

Supplemental Material

For City of Sacramento

City Council
Financing Authority
Housing Authority
Redevelopment Agency

Agenda Packet

Submitted: FRIDAY, MARCH 25, 2011

For the Meeting of: March 29, 2011

- Additional Material
 Revised Material

TITLE: AGREEMENT: SOLAR POWER PURCHASE

This supplemental replaces the entire council report and agreements originally submitted. The following substantive changes are being made to the report and the agreements:

- 1) The recommendation changes from 2.2 megawatts to 1.9 megawatts
- 2) Resolution changes:
 - a) **Section 1:** change 2.2 megawatts to 1.9 megawatts
 - b) **Exhibits A – E:** exhibit 3, paragraph B, language was added to provide more specificity as to when SolarCity can access City facilities.
 - c) **Exhibit D - Power Purchase Agreement 1 with SolarCity Corporation for Meadowview Service Center:** agreement exhibits 1 and 2 reflect changes in the system size (450kw to 275kw) and corresponding changes were made to the termination values and buy out values.
 - d) **Exhibit E - Power Purchase Agreement 2 with SolarCity Corporation for Meadowview Service Center:** agreement exhibits 1 and 2 reflect changes in the system size (552kw to 375kw) and corresponding changes were made to the termination values and buy out values.

Please include this supplemental material in your agenda packet. This material will also be published to the City's Internet. For additional information, contact the City Clerk Department at Historic City Hall, 915 I Street, First Floor, Sacramento, CA 95814-2604, (916) 808-7200.

Supplemental Material

For

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City Council

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Agenda Packet

Contact Information: YVETTE RINCON, SUSTAINABILITY PROGRAM
MANAGER, (916) 808-5827

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City of Sacramento City Council

915 I Street, Sacramento, CA, 95814
www.CityofSacramento.org

Meeting Date: 3/29/2011

Report Type: Consent

Title: Agreement: Solar Power Purchase

Report ID: 2011-00185

Location: Citywide

Recommendation: Adopt a Resolution: 1) authorizing the City Manager or the City Manager's designee to execute a 20 year power purchase agreement with SolarCity for up to 1.9 megawatts of solar energy for City facilities; and 2) authorizing the City Manager or the City Manager's designee to execute an agreement with SolarCity to reimburse the City's upfront expenses for administration of the power purchase agreement.

Contact: Yvette Rincon, Sustainability Program Manager, (916)-808-5827, Department of General Services

Presenter: Reina J. Schwartz, Director, (916) 808-7195, Department of General Services,

Department: General Services Dept

Division: Facility & Real Property Mgmt

Dept ID: 13001511

Attachments:

- 1-Description/Analysis
- 02 - Attachment 1 Background/Financial
- 03 - Attachment 2 New City Hall Proposed Interconnection Point
- 04 - Attachment 3 SACY Proposed Inverter Location
- 05 - Attachment 4 300 Richards Blvd Proposed Inverter Location
- 06 - Attachment 5 Meadowview Service Center Proposed Inverter & Tie-in Location
- 07 - Resolution
- 08 - Unexecuted Agreements Cover
- 09 - Exhibit A City Hall Solar PPA
- 10 - Exhibit B 300 Richards Solar PPA
- 11 - Exhibit C SACY Solar PPA
- 12 - Exhibit D Meadowview Solar PPA 1
- 13 - Exhibit E Meadowview Solar PPA 2
- 14 - Exhibit F Agreement to Pay Expenses for Admin of PPA

City Attorney Review

Approved as to Form
Jerry Hicks
3/24/2011 11:56:38 AM

City Treasurer Review

Prior Council Financial Policy Approval or
Outside City Treasurer Scope
Russell Fehr
3/11/2011 1:35:16 PM

Approvals/Acknowledgements

Department Director or Designee: Reina Schwartz - 3/23/2011 5:49:55 PM

Assistant City Manager: Patti Bisharat - 3/24/2011 11:24:33 AM



Description/Analysis

Issue: Staff is seeking authorization to enter into a 20-year agreement with SolarCity Corporation (“SolarCity”) for the purchase of up to 1.9 megawatts of solar energy for selected City facilities. The agreement will allow for the purchase of up to 1.9 megawatts of solar energy. Staff plans to explore the potential purchase of up to an additional 3.1 megawatts of solar energy. Under this agreement, photovoltaic (solar) panels will be installed at the City’s 24th Street South Area Corporation Yard, City Hall, 300 Richards Boulevard, and the Meadowview Service Center. In addition, this report recommends authorization to enter into an agreement with SolarCity to reimburse the City for upfront costs associated with the project.

This project has been a partnership between Department of General Services, SMUD, the City Attorney’s Office, and the U.S. Department of Energy. In addition, representatives from the City’s Department of Utilities, the State Department of General Services, and Sacramento County were all participants in the review and selection panel and have worked together to ensure the most financially and technically viable project for the City.

Policy Considerations: The City Council has stated its commitment to environmental leadership through approval of the Sustainability Master Plan and the revised General Plan. This report recommends City Council approval of an agreement to buy power from a private company, Solar City, who will install and maintain solar equipment on specified City facilities. Contracting to provide for solar power on City facilities will help improve overall greenhouse gas emissions in the region.

Environmental Considerations:

California Environmental Quality Act (CEQA): The Environmental Services Manager has determined that this project is exempt from the requirements of CEQA pursuant to Section 15311, which allows for the construction or replacement of minor structures accessory to existing facilities.

Sustainability: Entering into the recommended power purchase agreement is consistent with the City’s Sustainability Master Plan goals and is a project identified in the 2011 Sustainability Implementation Plan. This project allows for the production of clean energy on City facilities.

Commission/Committee Action: None

Rationale for Recommendation: This project presents the opportunity to support the generation of renewable energy, a reduction of greenhouse gases and creation of potential financial benefits to the City. It also will benefit our local workforce. SolarCity has a local office in Sacramento and has committed to use local workforce on this project to the extent practicable. SolarCity estimates that up to 250 people will be needed to complete this job. Upon completion of the installation, SolarCity has agreed to submit a letter to the City describing the number of local employees that worked on this job and the number of hours worked. This information will allow the City to estimate the economic impact of this project.

Financial Considerations: The proposed agreement would authorize the City to purchase up to 1.9 megawatts of solar energy annually from SolarCity for 20 years. As a private company, SolarCity is eligible for Federal and State tax incentives that are not available to the City. These tax incentives,

along with significant rebates from SMUD, reduce the cost of installation of solar equipment and SolarCity is able to pass those savings on to the City. While there are some risks associated with approving a 20-year agreement, a shorter-term agreement would increase the price for the power purchase to the extent that the project would not make financial sense for the City. The 20-year agreement includes buy-out options of the solar project at years 6, 10, and 20.

If the City terminates the agreement before the expiration of the twenty-year period, the City would be responsible for decreasing termination costs for years one to twenty. SolarCity has based these figures on its net present value of costs associated with the project such as expected payments for energy from the City, recapture of tax incentives, recapture of rebates, and depreciation benefits.

Under this agreement, the City will bear no upfront capital cost for installation of the solar equipment. The City will pay a set amount for the power being generated subject to an escalator of two percent (2%) per year. In addition, SolarCity will reimburse the City for its upfront costs for administration of the power purchase agreement.

In terms of analyzing the financial impacts of this agreement, one critical assumption is the SMUD rate increases that may occur over the next 20 years. For the solar power generated from City Hall, 300 Richards and the City's 24th Street Corporation Yard, even if SMUD rates do not increase at all over the next 20 years, the City will still pay less over that 20-year period for that energy than it would have paid at current rates from SMUD. For the system to be installed at the Meadowview City Service Center, if SMUD rates go up 1.7 percent per year for the next 20 years, the project breaks even. For more detail on the project background and financial analysis, please see Attachment 1.

Emerging Small Business Development (ESBD): SolarCity is not certified by the City as an emerging/small business.



Attachment 1

Background/Financial

In August 2008, the City was awarded a Solar America Cities grant by the Federal Department of Energy. The City's commitment under the grant was to solicit a third party to install, own and maintain up to 5 megawatts of solar on City facilities with the City purchasing the power generated.

In selecting a vendor to install, operate and maintain these solar systems, the City went through a two-step selection process (consistent with the purchasing requirements in City code and in the Administrative Policies). The first part of the process was a Request for Qualifications, used to identify a short-list of interested firms that had the necessary experience, funding and financial stability to complete a 20-year project. An evaluation panel comprised of City staff, County of Sacramento staff, an expert from the National Renewable Energy Laboratory and a representative from the State Department of General Services selected the top two firms to proceed to the next step in the selection process. In the next step, the City issued a Request for Proposals, as part of which each firm had the opportunity to visit each site with City staff to understand each facilities' characteristics and opportunities for solar, and ultimately to provide the City with a technically and financially precise proposal. SolarCity was able to provide the most technically and financially feasible project to the City.

The financial analysis for this project takes into account potential SMUD rate increases, the decline in the performance of the solar systems over 20 years, and the 2 percent annual escalator for the proposed agreement. Staff would note that while we cannot predict future SMUD rate increases, SMUD rates have increased by 3.7 percent over the past 60 years, 6 percent over the last 30 years, and 2 percent over the last 20 years. In evaluating projects, SMUD staff indicated that they typically use an assumption of average annual rate increases of 3.5 percent.

The table below shows the potential savings available to the City under the terms of the agreement, under varying assumptions of SMUD rate increases.

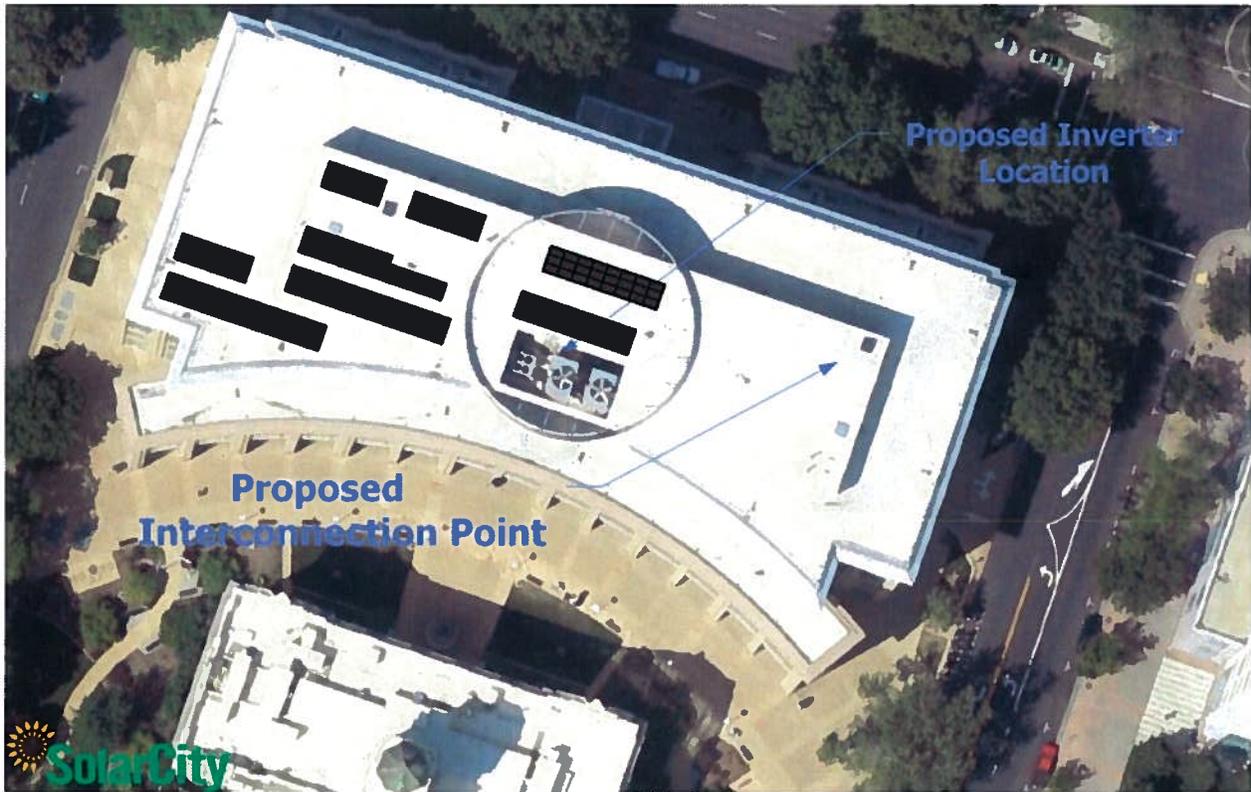
	Average Annual Savings	
	Annual SMUD increase of 3.5%	No annual SMUD increase
City Hall, 300 Richards Boulevard, 24 th Street Corporation Yard	\$37,000	\$3,700
Meadowview City Service Center	\$10,000	-\$7,000 (Note: at 1.7% average annual SMUD rate increase, the project is break-even)

For the City Hall, 300 Richards Boulevard and 24th Street Corporation Yard projects, if SMUD rates do increase an average of 3.5 percent per year, the City would save approximately \$37,000 per year in energy costs over the life of the project. Even if SMUD rates do not rise at all over the next 20 years, the project essentially breaks even. For the Meadowview City Service Center project, if SMUD rates rise by 3.5 percent per year, the City would save on average \$10,000 per year. If SMUD rates rise by 1.7 percent per year, the City would break even. Even under a worst-case scenario, if SMUD rates didn't rise at all over the next 20 years (an unlikely scenario), the additional City cost would be less than \$7,000 per year.

One other area of potential financial risk is the cost of early termination or buy-out of the agreements. For each site, there is a schedule of values reflecting the cost of either early termination of the agreement, where SolarCity would remove the equipment and maintain ownership of it, or for City buy-out of the system. Generally speaking, the termination and buy-out provisions require the City to compensate SolarCity for the net present value of their costs associated with the project such as expected payments for energy, lost tax incentive benefits, recapture of rebate amounts and system depreciation. The provisions in the proposed agreements are similar to those found in similar agreements with other jurisdictions using this model for implementing solar on city facilities.

The costs for termination values and buy-out, shown in Exhibits A-E, also are consistent with the standards in the industry and reflect real costs to SolarCity for early termination of the projects (e.g. tax incentive repayments and associated penalties).

New City Hall
915 I Street, 95814
Estimated System Size: 42 kW



Attachment 3

South Area Corporation Yard
5730 24th Street, 95822

Estimate System Size: 800 kW



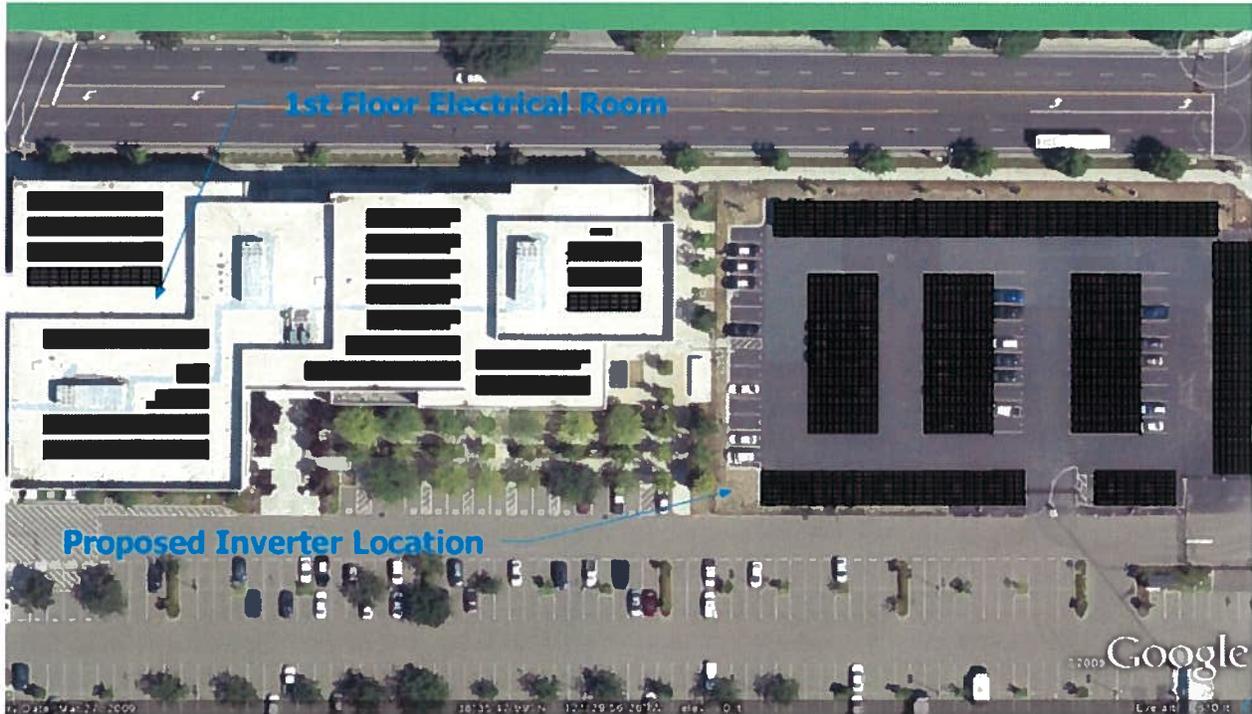


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Attachment 4

300 Richards Blvd

Estimate System Size: 420



Meadowview Service Center

Estimated System Size: 650 KW



RESOLUTION NO. 2011-XXXX

Adopted by the Sacramento City Council

March 29, 2011

**AUTHORIZING AN AGREEMENT FOR SOLAR ENERGY WITH SOLARCITY
AT SELECTED CITY FACILITIES**

BACKGROUND

- A. The City of Sacramento is committed to environmental leadership, consistent with the Council adopted Sustainability Master Plan and General Plan.
- B. Consistent with the commitment to environmental leadership, the City has gone through a competitive process to select a vendor to install, operate and maintain solar on specified City facilities in order to provide power for City purchase.
- C. This project has been a partnership between Department of General Services, SMUD, the City Attorney's Office, and the U.S. Department of Energy. In addition, representatives from the City's Utility Department, the State Department of General Services, and Sacramento County were all participants in the review and selection panel.
- D. Increased solar power production in the Sacramento area will reduce overall greenhouse gas emissions in the region.

**BASED ON THE FACTS SET FORTH IN THE BACKGROUND, THE CITY COUNCIL
RESOLVES AS FOLLOWS:**

- Section 1. The City Manager or the City Manager's designee is hereby authorized to execute a 20-year power purchase agreement with SolarCity Corporation for the purchase of up to 1.9 megawatts of solar energy per year.
- Section 2. The City Manager or the City Manager's designee is authorized to execute an agreement with SolarCity to reimburse the City's upfront expenses for administration of the power purchase agreement.

Table of Contents:

- Exhibit A: Power Purchase Agreement with SolarCity Corporation for City Hall
- Exhibit B: Power Purchase Agreement with SolarCity Corporation for 300 Richards Boulevard

- Exhibit C: Power Purchase Agreement with SolarCity Corporation for the City's South Area Corporation Yard**
- Exhibit D: Power Purchase Agreement 1 with SolarCity Corporation for Meadowview Service Center**
- Exhibit E: Power Purchase Agreement 2 with SolarCity Corporation for Meadowview Service Center**
- Exhibit F: Agreement to Pay Expenses for Administration of Power Purchase Agreement**

Agreement: Solar Power Purchase

Unexecuted Contract/Agreements

- The Unexecuted Contract/Agreement is signed by the other party, is attached as an exhibit to the resolution, and is approved as to form by the City Attorney.
- The Unexecuted Contract/Agreement (Public Project) is NOT signed by the other party, is attached as an exhibit to the resolution, and is approved as to form by the City Attorney.
- The Unexecuted Contract is NOT included as an exhibit to the Resolution because the Agreement(s) is with other another governmental agency and it is not feasible to obtain the other agency's signature prior to Council action (be they denominated Agreements, MOUs, MOAs, etc.); however, the City Attorney approves the forwarding of the report to Council even though the signed agreement is not in hand yet.
- The Unexecuted Contract is NOT included as an exhibit to the resolution because, due to special circumstances, and the City Attorney confirms in writing that it is okay to proceed with Council action even though the signed agreement is not in hand yet.

All unexecuted contracts/agreements which are signed by the other parties are in the Office of the City Clerk before agenda publication.



Requires Council Approval: No YES Meeting:

Real Estate

Other Party Signature Needed

Recording Requested

General Information

Type: Select Contract Type	PO Type: Select PO Type	Attachment: Original No.:
\$ Not to Exceed: \$		Original Doc Number:
Other Party: SolarCity		Certified Copies of Document:: 1
Project Name: Solar Power Purchase Agreement		Deed: <input checked="" type="checkbox"/> None <input type="checkbox"/> Included <input type="checkbox"/> Separate
Project Number:	Bid Transaction #:	E/SBE-DBE-M/WBE:

Department Information

Department: **General Services**

Division: **Office of the Director**

Project Mgr: **Yvette Rincon**

Supervisor: **Reina Schwartz**

Contract Services:

Date:

Division Mgr:

Phone Number: **808-5827**

Org Number:

Comment:

Review and Signature Routing

Department	Signature or Initial	Date
Project Mgr:	<i>YR</i>	<i>3/25/11</i>
Accounting:		
Contract Services:		
Supervisor:		
Division Manager:		

City Attorney	Signature or Initial	Date
City Attorney:	<i>KEB</i>	<i>3/25/11</i>

Send Interoffice Mail Notify for Pick Up

Authorization	Signature or Initial	Date
Choose Director		
Department Director:		
City Mgr: yes <input type="checkbox"/> No <input type="checkbox"/>		

Contract Cover/Routing Form: Must Accompany ALL Contracts; however, is not part of the contract. (01-01-09)

For City Clerk Processing

Finalized:

Initial: _____

Date: _____

Imaged:

Initial: _____

Date: _____

Received:
(City Clerk Stamp Here)



Solar Power Purchase Agreement (Commercial California)

This Solar Power Purchase Agreement (this "Agreement") is entered into by the parties listed below (each a "Party" and collectively the "Parties") as of the date signed by Seller below (the "Effective Date").

Purchaser:		Seller:	
Name and Address	City of Sacramento 5730 24th Street Building 1 Sacramento, California 95822 Attention: Reina Schwartz	Name and Address	SolarCity Corporation 3055 Clearview Way San Mateo, CA 94402 Attention: Legal Department
Phone	(916) 808-7195	Phone	(650) 638-1028
Fax	(916) 399-9263	Fax	(650) 638-1029
E-mail	rschwartz@cityofsacramento.org	E-mail	Contracts@solarcity.com
Facility Ownership	Purchaser owns the Facility		Contractor's License Numbers CA: CSLB 888104

This Agreement sets forth the terms and conditions of the purchase and sale of solar generated electric energy from the solar panel system described in **Exhibit 2** (the "System") and installed at the Purchaser's facility described in **Exhibit 3** (the "Facility").

The exhibits listed below are incorporated by reference and made part of this Agreement.

- Exhibit 1 Pricing Attachment
- Exhibit 2 System Description, Delivery Point and License Area
- Exhibit 3 Memorandum of License
- Exhibit 4 Solar Power Purchase Agreement General Terms and Conditions
- Exhibit 5 Non-Disturbance Agreement (Lender)



Purchaser: City of Sacramento

SolarCity Corporation

Signature: _____

Signature: David White

Printed Name: _____

Printed Name: DAVID WHITE

Title: _____

Title: CFO

Date: _____

Date: 3-24-2011

APPROVED AS TO FORM:

ATTEST:

City Attorney: Kourtney C. Bondick

City Clerk: _____

Exhibit 1
Pricing Attachment

1. **Term:** Twenty (20) years, beginning on the Commercial Operation Date.
2. **Additional Terms:** Up to two (2) Additional Terms of five (5) years each.
3. **Environmental Incentives and Environment Attributes Accrue to Seller.**
4. **Contract Price:**

Contract Year	\$/kWh
1	\$0.1010
2	\$0.1030
3	\$0.1051
4	\$0.1072
5	\$0.1093
6	\$0.1115
7	\$0.1137
8	\$0.1160
9	\$0.1183
10	\$0.1207
11	\$0.1231
12	\$0.1256
13	\$0.1281
14	\$0.1307
15	\$0.1333
16	\$0.1359
17	\$0.1387
18	\$0.1414
19	\$0.1443
20	\$0.1471

Includes ACH invoicing. If manual invoicing is required, a \$25 handling charge will be added to each invoice.

