entire agreement between the Parties relating to its subject matter. This Agreement shall be considered for all purposes as prepared through the joint efforts of the Parties and shall not be construed against one Party or the other as a result of the preparation, substitution, submission, or other event of negotiation, drafting or execution hereof. No amendment or modification to this Agreement shall be enforceable unless reduced to a writing signed by all 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. All indemnity rights shall survive the termination of this Agreement for twelve (12) months. This Agreement shall be binding on each Party’s successors and permitted assigns.”

Sections 10.9 and 10.10 are deleted in their entireties.

Section 10.11 is deleted in its entirety and replaced with the following:

“10.11 Confidentiality.

The terms of the Confidentiality Agreement dated October 22, 2002 between the Parties shall apply to the terms of this Agreement.”

A new section 10.12 is added, as follows:

“10.12 Insurance.

- (a) Throughout the term of this Agreement, Seller shall obtain and maintain in force as hereinafter provided comprehensive general liability insurance, including contractual liability coverage, with a combined single limit of not less than \$2,000,000 each occurrence for a Generating Facility with a Net Nameplate Capacity of 100 kW or greater. The insurance carrier or carriers and form of policy shall be subject to review and approval by SCE.
- (b) Before commencement of the Term of this Agreement, as provided in Special Condition E, Seller shall (i) furnish a certificate of insurance to SCE, which certificate shall provide that such insurance shall not be terminated nor expire except on thirty (30) calendar days’ prior written Notice to SCE, (ii) maintain such insurance in effect for so long as Seller's Generating Facility is operated in parallel with the SCE electric system,

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and (iii) furnish to SCE an additional insured endorsement with respect to such insurance in substantially the following form:

‘In consideration of the premium charged, SCE is named as additional insured with respect to all liabilities arising out of Seller's use and ownership of Seller's Generating Facility.’

‘The inclusion of more than one insured under this policy shall not operate to impair the rights of one insured against another insured and the coverages afforded by this policy will apply as though separate policies had been issued to each insured. The inclusion of more than one insured will not, however, operate to increase the limit of the carrier's liability. SCE will not, by reason of its inclusion under this policy, incur liability to the insurance carrier for payment of premium for this policy.’

‘Any other insurance carried by SCE which may be applicable shall be deemed excess insurance and Seller's insurance primary for all purposes despite any conflicting provisions in Seller's policy to the contrary.’ ”

A new section 10.13 is added, as follows:

“10.13 Nondedication.

Neither Party, by this Agreement, dedicates any part of its facilities involved in the performance of this Agreement to the public or to the service provided under the Agreement, and such service shall cease upon termination of the Agreement.”

This Agreement is supplemented by adding the following Article Nos. XI, XII and XIII:

**“ARTICLE ELEVEN: CONDITIONS PRECEDENT**

11.1 The Term of this Agreement shall not commence until both (i) this Agreement has been duly executed by authorized representatives of Seller and SCE, (ii) CPUC Final Approval has been obtained or waived by SCE, as provided herein, and (iii) Approval of Site Transfer has been obtained. SCE shall file with the CPUC the appropriate request for CPUC Final Approval, and seek such approval expeditiously. Seller shall use reasonable efforts in cooperation with SCE for the purpose of obtaining CPUC Final Approval. If Approval of Site Transfer is not obtained within one hundred eighty (180) calendar days after CPUC Final Approval, either party may terminate this Agreement by providing thirty (30) days written Notice to the other party.

11.2 This Agreement shall terminate automatically if CPUC Final Approval is not obtained (or waived by SCE) on or before, the date which is one

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hundred twenty (120) calendar days after SCE files the request for approval with the CPUC, or by such later date as may be agreed to in writing between Seller and SCE. In its sole discretion, SCE may waive CPUC Final Approval at any time by giving Notice of such waiver in writing to Seller.”