5. **Condition Satisfaction Date:** 180 days after the Effective Date
6. **Anticipated Commercial Operation Date:** 270 days after the Effective Date
7. **Outside Commercial Operation Date:** 365 days after the Effective Date
8. **Purchase Option**

End of Contract Year	Option Price*
Buyout after year 6	\$112,694.45
Buyout after year 10	\$113,032.21
Buyout after year 20	Fair Market Value

*Buyer shall have the right to purchase the System at the greater of the price set forth above and the then current fair market value.

9. Termination Value:

Contract Year	Termination Value
1	\$343,890.47
2	\$293,876.91
3	\$230,437.86
4	\$177,577.08
5	\$130,727.40
6	\$82,546.05
7	\$75,583.27
8	\$73,923.82
9	\$72,100.38
10	\$70,103.51
11	\$67,923.34
12	\$65,549.44
13	\$62,970.88
14	\$60,176.13
15	\$57,153.09
16	\$53,889.02
17	\$50,370.54
18	\$46,583.56
19	\$42,513.27
20	\$38,144.13

10. **Rebate Variance.** All prices in this Agreement are calculated based on an upfront rebate of \$0 and an ongoing incentive of \$0.35/kWh for 5 years. If the actual rebate is lower than calculated, prices will be adjusted pro-rata to reflect the actual rebate received.

Exhibit 2

System Description, Delivery Point and License Area

1. **System Location:** 915 I Street, Sacramento, California 95814
2. **System Size (DC kW):** 41.86
3. **Expected First Year Energy Production (kWh):** 49,275
4. **Expected Structure:** Roof Mount
5. **Expected Module(s):**

<u>Manufacturer/Model</u>	<u>Quantity</u>
Yingli Green Energy:YL230P-29b	182

6. **Expected Inverter(s):**

<u>Manufacturer/Model</u>	<u>Quantity</u>
Fronius USA:IG Plus 11.4-3 Delta-208	4

7. **Includes:**

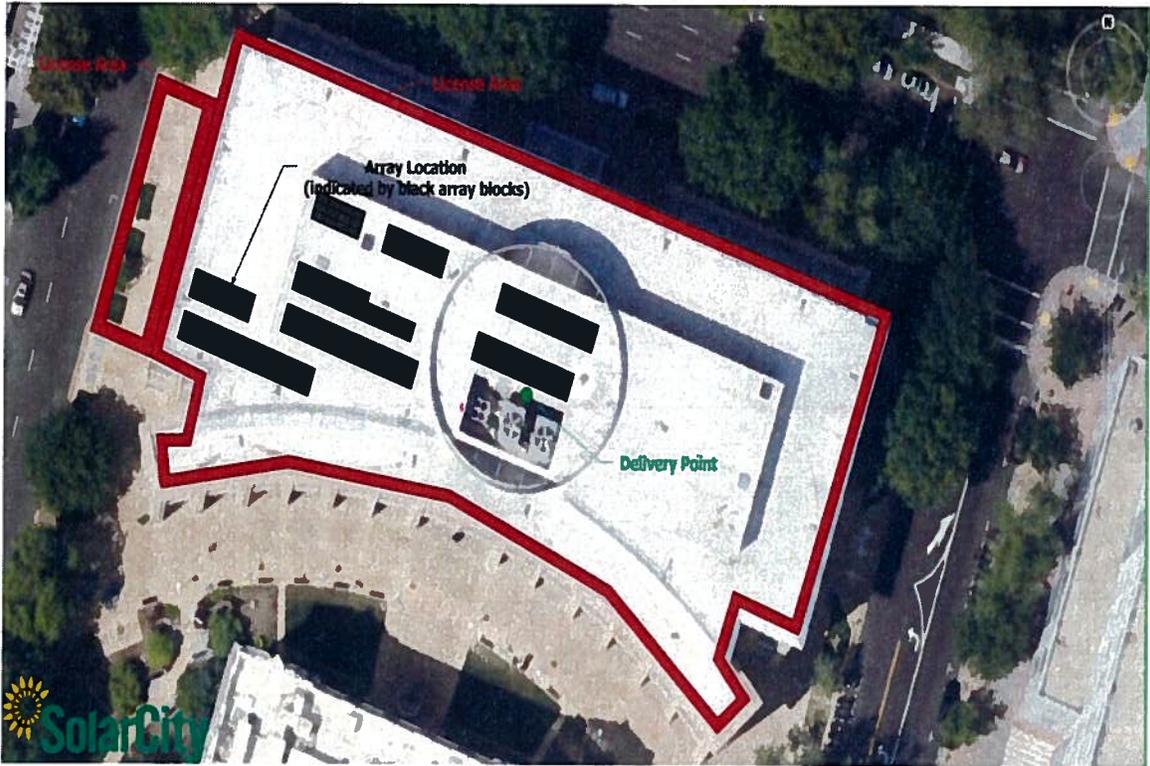
SolarCity Limited Warranty, installation of a solar energy system (includes: design, engineering, permitting, installation, monitoring, rebate application and paperwork processing for solar energy system).

8. **Excludes:**

Unforeseen groundwork (including, but not limited to, excavation/circumvention of underground obstacles), upgrades or repair to customer or utility electrical infrastructure, upgrades or repair to building structure or to roofing system, payment bonds, performance bond(s), prevailing wage construction, tree removal, tree trimming.

9. **Delivery Point and License Area:** SolarCity shall attach a schematic that contains the:

- (i) array;
- (ii) Delivery Point; and
- (iii) access points needed to install and service System (bldg access, electrical room, stairs etc.)



State of _____)
County of _____)

On _____, before me, _____, Notary Public, personally appeared _____, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PÉNALTY OF PERJURY under the laws of the State of _____ that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature of the Notary Public

State of California)
County of San Mateo)

On _____, before me, _____, Notary Public, personally appeared _____, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature of the Notary Public

Exhibit A
To Memorandum of License

Legal Description of Premises

That certain real property located in the County of Sacramento, State of California described as follows:

A PARCEL OF LAND LOCATED IN THE STATE OF CALIFORNIA, COUNTY OF SACRAMENTO, WITH A SITUS ADDRESS OF 915 I ST 5, SACRAMENTO, CA 95814-2613 CURRENTLY OWNED BY CITY OF SACRAMENTO HAVING A TAX ASSESSOR NUMBER OF 006-0041-013-0000 AND BEING THE SAME PROPERTY MORE FULLY DESCRIBED AS LOTS 1, 2, 3, 4, 5, 6, 7 & 8 BLK H & I 9TH & 10TH INCLUDING ALLY IN THE CITY OF SACRAMENTO CONTG 2.50 AC M/L

Exhibit 4

Solar Power Purchase Agreement General Terms and Conditions

1. **Definitions and Interpretation:** Unless otherwise defined or required by the context in which any term appears: (a) the singular includes the plural and vice versa; (b) the words "herein," "hereof" and "hereunder" refer to this Agreement as a whole and not to any particular section or subsection of this Agreement; (c) references to any agreement, document or instrument mean such agreement, document or instrument as amended, modified, supplemented or replaced from time to time; and (d) the words "include," "includes" and "including" mean include, includes and including "without limitation." The captions or headings in this Agreement are strictly for convenience and shall not be considered in interpreting this Agreement.

2. **Purchase and Sale of Electricity.** Purchaser shall purchase from Seller, and Seller shall sell to Purchaser, all of the electric energy generated by the System during the Initial Term and any Additional Term (as defined in Exhibit 1, and collectively the "Term"). Electric energy generated by the System will be delivered to Purchaser at the delivery point identified on Exhibit 3 (the "Delivery Point"). Purchaser shall take title to the electric energy generated by the System at the Delivery Point, and risk of loss will pass from Seller to Purchaser at the Delivery Point. Purchaser may purchase electric energy for the Facility from other sources if the Purchaser's electric requirements at the Facility exceed the output of the System.

3. **Term and Termination.**
 - a. **Initial Term.** The initial term ("Initial Term") of this Agreement shall commence on the Commercial Operation Date (as defined below) and continue for the length of time specified in Exhibit 1, unless earlier terminated as provided for in this Agreement. The "Commercial Operation Date" is the date Seller gives Purchaser written notice that the System is mechanically complete and capable of providing electric energy to the Delivery Point. Upon Purchaser's request, Seller will give Purchaser copies of certificates of completion or similar documentation from Seller's contractor and the interconnection or similar agreement with SMUD. This Agreement is effective as of the Effective Date and Purchaser's failure to enable Seller to provide the electric energy by preventing it from installing the System or otherwise not performing shall not excuse Purchaser's obligations to make payments that otherwise would have been due under this Agreement. **Additional Terms.** If Purchaser has not exercised its option to purchase the System by the end of the Initial Term, either Party may give the other Party written notice of its desire to extend this Agreement on the terms and conditions set forth herein for the number and length of additional periods specified in Exhibit 1 (each an "Additional Term"). Such notice shall be given, if at all, not more than one hundred twenty (120) and not less than sixty (60) days before the last day of the Initial Term or the then current Additional Term, as applicable. The Party receiving the notice requesting an Additional Term shall respond positively or negatively to that request in writing within thirty (30) days after receipt of the request. Failure to respond within such thirty (30) day period shall be deemed a rejection of the offer for an Additional Term. If both Parties agree to an Additional Term, the Additional Term shall begin immediately upon the conclusion of the Initial Term or the then current term on the same terms and conditions as set forth in this Agreement. If the Party receiving the request for an Additional Term rejects or is deemed to reject the first Party's offer, this Agreement shall terminate at the end of the Initial Term (if the same has not been extended) or the then current Additional Term.

4. **Billing and Payment.**
 - a. **Monthly Charges.** Purchaser shall pay Seller monthly for the electric energy generated by the System and delivered to the Delivery Point at the \$/kWh rate shown in Exhibit 1 (the "Contract Price"). The monthly payment for such energy will be equal to the applicable \$/kWh rate multiplied by the number of kWh of energy generated during the applicable month, as measured by the System meter.

 - b. **Monthly Invoices.** Seller shall invoice Purchaser monthly, either manually or through ACH. Such monthly invoices shall state (i) the amount of electric energy produced by the System and delivered to the Delivery Point, (ii) the rates applicable to, and charges incurred by, Purchaser under this Agreement and (iii) the total amount due from Purchaser.

 - c. **Taxes.** Purchaser shall either pay or reimburse Seller for any and all taxes assessed on the generation, sale, delivery or consumption of electric energy produced by the System or the interconnection of the System to SMUD's electric distribution system, including property taxes on the System; provided, however, Purchaser will not be required to pay or reimburse Seller for any taxes during periods when Seller fails to deliver electric energy to Purchaser for

reasons other than Force Majeure. For purposes of this Section 4(d), “Taxes” means any federal, state and local ad valorem, property, occupation, generation, privilege, sales, use, consumption, excise, transaction, and other taxes, regulatory fees, surcharges or other similar charges, but shall not include any income taxes or similar taxes imposed on Seller’s revenues due to the sale of energy under this Agreement, which shall be Seller’s responsibility.

- d. **Payment Terms.** All amounts due under this Agreement shall be due and payable net thirty (30) days from receipt of invoice. Any undisputed portion of the invoice amount not paid within the thirty (30) day period shall accrue interest as permitted under Civil Code section 3289.

5. **Environmental Attributes and Environmental Incentives.**

Unless otherwise specified on Exhibit 1, Seller is the owner of all Environmental Attributes and Environmental Incentives and is entitled to the benefit of all Tax Credits, and Purchaser’s purchase of electricity under this Agreement does not include Environmental Attributes, Environmental Incentives or the right to Tax Credits or any other attributes of ownership and operation of the System, all of which shall be retained by Seller. Purchaser shall cooperate with Seller in obtaining, securing and transferring all Environmental Attributes and Environmental Incentives and the benefit of all Tax Credits, including by using the electric energy generated by the System in a manner necessary to qualify for such available Environmental Attributes, Environmental Incentives and Tax Credits. Purchaser shall not be obligated to incur any out-of-pocket costs or expenses in connection with such actions unless reimbursed by Seller. If any Environmental Incentives are paid directly to Purchaser, Purchaser shall immediately pay such amounts over to Seller. To avoid any conflicts with fair trade rules regarding claims of solar or renewable energy use, Purchaser, if engaged in commerce and/or trade, shall submit to Seller for approval any press releases regarding Purchaser’s use of solar or renewable energy and shall not submit for publication any such releases without the written approval of Seller. Approval shall not be unreasonably withheld, and Seller’s review and approval shall be made in a timely manner to permit Purchaser’s timely publication.

“**Environmental Attributes**” means any and all credits, benefits, emissions reductions, offsets, and allowances, howsoever entitled, attributable to the System, the production of electrical energy from the System and its displacement of conventional energy generation, including (1) any avoided emissions of pollutants to the air, soil or water such as sulfur oxides (SO_x), nitrogen oxides (NO_x), carbon monoxide (CO) and other pollutants; (2) any avoided emissions of carbon dioxide (CO₂), methane (CH₄), nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride and other greenhouse gases (GHGs) that have been determined by the United Nations Intergovernmental Panel on Climate Change, or otherwise by law, 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 related to these avoided emissions, such as Green Tag Reporting Rights and Renewable Energy Credits. Green Tag Reporting Rights are the right of a party to report the ownership of accumulated Green Tags in compliance with federal or state law, if applicable, and to a federal or state agency or any other party, and include Green Tag Reporting Rights accruing under Section 1605(b) of The Energy Policy Act of 1992 and any present or future federal, state, or local law, regulation or bill, and international or foreign emissions trading program. Environmental Attributes do not include Environmental Incentives and Tax Credits. Seller shall file all tax returns in a manner consistent with this Section 5. Without limiting the generality of the foregoing, Environmental Attributes include carbon trading credits, renewable energy credits or certificates, emissions reduction credits, investment credits, emissions allowances, green tags, tradeable renewable credits and Green-e® products.

“**Environmental Incentives**” means any and credits, rebates, subsidies, payments or other incentives that relate to self-generation of electricity, the use of technology incorporated into the System, environmental benefits of using the System, or other similar programs available from SMUD, any other regulated entity, the manufacturer of any part of the System or any Governmental Authority.

“**Governmental Authority**” means any national, state or local government (whether domestic or foreign), any political subdivision thereof or any other governmental, quasi-governmental, judicial, public or statutory instrumentality, authority, body, agency, bureau or entity (including the Federal Energy Regulatory Commission or the California Public Utilities Commission), or any arbitrator with authority to bind a party at law.

“**Tax Credits**” means any and all (i) investment tax credits, (ii) production tax credits and (iii) similar tax credits or grants under federal, state or local law relating to the construction, ownership or production of energy from the System.

6. **Conditions to Obligations.**

- a. **Conditions to Seller’s Obligations.**

Seller's obligations under this Agreement are conditioned on the completion of the following conditions to Seller's reasonable satisfaction on or before the Condition Satisfaction Date:

- i. Completion of a physical inspection of the Facility and the property upon which the Facility is located (the "Premises") including, if applicable, geotechnical work, and real estate due diligence to confirm the suitability of the Facility and the Premises for the System;
- ii. Approval of (A) this Agreement and (B) the Construction Agreement (if any) for the System by Seller's Financing Parties. "Construction Agreement" as used in this subsection means an agreement between SolarCity and a subcontractor to install the System;
- iii. Confirmation that Seller will obtain all applicable SMUD PBI incentives;
- iv. Confirmation that Seller will obtain all applicable Environmental Incentives (including SMUD PBI incentives) and Tax Credits;
- v. Receipt of all necessary zoning, land use and building permits;
- vi. Execution of all necessary agreements with SMUD for interconnection of the System to SMUD's electric distribution system; and

Prior to Seller commencing construction and installation of the System, Purchaser shall give Seller proof of self insurance for all insurance required to be maintained by Purchaser under this Agreement

b. Conditions to Purchaser's Obligations.

- i. Purchaser's obligations under this Agreement are conditioned on the occurrence of the Commercial Operation Date for the System on or before the Outside Commercial Operation Date (See Exhibit 1).

c. Failure of Conditions.

If any of the conditions listed in subsections a or b above are not satisfied by the applicable dates specified in those subsections, the Parties will attempt in good faith to negotiate new dates for the satisfaction of the failed conditions. If the parties are unable to negotiate new dates then the Party that has not failed to meet an obligation may terminate this Agreement upon ten (10) days written notice to the other Party without liability for costs or damages or triggering a default under this Agreement.

7. Seller's Rights and Obligations.

a. Permits and Approvals. Seller, consistent with applicable laws, shall use commercially reasonable efforts to obtain, at its sole cost and expense:

- i. any zoning, land use and building permits required to construct, install and operate the System; and
- ii. any agreements and approvals from SMUD necessary in order to interconnect the System to SMUD's electric distribution system.

Purchaser, consistent with applicable laws, shall cooperate with Seller's reasonable efforts to obtain such agreements, permits and approvals

b. Standard System Repair and Maintenance. Seller shall construct and install the System at the Facility. During the Term, Seller will operate and perform all routine and emergency repairs to, and maintenance of, the System at its sole cost and expense, except for any repairs or maintenance resulting from Purchaser's negligence, willful misconduct or breach of this Agreement or the Site Lease (if applicable). Seller shall not be responsible for any work done by others on any part of the System unless Seller authorizes that work in advance in writing. Seller shall not be responsible for any loss, damage, cost or expense arising out of or resulting from improper environmental controls or improper operation or maintenance of the System by anyone other than Seller or Seller's contractors. If the System requires repairs for which Seller is not responsible, Purchaser shall pay Seller for diagnosing and correcting the problem at Seller or Seller's contractors' then current reasonable rates. Seller shall provide Purchaser with reasonable notice prior to accessing the Facility to make standard repairs.

- c. **Non-Standard System Repair and Maintenance.** If Seller incurs unexpected costs to maintain the System due to conditions at the Facility that impair the functioning of the System and these conditions were: caused by the Purchaser or the Purchaser knew or should have known of these conditions; and the Purchaser failed to remedy these conditions or inform the Seller of these conditions prior to entering into this Agreement, the pricing, schedule and other terms of this Agreement will be equitably adjusted to compensate for any work in excess of normally expected work required to be performed by Seller. In such event, the Parties will negotiate such equitable adjustment in good faith.
- d. **Breakdown Notice.** Seller shall notify Purchaser within twenty-four (24) hours following Seller's discovery of (i) any material malfunction in the operation of the System or (ii) an interruption in the supply of electrical energy from the System. Purchaser and Seller shall each designate personnel and establish procedures such that each Party may provide notice of such conditions requiring Seller's repair or alteration at all times, twenty-four (24) hours per day, including weekends and holidays. Purchaser shall notify Seller immediately upon the discovery of an emergency condition affecting the System.
- e. **Suspension.** Notwithstanding anything to the contrary herein, Seller shall be entitled to suspend delivery of electricity from the System to the Delivery Point for the purpose of maintaining and repairing the System and such suspension of service shall not constitute a breach of this Agreement; provided, that Seller shall use commercially reasonable efforts to minimize any interruption in service to the Purchaser. A suspension of delivery of electricity under this provision shall not extend the term of the Agreement.
- f. **Use of Contractors and Subcontractors.** Seller shall be permitted to use contractors and subcontractors to perform its obligations under this Agreement. However, Seller shall continue to be responsible for the quality of the work performed by its contractors and subcontractors. If a list of pre-approved contractors and subcontractors is desired, such list shall be scheduled on an appendix to this Exhibit. All contractors and subcontractors, other than those that may be scheduled on an appendix to this Exhibit, shall be subject to Purchaser's prior written consent, not to be unreasonably withheld.
- g. **Liens and Payment of Contractors and Suppliers.** Seller shall pay when due all valid charges from all contractors, subcontractors and suppliers supplying goods or services to Seller under this Agreement and shall keep the Facility free and clear of any liens related to such charges. Seller shall indemnify Purchaser for all claims, losses, damages, liabilities and expenses resulting from any liens filed against the Facility or the Premises in connection with such charges; provided, however, that Seller shall have the right to contest any such lien, so long as it provides a statutory bond or other reasonable assurances of payment that either remove such lien from title to the Facility and the Premises or that assure that any adverse judgment with respect to such lien will be paid without affecting title to the Facility and the Premises.

Unless otherwise provided in this agreement, Seller shall not directly or indirectly cause, create, incur, assume or allow to exist any mortgage, pledge, lien, charge, security interest, encumbrance or other claim of any nature on or with respect to the System or any interest therein. Seller shall immediately notify Purchaser in writing of the existence of any such mortgage, pledge, lien, charge, security interest, encumbrance or other claim, shall promptly cause the same to be discharged and released of record without cost to Purchaser, and shall indemnify Purchaser against all costs and expenses (including reasonable attorneys' fees) incurred in discharging and releasing any such mortgage, pledge, lien, charge, security interest, encumbrance or other claim.

- h. **No Warranty.** NO WARRANTY OR REMEDY, WHETHER STATUTORY, WRITTEN, ORAL, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, OR WARRANTIES ARISING FROM COURSE OF DEALING OR USAGE OF TRADE SHALL APPLY. The remedies set forth in this Agreement shall be Purchaser's sole and exclusive remedies for any claim or liability arising out of or in connection with this Agreement, whether arising in contract, tort (including negligence), strict liability or otherwise. The Limited Warranty SolarCity will provide Purchaser with is a separate contract from this Agreement. No rights provided to Purchaser by the Limited Warranty may be asserted under this Agreement. No warranty is made in this Agreement. Therefore, any warranty claim must be made independently of this Agreement and will not affect Purchaser's obligations under this Agreement.

8. **Purchaser's Rights and Obligations.**

- a. **Facility Access Rights.** Purchaser grants to Seller and to Seller's agents, employees and contractors an irrevocable non-exclusive license running with the Premises (the "**License**") for access to, on, over, under and across the Premises as more particularly described in Exhibit A to **Exhibit 3** (the "**License Area**") for the purposes of (a)

installing, constructing, operating, owning, maintaining, accessing, removing and replacing the System; (b) performing all of Seller's obligations and enforcing all of Seller's rights set forth in this Agreement; and (c) installing, using and maintaining electric lines and equipment, including inverters and meters, necessary to interconnect the System to Purchaser's electric system at the Facility and/or to SMUD's electric distribution system or that otherwise may from time to time be useful or necessary in connection with the construction, installation, operation, maintenance or repair of the System. Seller shall notify Purchaser prior to entering the Facility except in situations where there is imminent risk of damage to persons or property. Purchaser shall provide Seller access during normal business hours, excluding weekends and holidays and during emergency situations when it is reasonable to enter the premises, for the purposes and on the terms set forth in the Agreement. Seller will provide twenty-four (24) hour notice or as much time as is reasonably possible to Purchaser in the event that it needs to access the System during excluded periods.. The term of the License shall continue until the date that is one hundred and twenty (120) days following the date of expiration or termination of this Agreement (the "**License Term**"). During the License Term, Purchaser shall ensure that Seller's rights under the License and Seller's access to the License Area are preserved and protected and shall not interfere with or permit any third parties to interfere with such rights or access. The grant of the License shall survive termination of this agreement by either Party. Purchaser agrees that Seller may record a memorandum of license in substantially the same form attached hereto as **Exhibit 3** in the land records respecting the License.

- b. **OSHA Compliance.** Both parties shall ensure that all Occupational Safety and Health Act (OSHA) requirements and other similar applicable safety laws or codes are adhered to in their performance under this Agreement.
- c. **Maintenance of Facility.** Purchaser shall, at its sole cost and expense, maintain the Facility in good condition and repair. Purchaser will ensure that the Facility remains interconnected to the local utility (SMUD) grid at all times and will not permit cessation of electric service to the Facility from the local utility (SMUD). Purchaser is fully responsible for the maintenance and repair of the Facility's electrical system and of all of Purchaser's equipment that utilizes the System's outputs. Purchaser shall properly maintain in full working order all of Purchaser's electric supply or generation equipment that Purchaser may shut down while utilizing the System. Purchaser shall promptly notify Seller of any matters of which it is aware pertaining to any damage to or loss of use of the System or that could reasonably be expected to adversely affect the System.
- d. **No Alteration of Facility.** Purchaser shall not make any alterations or repairs to the Facility which may adversely affect the operation and maintenance of the System without Seller's prior written consent. If Purchaser wishes to make such alterations or repairs, Purchaser shall give prior written notice to Seller, setting forth the work to be undertaken (except for emergency repairs, for which notice may be given by telephone), and give Seller the opportunity to advise Purchaser in making such alterations or repairs in a manner that avoids damage to the System. Purchaser shall be responsible for all damage to the System caused by Purchaser or its contractors, excluding damages resulting from alterations or repairs performed at the Seller's written direction. To the extent that temporary disconnection or removal of the System is necessary to perform such alterations or repairs, such work and any replacement of the System after completion of Purchaser's alterations and repairs, shall be done by Seller or its contractors at Purchaser's cost. All of Purchaser's alterations and repairs will be done in a good and workmanlike manner and in compliance with all applicable laws, codes and permits.
- e. **Outages.** Purchaser shall be permitted to be off line for two (2) full twenty-four (24) hour days (each, a "**Scheduled Outage**") per calendar year during the Term, during which days Purchaser shall not be obligated to accept or pay for electricity from the System; provided, however, that Purchaser must notify Seller in writing of each such Scheduled Outage at least forty-eight (48) hours in advance of the commencement of a Scheduled Outage. In the event that Scheduled Outages exceed two (2) days per calendar year or there are unscheduled outages, in each case for a reason other than a Force Majeure event, Seller shall reasonably estimate the amount of electricity that would have been delivered to Purchaser during such excess Scheduled Outages or unscheduled outages and shall invoice Purchaser for such amount in accordance with **Section 4**.
- f. **Liens.** Purchaser shall not directly or indirectly cause, create, incur, assume or allow to exist any mortgage, pledge, lien, charge, security interest, encumbrance or other claim of any nature on or with respect to the System or any interest therein. Purchaser shall immediately notify Seller in writing of the existence of any such mortgage, pledge, lien, charge, security interest, encumbrance or other claim, shall promptly cause the same to be discharged and released of record without cost to Seller, and shall indemnify Seller against all costs and expenses (including reasonable attorneys' fees) incurred in discharging and releasing any such mortgage, pledge, lien, charge, security interest, encumbrance or other claim.

- g. Security.** Purchaser shall be responsible for maintaining the physical security of the Facility and the System. Purchaser will not conduct activities on, in or about the License Area or the Facility that have a reasonable likelihood of causing damage, impairment or otherwise adversely affecting the System.
- h. Insolation.** Purchaser understands that unobstructed access to sunlight ("**Insolation**") is essential to Seller's performance of its obligations and a material term of this Agreement. Purchaser shall not in any way cause and, where possible, shall not in any way permit any interference with the System's Insolation. If Purchaser becomes aware of any activity or condition that could diminish the Insolation of the System, Purchaser shall notify Seller immediately and shall cooperate with Seller in preserving the System's existing Insolation levels. The Parties agree that reducing Insolation would irreparably injure Seller, that such injury may not be adequately compensated by an award of money damages, and that Seller is entitled to seek specific enforcement of this Section 8(h) against Purchaser.
- i. Data Line.** Purchaser shall provide Seller a high speed internet data line during the Term to enable Seller to record the electric energy generated by the System. If Purchaser fails to provide such high speed internet data line, or if such line ceases to function and is not repaired, Seller may reasonably estimate the amount of electric energy that was generated and invoice Purchaser for such amount in accordance with Section 4.
- j. Breakdown Notice.** Purchaser shall notify Seller within twenty-four (24) hours following the discovery by it of (A) any material malfunction in the operation of the System; or (B) any occurrences that could reasonably be expected to adversely affect the System. Purchaser shall notify Seller immediately upon (A) an interruption in the supply of electrical energy from the System; or (B) the discovery of an emergency condition respecting the System. Purchaser and Seller shall each designate personnel and establish procedures such that each Party may provide notice of such conditions requiring Seller's repair or alteration at all times, twenty-four (24) hours per day, including weekends and holidays.

9. Change in Law.

"**Change in Law**" means (i) the enactment, adoption, promulgation, modification or repeal after the Effective Date of any applicable law or regulation; (ii) the imposition of any material conditions on the issuance or renewal of any applicable permit after the Effective Date of this Agreement (notwithstanding the general requirements contained in any applicable Permit at the time of application or issue to comply with future laws, ordinances, codes, rules, regulations or similar legislation), or (iii) a change in any SMUD rate schedule or tariff approved by any Governmental Authority which in the case of any of (i), (ii) or (iii), establishes requirements affecting owning, supplying, constructing, installing, operating or maintaining the System, or other performance of the Seller's obligations hereunder and which has a material adverse effect on the cost to Seller of performing such obligations; provided, that a change in federal, state, county or any other tax law after the Effective Date of this Agreement shall not be a Change in Law pursuant to this Agreement.

If any Change in Law occurs that has a material adverse effect on the cost to Seller of performing its obligations under this Agreement, then the Parties shall, within thirty (30) days following receipt by Purchaser from Seller of notice of such Change in Law, meet and attempt in good faith to negotiate amendments to this Agreement as are reasonably necessary to preserve the economic value of this Agreement to both Parties. If the Parties are unable to agree upon such amendments within such thirty (30) day period, then Seller shall have the right to terminate this Agreement without further liability to either Party except with respect to payment of amounts accrued prior to termination.

10. Relocation of System.

If Purchaser ceases to conduct business operations at and/or vacates the Facility or is prevented from operating the System at the Facility prior to the expiration of the Term, Purchaser shall have the option to provide Seller with a mutually agreeable substitute premises located within SMUD as the terminated System or in a location with similar Utility rates and Insolation. Purchaser shall provide written notice at least sixty (60) days but not more than one hundred eighty (180) days prior to the date that it wants to make this substitution. In connection with such substitution, Purchaser shall execute an amended agreement that shall have all of the same terms as this Agreement except for the (i) Effective Date; (ii) License, which will be amended to grant rights in the real property where the System relocated to; and (iii) Term, which will be the remainder of the Term of this Agreement and such amended agreement shall be deemed to be a continuation of this Agreement without termination. Purchaser shall also provide any new Purchaser, owner, lessor or mortgagee consents or releases required by Seller or Seller's Financing Parties in connection with the substitute facility. Purchaser shall pay all costs associated with relocation of the System, including all costs and expenses incurred by or on behalf of Seller in connection with removal of the System from the Facility and installation and testing of the System at the substitute facility and all applicable interconnection fees and expenses at the substitute facility, as well as costs of new title search and other out-of-pocket

expenses connected to preserving and refiling the security interests of Seller's Financing Parties in the System. Seller shall remove the System from the vacated Facility prior to the termination of Purchaser's ownership, lease or other rights to use such Facility. Seller will not be required to restore the Facility to its prior condition but shall promptly pay Purchaser for any damage caused by Seller during removal of the System, but not for normal wear and tear. If the substitute facility has inferior Insulation as compared to the original Facility, Seller shall have the right to make an adjustment to Exhibit 1 such that Purchaser's payments to Seller are the same as if the System were located at the original Facility. If Purchaser is unable to provide such substitute facility and to relocate the System as provided, any early termination will be treated as a default by Purchaser.

11. Removal of System at Expiration.

Upon the expiration or earlier termination of this Agreement (provided Purchaser does not exercise its purchase option), Seller shall, at its expense, remove all of its tangible property comprising the System from the Facility on a mutually convenient date, but in no event later than ninety (90) days after the expiration of the Term. Excluding ordinary wear and tear, the Facility shall be returned to its original condition including the removal of System mounting pads or other support structures. In no case shall Seller's removal of the System affect the integrity of Purchaser's roof, which shall be as leak proof as it was prior to removal of the System and shall be flashed and/or patched to existing roof specifications. Seller shall leave the Facility in neat and clean order. If Seller fails to remove or commence substantial efforts to remove the System by such agreed upon date, Purchaser shall have the right, at its option, to remove the System to a public warehouse and restore the Facility to its original condition (other than ordinary wear and tear) at Seller's cost. Purchaser shall provide sufficient space for the temporary storage and staging of tools, materials and equipment and for the parking of construction crew vehicles and temporary construction trailers and facilities reasonably necessary during System removal.

12. Measurement.

Electricity delivered to the Facility shall be measured by the SolarGuard monitoring system installed and maintained by Seller as part of the System.

13. Default, Remedies and Damages.

a. **Default.** Any Party that fails to perform its responsibilities as listed below or experiences any of the circumstances listed below shall be deemed a "**Defaulting Party**" and each event of default shall be a "**Default Event**":

- (1) failure of a Party to pay any amount due and payable under this Agreement, other than an amount that is subject to a good faith dispute, within ten (10) days following receipt of written notice from the other Party (the "**Non-Defaulting Party**") of such failure to pay ("**Payment Default**");
- (2) failure of a Party to substantially perform any other material obligation under this Agreement within thirty (30) days following receipt of written notice from the Non-Defaulting Party demanding such cure; provided, that such thirty (30) day cure period shall be extended (but not beyond ninety (90) days) if and to the extent reasonably necessary to cure the Default Event, if (i) the Defaulting Party initiates such cure with the thirty (30) day period and continues such cure to completion and (ii) there is no material adverse affect on the Non-Defaulting Party resulting from the failure to cure the Default Event;
- (3) if any representation or warranty of a Party proves at any time to have been incorrect in any material respect when made and is material to the transactions contemplated hereby, if the effect of such incorrectness is not cured within thirty (30) days following receipt of written notice from the Non-Defaulting Party demanding such cure;
- (4) Purchaser loses its rights to occupy and enjoy the Premises;
- (5) a Party, or its guarantor, becomes insolvent or is a party to a bankruptcy, reorganization, insolvency, liquidation, receivership, dissolution, winding-up or relief of debtors, or any general assignment for the benefit of creditors or other similar arrangement or any event occurs or proceedings are taken in any jurisdiction with respect to the Party which has a similar effect; or
- (6) Purchaser prevents Seller from installing the System or otherwise failing to perform in a way that prevents the delivery of electric energy from the System. Such Default Event shall not excuse

Purchaser's obligations to make payments that otherwise would have been due under this Agreement.

b. Remedies.

- (1) Remedies for Payment Default. If a Payment Default occurs, the Non-Defaulting Party may suspend performance of its obligations under this Agreement. Further, the Non-Defaulting Party may pursue any remedy under this Agreement, at law or in equity, including an action for damages and termination of this Agreement, upon five (5) days prior written notice to the Defaulting Party following the Payment Default.
- (2) Remedies for Other Defaults. On the occurrence of a Default Event other than a Payment Default, the Non-Defaulting Party may pursue any remedy under this Agreement, at law or in equity, including an action for damages and termination of this Agreement or suspension of performance of its obligations under this Agreement, upon five (5) days prior written notice to the Defaulting Party following the occurrence of the Default Event. Nothing herein shall limit either Party's right to collect damages upon the occurrence of a breach or a default by the other Party that does not become a Default Event. If Purchaser terminates this contract without cause prior to System Installation, Purchaser shall pay Seller for all reasonable costs incurred to date. This shall be Seller's sole remedy against Purchaser in the event of default prior to System Installation.
- (3) Damages Upon Termination by Default. Upon a termination of this Agreement by the Non-Defaulting Party as a result of a Default Event by the Defaulting Party, the Defaulting Party shall pay a Termination Payment to the Non-Defaulting Party determined as follows (the "**Termination Payment**"):
 - A. Purchaser. If Purchaser is the Defaulting Party and Seller terminates this Agreement, the Termination Payment to Seller shall be equal to the sum of (i) the termination value set forth in Exhibit 1 (the "**Termination Value**") for such Contract Year, (ii) commercially reasonable removal costs as provided in Section 13(b)(2)(C) and (iii) any and all other amounts previously accrued under this Agreement and then owed by Purchaser to Seller. The Parties agree that actual damages to Seller in the event this Agreement terminates prior to the expiration of the Term as the result of an Default Event by Purchaser would be difficult to ascertain, and the applicable Termination Value set forth in Exhibit 1 is a reasonable approximation of the damages suffered by Seller as a result of early termination of this Agreement. The Termination Payment shall not be less than zero.
 - B. Seller. If Seller is the Defaulting Party and Purchaser terminates this Agreement, the Termination Payment to Purchaser shall be equal to the sum of (i) the present value (using a discount rate of 9.5%) of the excess, if any, of the reasonably expected cost of electric energy from SMUD over the Contract Price for the reasonably expected production of the System for the remainder of the Initial Term or the then current Additional Term, as applicable; (ii) all costs reasonably incurred by Purchaser in re-converting its electric supply to service from SMUD; (iii) any removal costs incurred by Purchaser, and (iv) any and all other amounts previously accrued under this Agreement and then owed by Seller to Purchaser. The Termination Payment shall not be less than zero.
 - C. Obligations Following Termination. If a Non-Defaulting Party terminates this Agreement pursuant to this Section 13(b), then following such termination, Seller shall, at the sole cost and expense of the Defaulting Party, remove the equipment (except for mounting pads and support structures) constituting the System. The Non-Defaulting Party shall take all commercially reasonable efforts to mitigate its damages as the result of a Default Event.

14. Representations and Warranties.

- a. General Representations and Warranties.** Each Party represents and warrants to the other the following:

- (1) Such Party is duly organized, validly existing and in good standing under the laws of the jurisdiction of its formation; the execution, delivery and performance by such Party of this Agreement have been duly authorized by all necessary corporate, partnership or limited liability company action, as applicable, and do not and shall not violate any law; and this Agreement is valid obligation of such Party, enforceable against such Party in accordance with its terms (except as may be limited by applicable bankruptcy, insolvency, reorganization, moratorium and other similar laws now or hereafter in effect relating to creditors' rights generally).
- (2) Such Party has obtained all licenses, authorizations, consents and approvals required by any Governmental Authority or other third party and necessary for such Party to own its assets, carry on its business and to execute and deliver this Agreement; and such Party is in compliance with all laws that relate to this Agreement in all material respects.

b. Purchaser's Representations and Warranties. Purchaser represents and warrants to Seller the following:

- (1) License. Purchaser has the full right, power and authority to grant the License contained in Section 8(a). Such grant of the License does not violate any law, ordinance, rule or other governmental restriction applicable to Purchaser or the Facility and is not inconsistent with and will not result in a breach or default under any agreement by which Purchaser is bound or that affects the Facility.
- (2) Other Agreements. Neither the execution and delivery of this Agreement by Purchaser nor the performance by Purchaser of any of its obligations under this Agreement conflicts with or will result in a breach or default under any agreement or obligation to which Purchaser is a party or by which Purchaser or the Facility is bound.
- (3) Accuracy of Information. All information provided by Purchaser to Seller, as it pertains to the Facility's physical configuration, Purchaser's planned use of the Facility, and Purchaser's estimated electricity requirements, is accurate in all material respects.
- (4) Purchaser Status. Purchaser is not a public utility or a public utility holding company and is not subject to regulation as a public utility or a public utility holding company.
- (5) No Pool Use. No electricity generated by the System will be used to heat a swimming pool.
- (6) Oregon Only: The electricity generated by the System will be used solely for commercial and business purposes. No portion of the electricity generated will be used for personal, family, household or agricultural purposes.

15. System and Facility Damage and Insurance.

a. System and Facility Damage.

- (1) Seller's Obligations. If the System is damaged or destroyed other than by Purchaser's gross negligence or willful misconduct, Seller shall promptly repair and restore the System to its pre-existing condition; provided, however, that if more than fifty percent (50%) of the System is destroyed during the last five (5) years of the Initial Term or during any Additional Term, Seller shall not be required to restore the System, but may instead terminate this Agreement, unless Purchaser agrees (i) to pay for the cost of such restoration of the System or (ii) to purchase the System "AS-IS" at the greater of (A) then current fair market value of the System and (B) the sum of the amounts described in Section 13.b(3)A)(i) (using the date of purchase to determine the appropriate Contract Year) and Section 13.b(3)A)(iii).
- (2) Purchaser's Obligations. If the Facility is damaged or destroyed by casualty of any kind or any other occurrence other than Seller's gross negligence or willful misconduct, such that the operation of the System and/or Purchaser's ability to accept the electric energy produced by the System are materially impaired or prevented, Purchaser shall promptly repair and restore the Facility to its pre-existing condition; provided, however, that if more than 50% of the Facility is destroyed during the last five years of the Initial Term or during any Additional Term, Purchaser may elect either (i) to restore the Facility or (ii) to pay the Termination Value set forth in Exhibit

1 and all other costs previously accrued but unpaid under this Agreement and thereupon terminate this Agreement.

- b. **Insurance Coverage.** At all times during the Term, Seller and Purchaser shall maintain the following insurance:
- i. **Seller's Insurance.** Seller shall maintain (i) property insurance on the System for the replacement cost thereof, (ii) comprehensive general liability insurance with coverage of at least \$1,000,000 per occurrence and \$2,000,000 annual aggregate, (iii) employer's liability insurance with coverage of at least \$1,000,000 and (iv) worker's compensation insurance as required by law.
 - ii. **Purchaser's Insurance.** Seller acknowledges that Purchaser is a self-insured public entity. Within (30) days after execution of this Agreement, Purchaser shall provide a letter of self-insurance stating that Purchaser's self-insurance program adequately protects against liabilities and claims arising out of the performance of this agreement.
- c. **Policy Provisions.** Seller's insurance policies provided hereunder shall (i) contain a provision whereby the insurer agrees to give the party not providing the insurance thirty (30) days (ten (10) days in the event of non-payment of premiums) written notice before the insurance is cancelled, terminated or materially altered, (ii) be written on an occurrence basis, (iii) with respect to the liability insurance policies, include the other Party as an additional insured as its interest may appear, (iv) include waivers of subrogation, (v) provide for primary coverage without right of contribution from any insurance of the other Party, and (vi) be maintained with companies either rated no less than A- as to Policy Holder's Rating in the current edition of Best's Insurance Guide or otherwise reasonably acceptable to the other party.
- d. **Certificates.** Within thirty (30) days after execution of this Agreement and upon the other Party's request and annually thereafter, Seller shall deliver the other Party certificates of insurance evidencing the above required coverage. A Party's receipt, review or acceptance of such certificate shall in no way limit or relieve the other Party of the duties and responsibilities to maintain insurance as set forth in this Agreement.
- e. **Deductibles.** Unless and to the extent that a claim is covered by an indemnity set forth in this Agreement, each Party shall be responsible for the payment of its own deductibles.

16. **Ownership; Option to Purchase.**

- a. **Ownership of System.** Throughout the Term, Seller shall be the legal and beneficial owner of the System at all times, including all Environmental Attributes, and the System shall remain the personal property of Seller and shall not attach to or be deemed a part of, or fixture to, the Facility or the Premises. Each of the Seller and Purchaser agree that the Seller is the tax owner of the System and all tax filings and reports will be filed in a manner consistent with this Agreement. The System shall at all times retain the legal status of personal property as defined under Article 9 of the Uniform Commercial Code. Purchaser covenants that it will use commercially reasonable efforts to place all parties having an interest in or a mortgage, pledge, lien, charge, security interest, encumbrance or other claim of any nature on the Facility or the Premises on notice of the ownership of the System and the legal status or classification of the System as personal property. If there is any mortgage or fixture filing against the Premises which could reasonably be construed as prospectively attaching to the System as a fixture of the Premises, Purchaser shall provide a disclaimer or release from such lienholder. If Purchaser is the fee owner of the Premises, Purchaser consents to the filing of a disclaimer of the System as a fixture of the Premises in the office where real estate records are customarily filed in the jurisdiction where the Facility is located. If Purchaser is not the fee owner, Purchaser will obtain such consent from such owner. Purchaser agrees to deliver to Seller a non-disturbance agreement in a form reasonably acceptable to Seller from the owner of the Facility (if the Facility is leased by Purchaser), any mortgagee with a lien on the Premises, and other Persons holding a similar interest in the Premises.
- b. **Option to Purchase.** At the end of the sixth (6th) and tenth (10th) Contract Years and at the end of the Initial Term and each Additional Term, so long as Purchaser is not in default under this Agreement, Purchaser may purchase the System from Seller on any such date for a purchase price equal to (i) with respect to an option exercised at the end of the sixth (6th) or tenth (10th) Contract Years the *greater* of (A) the amount set forth at such time in the Purchase Option Price schedule in Exhibit 1, and (B) the Fair Market Value of the System, and (ii) with respect to an option exercised at the end of the Term or an Additional Term, the Fair Market Value of the System. The “Fair Market Value” of the System shall be determined by mutual agreement of Purchaser and Seller; provided, however, if Purchaser and Seller cannot agree to a Fair Market Value within thirty (30) days after Purchaser has exercised its option, the Parties shall select a nationally recognized independent appraiser with experience and expertise in the solar photovoltaic industry to determine the Fair Market Value of the System. Such appraiser shall act reasonably and in good faith to determine the Fair Market Value of the System on an installed basis and shall set forth such determination in a written opinion delivered to the Parties. The valuation made by the appraiser shall be binding upon the Parties in the absence of grounds for vacation of an arbitration award under Code of Civil Procedure section 1286.2. The costs of the appraisal shall be borne by the Parties equally. Purchaser must provide a notification to Seller of its intent to purchase at least ninety (90) days and not more than one hundred eighty (180) days prior to the end of the applicable Contract Year or the Initial Term or Additional Term, as applicable, and the purchase shall be complete prior to the end of the applicable Contract Year or the Initial Term or Additional Term, as applicable. Upon purchase of the System, Purchaser will assume complete responsibility for the operation and maintenance of the System and liability for the performance of the System, and Seller shall have no further liabilities or obligations hereunder.

17. **Indemnification and Limitations of Liability.**

- a. **General.** Each Party (the “Indemnifying Party”) shall defend, indemnify and hold harmless the other Party and the directors, officers, shareholders, partners, members, agents and employees of such other Party, and the respective affiliates of each thereof (collectively, the “Indemnified Parties”), from and against all loss, damage, expense, liability and other claims, including court costs and reasonable attorneys’ fees (collectively, “Liabilities”) resulting from any third party actions relating to the breach of any representation or warranty set forth in Section 14 and from injury to or death of persons, and damage to or loss of property to the extent caused by or arising out of the negligent acts or omissions of, or the willful misconduct of, the Indemnifying Party (or its contractors, agents or employees) in connection with this Agreement; provided, however, that nothing herein shall require the Indemnifying Party to indemnify the Indemnified Party for any Liabilities to the extent caused by or arising out of the negligent acts or omissions of, or the willful misconduct of, the Indemnified Party. This Section 17(a) however, shall not apply to liability arising from any form of hazardous substances or other environmental contamination, such matters being addressed exclusively by Section 17(c).
- b. **Notice and Participation in Third Party Claims.** The Indemnified Party shall give the Indemnifying Party written notice with respect to any Liability asserted by a third party (a “Claim”), as soon as possible upon the receipt of information of any possible Claim or of the commencement of such Claim. The Indemnifying Party may assume the defense of any Claim, at its sole cost and expense, with counsel designated by the Indemnifying Party, to include the City Attorney’s Office in the event the Purchaser is the Indemnifying Party, and reasonably satisfactory to the

Indemnified Party. The Indemnified Party may, however, select separate counsel if both Parties are defendants in the Claim and such defense or other form of participation is not reasonably available to the Indemnifying Party. The Indemnifying Party shall pay the reasonable attorneys' fees incurred by such separate counsel until such time as the need for separate counsel expires. The Indemnified Party may also, at the sole cost and expense of the Indemnifying Party, assume the defense of any Claim if the Indemnifying Party fails to assume the defense of the Claim within a reasonable time. Neither Party shall settle any Claim covered by this Section 17(b) unless it has obtained the prior written consent of the other Party, which consent shall not be unreasonably withheld or delayed. The Indemnifying Party shall have no liability under this Section 17(b) for any Claim for which such notice is not provided if that the failure to give notice prejudices the Indemnifying Party.

c. **Environmental Indemnification.** Seller shall indemnify, defend and hold harmless all of Purchaser's Indemnified Parties from and against all Liabilities arising out of or relating to the existence at, on, above, below or near the License Area of any Hazardous Substance (as defined in Section 17(c)(i)) to the extent deposited, spilled or otherwise caused by Seller or any of its contractors or agents. Purchaser shall indemnify, defend and hold harmless all of Seller's Indemnified Parties from and against all Liabilities arising out of or relating to the existence at, on, above, below or near the Premises of any Hazardous Substance, except to the extent deposited, spilled or otherwise caused by Seller or any of its contractors or agents. Each Party shall promptly notify the other Party if it becomes aware of any Hazardous Substance on or about the License Area or the Premises generally or any deposit, spill or release of any Hazardous Substance.

i. **"Hazardous Substance"** means any chemical, waste or other substance (a) which now or hereafter becomes defined as or included in the definition of "hazardous substances," "hazardous wastes," "hazardous materials," "extremely hazardous wastes," "restricted hazardous wastes," "toxic substances," "toxic pollutants," "pollution," "pollutants," "regulated substances," or words of similar import under any laws pertaining to the environment, health, safety or welfare, (b) which is declared to be hazardous, toxic, or polluting by any Governmental Authority, (c) exposure to which is now or hereafter prohibited, limited or regulated by any Governmental Authority, (d) the storage, use, handling, disposal or release of which is restricted or regulated by any Governmental Authority, or (e) for which remediation or cleanup is required by any Governmental Authority.

d. **Limitations on Liability.**

i. **No Consequential Damages.** Neither Party nor its directors, officers, shareholders, partners, members, agents and employees subcontractors or suppliers shall be liable for any indirect, special, incidental, exemplary, or consequential loss or damage of any nature arising out of their performance or non-performance hereunder even if advised of such.

ii. **Actual Damages.** Seller's aggregate liability under this Agreement arising out of or in connection with the performance or non-performance of this Agreement shall not exceed the *lesser* of (A) the total payments made by Purchaser under this Agreement as of the date that the events that first gave rise to such liability occurred; and (B) the total of the prior twelve (12) monthly payments preceding the date that the events that first gave rise to such liability occurred. The provisions of this Section (17)(d)(ii) shall apply whether such liability arises in contract, tort (including negligence), strict liability or otherwise. Any action against either party must be brought within two (2) years after the cause of action accrues.