#### **“ARTICLE TWELVE: PGC FUNDS**

- 12.1 Seller shall use best efforts to obtain PGC Funds at the level specified in Special Condition G for all anticipated deliveries from the Generating Facility under this Agreement. SCE shall, upon Seller’s request, reasonably support any applications for PGC Funds filed by or on behalf of Seller.
- 12.2 If at any time up to and including the date that is six (6) months after CPUC Final Approval, either Party determines in its sole discretion that Seller has not obtained a Satisfactory PGC Commitment for the entire output of the Generating Facility (excluding any output of the Expanded Facility) for the Term of this Agreement, then such Party may unilaterally terminate this Agreement without liability of any kind for such termination, effective as of the date that the Party sends the other Party written Notice of termination under this Section.
- 12.3 If at any time up to and including the date that is six (6) months before installation of the Expanded Facility in accordance with Article Thirteen, either Party determines in its sole discretion that Seller has not obtained a Satisfactory PGC Commitment for the remaining Term of this Agreement for the entire output of the Expanded Facility, then such Party may unilaterally terminate the option of Seller to install the Expanded Facility without liability of any kind for such termination, effective as of the date that the Party sends the other Party written Notice of such termination under this Section.
- 12.4 All PGC Funds obtained for deliveries from the Generating Facility under this Agreement shall, at SCE’s election, (i) be sent to SCE by Seller within five (5) Business Days of Seller’s receipt of same, or (ii) the amount of such PGC Funds payment shall, immediately upon payment to Seller, be automatically deducted by SCE against any payments due to Seller from SCE under the Agreement. If SCE elects to have the PGC Funds payments sent to it, and Seller fails to do so within five (5) Business Days of Seller’s receipt of same, then SCE may treat the failure as an Event of Default under Article Five.”

#### **“ARTICLE THIRTEEN: EXPANDED FACILITIES**

- 13.1 Seller may expand the Generating Facility (the expanded section of the Generating Facility shall be individually referred to as the “Expanded

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Facility”), such that this Expanded Facility generates up to an additional 65.0 MW up to a maximum combined total Firm Contract Capacity for the Generating Facility, including the Expanded Facility, of 99.8 MW, so long as (i) Seller provides SCE with fifteen (15) months Notice prior to the completion of the expansion; (ii) Seller posts a Project Fee for the Expanded Facility at the same time that it provides SCE with written Notice of the expansion; and (iii) as of June 30, 2006, the Expanded Facility is operating in parallel with the SCE electrical system and delivering Product to the Delivery Point. The Notice must specify the new Firm Contract Capacity resulting from the Expanded Facility. If the Expanded Facility is not operating in parallel with the SCE electrical system and delivering Product to the Delivery Point as of June 30, 2006, as extended for the periods of Force Majeure, then Seller shall have no further right to expand the Generating Facility beyond its original 49.9 MW capability.”

Schedule M is deleted in its entirety.

Schedule P is deleted in its entirety.

Exhibit A is deleted in its entirety and replaced with the following:

Exhibit A, Firm Capacity Test Protocols, is attached hereto and made a part hereof.

Exhibit B, Security Agreement(s) - [Not Applicable].

Exhibit C, Capacity Demonstration Test Protocols, is attached hereto and made a part hereof.

Exhibit D, sample Capacity Replacement Damage Amount calculation, is attached hereto and made a part hereof.

Exhibit E, sample Performance Assurance Amount calculation, is attached hereto and made a part hereof.

## EXHIBIT A

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# INITIAL FIRM OPERATION DEMONSTRATION TEST PROTOCOL and CRITERIA

### Capacity Payments:

- Firm Contract Capacity payments will not commence until the Seller has successfully completed the following initial firm operation tests.

### Demonstration Dates and Duration of Demonstration:

- The initial firm operation demonstration test shall commence at 12:00 p.m. (noon) on a date following Initial Operation that is mutually agreed to by SCE and Seller and shall extend for a total period of thirty (30) consecutive days (the “Thirty-Day Demonstration”). Concurrently with the selection of the commencement date for the Thirty-Day Demonstration, SCE and Seller shall also select a date within the same thirty (30) day period for the “Twenty-Four Hour Demonstration” described below. The Thirty-Day Demonstration and the Twenty-Four Hour Demonstration are jointly referred to herein as the “Demonstration.”
  - SCE and Seller may each, upon three (3) Business Days’ written Notice sent by facsimile transmission or e-mail, make up to two (2) requests to reschedule the commencement date for either the Thirty-Day Demonstration or the Twenty-Four Hour Demonstration. The commencement date for the Twenty-Four Hour Demonstration, however, may only be rescheduled to a different date within the original thirty (30) day demonstration period unless the commencement date for the Thirty-Day Demonstration is itself also being rescheduled.
  - Once a Demonstration has commenced, it cannot be rescheduled except as set forth in this Exhibit in the Remedial Actions for Sellers Failing the Demonstration.
  - The Demonstration must be completed within one (1) year of Initial Operation (or such later date as SCE, in its sole discretion, may agree to) (“Firm Operation Deadline”).