18. **Force Majeure.**

a. **"Force Majeure Event"** means any act or event that prevents the affected Party from performing its obligations in accordance with the Agreement, if such act or event is beyond the reasonable control, and not the result of the fault or negligence, of the affected Party and such Party had been unable to overcome such act or event with the exercise of due diligence (including the expenditure of reasonable sums). Subject to the foregoing conditions, "Force Majeure Event" shall include without limitation the following acts or events: (i) natural phenomena, such as storms, hurricanes, floods, lightning, volcanic eruptions and earthquakes; (ii) explosions or fires arising from lightning or other causes unrelated to the acts or omissions of the Party seeking to be excused from performance; (iii) acts of war or public disorders, civil disturbances, riots, insurrection, sabotage, epidemic, terrorist acts, or rebellion; (iv) strikes or labor disputes (except strikes or labor disputes caused solely by employees of the Provider or as a result of such party's failure to comply with a collective bargaining agreement); (v) action by a Governmental Authority, including a moratorium on any activities related to the Agreement; and (vi) the inability for one of the Parties, despite its reasonable efforts, to obtain, in a timely manner, any Governmental Approval necessary to enable the affected Party to fulfill its obligations in accordance with the Agreement, provided that the delay or non-obtaining of such

Governmental Approval is not attributable to the Party in question and that such Party has exercised its reasonable efforts to obtain such Permit.

A Force Majeure Event shall not be based on the economic hardship of either Party, except as described in the following paragraph. Due to the constitutional limitations on cities pertaining to multiple year contracts, a Force Majeure event shall include a "budget non-appropriation event" in which the City's appropriation for any year covered in this Agreement does not appropriate funds for the procurement of any utility services for City. During the continuation of a budget non-appropriation event as defined above, if the City does not otherwise have other funds available to make payments otherwise due on this Agreement, the City shall not be obligated to pay for (and the Seller shall not be required to deliver) electric energy provided under this Agreement until the budget non-appropriation event has terminated. City agrees that it shall use its best efforts to seek appropriation for utility services during the term of this Agreement. If a budget non-appropriation event continues for more than 180 days, Seller (but not Purchaser) may terminate this Agreement.

- b. **Excused Performance.** Except as otherwise specifically provided in the Agreement, neither Party shall be considered in breach of the Agreement or liable for any delay or failure to comply with the Agreement (other than the failure to pay amounts due hereunder), if and to the extent that such delay or failure is attributable to the occurrence of a Force Majeure Event; provided that the Party claiming relief under this Section 10 shall immediately (i) notify the other Party in writing of the existence of the Force Majeure Event, (ii) exercise all reasonable efforts necessary to minimize delay caused by such Force Majeure Event, (iii) notify the other Party in writing of the cessation or termination of said Force Majeure Event and (iv) resume performance of its obligations hereunder as soon as practicable thereafter; provided, however, that Purchaser shall not be excused from making any payments and paying any unpaid amounts due in respect of Solar Services delivered to Purchaser prior to the Force Majeure Event performance interruption.
- c. **Termination in Consequence of Force Majeure Event.** If a Force Majeure Event shall have occurred that has affected Seller's performance of its obligations hereunder and that has continued for a continuous period of one hundred eighty (180) days, then Purchaser shall be entitled to terminate the Agreement upon ninety (90) days' prior written notice to Seller. If at the end of such ninety (90) day period such Force Majeure Event shall still continue, the Agreement shall automatically terminate. Upon such termination for a Force Majeure Event, neither Party shall have any liability to the other (other than any such liabilities that have accrued prior to such termination), and the provisions of Section 2.2 (Early Termination) shall be inapplicable."

19. Assignment and Financing.

- a. **Assignment.** This Agreement may not be assigned in whole or in part by either Party without the prior written consent of the other Party, which consent shall not be unreasonably withheld or delayed. Notwithstanding the foregoing, Seller may, without the prior written consent of Purchaser, (i) assign, mortgage, pledge or otherwise collaterally assign its interests in this Agreement to any Financing Party, (ii) directly or indirectly assign this Agreement to an affiliate of Seller, (iii) assign this Agreement to any entity through which Seller is obtaining financing or capital for the System and (iv) assign this Agreement to any person succeeding to all or substantially all of the assets of Seller (provided that Seller shall be released from liability hereunder as a result of any of the foregoing permitted assignments only upon assumption of Seller's obligations hereunder by the assignee). Purchaser's consent to any other assignment shall not be unreasonably withheld if Purchaser has been provided with reasonable proof that the proposed assignee (x) has comparable experience in operating and maintaining photovoltaic solar systems comparable to the System and providing services comparable to those contemplated by this Agreement and (y) has the financial capability to maintain the System and provide the services contemplated by this Agreement in the manner required by this Agreement. This Agreement shall be binding on and inure to the benefit of the successors and permitted assignees.
- b. **Financing.** The Parties acknowledge that Seller may obtain construction and long-term financing or other credit support from lenders or third parties ("**Financing Parties**") in connection with the installation, construction, ownership, operation and maintenance of the System. Both Parties agree in good faith to consider and to negotiate changes or additions to this Agreement that may be reasonably requested by the Financing Parties; provided, that such changes do not alter the fundamental economic terms of this Agreement. The Parties also agree that Seller may assign this Agreement to the Financing Parties as collateral, and in connection with any such assignment, Purchaser agrees to execute a consent to assignment in customary form and reasonably acceptable to the Financing Parties.

20. Contractor Information.

- a. All proprietary and other information received from Seller by Purchaser, whether received in connection with Seller's proposal to Purchaser or in connection with any services performed by Seller, will be disclosed upon receipt of a request for disclosure, pursuant to the California Public Records Act; provided, however, that, if any information is set apart and clearly marked "trade secret" or "confidential" or otherwise indicated as such to Purchaser when it is provided to Purchaser, Purchaser shall give notice to Seller of any request for the disclosure of such information. The Seller shall then have five (5) days from the date it receives such notice to enter into an agreement with the Purchaser, satisfactory to the City Attorney, providing for the defense of, and complete indemnification and reimbursement for all costs (including plaintiff's attorney fees) incurred by Purchaser in any legal action to compel the disclosure of such information under the California Public Records Act. If Purchaser and Seller enter into such an agreement, Purchaser shall not disclose the requested information or documents. The Seller shall have sole responsibility for defense of the actual "trade secret" or "confidential" designation of such information.
- b. The parties understand and agree that any failure by Seller to respond to the notice provided by Purchaser and/or to enter into an agreement with Purchaser, in accordance with the provisions of subsection a, above, shall constitute a complete waiver by Seller of any rights regarding the information designated "trade secret" or "confidential" by Seller, and such information shall be disclosed by Purchaser pursuant to applicable procedures required by the Public Records Act.

21. Goodwill and Publicity. Neither Party shall use any name, trade name, service mark or trademark of the other Party in any promotional or advertising material without the prior written consent of such other Party. The Parties shall coordinate and cooperate with each other when making public announcements related to the execution and existence of this Agreement, and each Party shall have the right to promptly review, comment upon and approve any publicity materials, press releases or other public statements by the other Party that refer to, or that describe any aspect of, this Agreement. Neither Party shall make any press release or public announcement of the specific terms of this Agreement (except for filings or other statements or releases as may be required by applicable law) without the specific prior written consent of the other Party. Without limiting the generality of the foregoing, all public statements must accurately reflect the rights and obligations of the Parties under this Agreement, including the ownership of Environmental Attributes and Environmental Incentives and any related reporting rights.

22. General Provisions

- a. **Choice of Law.** The law of the state where the System is located shall govern this Agreement without giving effect to conflict of laws principles.
- b. **Arbitration and Attorneys' Fees.** Any dispute arising from or relating to this Agreement shall be arbitrated in Sacramento, California. The arbitration shall be administered by JAMS in accordance with its Comprehensive Arbitration Rules and Procedures, and judgment on any award may be entered in any court of competent jurisdiction. If the Parties agree, a mediator may be consulted prior to arbitration. The prevailing party in any dispute arising out of this Agreement shall be entitled to reasonable attorneys' fees and costs.
- c. **Notices.** All notices under this Agreement shall be in writing and shall be by personal delivery, facsimile transmission, electronic mail, overnight courier, or regular, certified, or registered mail, return receipt requested, and deemed received upon personal delivery, acknowledgment of receipt of electronic transmission, the promised delivery date after deposit with overnight courier, or five (5) days after deposit in the mail. Notices shall be sent to the person identified in this Agreement at the addresses set forth in this Agreement or such other address as either party may specify in writing. Each party shall deem a document faxed, emailed or electronically sent in PDF form to it as an original document.
- d. **Survival.** Provisions of this Agreement that should reasonably be considered to survive termination of this Agreement shall survive. For the avoidance of doubt, surviving provisions shall include, without limitation, Section 14 (Representations and Warranties), Section 7(h) (No Warranty), Section 15(b) (Insurance Coverage), Section 17 (Indemnification and Limits of Liability), Section 20 (Confidentiality and Publicity), Section 22(a) (Choice of Law), Section 22(b) (Arbitration and Attorneys' Fees), Section 22(c) (Notices), Section 22(g) (Comparative Negligence), Section 22(h) (Non-Dedication of Facilities), Section 22(j) (Service Contract), Section 22(k) (No Partnership), Section 22(l) (Full Agreement, Modification, Invalidity, Counterparts, Captions) and Section 22(n) (No Third Party Beneficiaries).

- e. **Further Assurances.** Each of the Parties hereto agree to provide such information, execute and deliver any instruments and documents and to take such other actions as may be necessary or reasonably requested by the other Party which are not inconsistent with the provisions of this Agreement and which do not involve the assumptions of obligations other than those provided for in this Agreement, to give full effect to this Agreement and to carry out the intent of this Agreement.
- f. **Right of Waiver.** Each Party, in its sole discretion, shall have the right to waive, defer or reduce any of the requirements to which the other Party is subject under this Agreement at any time; provided, however that neither Party shall be deemed to have waived, deferred or reduced any such requirements unless such action is in writing and signed by the waiving Party. No waiver will be implied by any usage of trade, course of dealing or course of performance. A Party's exercise of any rights hereunder shall apply only to such requirements and on such occasions as such Party may specify and shall in no event relieve the other Party of any requirements or other obligations not so specified. No failure of either Party to enforce any term of this Agreement will be deemed to be a waiver. No exercise of any right or remedy under this Agreement by Purchaser or Seller shall constitute a waiver of any other right or remedy contained or provided by law. Any delay or failure of a Party to exercise, or any partial exercise of, its rights and remedies under this Agreement shall not operate to limit or otherwise affect such rights or remedies. Any waiver of performance under this Agreement shall be limited to the specific performance waived and shall not, unless otherwise expressly stated in writing, constitute a continuous waiver or a waiver of future performance.
- g. **Comparative Negligence.** It is the intent of the Parties that where negligence is determined to have been joint, contributory or concurrent, each Party shall bear the proportionate cost of any Liability.
- h. **Non-Dedication of Facilities.** Nothing herein shall be construed as the dedication by either Party of its facilities or equipment to the public or any part thereof. Neither Party shall knowingly take any action that would subject the other Party, or other Party's facilities or equipment, to the jurisdiction of any Governmental Authority as a public utility or similar entity. Neither Party shall assert in any proceeding before a court or regulatory body that the other Party is a public utility by virtue of such other Party's performance under this agreement. If Seller is reasonably likely to become subject to regulation as a public utility, then the Parties shall use all reasonable efforts to restructure their relationship under this Agreement in a manner that preserves their relative economic interests while ensuring that Seller does not become subject to any such regulation. If the Parties are unable to agree upon such restructuring, Seller shall have the right to terminate this Agreement without further liability, and Seller shall remove the System in accordance with Section 11 of this Agreement.
- i. **Estoppel.** Either Party hereto, without charge, at any time and from time to time, within five (5) business days after receipt of a written request by the other party hereto, shall deliver a written instrument, duly executed, certifying to such requesting party, or any other person specified by such requesting Party: (i) that this Agreement is unmodified and in full force and effect, or if there has been any modification, that the same is in full force and effect as so modified, and identifying any such modification; (ii) whether or not to the knowledge of any such party there are then existing any offsets or defenses in favor of such party against enforcement of any of the terms, covenants and conditions of this Agreement and, if so, specifying the same and also whether or not to the knowledge of such party the other party has observed and performed all of the terms, covenants and conditions on its part to be observed and performed, and if not, specifying the same; and (iii) such other information as may be reasonably requested by the requesting Party. Any written instrument given hereunder may be relied upon by the recipient of such instrument, except to the extent the recipient has actual knowledge of facts contained in the certificate.
- j. **Service Contract.** The Parties intend this Agreement to be a "service contract" within the meaning of Section 7701(e)(3) of the Internal Revenue Code of 1986. Purchaser will not take the position on any tax return or in any other filings suggesting that it is anything other than a purchase of electricity from the System.
- k. **No Partnership.** No provision of this Agreement shall be construed or represented as creating a partnership, trust, joint venture, fiduciary or any similar relationship between the Parties. No Party is authorized to act on behalf of the other Party, and neither shall be considered the agent of the other.
- l. **Full Agreement, Modification, Invalidity, Counterparts, Captions.** This Agreement, together with any Exhibits, completely and exclusively states the agreement of the parties regarding its subject matter and supersedes all prior proposals, agreements, or other communications between the parties, oral or written, regarding its subject matter. This Agreement may be modified only by a writing signed by both Parties, and any such modification must not violate Purchaser's Master Lease Program or jeopardize the tax-exempt status of bonds issued through that program. If any provision of this Agreement is found unenforceable or invalid, such unenforceability or invalidity shall not

render this Agreement unenforceable or invalid as a whole. In such event, such provision shall be changed and interpreted so as to best accomplish the objectives of such unenforceable or invalid provision within the limits of applicable law. This Agreement may be executed in any number of separate counterparts and each counterpart shall be considered an original and together shall comprise the same Agreement. The captions or headings in this Agreement are strictly for convenience and shall not be considered in interpreting this Agreement.

- m. **Forward Contract.** The transaction contemplated under this Agreement constitutes a “forward contract” within the meaning of the United States Bankruptcy Code, and the Parties further acknowledge and agree that each Party is a “forward contract merchant” within the meaning of the United States Bankruptcy Code.
- n. **No Third Party Beneficiaries.** Except as otherwise expressly provided herein, this Agreement and all rights hereunder are intended for the sole benefit of the Parties hereto and shall not imply or create any rights on the part of, or obligations to, any other Person.

Exhibit 5

RECORDING REQUESTED BY)
AND)
WHEN RECORDED, MAIL TO:)
)
SolarCity Corporation)
393 Vintage Park Drive, Suite 140)
Foster City, CA 94404)
Attn: General Counsel)
Facsimile (650) 560-6182)
Email: contracts@solarcity.com)

(Space Above This Line for Recorder's Use)

NON-DISTURBANCE AGREEMENT (LENDER)

The undersigned ("Lender") acknowledges that, [Customer Company Name] (the "Host") will be benefited by entering into a power purchase agreement with SolarCity Corporation, a Delaware corporation ("SolarCity"), pursuant to which SolarCity will install its solar power generation system, including photovoltaic panels, racks, wiring and other electrical devices, conduit, weatherproof housings, hardware, inverter(s), remote monitoring system, connectors, disconnects and overcurrent devices (collectively the "PV System"), on the real property described on Exhibit A hereto (the "Premises"), for the purpose of generating power and selling it to the Host and granted a license to enter on the Premises and install, construct, own, operate, maintain, access, remove and replace the PV System (the "License"). As an inducement to SolarCity to install its PV System on the Premises and sell power generated by such PV System to the Host, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the undersigned hereby agrees, waives and undertakes as follows:

1. The PV System shall not be, or be deemed to be, a part of or an accession or addition to or a fixture on the Premises even though the PV System is installed on the Premises; nor shall the PV System be moved from the Premises by the undersigned unless SolarCity's prior written consent to such move has been obtained.
2. The undersigned waives any and all right, title and interest in the PV System and shall not acquire any such right title or interest by virtue of the installation of the PV System on the Premises. The undersigned further waives any right to seize, or to claim any interest, whatsoever in the PV System on account of any claim or right the undersigned may have against any person, including, without limitation, any claim or right the undersigned may have or assert against the Host, by levy of distraint or otherwise; *provided, however*, to the extent that the undersigned forecloses on the Premises, receives a deed in lieu of foreclosure or otherwise becomes the owner of the Premises (and has provided written notification of the same to SolarCity pursuant to Section 6 below), the undersigned or the successful bidder at a foreclosure sale may request in writing that SolarCity remove the PV System. SolarCity shall commence such removal within thirty (30) days of receipt of such notification and shall use commercially reasonable efforts to complete such removal within a commercially reasonable period of time. If SolarCity does not commence removal within such thirty (30) day period, the undersigned may itself remove the PV System, using the degree of care it would use if the PV System was its own property, at SolarCity's cost and expense for all documented reasonable costs incurred.
3. SolarCity may at any time, at its option, enter upon the Premises and inspect, maintain, remove or repair the PV System, sell the PV System while it is installed on the Premises, by auction or otherwise (for the avoidance of doubt, such auction shall not be held on the Premises), or remove the PV System at its sole cost and expense, and SolarCity by its acceptance hereof agrees to make such repairs following any such removal to the extent reasonably necessary to restore the Premises to its condition immediately prior to such removal.
4. All of the terms and conditions of this waiver shall run with the land and be binding upon and benefit the heirs, devisees, personal representatives, successors, assigns or encumbrancers of the undersigned and shall inure to the benefit of SolarCity, its successors and assigns. As used herein the term "Host" shall include the heirs, devisees, personal representatives, successors and assigns of the Host.
5. In the event of any foreclosure, trustee's sale, conveyance in lieu of foreclosure, eviction or other transaction that results in Host surrendering or losing its right to occupy and enjoy the Premises, SolarCity's rights and interests under the License shall not be affected or impaired thereby and the License shall continue in effect in accordance with its terms.

6. When sending to Host any notice of impending or actual foreclosure of the Premises, the undersigned shall concurrently provide SolarCity a copy of the same.
7. This agreement may be executed in any number of separate counterparts. Each counterpart shall be deemed an original.

Executed this ____ day of _____, _____.

Lender: [Lender/MortgageHolder/Company Name]

By: _____

Host: [Customer Company Name]

By: _____

Accepted by:

SolarCity Corporation

By: David White

DAVID WHITE

CFD

Exhibit A

The Premises

A PARCEL OF LAND LOCATED IN THE STATE OF CALIFORNIA, COUNTY OF SACRAMENTO, WITH A SITUS ADDRESS OF 915 I ST 5, SACRAMENTO, CA 95814-2613 CURRENTLY OWNED BY CITY OF SACRAMENTO HAVING A TAX ASSESSOR NUMBER OF 006-0041-013-0000 AND BEING THE SAME PROPERTY MORE FULLY DESCRIBED AS LOTS 1, 2, 3, 4, 5, 6, 7 & 8 BLK H & I 9TH & 10TH INCLUDING ALLY IN THE CITY OF SACRAMENTO CONTG 2.50 AC M/L



Requires Council Approval: No YES Meeting:

Real Estate

Other Party Signature Needed

Recording Requested

General Information

Type: Select Contract Type	PO Type: Select PO Type	Attachment: Original No.:
\$ Not to Exceed: \$		Original Doc Number:
Other Party: SolarCity		Certified Copies of Document:: 1
Project Name: Solar Power Purchase Agreement		Deed: <input checked="" type="checkbox"/> None <input type="checkbox"/> Included <input type="checkbox"/> Separate
Project Number:	Bid Transaction #:	E/SBE-DBE-M/WBE:

Department Information

Department: **General Services**

Division: **Office of the Director**

Project Mgr: **Yvette Rincon**

Supervisor: **Reina Schwartz**

Contract Services:

Date:

Division Mgr:

Phone Number: **808-5827**

Org Number:

Comment:

Review and Signature Routing

Department	Signature or Initial	Date
Project Mgr:	<i>YR</i>	<i>3/25/11</i>
Accounting:		
Contract Services:		
Supervisor:		
Division Manager:		

City Attorney	Signature or Initial	Date
City Attorney:	<i>KOB</i>	<i>3/25/11</i>

Send Interoffice Mail Notify for Pick Up

Authorization	Signature or Initial	Date
Choose Director		
Department Director:		
City Mgr: yes <input type="checkbox"/> No <input type="checkbox"/>		

Contract Cover/Routing Form: Must Accompany ALL Contracts; however, is not part of the contract. (01-01-09)

For City Clerk Processing

Finalized: _____

Initial: _____

Date: _____

Imaged: _____

Initial: _____

Date: _____

Received: _____
(City Clerk Stamp Here)



Solar Power Purchase Agreement (Commercial California)

This Solar Power Purchase Agreement (this "Agreement") is entered into by the parties listed below (each a "Party" and collectively the "Parties") as of the date signed by Seller below (the "Effective Date").

Table with 4 columns: Purchaser, Seller, Name and Address, Phone, Fax, E-mail, Facility Ownership. Rows include contact information for City of Sacramento and SolarCity Corporation.

This Agreement sets forth the terms and conditions of the purchase and sale of solar generated electric energy from the solar panel system described in Exhibit 2 (the "System") and installed at the Purchaser's facility described in Exhibit 3 (the "Facility").

The exhibits listed below are incorporated by reference and made part of this Agreement.

- Exhibit 1 Pricing Attachment
Exhibit 2 System Description, Delivery Point and License Area
Exhibit 3 Memorandum of License
Exhibit 4 Solar Power Purchase Agreement General Terms and Conditions
Exhibit 5 Non-Disturbance Agreement (Lender)

LEGAL APPROVED stamp with handwritten initials and date 3/24/11, and SolarCity logo.

Purchaser: City of Sacramento

SolarCity Corporation

Signature: _____

Signature: [Handwritten Signature]

Printed Name: _____

Printed Name: DAVID WHITE

Title: _____

Title: CFO

Date: _____

Date: 3-24-2011

APPROVED AS TO FORM:

ATTEST:

City Attorney: [Handwritten Signature]

City Clerk: _____

Exhibit 1
Pricing Attachment

1. **Term:** Twenty (20) years, beginning on the Commercial Operation Date.
2. **Additional Terms:** Up to two (2) Additional Terms of five (5) years each.
3. **Environmental Incentives and Environment Attributes Accrue to Seller.**
4. **Contract Price:**

Contract Year	\$/kWh
1	\$0.0860
2	\$0.0877
3	\$0.0895
4	\$0.0913
5	\$0.0931
6	\$0.0950
7	\$0.0968
8	\$0.0988
9	\$0.1008
10	\$0.1028
11	\$0.1048
12	\$0.1069
13	\$0.1091
14	\$0.1113
15	\$0.1135
16	\$0.1157
17	\$0.1181
18	\$0.1204
19	\$0.1228
20	\$0.1253

Includes ACH invoicing. If manual invoicing is required, a \$25 handling charge will be added to each invoice.

5. **Condition Satisfaction Date:** 180 days after the Effective Date
6. **Anticipated Commercial Operation Date:** 270 days after the Effective Date
7. **Outside Commercial Operation Date:** 365 days after the Effective Date
8. **Purchase Option**

End of Contract Year	Option Price*
Buyout after year 6	\$1,097,594.62
Buyout after year 10	\$1,109,046.85
Buyout after year 20	Fair Market Value

*Buyer shall have the right to purchase the System at the greater of the price set forth above and the then current fair market value.

9. Termination Value:

Contract Year	Termination Value
1	\$3,495,590.64
2	\$2,978,436.09
3	\$2,325,107.95
4	\$1,778,259.72
5	\$1,291,695.14
6	\$791,155.47
7	\$722,404.62
8	\$707,408.90
9	\$690,901.76
10	\$672,796.29
11	\$653,001.06
12	\$631,419.88
13	\$607,951.60
14	\$582,489.82
15	\$554,922.64
16	\$525,132.40
17	\$492,995.36
18	\$458,381.39
19	\$421,153.70
20	\$381,168.44

- 10. Rebate Variance.** All prices in this Agreement are calculated based on an upfront rebate of \$0 and an ongoing incentive of \$0.35/kWh for 5 years. If the actual rebate is lower than calculated, prices will be adjusted pro-rata to reflect the actual rebate received.

Exhibit 2

System Description, Delivery Point and License Area

1. **System Location:** 300 Richards Blvd., Sacramento, California 95811
2. **System Size (DC kW):** 423.20
3. **Expected First Year Energy Production (kWh):** 543,899
4. **Expected Structure:** Roof Mount and Solar Support Structure
5. **Expected Module(s):**

<u>Manufacturer/Model</u>	<u>Quantity</u>
Yingli Green Energy:YL230P-29b	1,840

6. **Expected Inverter(s):**

<u>Manufacturer/Model</u>	<u>Quantity</u>
SatCon Technology:PVS-375 (480 V)	1

7. **Includes:**

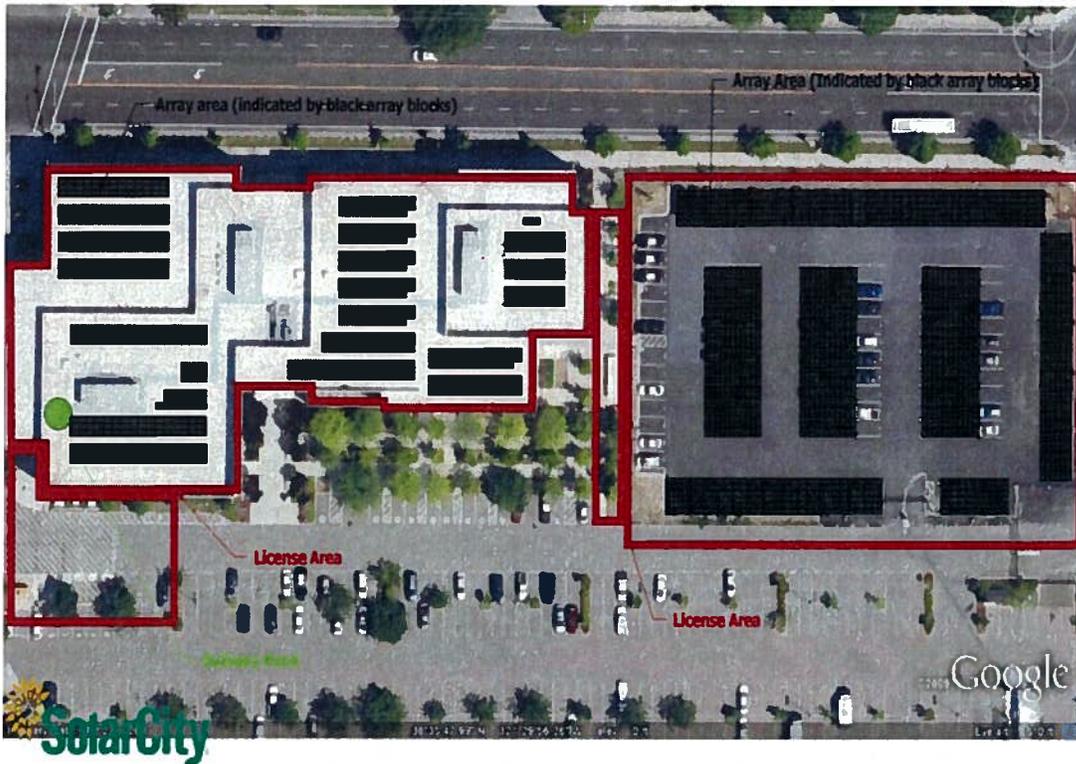
SolarCity Limited Warranty, installation of a solar energy system (includes: design, engineering, permitting, installation, monitoring, rebate application and paperwork processing for solar energy system).

8. **Excludes:**

Unforeseen groundwork (including, but not limited to, excavation/circumvention of underground obstacles), upgrades or repair to customer or utility electrical infrastructure, upgrades or repair to building structure or to roofing system, payment bonds, performance bond(s), prevailing wage construction, tree removal, tree trimming.

9. **Delivery Point and License Area:** SolarCity shall attach a schematic that contains the:

- (i) array;
- (ii) Delivery Point; and
- (iii) access points needed to install and service System (bldg access, electrical room, stairs etc.)



RECORDING REQUESTED BY AND)
WHEN RECORDED, RETURN TO:)
 SolarCity Corporation)
 Legal Department)
 3055 Clearview Way)
 San Mateo, CA 94402)
)
)
)
)
)
)
)
)
 Facsimile: (650) 560-6182)
 Email: contacts@solarcity.com)

(space above this line reserved for recorder's use)

Exhibit 3
MEMORANDUM OF LICENSE

THIS MEMORANDUM OF LICENSE is made and entered into this ____ day of _____, 201__, (the "Effective Date") by and between CITY OF SACRAMENTO, whose address is 5730 24th Street, Building 1, Sacramento, California 95822 ("Licensor"), and SOLARCITY CORPORATION, whose address is 3055 Clearview Way, San Mateo, CA 94402 ("Licensee").

- A. Licensor is the owner of certain real property ("Premises"), located in the County of Sacramento, State of California, attached to this License as Exhibit A and incorporated herein by reference.
- B. Licensor and Licensee have entered into a Solar Power Purchase Agreement dated on or about the Effective Date (the "Agreement") under which Licensee is selling energy generated by a photovoltaic electric generating system (the "System") to Licensor. The Agreement is for a term of twenty (20) years, beginning on the Effective Date and ending on the twenty (20) year anniversary of the Commercial Operation Date with an option to extend the Agreement for up to two (2) extended terms of five (5) years each. Pursuant to the Agreement, Licensor has granted Licensee an irrevocable, non-exclusive license ("License") over the Premises during normal business hours, excluding weekends and holidays, and during emergency situations when it is reasonable to enter the premises, for the purposes and on the terms set forth in the Agreement. Licensee will provide twenty four (24) hour notice or as much time as is reasonably possible to Licensor in the event that it needs to access the System during excluded periods.

Licensor and Licensee agree as follows:

- 1. Licensor hereby grants to Licensee the License over the Premises on and subject to the terms and conditions set forth in the Agreement which is incorporated herein by reference.
- 2. The term of the License begins on the Effective Date and continues until one hundred and twenty (120) days after the termination of the Agreement.
- 3. This Memorandum of License shall not be deemed to modify, alter or amend in any way the provisions of the License or the Agreement. In the event of any conflict between the terms of the License and/or the Agreement and this Memorandum, the terms of the License and/or the Agreement, as applicable, shall control.

The undersigned have executed this Memorandum of License as of the date first written above.

LICENSOR
 CITY OF SACRAMENTO
 By: _____
 Name: _____
 Title: _____

LICENSEE
 SOLARCITY CORPORATION

 By: _____
 Name: DAVID WHITE
 Title: CFO

State of _____)
County of _____)

On _____, before me, _____, Notary Public, personally appeared _____, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of _____ that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature of the Notary Public

State of California)
County of San Mateo)

On _____, before me, _____, Notary Public, personally appeared _____, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature of the Notary Public

Exhibit A
To Memorandum of License

Legal Description of Premises

That certain real property located in the County of Sacramento, State of California described as follows:

A PARCEL OF LAND LOCATED IN THE STATE OF CALIFORNIA, COUNTY OF SACRAMENTO, WITH A SITUS ADDRESS OF 300 RICHARDS BLVD, SACRAMENTO, CA 95811-0218 CURRENTLY OWNED BY CITY OF SACRAMENTO HAVING A TAX ASSESSOR NUMBER OF 001-0210-045-0000 AND BEING THE SAME PROPERTY MORE FULLY DESCRIBED AS PCL 1 DISCOVERY CENTRE PM BK 158 PG 12 EXC ANYTHING LYING IN TAX CODE AREA 03169. CONTG. 2.52 AC AND DESCRIBED IN DOCUMENT NUMBER 61228-1465 DATED 12/13/2006 AND RECORDED 12/28/2006.

Exhibit 4

Solar Power Purchase Agreement General Terms and Conditions

1. **Definitions and Interpretation:** Unless otherwise defined or required by the context in which any term appears: (a) the singular includes the plural and vice versa; (b) the words "herein," "hereof" and "hereunder" refer to this Agreement as a whole and not to any particular section or subsection of this Agreement; (c) references to any agreement, document or instrument mean such agreement, document or instrument as amended, modified, supplemented or replaced from time to time; and (d) the words "include," "includes" and "including" mean include, includes and including "without limitation." The captions or headings in this Agreement are strictly for convenience and shall not be considered in interpreting this Agreement.

2. **Purchase and Sale of Electricity.** Purchaser shall purchase from Seller, and Seller shall sell to Purchaser, all of the electric energy generated by the System during the Initial Term and any Additional Term (as defined in Exhibit 1, and collectively the "Term"). Electric energy generated by the System will be delivered to Purchaser at the delivery point identified on Exhibit 3 (the "Delivery Point"). Purchaser shall take title to the electric energy generated by the System at the Delivery Point, and risk of loss will pass from Seller to Purchaser at the Delivery Point. Purchaser may purchase electric energy for the Facility from other sources if the Purchaser's electric requirements at the Facility exceed the output of the System.

3. **Term and Termination.**
 - a. **Initial Term.** The initial term ("Initial Term") of this Agreement shall commence on the Commercial Operation Date (as defined below) and continue for the length of time specified in Exhibit 1, unless earlier terminated as provided for in this Agreement. The "Commercial Operation Date" is the date Seller gives Purchaser written notice that the System is mechanically complete and capable of providing electric energy to the Delivery Point. Upon Purchaser's request, Seller will give Purchaser copies of certificates of completion or similar documentation from Seller's contractor and the interconnection or similar agreement with SMUD. This Agreement is effective as of the Effective Date and Purchaser's failure to enable Seller to provide the electric energy by preventing it from installing the System or otherwise not performing shall not excuse Purchaser's obligations to make payments that otherwise would have been due under this Agreement. **Additional Terms.** If Purchaser has not exercised its option to purchase the System by the end of the Initial Term, either Party may give the other Party written notice of its desire to extend this Agreement on the terms and conditions set forth herein for the number and length of additional periods specified in Exhibit 1 (each an "Additional Term"). Such notice shall be given, if at all, not more than one hundred twenty (120) and not less than sixty (60) days before the last day of the Initial Term or the then current Additional Term, as applicable. The Party receiving the notice requesting an Additional Term shall respond positively or negatively to that request in writing within thirty (30) days after receipt of the request. Failure to respond within such thirty (30) day period shall be deemed a rejection of the offer for an Additional Term. If both Parties agree to an Additional Term, the Additional Term shall begin immediately upon the conclusion of the Initial Term or the then current term on the same terms and conditions as set forth in this Agreement. If the Party receiving the request for an Additional Term rejects or is deemed to reject the first Party's offer, this Agreement shall terminate at the end of the Initial Term (if the same has not been extended) or the then current Additional Term.

4. **Billing and Payment.**
 - a. **Monthly Charges.** Purchaser shall pay Seller monthly for the electric energy generated by the System and delivered to the Delivery Point at the \$/kWh rate shown in Exhibit 1 (the "Contract Price"). The monthly payment for such energy will be equal to the applicable \$/kWh rate multiplied by the number of kWh of energy generated during the applicable month, as measured by the System meter.

 - b. **Monthly Invoices.** Seller shall invoice Purchaser monthly, either manually or through ACH. Such monthly invoices shall state (i) the amount of electric energy produced by the System and delivered to the Delivery Point, (ii) the rates applicable to, and charges incurred by, Purchaser under this Agreement and (iii) the total amount due from Purchaser.

 - c. **Taxes.** Purchaser shall either pay or reimburse Seller for any and all taxes assessed on the generation, sale, delivery or consumption of electric energy produced by the System or the interconnection of the System to SMUD's electric distribution system, including property taxes on the System; provided, however, Purchaser will not be required to pay or reimburse Seller for any taxes during periods when Seller fails to deliver electric energy to Purchaser for

reasons other than Force Majeure. For purposes of this Section 4(d), “**Taxes**” means any federal, state and local ad valorem, property, occupation, generation, privilege, sales, use, consumption, excise, transaction, and other taxes, regulatory fees, surcharges or other similar charges, but shall not include any income taxes or similar taxes imposed on Seller’s revenues due to the sale of energy under this Agreement, which shall be Seller’s responsibility.

- d. **Payment Terms.** All amounts due under this Agreement shall be due and payable net thirty (30) days from receipt of invoice. Any undisputed portion of the invoice amount not paid within the thirty (30) day period shall accrue interest as permitted under Civil Code section 3289.

5. Environmental Attributes and Environmental Incentives.

Unless otherwise specified on Exhibit 1, Seller is the owner of all Environmental Attributes and Environmental Incentives and is entitled to the benefit of all Tax Credits, and Purchaser’s purchase of electricity under this Agreement does not include Environmental Attributes, Environmental Incentives or the right to Tax Credits or any other attributes of ownership and operation of the System, all of which shall be retained by Seller. Purchaser shall cooperate with Seller in obtaining, securing and transferring all Environmental Attributes and Environmental Incentives and the benefit of all Tax Credits, including by using the electric energy generated by the System in a manner necessary to qualify for such available Environmental Attributes, Environmental Incentives and Tax Credits. Purchaser shall not be obligated to incur any out-of-pocket costs or expenses in connection with such actions unless reimbursed by Seller. If any Environmental Incentives are paid directly to Purchaser, Purchaser shall immediately pay such amounts over to Seller. To avoid any conflicts with fair trade rules regarding claims of solar or renewable energy use, Purchaser, if engaged in commerce and/or trade, shall submit to Seller for approval any press releases regarding Purchaser’s use of solar or renewable energy and shall not submit for publication any such releases without the written approval of Seller. Approval shall not be unreasonably withheld, and Seller’s review and approval shall be made in a timely manner to permit Purchaser’s timely publication.

“**Environmental Attributes**” means any and all credits, benefits, emissions reductions, offsets, and allowances, howsoever entitled, attributable to the System, the production of electrical energy from the System and its displacement of conventional energy generation, including (1) any avoided emissions of pollutants to the air, soil or water such as sulfur oxides (SOx), nitrogen oxides (NOx), carbon monoxide (CO) and other pollutants; (2) any avoided emissions of carbon dioxide (CO2), methane (CH4), nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride and other greenhouse gases (GHGs) that have been determined by the United Nations Intergovernmental Panel on Climate Change, or otherwise by law, 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 related to these avoided emissions, such as Green Tag Reporting Rights and Renewable Energy Credits. Green Tag Reporting Rights are the right of a party to report the ownership of accumulated Green Tags in compliance with federal or state law, if applicable, and to a federal or state agency or any other party, and include Green Tag Reporting Rights accruing under Section 1605(b) of The Energy Policy Act of 1992 and any present or future federal, state, or local law, regulation or bill, and international or foreign emissions trading program. Environmental Attributes do not include Environmental Incentives and Tax Credits. Seller shall file all tax returns in a manner consistent with this Section 5. Without limiting the generality of the foregoing, Environmental Attributes include carbon trading credits, renewable energy credits or certificates, emissions reduction credits, investment credits, emissions allowances, green tags, tradeable renewable credits and Green-e® products.

“**Environmental Incentives**” means any and credits, rebates, subsidies, payments or other incentives that relate to self-generation of electricity, the use of technology incorporated into the System, environmental benefits of using the System, or other similar programs available from SMUD, any other regulated entity, the manufacturer of any part of the System or any Governmental Authority.

“**Governmental Authority**” means any national, state or local government (whether domestic or foreign), any political subdivision thereof or any other governmental, quasi-governmental, judicial, public or statutory instrumentality, authority, body, agency, bureau or entity (including the Federal Energy Regulatory Commission or the California Public Utilities Commission), or any arbitrator with authority to bind a party at law.

“**Tax Credits**” means any and all (i) investment tax credits, (ii) production tax credits and (iii) similar tax credits or grants under federal, state or local law relating to the construction, ownership or production of energy from the System.

6. Conditions to Obligations.

- a. **Conditions to Seller’s Obligations.**

Seller's obligations under this Agreement are conditioned on the completion of the following conditions to Seller's reasonable satisfaction on or before the Condition Satisfaction Date:

- i. Completion of a physical inspection of the Facility and the property upon which the Facility is located (the "Premises") including, if applicable, geotechnical work, and real estate due diligence to confirm the suitability of the Facility and the Premises for the System;
- ii. Approval of (A) this Agreement and (B) the Construction Agreement (if any) for the System by Seller's Financing Parties. "Construction Agreement" as used in this subsection means an agreement between SolarCity and a subcontractor to install the System;
- iii. Confirmation that Seller will obtain all applicable SMUD PBI incentives;
- iv. Confirmation that Seller will obtain all applicable Environmental Incentives (including SMUD PBI incentives) and Tax Credits;
- v. Receipt of all necessary zoning, land use and building permits;
- vi. Execution of all necessary agreements with SMUD for interconnection of the System to SMUD's electric distribution system; and

Prior to Seller commencing construction and installation of the System, Purchaser shall give Seller proof of self insurance for all insurance required to be maintained by Purchaser under this Agreement

b. Conditions to Purchaser's Obligations.

- i. Purchaser's obligations under this Agreement are conditioned on the occurrence of the Commercial Operation Date for the System on or before the Outside Commercial Operation Date (See Exhibit 1).

c. Failure of Conditions.

If any of the conditions listed in subsections a or b above are not satisfied by the applicable dates specified in those subsections, the Parties will attempt in good faith to negotiate new dates for the satisfaction of the failed conditions. If the parties are unable to negotiate new dates then the Party that has not failed to meet an obligation may terminate this Agreement upon ten (10) days written notice to the other Party without liability for costs or damages or triggering a default under this Agreement.

7. Seller's Rights and Obligations.

- a. Permits and Approvals.** Seller, consistent with applicable laws, shall use commercially reasonable efforts to obtain, at its sole cost and expense:

- i. any zoning, land use and building permits required to construct, install and operate the System; and
- ii. any agreements and approvals from SMUD necessary in order to interconnect the System to SMUD's electric distribution system.

Purchaser, consistent with applicable laws, shall cooperate with Seller's reasonable efforts to obtain such agreements, permits and approvals

- b. Standard System Repair and Maintenance.** Seller shall construct and install the System at the Facility. During the Term, Seller will operate and perform all routine and emergency repairs to, and maintenance of, the System at its sole cost and expense, except for any repairs or maintenance resulting from Purchaser's negligence, willful misconduct or breach of this Agreement or the Site Lease (if applicable). Seller shall not be responsible for any work done by others on any part of the System unless Seller authorizes that work in advance in writing. Seller shall not be responsible for any loss, damage, cost or expense arising out of or resulting from improper environmental controls or improper operation or maintenance of the System by anyone other than Seller or Seller's contractors. If the System requires repairs for which Seller is not responsible, Purchaser shall pay Seller for diagnosing and correcting the problem at Seller or Seller's contractors' then current reasonable rates. Seller shall provide Purchaser with reasonable notice prior to accessing the Facility to make standard repairs.

- c. **Non-Standard System Repair and Maintenance.** If Seller incurs unexpected costs to maintain the System due to conditions at the Facility that impair the functioning of the System and these conditions were: caused by the Purchaser or the Purchaser knew or should have known of these conditions; and the Purchaser failed to remedy these conditions or inform the Seller of these conditions prior to entering into this Agreement, the pricing, schedule and other terms of this Agreement will be equitably adjusted to compensate for any work in excess of normally expected work required to be performed by Seller. In such event, the Parties will negotiate such equitable adjustment in good faith.
- d. **Breakdown Notice.** Seller shall notify Purchaser within twenty-four (24) hours following Seller's discovery of (i) any material malfunction in the operation of the System or (ii) an interruption in the supply of electrical energy from the System. Purchaser and Seller shall each designate personnel and establish procedures such that each Party may provide notice of such conditions requiring Seller's repair or alteration at all times, twenty-four (24) hours per day, including weekends and holidays. Purchaser shall notify Seller immediately upon the discovery of an emergency condition affecting the System.
- e. **Suspension.** Notwithstanding anything to the contrary herein, Seller shall be entitled to suspend delivery of electricity from the System to the Delivery Point for the purpose of maintaining and repairing the System and such suspension of service shall not constitute a breach of this Agreement; provided, that Seller shall use commercially reasonable efforts to minimize any interruption in service to the Purchaser. A suspension of delivery of electricity under this provision shall not extend the term of the Agreement.
- f. **Use of Contractors and Subcontractors.** Seller shall be permitted to use contractors and subcontractors to perform its obligations under this Agreement. However, Seller shall continue to be responsible for the quality of the work performed by its contractors and subcontractors. If a list of pre-approved contractors and subcontractors is desired, such list shall be scheduled on an appendix to this Exhibit. All contractors and subcontractors, other than those that may be scheduled on an appendix to this Exhibit, shall be subject to Purchaser's prior written consent, not to be unreasonably withheld.
- g. **Liens and Payment of Contractors and Suppliers.** Seller shall pay when due all valid charges from all contractors, subcontractors and suppliers supplying goods or services to Seller under this Agreement and shall keep the Facility free and clear of any liens related to such charges. Seller shall indemnify Purchaser for all claims, losses, damages, liabilities and expenses resulting from any liens filed against the Facility or the Premises in connection with such charges; provided, however, that Seller shall have the right to contest any such lien, so long as it provides a statutory bond or other reasonable assurances of payment that either remove such lien from title to the Facility and the Premises or that assure that any adverse judgment with respect to such lien will be paid without affecting title to the Facility and the Premises.

Unless otherwise provided in this agreement, Seller shall not directly or indirectly cause, create, incur, assume or allow to exist any mortgage, pledge, lien, charge, security interest, encumbrance or other claim of any nature on or with respect to the System or any interest therein. Seller shall immediately notify Purchaser in writing of the existence of any such mortgage, pledge, lien, charge, security interest, encumbrance or other claim, shall promptly cause the same to be discharged and released of record without cost to Purchaser, and shall indemnify Purchaser against all costs and expenses (including reasonable attorneys' fees) incurred in discharging and releasing any such mortgage, pledge, lien, charge, security interest, encumbrance or other claim.

- h. **No Warranty.** NO WARRANTY OR REMEDY, WHETHER STATUTORY, WRITTEN, ORAL, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, OR WARRANTIES ARISING FROM COURSE OF DEALING OR USAGE OF TRADE SHALL APPLY. The remedies set forth in this Agreement shall be Purchaser's sole and exclusive remedies for any claim or liability arising out of or in connection with this Agreement, whether arising in contract, tort (including negligence), strict liability or otherwise. The Limited Warranty SolarCity will provide Purchaser with is a separate contract from this Agreement. No rights provided to Purchaser by the Limited Warranty may be asserted under this Agreement. No warranty is made in this Agreement. Therefore, any warranty claim must be made independently of this Agreement and will not affect Purchaser's obligations under this Agreement.