### Satisfactory Demonstration:

- For the Thirty-Day Demonstration, Seller shall demonstrate the ability to operate such that the Capacity

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Demonstration Factor for that time period shall be greater than or equal to eighty percent (80%). The Capacity Demonstration Factor shall be calculated as follows:

$$\text{CAPACITY DEMONSTRATION FACTOR} = [A \times B \times C] / [D \times E]$$

Where A = Sum of all kWh of Energy delivered by Seller to the Delivery Point during applicable hours adjusted for transformer and electrical losses, as may be applicable in accordance with Section 3.1(a) (not including the adjustment for GMM which is included as variable B), limited in each and every metering interval by the level of Firm Contract Capacity.

B = Generation-weighted average GMM for applicable hours in the Demonstration Period in the month.

C = DLF for Seller's Project (if applicable).

D = Total of applicable hours in the Demonstration Period where the applicable hours shall be 12:00 (noon) to 6:00 pm for each non-holiday weekday (as defined in SCE's Tariff Schedule TOU-8) within the Thirty-Day Demonstration period.

E = Firm Contract Capacity specified in Special Condition B.

- For the Twenty-Four Hour Demonstration, Seller shall operate for a twenty-four (24) consecutive hour period, starting at 12:00 p.m. (noon) on the day the Twenty-Four Hour Demonstration commences and ending at 12:00 p.m. (noon) on the next day (unless SCE, in its sole discretion, elects to conduct the Twenty-Four Hour Demonstration over a different 24-hour period). A Project shall be deemed to have satisfied this demonstration test if and only if the rate of delivery in each and every metering interval, adjusted for all electrical losses, as set forth in Section 3.1(a), is equal to or greater than the proposed Firm Contract Capacity level.

Testing Tool:

- For all Demonstrations, the rate of delivery is to be determined using SCE's Solid State Data Recorder (or a similar data collection and metering device).

Special Considerations:



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- For a Project located outside of SCE's service territory and whose Delivery Point is not SP-15, the SCE metered output shall be adjusted by both (a) the factor assigned to such Project by the transmitting utility (such as Imperial Irrigation District) or other Transmission Provider within that service territory, to account for electrical losses to the Delivery Point, and (b) the actual GMM factor (or such other successor factor as may be applicable from time-to-time).

Representation and Access:

- SCE representatives (normally one to three) may attend the setup and operation of the Demonstration or any portion thereof.
- SCE may, in its sole discretion, witness a start-up, ramp-up, ramp-down, and shutdown of the Generating Facility at the commencement and end of the Demonstration.
- SCE's representatives may also concurrently conduct a site inspection of the Generating Facility and associated facilities, systems, and equipment.
- SCE shall have access to and copies of control room logs, control system display screens, and instrumentation data before, during and after the Demonstration tests.
- Seller's representatives may be present during both the Demonstration and site inspection at the Seller's option.

Cost of Demonstration:

- Each Party shall bear its own costs of the Demonstration.

Remedial Action for Sellers Failing the Demonstration:

- If Seller fails its initial Thirty-Day Demonstration and/or the Twenty-Four Hour Demonstration, Seller may, subject to the Firm Operation Deadline, submit to one additional Thirty-Day Demonstration or an additional Twenty-Four Hour Demonstration within the initial Thirty-Day Demonstration upon providing three (3) Business Days' written Notice sent by facsimile transmission or e-mail. Any additional Thirty-Day Demonstration, which must include another Twenty-Four Hour Demonstration within the same thirty (30) day time frame of this second (2<sup>nd</sup>) Thirty-Day Demonstration.
- If, during the second (2<sup>nd</sup>) demonstration, the Seller fails to demonstrate Contract Capacity due to an abnormal and unforeseeable operating condition, as verified and determined in SCE's sole judgment, an additional demonstration may be scheduled. Lack of wind, sun, water or other fuel source of an inherently

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intermittent nature shall not be deemed an abnormal and unforeseeable operating condition.