8. **Purchaser's Rights and Obligations.**

- a. **Facility Access Rights.** Purchaser grants to Seller and to Seller's agents, employees and contractors an irrevocable non-exclusive license running with the Premises (the "**License**") for access to, on, over, under and across the Premises as more particularly described in Exhibit A to **Exhibit 3** (the "**License Area**") for the purposes of (a)

installing, constructing, operating, owning, maintaining, accessing, removing and replacing the System; (b) performing all of Seller's obligations and enforcing all of Seller's rights set forth in this Agreement; and (c) installing, using and maintaining electric lines and equipment, including inverters and meters, necessary to interconnect the System to Purchaser's electric system at the Facility and/or to SMUD's electric distribution system or that otherwise may from time to time be useful or necessary in connection with the construction, installation, operation, maintenance or repair of the System. Seller shall notify Purchaser prior to entering the Facility except in situations where there is imminent risk of damage to persons or property. Purchaser shall provide Seller access during normal business hours, excluding weekends and holidays and during emergency situations when it is reasonable to enter the premises, for the purposes and on the terms set forth in the Agreement. Seller will provide twenty-four (24) hour notice or as much time as is reasonably possible to Purchaser in the event that it needs to access the System during excluded periods.. The term of the License shall continue until the date that is one hundred and twenty (120) days following the date of expiration or termination of this Agreement (the "License Term"). During the License Term, Purchaser shall ensure that Seller's rights under the License and Seller's access to the License Area are preserved and protected and shall not interfere with or permit any third parties to interfere with such rights or access. The grant of the License shall survive termination of this agreement by either Party. Purchaser agrees that Seller may record a memorandum of license in substantially the same form attached hereto as **Exhibit 3** in the land records respecting the License.

- b. **OSHA Compliance.** Both parties shall ensure that all Occupational Safety and Health Act (OSHA) requirements and other similar applicable safety laws or codes are adhered to in their performance under this Agreement.
- c. **Maintenance of Facility.** Purchaser shall, at its sole cost and expense, maintain the Facility in good condition and repair. Purchaser will ensure that the Facility remains interconnected to the local utility (SMUD) grid at all times and will not permit cessation of electric service to the Facility from the local utility (SMUD). Purchaser is fully responsible for the maintenance and repair of the Facility's electrical system and of all of Purchaser's equipment that utilizes the System's outputs. Purchaser shall properly maintain in full working order all of Purchaser's electric supply or generation equipment that Purchaser may shut down while utilizing the System. Purchaser shall promptly notify Seller of any matters of which it is aware pertaining to any damage to or loss of use of the System or that could reasonably be expected to adversely affect the System.
- d. **No Alteration of Facility.** Purchaser shall not make any alterations or repairs to the Facility which may adversely affect the operation and maintenance of the System without Seller's prior written consent. If Purchaser wishes to make such alterations or repairs, Purchaser shall give prior written notice to Seller, setting forth the work to be undertaken (except for emergency repairs, for which notice may be given by telephone), and give Seller the opportunity to advise Purchaser in making such alterations or repairs in a manner that avoids damage to the System. Purchaser shall be responsible for all damage to the System caused by Purchaser or its contractors, excluding damages resulting from alterations or repairs performed at the Seller's written direction. To the extent that temporary disconnection or removal of the System is necessary to perform such alterations or repairs, such work and any replacement of the System after completion of Purchaser's alterations and repairs, shall be done by Seller or its contractors at Purchaser's cost. All of Purchaser's alterations and repairs will be done in a good and workmanlike manner and in compliance with all applicable laws, codes and permits.
- e. **Outages.** Purchaser shall be permitted to be off line for two (2) full twenty-four (24) hour days (each, a "Scheduled Outage") per calendar year during the Term, during which days Purchaser shall not be obligated to accept or pay for electricity from the System; provided, however, that Purchaser must notify Seller in writing of each such Scheduled Outage at least forty-eight (48) hours in advance of the commencement of a Scheduled Outage. In the event that Scheduled Outages exceed two (2) days per calendar year or there are unscheduled outages, in each case for a reason other than a Force Majeure event, Seller shall reasonably estimate the amount of electricity that would have been delivered to Purchaser during such excess Scheduled Outages or unscheduled outages and shall invoice Purchaser for such amount in accordance with Section 4.
- f. **Liens.** Purchaser shall not directly or indirectly cause, create, incur, assume or allow to exist any mortgage, pledge, lien, charge, security interest, encumbrance or other claim of any nature on or with respect to the System or any interest therein. Purchaser shall immediately notify Seller in writing of the existence of any such mortgage, pledge, lien, charge, security interest, encumbrance or other claim, shall promptly cause the same to be discharged and released of record without cost to Seller, and shall indemnify Seller against all costs and expenses (including reasonable attorneys' fees) incurred in discharging and releasing any such mortgage, pledge, lien, charge, security interest, encumbrance or other claim.

- g. **Security.** Purchaser shall be responsible for maintaining the physical security of the Facility and the System. Purchaser will not conduct activities on, in or about the License Area or the Facility that have a reasonable likelihood of causing damage, impairment or otherwise adversely affecting the System.
- h. **Insolation.** Purchaser understands that unobstructed access to sunlight ("**Insolation**") is essential to Seller's performance of its obligations and a material term of this Agreement. Purchaser shall not in any way cause and, where possible, shall not in any way permit any interference with the System's Insolation. If Purchaser becomes aware of any activity or condition that could diminish the Insolation of the System, Purchaser shall notify Seller immediately and shall cooperate with Seller in preserving the System's existing Insolation levels. The Parties agree that reducing Insolation would irreparably injure Seller, that such injury may not be adequately compensated by an award of money damages, and that Seller is entitled to seek specific enforcement of this Section 8(h) against Purchaser.
- i. **Data Line.** Purchaser shall provide Seller a high speed internet data line during the Term to enable Seller to record the electric energy generated by the System. If Purchaser fails to provide such high speed internet data line, or if such line ceases to function and is not repaired, Seller may reasonably estimate the amount of electric energy that was generated and invoice Purchaser for such amount in accordance with Section 4.
- j. **Breakdown Notice.** Purchaser shall notify Seller within twenty-four (24) hours following the discovery by it of (A) any material malfunction in the operation of the System; or (B) any occurrences that could reasonably be expected to adversely affect the System. Purchaser shall notify Seller immediately upon (A) an interruption in the supply of electrical energy from the System; or (B) the discovery of an emergency condition respecting the System. Purchaser and Seller shall each designate personnel and establish procedures such that each Party may provide notice of such conditions requiring Seller's repair or alteration at all times, twenty-four (24) hours per day, including weekends and holidays.

9. **Change in Law.**

"**Change in Law**" means (i) the enactment, adoption, promulgation, modification or repeal after the Effective Date of any applicable law or regulation; (ii) the imposition of any material conditions on the issuance or renewal of any applicable permit after the Effective Date of this Agreement (notwithstanding the general requirements contained in any applicable Permit at the time of application or issue to comply with future laws, ordinances, codes, rules, regulations or similar legislation), or (iii) a change in any SMUD rate schedule or tariff approved by any Governmental Authority which in the case of any of (i), (ii) or (iii), establishes requirements affecting owning, supplying, constructing, installing, operating or maintaining the System, or other performance of the Seller's obligations hereunder and which has a material adverse effect on the cost to Seller of performing such obligations; provided, that a change in federal, state, county or any other tax law after the Effective Date of this Agreement shall not be a Change in Law pursuant to this Agreement.

If any Change in Law occurs that has a material adverse effect on the cost to Seller of performing its obligations under this Agreement, then the Parties shall, within thirty (30) days following receipt by Purchaser from Seller of notice of such Change in Law, meet and attempt in good faith to negotiate amendments to this Agreement as are reasonably necessary to preserve the economic value of this Agreement to both Parties. If the Parties are unable to agree upon such amendments within such thirty (30) day period, then Seller shall have the right to terminate this Agreement without further liability to either Party except with respect to payment of amounts accrued prior to termination.

10. **Relocation of System.**

If Purchaser ceases to conduct business operations at and/or vacates the Facility or is prevented from operating the System at the Facility prior to the expiration of the Term, Purchaser shall have the option to provide Seller with a mutually agreeable substitute premises located within SMUD as the terminated System or in a location with similar Utility rates and Insolation. Purchaser shall provide written notice at least sixty (60) days but not more than one hundred eighty (180) days prior to the date that it wants to make this substitution. In connection with such substitution, Purchaser shall execute an amended agreement that shall have all of the same terms as this Agreement except for the (i) Effective Date; (ii) License, which will be amended to grant rights in the real property where the System relocated to; and (iii) Term, which will be the remainder of the Term of this Agreement and such amended agreement shall be deemed to be a continuation of this Agreement without termination. Purchaser shall also provide any new Purchaser, owner, lessor or mortgagee consents or releases required by Seller or Seller's Financing Parties in connection with the substitute facility. Purchaser shall pay all costs associated with relocation of the System, including all costs and expenses incurred by or on behalf of Seller in connection with removal of the System from the Facility and installation and testing of the System at the substitute facility and all applicable interconnection fees and expenses at the substitute facility, as well as costs of new title search and other out-of-pocket

expenses connected to preserving and refiling the security interests of Seller's Financing Parties in the System. Seller shall remove the System from the vacated Facility prior to the termination of Purchaser's ownership, lease or other rights to use such Facility. Seller will not be required to restore the Facility to its prior condition but shall promptly pay Purchaser for any damage caused by Seller during removal of the System, but not for normal wear and tear. If the substitute facility has inferior Insulation as compared to the original Facility, Seller shall have the right to make an adjustment to **Exhibit 1** such that Purchaser's payments to Seller are the same as if the System were located at the original Facility. If Purchaser is unable to provide such substitute facility and to relocate the System as provided, any early termination will be treated as a default by Purchaser.

11. Removal of System at Expiration.

Upon the expiration or earlier termination of this Agreement (provided Purchaser does not exercise its purchase option), Seller shall, at its expense, remove all of its tangible property comprising the System from the Facility on a mutually convenient date, but in no event later than ninety (90) days after the expiration of the Term. Excluding ordinary wear and tear, the Facility shall be returned to its original condition including the removal of System mounting pads or other support structures. In no case shall Seller's removal of the System affect the integrity of Purchaser's roof, which shall be as leak proof as it was prior to removal of the System and shall be flashed and/or patched to existing roof specifications. Seller shall leave the Facility in neat and clean order. If Seller fails to remove or commence substantial efforts to remove the System by such agreed upon date, Purchaser shall have the right, at its option, to remove the System to a public warehouse and restore the Facility to its original condition (other than ordinary wear and tear) at Seller's cost. Purchaser shall provide sufficient space for the temporary storage and staging of tools, materials and equipment and for the parking of construction crew vehicles and temporary construction trailers and facilities reasonably necessary during System removal.

12. Measurement.

Electricity delivered to the Facility shall be measured by the SolarGuard monitoring system installed and maintained by Seller as part of the System.

13. Default, Remedies and Damages.

a. **Default.** Any Party that fails to perform its responsibilities as listed below or experiences any of the circumstances listed below shall be deemed a "**Defaulting Party**" and each event of default shall be a "**Default Event**":

- (1) failure of a Party to pay any amount due and payable under this Agreement, other than an amount that is subject to a good faith dispute, within ten (10) days following receipt of written notice from the other Party (the "**Non-Defaulting Party**") of such failure to pay ("**Payment Default**");
- (2) failure of a Party to substantially perform any other material obligation under this Agreement within thirty (30) days following receipt of written notice from the Non-Defaulting Party demanding such cure; provided, that such thirty (30) day cure period shall be extended (but not beyond ninety (90) days) if and to the extent reasonably necessary to cure the Default Event, if (i) the Defaulting Party initiates such cure with the thirty (30) day period and continues such cure to completion and (ii) there is no material adverse affect on the Non-Defaulting Party resulting from the failure to cure the Default Event;
- (3) if any representation or warranty of a Party proves at any time to have been incorrect in any material respect when made and is material to the transactions contemplated hereby, if the effect of such incorrectness is not cured within thirty (30) days following receipt of written notice from the Non-Defaulting Party demanding such cure;
- (4) Purchaser loses its rights to occupy and enjoy the Premises;
- (5) a Party, or its guarantor, becomes insolvent or is a party to a bankruptcy, reorganization, insolvency, liquidation, receivership, dissolution, winding-up or relief of debtors, or any general assignment for the benefit of creditors or other similar arrangement or any event occurs or proceedings are taken in any jurisdiction with respect to the Party which has a similar effect; or
- (6) Purchaser prevents Seller from installing the System or otherwise failing to perform in a way that prevents the delivery of electric energy from the System. Such Default Event shall not excuse

Purchaser's obligations to make payments that otherwise would have been due under this Agreement.

b. Remedies.

- (1) Remedies for Payment Default. If a Payment Default occurs, the Non-Defaulting Party may suspend performance of its obligations under this Agreement. Further, the Non-Defaulting Party may pursue any remedy under this Agreement, at law or in equity, including an action for damages and termination of this Agreement, upon five (5) days prior written notice to the Defaulting Party following the Payment Default.
- (2) Remedies for Other Defaults. On the occurrence of a Default Event other than a Payment Default, the Non-Defaulting Party may pursue any remedy under this Agreement, at law or in equity, including an action for damages and termination of this Agreement or suspension of performance of its obligations under this Agreement, upon five (5) days prior written notice to the Defaulting Party following the occurrence of the Default Event. Nothing herein shall limit either Party's right to collect damages upon the occurrence of a breach or a default by the other Party that does not become a Default Event. If Purchaser terminates this contract without cause prior to System Installation, Purchaser shall pay Seller for all reasonable costs incurred to date. This shall be Seller's sole remedy against Purchaser in the event of default prior to System Installation.
- (3) Damages Upon Termination by Default. Upon a termination of this Agreement by the Non-Defaulting Party as a result of a Default Event by the Defaulting Party, the Defaulting Party shall pay a Termination Payment to the Non-Defaulting Party determined as follows (the "**Termination Payment**"):
 - A. Purchaser. If Purchaser is the Defaulting Party and Seller terminates this Agreement, the Termination Payment to Seller shall be equal to the sum of (i) the termination value set forth in Exhibit 1 (the "**Termination Value**") for such Contract Year, (ii) commercially reasonable removal costs as provided in Section 13(b)(2)(C) and (iii) any and all other amounts previously accrued under this Agreement and then owed by Purchaser to Seller. The Parties agree that actual damages to Seller in the event this Agreement terminates prior to the expiration of the Term as the result of an Default Event by Purchaser would be difficult to ascertain, and the applicable Termination Value set forth in Exhibit 1 is a reasonable approximation of the damages suffered by Seller as a result of early termination of this Agreement. The Termination Payment shall not be less than zero.
 - B. Seller. If Seller is the Defaulting Party and Purchaser terminates this Agreement, the Termination Payment to Purchaser shall be equal to the sum of (i) the present value (using a discount rate of 9.5%) of the excess, if any, of the reasonably expected cost of electric energy from SMUD over the Contract Price for the reasonably expected production of the System for the remainder of the Initial Term or the then current Additional Term, as applicable; (ii) all costs reasonably incurred by Purchaser in re-converting its electric supply to service from SMUD; (iii) any removal costs incurred by Purchaser, and (iv) any and all other amounts previously accrued under this Agreement and then owed by Seller to Purchaser. The Termination Payment shall not be less than zero.
 - C. Obligations Following Termination. If a Non-Defaulting Party terminates this Agreement pursuant to this Section 13(b), then following such termination, Seller shall, at the sole cost and expense of the Defaulting Party, remove the equipment (except for mounting pads and support structures) constituting the System. The Non-Defaulting Party shall take all commercially reasonable efforts to mitigate its damages as the result of a Default Event.

14. Representations and Warranties.

- a. General Representations and Warranties.** Each Party represents and warrants to the other the following:

- (1) Such Party is duly organized, validly existing and in good standing under the laws of the jurisdiction of its formation; the execution, delivery and performance by such Party of this Agreement have been duly authorized by all necessary corporate, partnership or limited liability company action, as applicable, and do not and shall not violate any law; and this Agreement is valid obligation of such Party, enforceable against such Party in accordance with its terms (except as may be limited by applicable bankruptcy, insolvency, reorganization, moratorium and other similar laws now or hereafter in effect relating to creditors' rights generally).
- (2) Such Party has obtained all licenses, authorizations, consents and approvals required by any Governmental Authority or other third party and necessary for such Party to own its assets, carry on its business and to execute and deliver this Agreement; and such Party is in compliance with all laws that relate to this Agreement in all material respects.

b. **Purchaser's Representations and Warranties.** Purchaser represents and warrants to Seller the following:

- (1) **License.** Purchaser has the full right, power and authority to grant the License contained in Section 8(a). Such grant of the License does not violate any law, ordinance, rule or other governmental restriction applicable to Purchaser or the Facility and is not inconsistent with and will not result in a breach or default under any agreement by which Purchaser is bound or that affects the Facility.
- (2) **Other Agreements.** Neither the execution and delivery of this Agreement by Purchaser nor the performance by Purchaser of any of its obligations under this Agreement conflicts with or will result in a breach or default under any agreement or obligation to which Purchaser is a party or by which Purchaser or the Facility is bound.
- (3) **Accuracy of Information.** All information provided by Purchaser to Seller, as it pertains to the Facility's physical configuration, Purchaser's planned use of the Facility, and Purchaser's estimated electricity requirements, is accurate in all material respects.
- (4) **Purchaser Status.** Purchaser is not a public utility or a public utility holding company and is not subject to regulation as a public utility or a public utility holding company.
- (5) **No Pool Use.** No electricity generated by the System will be used to heat a swimming pool.
- (6) **Oregon Only:** The electricity generated by the System will be used solely for commercial and business purposes. No portion of the electricity generated will be used for personal, family, household or agricultural purposes.

15. **System and Facility Damage and Insurance.**

a. **System and Facility Damage.**

- (1) **Seller's Obligations.** If the System is damaged or destroyed other than by Purchaser's gross negligence or willful misconduct, Seller shall promptly repair and restore the System to its pre-existing condition; provided, however, that if more than fifty percent (50%) of the System is destroyed during the last five (5) years of the Initial Term or during any Additional Term, Seller shall not be required to restore the System, but may instead terminate this Agreement, unless Purchaser agrees (i) to pay for the cost of such restoration of the System or (ii) to purchase the System "AS-IS" at the greater of (A) then current fair market value of the System and (B) the sum of the amounts described in Section 13.b(3)A(i) (using the date of purchase to determine the appropriate Contract Year) and Section 13.b(3)A(iii).
- (2) **Purchaser's Obligations.** If the Facility is damaged or destroyed by casualty of any kind or any other occurrence other than Seller's gross negligence or willful misconduct, such that the operation of the System and/or Purchaser's ability to accept the electric energy produced by the System are materially impaired or prevented, Purchaser shall promptly repair and restore the Facility to its pre-existing condition; provided, however, that if more than 50% of the Facility is destroyed during the last five years of the Initial Term or during any Additional Term, Purchaser may elect either (i) to restore the Facility or (ii) to pay the Termination Value set forth in Exhibit

1 and all other costs previously accrued but unpaid under this Agreement and thereupon terminate this Agreement.

- b. Insurance Coverage.** At all times during the Term, Seller and Purchaser shall maintain the following insurance:
- i. **Seller's Insurance.** Seller shall maintain (i) property insurance on the System for the replacement cost thereof, (ii) comprehensive general liability insurance with coverage of at least \$1,000,000 per occurrence and \$2,000,000 annual aggregate, (iii) employer's liability insurance with coverage of at least \$1,000,000 and (iv) worker's compensation insurance as required by law.
 - ii. **Purchaser's Insurance.** Seller acknowledges that Purchaser is a self-insured public entity. Within (30) days after execution of this Agreement, Purchaser shall provide a letter of self-insurance stating that Purchaser's self-insurance program adequately protects against liabilities and claims arising out of the performance of this agreement.
- c. Policy Provisions.** Seller's insurance policies provided hereunder shall (i) contain a provision whereby the insurer agrees to give the party not providing the insurance thirty (30) days (ten (10) days in the event of non-payment of premiums) written notice before the insurance is cancelled, terminated or materially altered, (ii) be written on an occurrence basis, (iii) with respect to the liability insurance policies, include the other Party as an additional insured as its interest may appear, (iv) include waivers of subrogation, (v) provide for primary coverage without right of contribution from any insurance of the other Party, and (vi) be maintained with companies either rated no less than A- as to Policy Holder's Rating in the current edition of Best's Insurance Guide or otherwise reasonably acceptable to the other party.
- d. Certificates.** Within thirty (30) days after execution of this Agreement and upon the other Party's request and annually thereafter, Seller shall deliver the other Party certificates of insurance evidencing the above required coverage. A Party's receipt, review or acceptance of such certificate shall in no way limit or relieve the other Party of the duties and responsibilities to maintain insurance as set forth in this Agreement.
- e. Deductibles.** Unless and to the extent that a claim is covered by an indemnity set forth in this Agreement, each Party shall be responsible for the payment of its own deductibles.

16. **Ownership; Option to Purchase.**

- a. **Ownership of System.** Throughout the Term, Seller shall be the legal and beneficial owner of the System at all times, including all Environmental Attributes, and the System shall remain the personal property of Seller and shall not attach to or be deemed a part of, or fixture to, the Facility or the Premises. Each of the Seller and Purchaser agree that the Seller is the tax owner of the System and all tax filings and reports will be filed in a manner consistent with this Agreement. The System shall at all times retain the legal status of personal property as defined under Article 9 of the Uniform Commercial Code. Purchaser covenants that it will use commercially reasonable efforts to place all parties having an interest in or a mortgage, pledge, lien, charge, security interest, encumbrance or other claim of any nature on the Facility or the Premises on notice of the ownership of the System and the legal status or classification of the System as personal property. If there is any mortgage or fixture filing against the Premises which could reasonably be construed as prospectively attaching to the System as a fixture of the Premises, Purchaser shall provide a disclaimer or release from such lienholder. If Purchaser is the fee owner of the Premises, Purchaser consents to the filing of a disclaimer of the System as a fixture of the Premises in the office where real estate records are customarily filed in the jurisdiction where the Facility is located. If Purchaser is not the fee owner, Purchaser will obtain such consent from such owner. Purchaser agrees to deliver to Seller a non-disturbance agreement in a form reasonably acceptable to Seller from the owner of the Facility (if the Facility is leased by Purchaser), any mortgagee with a lien on the Premises, and other Persons holding a similar interest in the Premises.
- b. **Option to Purchase.** At the end of the sixth (6th) and tenth (10th) Contract Years and at the end of the Initial Term and each Additional Term, so long as Purchaser is not in default under this Agreement, Purchaser may purchase the System from Seller on any such date for a purchase price equal to (i) with respect to an option exercised at the end of the sixth (6th) or tenth (10th) Contract Years the *greater* of (A) the amount set forth at such time in the Purchase Option Price schedule in **Exhibit 1**, and (B) the Fair Market Value of the System, and (ii) with respect to an option exercised at the end of the Term or an Additional Term, the Fair Market Value of the System. The “Fair Market Value” of the System shall be determined by mutual agreement of Purchaser and Seller; provided, however, if Purchaser and Seller cannot agree to a Fair Market Value within thirty (30) days after Purchaser has exercised its option, the Parties shall select a nationally recognized independent appraiser with experience and expertise in the solar photovoltaic industry to determine the Fair Market Value of the System. Such appraiser shall act reasonably and in good faith to determine the Fair Market Value of the System on an installed basis and shall set forth such determination in a written opinion delivered to the Parties. The valuation made by the appraiser shall be binding upon the Parties in the absence of grounds for vacation of an arbitration award under Code of Civil Procedure section 1286.2. The costs of the appraisal shall be borne by the Parties equally. Purchaser must provide a notification to Seller of its intent to purchase at least ninety (90) days and not more than one hundred eighty (180) days prior to the end of the applicable Contract Year or the Initial Term or Additional Term, as applicable, and the purchase shall be complete prior to the end of the applicable Contract Year or the Initial Term or Additional Term, as applicable. Upon purchase of the System, Purchaser will assume complete responsibility for the operation and maintenance of the System and liability for the performance of the System, and Seller shall have no further liabilities or obligations hereunder.

17. **Indemnification and Limitations of Liability.**

- a. **General.** Each Party (the “Indemnifying Party”) shall defend, indemnify and hold harmless the other Party and the directors, officers, shareholders, partners, members, agents and employees of such other Party, and the respective affiliates of each thereof (collectively, the “Indemnified Parties”), from and against all loss, damage, expense, liability and other claims, including court costs and reasonable attorneys’ fees (collectively, “Liabilities”) resulting from any third party actions relating to the breach of any representation or warranty set forth in **Section 14** and from injury to or death of persons, and damage to or loss of property to the extent caused by or arising out of the negligent acts or omissions of, or the willful misconduct of, the Indemnifying Party (or its contractors, agents or employees) in connection with this Agreement; provided, however, that nothing herein shall require the Indemnifying Party to indemnify the Indemnified Party for any Liabilities to the extent caused by or arising out of the negligent acts or omissions of, or the willful misconduct of, the Indemnified Party. This **Section 17(a)** however, shall not apply to liability arising from any form of hazardous substances or other environmental contamination, such matters being addressed exclusively by **Section 17(c)**.
- b. **Notice and Participation in Third Party Claims.** The Indemnified Party shall give the Indemnifying Party written notice with respect to any Liability asserted by a third party (a “Claim”), as soon as possible upon the receipt of information of any possible Claim or of the commencement of such Claim. The Indemnifying Party may assume the defense of any Claim, at its sole cost and expense, with counsel designated by the Indemnifying Party, to include the City Attorney’s Office in the event the Purchaser is the Indemnifying Party, and reasonably satisfactory to the

Indemnified Party. The Indemnified Party may, however, select separate counsel if both Parties are defendants in the Claim and such defense or other form of participation is not reasonably available to the Indemnifying Party. The Indemnifying Party shall pay the reasonable attorneys' fees incurred by such separate counsel until such time as the need for separate counsel expires. The Indemnified Party may also, at the sole cost and expense of the Indemnifying Party, assume the defense of any Claim if the Indemnifying Party fails to assume the defense of the Claim within a reasonable time. Neither Party shall settle any Claim covered by this Section 17(b) unless it has obtained the prior written consent of the other Party, which consent shall not be unreasonably withheld or delayed. The Indemnifying Party shall have no liability under this Section 17(b) for any Claim for which such notice is not provided if that the failure to give notice prejudices the Indemnifying Party.

c. **Environmental Indemnification.** Seller shall indemnify, defend and hold harmless all of Purchaser's Indemnified Parties from and against all Liabilities arising out of or relating to the existence at, on, above, below or near the License Area of any Hazardous Substance (as defined in Section 17(c)(i)) to the extent deposited, spilled or otherwise caused by Seller or any of its contractors or agents. Purchaser shall indemnify, defend and hold harmless all of Seller's Indemnified Parties from and against all Liabilities arising out of or relating to the existence at, on, above, below or near the Premises of any Hazardous Substance, except to the extent deposited, spilled or otherwise caused by Seller or any of its contractors or agents. Each Party shall promptly notify the other Party if it becomes aware of any Hazardous Substance on or about the License Area or the Premises generally or any deposit, spill or release of any Hazardous Substance.

i. **"Hazardous Substance"** means any chemical, waste or other substance (a) which now or hereafter becomes defined as or included in the definition of "hazardous substances," "hazardous wastes," "hazardous materials," "extremely hazardous wastes," "restricted hazardous wastes," "toxic substances," "toxic pollutants," "pollution," "pollutants," "regulated substances," or words of similar import under any laws pertaining to the environment, health, safety or welfare, (b) which is declared to be hazardous, toxic, or polluting by any Governmental Authority, (c) exposure to which is now or hereafter prohibited, limited or regulated by any Governmental Authority, (d) the storage, use, handling, disposal or release of which is restricted or regulated by any Governmental Authority, or (e) for which remediation or cleanup is required by any Governmental Authority.

d. **Limitations on Liability.**

i. **No Consequential Damages.** Neither Party nor its directors, officers, shareholders, partners, members, agents and employees subcontractors or suppliers shall be liable for any indirect, special, incidental, exemplary, or consequential loss or damage of any nature arising out of their performance or non-performance hereunder even if advised of such.

ii. **Actual Damages.** Seller's aggregate liability under this Agreement arising out of or in connection with the performance or non-performance of this Agreement shall not exceed the *lesser* of (A) the total payments made by Purchaser under this Agreement as of the date that the events that first gave rise to such liability occurred; and (B) the total of the prior twelve (12) monthly payments preceding the date that the events that first gave rise to such liability occurred. The provisions of this Section (17)(d)(ii) shall apply whether such liability arises in contract, tort (including negligence), strict liability or otherwise. Any action against either party must be brought within two (2) years after the cause of action accrues.

18. **Force Majeure.**

a. **"Force Majeure Event"** means any act or event that prevents the affected Party from performing its obligations in accordance with the Agreement, if such act or event is beyond the reasonable control, and not the result of the fault or negligence, of the affected Party and such Party had been unable to overcome such act or event with the exercise of due diligence (including the expenditure of reasonable sums). Subject to the foregoing conditions, "Force Majeure Event" shall include without limitation the following acts or events: (i) natural phenomena, such as storms, hurricanes, floods, lightning, volcanic eruptions and earthquakes; (ii) explosions or fires arising from lightning or other causes unrelated to the acts or omissions of the Party seeking to be excused from performance; (iii) acts of war or public disorders, civil disturbances, riots, insurrection, sabotage, epidemic, terrorist acts, or rebellion; (iv) strikes or labor disputes (except strikes or labor disputes caused solely by employees of the Provider or as a result of such party's failure to comply with a collective bargaining agreement); (v) action by a Governmental Authority, including a moratorium on any activities related to the Agreement; and (vi) the inability for one of the Parties, despite its reasonable efforts, to obtain, in a timely manner, any Governmental Approval necessary to enable the affected Party to fulfill its obligations in accordance with the Agreement, provided that the delay or non-obtaining of such

Governmental Approval is not attributable to the Party in question and that such Party has exercised its reasonable efforts to obtain such Permit.

A Force Majeure Event shall not be based on the economic hardship of either Party, except as described in the following paragraph. Due to the constitutional limitations on cities pertaining to multiple year contracts, a Force Majeure event shall include a "budget non-appropriation event" in which the City's appropriation for any year covered in this Agreement does not appropriate funds for the procurement of any utility services for City. During the continuation of a budget non-appropriation event as defined above, if the City does not otherwise have other funds available to make payments otherwise due on this Agreement, the City shall not be obligated to pay for (and the Seller shall not be required to deliver) electric energy provided under this Agreement until the budget non-appropriation event has terminated. City agrees that it shall use its best efforts to seek appropriation for utility services during the term of this Agreement. If a budget non-appropriation event continues for more than 180 days, Seller (but not Purchaser) may terminate this Agreement.

- b. **Excused Performance.** Except as otherwise specifically provided in the Agreement, neither Party shall be considered in breach of the Agreement or liable for any delay or failure to comply with the Agreement (other than the failure to pay amounts due hereunder), if and to the extent that such delay or failure is attributable to the occurrence of a Force Majeure Event; provided that the Party claiming relief under this Section 10 shall immediately (i) notify the other Party in writing of the existence of the Force Majeure Event, (ii) exercise all reasonable efforts necessary to minimize delay caused by such Force Majeure Event, (iii) notify the other Party in writing of the cessation or termination of said Force Majeure Event and (iv) resume performance of its obligations hereunder as soon as practicable thereafter; provided, however, that Purchaser shall not be excused from making any payments and paying any unpaid amounts due in respect of Solar Services delivered to Purchaser prior to the Force Majeure Event performance interruption.
- c. **Termination in Consequence of Force Majeure Event.** If a Force Majeure Event shall have occurred that has affected Seller's performance of its obligations hereunder and that has continued for a continuous period of one hundred eighty (180) days, then Purchaser shall be entitled to terminate the Agreement upon ninety (90) days' prior written notice to Seller. If at the end of such ninety (90) day period such Force Majeure Event shall still continue, the Agreement shall automatically terminate. Upon such termination for a Force Majeure Event, neither Party shall have any liability to the other (other than any such liabilities that have accrued prior to such termination), and the provisions of Section 2.2 (Early Termination) shall be inapplicable."

19. **Assignment and Financing.**

- a. **Assignment.** This Agreement may not be assigned in whole or in part by either Party without the prior written consent of the other Party, which consent shall not be unreasonably withheld or delayed. Notwithstanding the foregoing, Seller may, without the prior written consent of Purchaser, (i) assign, mortgage, pledge or otherwise collaterally assign its interests in this Agreement to any Financing Party, (ii) directly or indirectly assign this Agreement to an affiliate of Seller, (iii) assign this Agreement to any entity through which Seller is obtaining financing or capital for the System and (iv) assign this Agreement to any person succeeding to all or substantially all of the assets of Seller (provided that Seller shall be released from liability hereunder as a result of any of the foregoing permitted assignments only upon assumption of Seller's obligations hereunder by the assignee). Purchaser's consent to any other assignment shall not be unreasonably withheld if Purchaser has been provided with reasonable proof that the proposed assignee (x) has comparable experience in operating and maintaining photovoltaic solar systems comparable to the System and providing services comparable to those contemplated by this Agreement and (y) has the financial capability to maintain the System and provide the services contemplated by this Agreement in the manner required by this Agreement. This Agreement shall be binding on and inure to the benefit of the successors and permitted assignees.
- b. **Financing.** The Parties acknowledge that Seller may obtain construction and long-term financing or other credit support from lenders or third parties ("**Financing Parties**") in connection with the installation, construction, ownership, operation and maintenance of the System. Both Parties agree in good faith to consider and to negotiate changes or additions to this Agreement that may be reasonably requested by the Financing Parties; provided, that such changes do not alter the fundamental economic terms of this Agreement. The Parties also agree that Seller may assign this Agreement to the Financing Parties as collateral, and in connection with any such assignment, Purchaser agrees to execute a consent to assignment in customary form and reasonably acceptable to the Financing Parties.

20. Contractor Information.

- a. All proprietary and other information received from Seller by Purchaser, whether received in connection with Seller's proposal to Purchaser or in connection with any services performed by Seller, will be disclosed upon receipt of a request for disclosure, pursuant to the California Public Records Act; provided, however, that, if any information is set apart and clearly marked "trade secret" or "confidential" or otherwise indicated as such to Purchaser when it is provided to Purchaser, Purchaser shall give notice to Seller of any request for the disclosure of such information. The Seller shall then have five (5) days from the date it receives such notice to enter into an agreement with the Purchaser, satisfactory to the City Attorney, providing for the defense of, and complete indemnification and reimbursement for all costs (including plaintiff's attorney fees) incurred by Purchaser in any legal action to compel the disclosure of such information under the California Public Records Act. If Purchaser and Seller enter into such an agreement, Purchaser shall not disclose the requested information or documents. The Seller shall have sole responsibility for defense of the actual "trade secret" or "confidential" designation of such information.
- b. The parties understand and agree that any failure by Seller to respond to the notice provided by Purchaser and/or to enter into an agreement with Purchaser, in accordance with the provisions of subsection a, above, shall constitute a complete waiver by Seller of any rights regarding the information designated "trade secret" or "confidential" by Seller, and such information shall be disclosed by Purchaser pursuant to applicable procedures required by the Public Records Act.

21. Goodwill and Publicity. Neither Party shall use any name, trade name, service mark or trademark of the other Party in any promotional or advertising material without the prior written consent of such other Party. The Parties shall coordinate and cooperate with each other when making public announcements related to the execution and existence of this Agreement, and each Party shall have the right to promptly review, comment upon and approve any publicity materials, press releases or other public statements by the other Party that refer to, or that describe any aspect of, this Agreement. Neither Party shall make any press release or public announcement of the specific terms of this Agreement (except for filings or other statements or releases as may be required by applicable law) without the specific prior written consent of the other Party. Without limiting the generality of the foregoing, all public statements must accurately reflect the rights and obligations of the Parties under this Agreement, including the ownership of Environmental Attributes and Environmental Incentives and any related reporting rights.

22. General Provisions

- a. **Choice of Law.** The law of the state where the System is located shall govern this Agreement without giving effect to conflict of laws principles.
- b. **Arbitration and Attorneys' Fees.** Any dispute arising from or relating to this Agreement shall be arbitrated in Sacramento, California. The arbitration shall be administered by JAMS in accordance with its Comprehensive Arbitration Rules and Procedures, and judgment on any award may be entered in any court of competent jurisdiction. If the Parties agree, a mediator may be consulted prior to arbitration. The prevailing party in any dispute arising out of this Agreement shall be entitled to reasonable attorneys' fees and costs.
- c. **Notices.** All notices under this Agreement shall be in writing and shall be by personal delivery, facsimile transmission, electronic mail, overnight courier, or regular, certified, or registered mail, return receipt requested, and deemed received upon personal delivery, acknowledgment of receipt of electronic transmission, the promised delivery date after deposit with overnight courier, or five (5) days after deposit in the mail. Notices shall be sent to the person identified in this Agreement at the addresses set forth in this Agreement or such other address as either party may specify in writing. Each party shall deem a document faxed, emailed or electronically sent in PDF form to it as an original document.
- d. **Survival.** Provisions of this Agreement that should reasonably be considered to survive termination of this Agreement shall survive. For the avoidance of doubt, surviving provisions shall include, without limitation, Section 14 (Representations and Warranties), Section 7(h) (No Warranty), Section 15(b) (Insurance Coverage), Section 17 (Indemnification and Limits of Liability), Section 20 (Confidentiality and Publicity), Section 22(a) (Choice of Law), Section 22(b) (Arbitration and Attorneys' Fees), Section 22(c) (Notices), Section 22(g) (Comparative Negligence), Section 22(h) (Non-Dedication of Facilities), Section 22(j) (Service Contract), Section 22(k) (No Partnership), Section 22(l) (Full Agreement, Modification, Invalidity, Counterparts, Captions) and Section 22(n) (No Third Party Beneficiaries).

- e. **Further Assurances.** Each of the Parties hereto agree to provide such information, execute and deliver any instruments and documents and to take such other actions as may be necessary or reasonably requested by the other Party which are not inconsistent with the provisions of this Agreement and which do not involve the assumptions of obligations other than those provided for in this Agreement, to give full effect to this Agreement and to carry out the intent of this Agreement.
- f. **Right of Waiver.** Each Party, in its sole discretion, shall have the right to waive, defer or reduce any of the requirements to which the other Party is subject under this Agreement at any time; provided, however that neither Party shall be deemed to have waived, deferred or reduced any such requirements unless such action is in writing and signed by the waiving Party. No waiver will be implied by any usage of trade, course of dealing or course of performance. A Party's exercise of any rights hereunder shall apply only to such requirements and on such occasions as such Party may specify and shall in no event relieve the other Party of any requirements or other obligations not so specified. No failure of either Party to enforce any term of this Agreement will be deemed to be a waiver. No exercise of any right or remedy under this Agreement by Purchaser or Seller shall constitute a waiver of any other right or remedy contained or provided by law. Any delay or failure of a Party to exercise, or any partial exercise of, its rights and remedies under this Agreement shall not operate to limit or otherwise affect such rights or remedies. Any waiver of performance under this Agreement shall be limited to the specific performance waived and shall not, unless otherwise expressly stated in writing, constitute a continuous waiver or a waiver of future performance.
- g. **Comparative Negligence.** It is the intent of the Parties that where negligence is determined to have been joint, contributory or concurrent, each Party shall bear the proportionate cost of any Liability.
- h. **Non-Dedication of Facilities.** Nothing herein shall be construed as the dedication by either Party of its facilities or equipment to the public or any part thereof. Neither Party shall knowingly take any action that would subject the other Party, or other Party's facilities or equipment, to the jurisdiction of any Governmental Authority as a public utility or similar entity. Neither Party shall assert in any proceeding before a court or regulatory body that the other Party is a public utility by virtue of such other Party's performance under this agreement. If Seller is reasonably likely to become subject to regulation as a public utility, then the Parties shall use all reasonable efforts to restructure their relationship under this Agreement in a manner that preserves their relative economic interests while ensuring that Seller does not become subject to any such regulation. If the Parties are unable to agree upon such restructuring, Seller shall have the right to terminate this Agreement without further liability, and Seller shall remove the System in accordance with Section 11 of this Agreement.
- i. **Estoppel.** Either Party hereto, without charge, at any time and from time to time, within five (5) business days after receipt of a written request by the other party hereto, shall deliver a written instrument, duly executed, certifying to such requesting party, or any other person specified by such requesting Party: (i) that this Agreement is unmodified and in full force and effect, or if there has been any modification, that the same is in full force and effect as so modified, and identifying any such modification; (ii) whether or not to the knowledge of any such party there are then existing any offsets or defenses in favor of such party against enforcement of any of the terms, covenants and conditions of this Agreement and, if so, specifying the same and also whether or not to the knowledge of such party the other party has observed and performed all of the terms, covenants and conditions on its part to be observed and performed, and if not, specifying the same; and (iii) such other information as may be reasonably requested by the requesting Party. Any written instrument given hereunder may be relied upon by the recipient of such instrument, except to the extent the recipient has actual knowledge of facts contained in the certificate.
- j. **Service Contract.** The Parties intend this Agreement to be a "service contract" within the meaning of Section 7701(e)(3) of the Internal Revenue Code of 1986. Purchaser will not take the position on any tax return or in any other filings suggesting that it is anything other than a purchase of electricity from the System.
- k. **No Partnership.** No provision of this Agreement shall be construed or represented as creating a partnership, trust, joint venture, fiduciary or any similar relationship between the Parties. No Party is authorized to act on behalf of the other Party, and neither shall be considered the agent of the other.
- l. **Full Agreement, Modification, Invalidity, Counterparts, Captions.** This Agreement, together with any Exhibits, completely and exclusively states the agreement of the parties regarding its subject matter and supersedes all prior proposals, agreements, or other communications between the parties, oral or written, regarding its subject matter. This Agreement may be modified only by a writing signed by both Parties, and any such modification must not violate Purchaser's Master Lease Program or jeopardize the tax-exempt status of bonds issued through that program. If any provision of this Agreement is found unenforceable or invalid, such unenforceability or invalidity shall not

render this Agreement unenforceable or invalid as a whole. In such event, such provision shall be changed and interpreted so as to best accomplish the objectives of such unenforceable or invalid provision within the limits of applicable law. This Agreement may be executed in any number of separate counterparts and each counterpart shall be considered an original and together shall comprise the same Agreement. The captions or headings in this Agreement are strictly for convenience and shall not be considered in interpreting this Agreement.

- m. **Forward Contract.** The transaction contemplated under this Agreement constitutes a “forward contract” within the meaning of the United States Bankruptcy Code, and the Parties further acknowledge and agree that each Party is a “forward contract merchant” within the meaning of the United States Bankruptcy Code.
- n. **No Third Party Beneficiaries.** Except as otherwise expressly provided herein, this Agreement and all rights hereunder are intended for the sole benefit of the Parties hereto and shall not imply or create any rights on the part of, or obligations to, any other Person.

Exhibit 5

RECORDING REQUESTED BY)
AND)
WHEN RECORDED, MAIL TO:)
)
SolarCity Corporation)
393 Vintage Park Drive, Suite 140)
Foster City, CA 94404)
Attn: General Counsel)
Facsimile (650) 560-6182)
Email: contracts@solarcity.com)

(Space Above This Line for Recorder's Use)

NON-DISTURBANCE AGREEMENT (LENDER)

The undersigned ("Lender") acknowledges that, [Customer Company Name] (the "Host") will be benefited by entering into a power purchase agreement with SolarCity Corporation, a Delaware corporation ("SolarCity"), pursuant to which SolarCity will install its solar power generation system, including photovoltaic panels, racks, wiring and other electrical devices, conduit, weatherproof housings, hardware, inverter(s), remote monitoring system, connectors, disconnects and overcurrent devices (collectively the "PV System"), on the real property described on Exhibit A hereto (the "Premises"), for the purpose of generating power and selling it to the Host and granted a license to enter on the Premises and install, construct, own, operate, maintain, access, remove and replace the PV System (the "License"). As an inducement to SolarCity to install its PV System on the Premises and sell power generated by such PV System to the Host, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the undersigned hereby agrees, waives and undertakes as follows:

1. The PV System shall not be, or be deemed to be, a part of or an accession or addition to or a fixture on the Premises even though the PV System is installed on the Premises; nor shall the PV System be moved from the Premises by the undersigned unless SolarCity's prior written consent to such move has been obtained.
2. The undersigned waives any and all right, title and interest in the PV System and shall not acquire any such right title or interest by virtue of the installation of the PV System on the Premises. The undersigned further waives any right to seize, or to claim any interest, whatsoever in the PV System on account of any claim or right the undersigned may have against any person, including, without limitation, any claim or right the undersigned may have or assert against the Host, by levy of distraint or otherwise; *provided, however*, to the extent that the undersigned forecloses on the Premises, receives a deed in lieu of foreclosure or otherwise becomes the owner of the Premises (and has provided written notification of the same to SolarCity pursuant to Section 6 below), the undersigned or the successful bidder at a foreclosure sale may request in writing that SolarCity remove the PV System. SolarCity shall commence such removal within thirty (30) days of receipt of such notification and shall use commercially reasonable efforts to complete such removal within a commercially reasonable period of time. If SolarCity does not commence removal within such thirty (30) day period, the undersigned may itself remove the PV System, using the degree of care it would use if the PV System was its own property, at SolarCity's cost and expense for all documented reasonable costs incurred.
3. SolarCity may at any time, at its option, enter upon the Premises and inspect, maintain, remove or repair the PV System, sell the PV System while it is installed on the Premises, by auction or otherwise (for the avoidance of doubt, such auction shall not be held on the Premises), or remove the PV System at its sole cost and expense, and SolarCity by its acceptance hereof agrees to make such repairs following any such removal to the extent reasonably necessary to restore the Premises to its condition immediately prior to such removal.
4. All of the terms and conditions of this waiver shall run with the land and be binding upon and benefit the heirs, devisees, personal representatives, successors, assigns or encumbrancers of the undersigned and shall inure to the benefit of SolarCity, its successors and assigns. As used herein the term "Host" shall include the heirs, devisees, personal representatives, successors and assigns of the Host.
5. In the event of any foreclosure, trustee's sale, conveyance in lieu of foreclosure, eviction or other transaction that results in Host surrendering or losing its right to occupy and enjoy the Premises, SolarCity's rights and interests under the License shall not be affected or impaired thereby and the License shall continue in effect in accordance with its terms.

6. When sending to Host any notice of impending or actual foreclosure of the Premises, the undersigned shall concurrently provide SolarCity a copy of the same.
7. This agreement may be executed in any number of separate counterparts. Each counterpart shall be deemed an original.

Executed this ____ day of _____, _____.

Lender: [Lender/MortgageHolder/Company Name]

By: _____

Host: [Customer Company Name]

By: _____

Accepted by:

SolarCity Corporation

By: 

DAVID WHITE
CFO

Exhibit A

The Premises

A PARCEL OF LAND LOCATED IN THE STATE OF CALIFORNIA, COUNTY OF SACRAMENTO, WITH A SITUS ADDRESS OF 300 RICHARDS BLVD, SACRAMENTO, CA 95811-0218 CURRENTLY OWNED BY CITY OF SACRAMENTO HAVING A TAX ASSESSOR NUMBER OF 001-0210-045-0000 AND BEING THE SAME PROPERTY MORE FULLY DESCRIBED AS PCL 1 DISCOVERY CENTRE PM BK 158 PG 12 EXC ANYTHING LYING IN TAX CODE AREA 03169. CONTG. 2.52 AC AND DESCRIBED IN DOCUMENT NUMBER 61228-1465 DATED 12/13/2006 AND RECORDED 12/28/2006.



Requires Council Approval: No YES Meeting:

Real Estate

Other Party Signature Needed

Recording Requested

General Information

Type: Select Contract Type	PO Type: Select PO Type	Attachment: Original No.:
\$ Not to Exceed: \$		Original Doc Number:
Other Party: SolarCity		Certified Copies of Document:: 1
Project Name: Solar Power Purchase Agreement		Deed: <input checked="" type="checkbox"/> None <input type="checkbox"/> Included <input type="checkbox"/> Separate
Project Number:	Bid Transaction #:	E/SBE-DBE-M/WBE:

Department Information

Department: **General Services**

Division: **Office of the Director**

Project Mgr: **Yvette Rincon**

Supervisor: **Reina Schwartz**

Contract Services:

Date:

Division Mgr:

Phone Number: **808-5827**

Org Number:

Comment:

Review and Signature Routing

Department	Signature or Initial	Date
Project Mgr:	<i>VR</i>	3/25/11
Accounting:		
Contract Services:		
Supervisor:		
Division Manager:		

City Attorney	Signature or Initial	Date
City Attorney:	<i>VKB</i>	3/25/11

Send Interoffice Mail Notify for Pick Up

Authorization	Signature or Initial	Date
Choose Director Department Director:		
City Mgr: yes <input type="checkbox"/> No <input type="checkbox"/>		

For City Clerk Processing

Finalized:
Initial: _____
Date: _____

Imaged:
Initial: _____
Date: _____

Received:
(City Clerk Stamp Here)



Solar Power Purchase Agreement (Commercial California)

This Solar Power Purchase Agreement (this "Agreement") is entered into by the parties listed below (each a "Party" and collectively the "Parties") as of the date signed by Seller below (the "Effective Date").