- If Seller fails to meet the minimum requirements of either component of the Demonstration (i.e., the Thirty-Day Demonstration and the Twenty-Four Hour Demonstration) during an initial Demonstration and, if applicable, fails again to meet the minimum requirements during the second (2<sup>nd</sup>) or third (3<sup>rd</sup>) Demonstration opportunity described above, then Seller's Contract Capacity may be derated to the lowest level of Contract Capacity demonstrated during either the Thirty-Day Demonstration or the Twenty-Four Hour Demonstration component of the last Demonstration opportunity, and Seller shall also be liable for the Capacity Replacement Damage Amount as described in Section 3.3(f) of the Agreement by reason of the deration.

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**EXHIBIT B**

**[NOT APPLICABLE]**

## EXHIBIT C

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# ANNUAL CAPACITY DEMONSTRATION TEST CRITERIA and PROTOCOL

### Annual Demonstration Date:

- An Annual Capacity Demonstration Test (“Annual Demonstration”) shall be held on a non-holiday weekday, normally within the Peak Months, that is mutually agreed to by SCE and Seller. If, by August 31 of a particular year, SCE and Seller have not mutually agreed upon a date for the Annual Demonstration, SCE shall unilaterally select a date for that year. At its discretion, SCE may request that the Annual Demonstration be held on a non-holiday weekday and/or in a non-Peak Month.
- Either Party may request to reschedule the originally scheduled Annual Demonstration date upon three (3) Business Days’ Notice sent by facsimile transmission or e-mail to the other Party. However, the Annual Demonstration may only be rescheduled once per year. Moreover, once the Annual Demonstration has commenced, it cannot be terminated or rescheduled for any reason whatsoever.

### Annual Demonstration Period:

- The Annual Demonstration period shall commence at 12:00 pm (noon) on the selected day and end at 12:00 pm (noon) of the next day (unless SCE has elected, in its sole discretion, to request that the Annual Demonstration take place over a different twenty-four 24 hour period).

### Satisfactory Demonstration:

- Seller shall demonstrate the ability to operate at a rate of delivery, net of all electrical losses associated with the transmission of capacity from the Generating Facility to the Delivery Point as set forth in Section 3.1(a), equal to or greater than the current Firm Contract Capacity during each and every metering interval within the Annual Demonstration period.
- For a Project located within SCE’s service territory or a Project located outside of SCE’s service territory, but whose Delivery Point is within SP-15, the metered output will be adjusted by the Project’s GMM and DLF factors (or such successor factors as may be applicable from time-to-time) (“GMM” or “DLF” “Factor”).

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- For a Project located outside of SCE's service territory and whose Delivery Point is not SP-15, the metered output may be adjusted both by (a) the factor assigned to such Project by the transmitting utility (such as Imperial Irrigation District) or other Transmission Provider within that service territory, to account for electrical losses to the SCE territory, and (b) the Project's GMM Factor.

Testing Tool:

- The rate of delivery is to be determined using SCE's Solid-State Data Recorder (or similar data collection and metering device).

Representation and Access:

- SCE representatives (normally one (1) to three (3)) may attend the setup and operation of the Annual Demonstration.
- SCE representatives may also concurrently conduct a site inspection of the Generating Facility and associated facilities, systems, and equipment.
- SCE shall have access to and copies of control room logs, control system display screens, and instrumentation data before, during, and after the demonstration.
- Project personnel may be present during both the Annual Demonstration and site inspection at the Seller's option.

Cost of Annual Demonstration:

- Each Party shall bear its own costs of the Annual Demonstration.

Remedial Action for Failing the Annual Demonstration:

- Should the Seller fail to demonstrate the ability to achieve and sustain Firm Contract Capacity for each and every metering interval during the Annual Demonstration, the Firm Contract Capacity may be derated pursuant to Section 3.3 (e), which shall cause Seller to be liable to SCE for the Capacity Repayment Damage Amount pursuant to Section 3.3 (f) of the Master Agreement by reason of such deration.
- If the Seller fails to demonstrate Firm Contract Capacity due to an abnormal and unforeseeable operating condition, as verified and determined at SCE's sole discretion, an additional Annual Demonstration may be scheduled, provided there is time remaining within current year's Peak Months or such other month as SCE may select in its sole discretion. Lack of wind, sun,

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water, or other fuel source of an inherently intermittent nature shall not be deemed an abnormal and unforeseeable operating condition.



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## EXHIBIT E

### SAMPLE PERFORMANCE ASSURANCE AMOUNT CALCULATION

<b>Exhibit E</b>									
<b>Sample Calculation of Performance Assurance Amount for 1 MW contract</b>									
<b>assuming computation date is at start of 2004 and the original agreement was through 2017.</b>									
<i>CASE 1: Performance Assurance owed to Seller by SCE (See Section 8.4); Interest rate = 10%</i>									
Contract year	Year	Date	Pzero (Market quotation average SP15 price as of date of computation, in \$/MWh, adjusted for initial and final years)	Pi (Performance Assurance threshold price in \$/MWh)	"B" (=Firm contract capacity in MW * hrs/year, in MWh)	"C" (assumed capacity factor)	PPA in year i, in \$ (= [Pi - Pzero] * B * C)		
2	2004	7/1/04	43 000	45 000	8784	1.0	\$	17,568	
3	2005	7/1/05	43 000	45 000	8760	1.0	\$	17 520	
4	2006	7/1/06	44 000	45 000	8760	1.0	\$	8 760	
5	2007	7/1/07	45 000	45 000	8760	1.0	\$	-	
6	2008	7/1/08	44 850	45 000	8784	1.0	\$	1,318	
7	2009	7/1/09	44.700	45 000	8760	1.0	\$	2,628	
8	2010	7/1/10	44 550	45 000	8760	1.0	\$	3,942	
9	2011	7/1/11	44.400	45 000	8760	1.0	\$	5 256	
10	2012	7/1/12	44 250	45 000	8784	1.0	\$	6 588	
11	2013	7/1/13	44.100	45 000	8760	1.0	\$	7 884	
12	2014	7/1/14	43 950	45 000	8760	1.0	\$	9,198	
13	2015	7/1/15	43 800	45 000	8760	1.0	\$	10,512	
14	2016	7/1/16	43 650	45 000	8784	1.0	\$	11 858	
15	2017	7/1/17	43 650	45 000	8760	1.0	\$	11 826	
<b>If A, amounts owed but unpaid = \$10,000, PPA</b>					<b>\$59,026</b>			<b>\$69,026</b>	<b>=XNPV</b>
<b>SCE must provide assurance</b>									
<i>CASE 2: Performance Assurance owed to SCE by Seller (See Section 8.5); Interest rate = 10%</i>									
Contract year	Year	Date	Pzero (Market quotation average SP15 price as of date of computation, in \$/MWh, adjusted for initial and final years)	Pi (Performance Assurance threshold price in \$/MWh)	"B" (=Firm contract capacity in MW * hrs/year, in MWh)	"C" (assumed capacity factor)	PPA in year i, in \$ (= [Pzero - Pi] * B * C)		
2	2004	7/1/04	43 000	45 000	8784	1.0	\$	(17,568)	
3	2005	7/1/05	43 000	45 000	8760	1.0	\$	(17 520)	
4	2006	7/1/06	44 000	45 000	8760	1.0	\$	(8 760)	
5	2007	7/1/07	44 500	45 000	8760	1.0	\$	(4 380)	
6	2008	7/1/08	45 000	45 000	8784	1.0	\$	-	
7	2009	7/1/09	45 650	45 000	8760	1.0	\$	5,694	
8	2010	7/1/10	46 300	45 000	8760	1.0	\$	11,388	
9	2011	7/1/11	46 950	45 000	8760	1.0	\$	17 082	
10	2012	7/1/12	47 600	45 000	8784	1.0	\$	22 838	
11	2013	7/1/13	48 250	45 000	8760	1.0	\$	28 470	
12	2014	7/1/14	48 900	45 000	8760	1.0	\$	34,164	
13	2015	7/1/15	49 550	45 000	8760	1.0	\$	39,858	
14	2016	7/1/16	50 200	45 000	8784	1.0	\$	45 677	
15	2017	7/1/17	50 200	45 000	8760	1.0	\$	45 552	
<b>If A, amounts owed but unpaid = \$10,000, PPA</b>					<b>\$ 42,270</b>			<b>\$52,270</b>	<b>=XNPV</b>
<b>Seller must provide assurance</b>									