Purchaser:		Seller:	
Name and Address	City of Sacramento 5730 24th Street Building 1 Sacramento, California 95822 Attention: Reina Schwartz	Name and Address	SolarCity Corporation 3055 Clearview Way San Mateo, CA 94402 Attention: Legal Department
Phone	(916) 808-7195	Phone	(650) 638-1028
Fax	(916) 399-9263	Fax	(650) 638-1029
E-mail	rschwartz@cityofsacramento.org	E-mail	Contracts@solarcity.com
Facility Ownership	Purchaser owns the Facility		Contractor's License Numbers CA: CSLB 888104

This Agreement sets forth the terms and conditions of the purchase and sale of solar generated electric energy from the solar panel system described in **Exhibit 2** (the "System") and installed at the Purchaser's facility described in **Exhibit 3** (the "Facility").

The exhibits listed below are incorporated by reference and made part of this Agreement.

- Exhibit 1 Pricing Attachment
- Exhibit 2 System Description, Delivery Point and License Area
- Exhibit 3 Memorandum of License
- Exhibit 4 Solar Power Purchase Agreement General Terms and Conditions
- Exhibit 5 Non-Disturbance Agreement (Lender)



Purchaser: City of Sacramento

SolarCity Corporation

Signature: _____

Signature: David White

Printed Name: _____

Printed Name: DAVID WHITE

Title: _____

Title: CFO

Date: _____

Date: 3-24-2011

APPROVED AS TO FORM:

ATTEST:

City Attorney: [Signature]

City Clerk: _____

Exhibit 1
Pricing Attachment

1. **Term:** Twenty (20) years, beginning on the Commercial Operation Date.
2. **Additional Terms:** Up to two (2) Additional Terms of five (5) years each.
3. **Environmental Incentives and Environment Attributes Accrue to Seller.**
4. **Contract Price:**

Contract Year	\$/kWh
1	\$0.0750
2	\$0.0765
3	\$0.0780
4	\$0.0796
5	\$0.0812
6	\$0.0828
7	\$0.0845
8	\$0.0862
9	\$0.0879
10	\$0.0896
11	\$0.0914
12	\$0.0933
13	\$0.0951
14	\$0.0970
15	\$0.0990
16	\$0.1009
17	\$0.1030
18	\$0.1050
19	\$0.1071
20	\$0.1093

Includes ACH invoicing. If manual invoicing is required, a \$25 handling charge will be added to each invoice.

5. **Condition Satisfaction Date:** 180 days after the Effective Date
6. **Anticipated Commercial Operation Date:** 270 days after the Effective Date
7. **Outside Commercial Operation Date:** 365 days after the Effective Date
8. **Purchase Option**

End of Contract Year	Option Price*
Buyout after year 6	\$1,979,328.30
Buyout after year 10	\$2,019,583.82
Buyout after year 20	Fair Market Value

*Buyer shall have the right to purchase the System at the greater of the price set forth above and the then current fair market value.

9. Termination Value:

Contract Year	Termination Value
1	\$6,558,697.59
2	\$5,571,571.56
3	\$4,326,643.31
4	\$3,282,833.13
5	\$2,352,757.88
6	\$1,395,959.24
7	\$1,269,729.82
8	\$1,245,489.06
9	\$1,218,729.12
10	\$1,189,304.58
11	\$1,157,062.43
12	\$1,121,841.73
13	\$1,083,473.20
14	\$1,041,778.78
15	\$996,571.20
16	\$947,653.53
17	\$894,818.65
18	\$837,848.79
19	\$776,514.94
20	\$710,576.33

- 10. Rebate Variance.** All prices in this Agreement are calculated based on an upfront rebate of \$0 and an ongoing incentive of \$0.35/kWh for 5 years. If the actual rebate is lower than calculated, prices will be adjusted pro-rata to reflect the actual rebate received.

Exhibit 2

System Description, Delivery Point and License Area

1. **System Location:** 5730 24th Street, Sacramento, California 95822
2. **System Size (DC kW):** 800.40
3. **Expected First Year Energy Production (kWh):** 1,070,370
4. **Expected Structure:** Solar Support Structure
5. **Expected Module(s):**

<u>Manufacturer/Model</u>	<u>Quantity</u>
Yingli Green Energy:YL230P-29b	3,480

6. **Expected Inverter(s):**

<u>Manufacturer/Model</u>	<u>Quantity</u>
SatCon Technology:PVS-375 (480 V)	2

7. **Includes:**

SolarCity Limited Warranty, installation of a solar energy system (includes: design, engineering, permitting, installation, monitoring, rebate application and paperwork processing for solar energy system).

8. **Excludes:**

Unforeseen groundwork (including, but not limited to, excavation/circumvention of underground obstacles), upgrades or repair to customer or utility electrical infrastructure, payment bonds, performance bond(s), prevailing wage construction, tree removal, tree trimming.

9. **Delivery Point and License Area:** SolarCity shall attach a schematic that contains the:

- (i) array;
- (ii) Delivery Point; and
- (iii) access points needed to install and service System (bldg access, electrical room, stairs etc.)



State of _____)

County of _____)

On _____, before me, _____, Notary Public, personally appeared _____, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of _____ that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature of the Notary Public

State of California)

County of San Mateo)

On _____, before me, _____, Notary Public, personally appeared _____, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature of the Notary Public

Exhibit A
To Memorandum of License

Legal Description of Premises

That certain real property located in the County of Sacramento, State of California described as follows:

A PARCEL OF LAND LOCATED IN THE STATE OF CALIFORNIA, COUNTY OF SACRAMENTO, WITH A SITUS ADDRESS OF 5730 24TH ST, SACRAMENTO, CA 95822-3604 CURRENTLY OWNED BY CITY OF SACRAMENTO HAVING A TAX ASSESSOR NUMBER OF 035-0010-048-0000 AND BEING THE SAME PROPERTY MORE FULLY DESCRIBED AS POR OF THE CITY OF SACRAMENTO DES AS: BEG AT A PT ON THE N-S 1/4 SEC LN OF SEC 25, T8N, R4E, MDB&M, LOC S))505'00W 245.01 FT FR THE SE COR OF TERRA BONITA VISTA UNIT NO 2; TH FR SD POB E'LY 1,420 FT M/L TO INTERSECTION OF THE W LN OF NORMAN WAY WITH THE S LN OF 34TH AVE; TH ALG SD S LN E'LY 1,252.9 FT TO THE W LN OF 24TH ST; TH ALG SD LN S 1,209.06 FT; TH W'LY 1,240 FT M/L TO THE E'LY LN OF SACRAMENTO EXECUTIVE AIRPORT; TH ALG SD LN DUE N 304.20 FT; TH N29°23'17E 1,076.05 FT; TH ALG THE N'LY LN OF SD AIRPORT S89°42'15W 330.02'; TH S00°05'00W 30'; TH S89°42'15W 1,611.51 FT TO SD N-S 1/4 SEC LN; TH ALG SD LN N00°05'00E 200 FT M/L TO THE POB. CONTG 41.25 N AC M/L

Exhibit 4

Solar Power Purchase Agreement General Terms and Conditions

1. **Definitions and Interpretation:** Unless otherwise defined or required by the context in which any term appears: (a) the singular includes the plural and vice versa; (b) the words “herein,” “hereof” and “hereunder” refer to this Agreement as a whole and not to any particular section or subsection of this Agreement; (c) references to any agreement, document or instrument mean such agreement, document or instrument as amended, modified, supplemented or replaced from time to time; and (d) the words “include,” “includes” and “including” mean include, includes and including “without limitation.” The captions or headings in this Agreement are strictly for convenience and shall not be considered in interpreting this Agreement.
2. **Purchase and Sale of Electricity.** Purchaser shall purchase from Seller, and Seller shall sell to Purchaser, all of the electric energy generated by the System during the Initial Term and any Additional Term (as defined in Exhibit 1, and collectively the “Term”). Electric energy generated by the System will be delivered to Purchaser at the delivery point identified on Exhibit 3 (the “Delivery Point”). Purchaser shall take title to the electric energy generated by the System at the Delivery Point, and risk of loss will pass from Seller to Purchaser at the Delivery Point. Purchaser may purchase electric energy for the Facility from other sources if the Purchaser's electric requirements at the Facility exceed the output of the System.
3. **Term and Termination.**
 - a. **Initial Term.** The initial term (“Initial Term”) of this Agreement shall commence on the Commercial Operation Date (as defined below) and continue for the length of time specified in Exhibit 1, unless earlier terminated as provided for in this Agreement. The “Commercial Operation Date” is the date Seller gives Purchaser written notice that the System is mechanically complete and capable of providing electric energy to the Delivery Point. Upon Purchaser's request, Seller will give Purchaser copies of certificates of completion or similar documentation from Seller's contractor and the interconnection or similar agreement with SMUD. This Agreement is effective as of the Effective Date and Purchaser's failure to enable Seller to provide the electric energy by preventing it from installing the System or otherwise not performing shall not excuse Purchaser's obligations to make payments that otherwise would have been due under this Agreement. **Additional Terms.** If Purchaser has not exercised its option to purchase the System by the end of the Initial Term, either Party may give the other Party written notice of its desire to extend this Agreement on the terms and conditions set forth herein for the number and length of additional periods specified in Exhibit 1 (each an “Additional Term”). Such notice shall be given, if at all, not more than one hundred twenty (120) and not less than sixty (60) days before the last day of the Initial Term or the then current Additional Term, as applicable. The Party receiving the notice requesting an Additional Term shall respond positively or negatively to that request in writing within thirty (30) days after receipt of the request. Failure to respond within such thirty (30) day period shall be deemed a rejection of the offer for an Additional Term. If both Parties agree to an Additional Term, the Additional Term shall begin immediately upon the conclusion of the Initial Term or the then current term on the same terms and conditions as set forth in this Agreement. If the Party receiving the request for an Additional Term rejects or is deemed to reject the first Party's offer, this Agreement shall terminate at the end of the Initial Term (if the same has not been extended) or the then current Additional Term.
4. **Billing and Payment.**
 - a. **Monthly Charges.** Purchaser shall pay Seller monthly for the electric energy generated by the System and delivered to the Delivery Point at the \$/kWh rate shown in Exhibit 1 (the “Contract Price”). The monthly payment for such energy will be equal to the applicable \$/kWh rate multiplied by the number of kWh of energy generated during the applicable month, as measured by the System meter.
 - b. **Monthly Invoices.** Seller shall invoice Purchaser monthly, either manually or through ACH. Such monthly invoices shall state (i) the amount of electric energy produced by the System and delivered to the Delivery Point, (ii) the rates applicable to, and charges incurred by, Purchaser under this Agreement and (iii) the total amount due from Purchaser.
 - c. **Taxes.** Purchaser shall either pay or reimburse Seller for any and all taxes assessed on the generation, sale, delivery or consumption of electric energy produced by the System or the interconnection of the System to SMUD's electric distribution system, including property taxes on the System; provided, however, Purchaser will not be required to pay or reimburse Seller for any taxes during periods when Seller fails to deliver electric energy to Purchaser for

reasons other than Force Majeure. For purposes of this Section 4(d), “Taxes” means any federal, state and local ad valorem, property, occupation, generation, privilege, sales, use, consumption, excise, transaction, and other taxes, regulatory fees, surcharges or other similar charges, but shall not include any income taxes or similar taxes imposed on Seller’s revenues due to the sale of energy under this Agreement, which shall be Seller’s responsibility.

- d. **Payment Terms.** All amounts due under this Agreement shall be due and payable net thirty (30) days from receipt of invoice. Any undisputed portion of the invoice amount not paid within the thirty (30) day period shall accrue interest as permitted under Civil Code section 3289.

5. Environmental Attributes and Environmental Incentives.

Unless otherwise specified on Exhibit 1, Seller is the owner of all Environmental Attributes and Environmental Incentives and is entitled to the benefit of all Tax Credits, and Purchaser’s purchase of electricity under this Agreement does not include Environmental Attributes, Environmental Incentives or the right to Tax Credits or any other attributes of ownership and operation of the System, all of which shall be retained by Seller. Purchaser shall cooperate with Seller in obtaining, securing and transferring all Environmental Attributes and Environmental Incentives and the benefit of all Tax Credits, including by using the electric energy generated by the System in a manner necessary to qualify for such available Environmental Attributes, Environmental Incentives and Tax Credits. Purchaser shall not be obligated to incur any out-of-pocket costs or expenses in connection with such actions unless reimbursed by Seller. If any Environmental Incentives are paid directly to Purchaser, Purchaser shall immediately pay such amounts over to Seller. To avoid any conflicts with fair trade rules regarding claims of solar or renewable energy use, Purchaser, if engaged in commerce and/or trade, shall submit to Seller for approval any press releases regarding Purchaser’s use of solar or renewable energy and shall not submit for publication any such releases without the written approval of Seller. Approval shall not be unreasonably withheld, and Seller’s review and approval shall be made in a timely manner to permit Purchaser’s timely publication.

“**Environmental Attributes**” means any and all credits, benefits, emissions reductions, offsets, and allowances, howsoever entitled, attributable to the System, the production of electrical energy from the System and its displacement of conventional energy generation, including (1) any avoided emissions of pollutants to the air, soil or water such as sulfur oxides (SOx), nitrogen oxides (NOx), carbon monoxide (CO) and other pollutants; (2) any avoided emissions of carbon dioxide (CO2), methane (CH4), nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride and other greenhouse gases (GHGs) that have been determined by the United Nations Intergovernmental Panel on Climate Change, or otherwise by law, 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 related to these avoided emissions, such as Green Tag Reporting Rights and Renewable Energy Credits. Green Tag Reporting Rights are the right of a party to report the ownership of accumulated Green Tags in compliance with federal or state law, if applicable, and to a federal or state agency or any other party, and include Green Tag Reporting Rights accruing under Section 1605(b) of The Energy Policy Act of 1992 and any present or future federal, state, or local law, regulation or bill, and international or foreign emissions trading program. Environmental Attributes do not include Environmental Incentives and Tax Credits. Seller shall file all tax returns in a manner consistent with this Section 5. Without limiting the generality of the foregoing, Environmental Attributes include carbon trading credits, renewable energy credits or certificates, emissions reduction credits, investment credits, emissions allowances, green tags, tradeable renewable credits and Green-e® products.

“**Environmental Incentives**” means any and credits, rebates, subsidies, payments or other incentives that relate to self-generation of electricity, the use of technology incorporated into the System, environmental benefits of using the System, or other similar programs available from SMUD, any other regulated entity, the manufacturer of any part of the System or any Governmental Authority.

“**Governmental Authority**” means any national, state or local government (whether domestic or foreign), any political subdivision thereof or any other governmental, quasi-governmental, judicial, public or statutory instrumentality, authority, body, agency, bureau or entity (including the Federal Energy Regulatory Commission or the California Public Utilities Commission), or any arbitrator with authority to bind a party at law.

“**Tax Credits**” means any and all (i) investment tax credits, (ii) production tax credits and (iii) similar tax credits or grants under federal, state or local law relating to the construction, ownership or production of energy from the System.

6. Conditions to Obligations.

- a. **Conditions to Seller’s Obligations.**

Seller's obligations under this Agreement are conditioned on the completion of the following conditions to Seller's reasonable satisfaction on or before the Condition Satisfaction Date:

- i. Completion of a physical inspection of the Facility and the property upon which the Facility is located (the "Premises") including, if applicable, geotechnical work, and real estate due diligence to confirm the suitability of the Facility and the Premises for the System;
- ii. Approval of (A) this Agreement and (B) the Construction Agreement (if any) for the System by Seller's Financing Parties. "Construction Agreement" as used in this subsection means an agreement between SolarCity and a subcontractor to install the System;
- iii. Confirmation that Seller will obtain all applicable SMUD PBI incentives;
- iv. Confirmation that Seller will obtain all applicable Environmental Incentives (including SMUD PBI incentives) and Tax Credits;
- v. Receipt of all necessary zoning, land use and building permits;
- vi. Execution of all necessary agreements with SMUD for interconnection of the System to SMUD's electric distribution system; and

Prior to Seller commencing construction and installation of the System, Purchaser shall give Seller proof of self insurance for all insurance required to be maintained by Purchaser under this Agreement

b. Conditions to Purchaser's Obligations.

- i. Purchaser's obligations under this Agreement are conditioned on the occurrence of the Commercial Operation Date for the System on or before the Outside Commercial Operation Date (*See Exhibit 1*).

c. Failure of Conditions.

If any of the conditions listed in subsections a or b above are not satisfied by the applicable dates specified in those subsections, the Parties will attempt in good faith to negotiate new dates for the satisfaction of the failed conditions. If the parties are unable to negotiate new dates then the Party that has not failed to meet an obligation may terminate this Agreement upon ten (10) days written notice to the other Party without liability for costs or damages or triggering a default under this Agreement.

7. Seller's Rights and Obligations.

- a. Permits and Approvals.** Seller, consistent with applicable laws, shall use commercially reasonable efforts to obtain, at its sole cost and expense:

- i. any zoning, land use and building permits required to construct, install and operate the System; and
- ii. any agreements and approvals from SMUD necessary in order to interconnect the System to SMUD's electric distribution system.

Purchaser, consistent with applicable laws, shall cooperate with Seller's reasonable efforts to obtain such agreements, permits and approvals

- b. Standard System Repair and Maintenance.** Seller shall construct and install the System at the Facility. During the Term, Seller will operate and perform all routine and emergency repairs to, and maintenance of, the System at its sole cost and expense, except for any repairs or maintenance resulting from Purchaser's negligence, willful misconduct or breach of this Agreement or the Site Lease (if applicable). Seller shall not be responsible for any work done by others on any part of the System unless Seller authorizes that work in advance in writing. Seller shall not be responsible for any loss, damage, cost or expense arising out of or resulting from improper environmental controls or improper operation or maintenance of the System by anyone other than Seller or Seller's contractors. If the System requires repairs for which Seller is not responsible, Purchaser shall pay Seller for diagnosing and correcting the problem at Seller or Seller's contractors' then current reasonable rates. Seller shall provide Purchaser with reasonable notice prior to accessing the Facility to make standard repairs.

- c. **Non-Standard System Repair and Maintenance.** If Seller incurs unexpected costs to maintain the System due to conditions at the Facility that impair the functioning of the System and these conditions were: caused by the Purchaser or the Purchaser knew or should have known of these conditions; and the Purchaser failed to remedy these conditions or inform the Seller of these conditions prior to entering into this Agreement, the pricing, schedule and other terms of this Agreement will be equitably adjusted to compensate for any work in excess of normally expected work required to be performed by Seller. In such event, the Parties will negotiate such equitable adjustment in good faith.
- d. **Breakdown Notice.** Seller shall notify Purchaser within twenty-four (24) hours following Seller's discovery of (i) any material malfunction in the operation of the System or (ii) an interruption in the supply of electrical energy from the System. Purchaser and Seller shall each designate personnel and establish procedures such that each Party may provide notice of such conditions requiring Seller's repair or alteration at all times, twenty-four (24) hours per day, including weekends and holidays. Purchaser shall notify Seller immediately upon the discovery of an emergency condition affecting the System.
- e. **Suspension.** Notwithstanding anything to the contrary herein, Seller shall be entitled to suspend delivery of electricity from the System to the Delivery Point for the purpose of maintaining and repairing the System and such suspension of service shall not constitute a breach of this Agreement; provided, that Seller shall use commercially reasonable efforts to minimize any interruption in service to the Purchaser. A suspension of delivery of electricity under this provision shall not extend the term of the Agreement.
- f. **Use of Contractors and Subcontractors.** Seller shall be permitted to use contractors and subcontractors to perform its obligations under this Agreement. However, Seller shall continue to be responsible for the quality of the work performed by its contractors and subcontractors. If a list of pre-approved contractors and subcontractors is desired, such list shall be scheduled on an appendix to this Exhibit. All contractors and subcontractors, other than those that may be scheduled on an appendix to this Exhibit, shall be subject to Purchaser's prior written consent, not to be unreasonably withheld.
- g. **Liens and Payment of Contractors and Suppliers.** Seller shall pay when due all valid charges from all contractors, subcontractors and suppliers supplying goods or services to Seller under this Agreement and shall keep the Facility free and clear of any liens related to such charges. Seller shall indemnify Purchaser for all claims, losses, damages, liabilities and expenses resulting from any liens filed against the Facility or the Premises in connection with such charges; provided, however, that Seller shall have the right to contest any such lien, so long as it provides a statutory bond or other reasonable assurances of payment that either remove such lien from title to the Facility and the Premises or that assure that any adverse judgment with respect to such lien will be paid without affecting title to the Facility and the Premises.

Unless otherwise provided in this agreement, Seller shall not directly or indirectly cause, create, incur, assume or allow to exist any mortgage, pledge, lien, charge, security interest, encumbrance or other claim of any nature on or with respect to the System or any interest therein. Seller shall immediately notify Purchaser in writing of the existence of any such mortgage, pledge, lien, charge, security interest, encumbrance or other claim, shall promptly cause the same to be discharged and released of record without cost to Purchaser, and shall indemnify Purchaser against all costs and expenses (including reasonable attorneys' fees) incurred in discharging and releasing any such mortgage, pledge, lien, charge, security interest, encumbrance or other claim.

- h. **No Warranty.** NO WARRANTY OR REMEDY, WHETHER STATUTORY, WRITTEN, ORAL, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, OR WARRANTIES ARISING FROM COURSE OF DEALING OR USAGE OF TRADE SHALL APPLY. The remedies set forth in this Agreement shall be Purchaser's sole and exclusive remedies for any claim or liability arising out of or in connection with this Agreement, whether arising in contract, tort (including negligence), strict liability or otherwise. The Limited Warranty SolarCity will provide Purchaser with is a separate contract from this Agreement. No rights provided to Purchaser by the Limited Warranty may be asserted under this Agreement. No warranty is made in this Agreement. Therefore, any warranty claim must be made independently of this Agreement and will not affect Purchaser's obligations under this Agreement.

8. Purchaser's Rights and Obligations.

- a. **Facility Access Rights.** Purchaser grants to Seller and to Seller's agents, employees and contractors an irrevocable non-exclusive license running with the Premises (the "License") for access to, on, over, under and across the Premises as more particularly described in Exhibit A to Exhibit 3 (the "License Area") for the purposes of (a)

installing, constructing, operating, owning, maintaining, accessing, removing and replacing the System; (b) performing all of Seller's obligations and enforcing all of Seller's rights set forth in this Agreement; and (c) installing, using and maintaining electric lines and equipment, including inverters and meters, necessary to interconnect the System to Purchaser's electric system at the Facility and/or to SMUD's electric distribution system or that otherwise may from time to time be useful or necessary in connection with the construction, installation, operation, maintenance or repair of the System. Seller shall notify Purchaser prior to entering the Facility except in situations where there is imminent risk of damage to persons or property. Purchaser shall provide Seller access during normal business hours, excluding weekends and holidays and during emergency situations when it is reasonable to enter the premises, for the purposes and on the terms set forth in the Agreement. Seller will provide twenty-four (24) hour notice or as much time as is reasonably possible to Purchaser in the event that it needs to access the System during excluded periods. The term of the License shall continue until the date that is one hundred and twenty (120) days following the date of expiration or termination of this Agreement (the "License Term"). During the License Term, Purchaser shall ensure that Seller's rights under the License and Seller's access to the License Area are preserved and protected and shall not interfere with or permit any third parties to interfere with such rights or access. The grant of the License shall survive termination of this agreement by either Party. Purchaser agrees that Seller may record a memorandum of license in substantially the same form attached hereto as Exhibit 3 in the land records respecting the License.

- b. **OSHA Compliance.** Both parties shall ensure that all Occupational Safety and Health Act (OSHA) requirements and other similar applicable safety laws or codes are adhered to in their performance under this Agreement.
- c. **Maintenance of Facility.** Purchaser shall, at its sole cost and expense, maintain the Facility in good condition and repair. Purchaser will ensure that the Facility remains interconnected to the local utility (SMUD) grid at all times and will not permit cessation of electric service to the Facility from the local utility (SMUD). Purchaser is fully responsible for the maintenance and repair of the Facility's electrical system and of all of Purchaser's equipment that utilizes the System's outputs. Purchaser shall properly maintain in full working order all of Purchaser's electric supply or generation equipment that Purchaser may shut down while utilizing the System. Purchaser shall promptly notify Seller of any matters of which it is aware pertaining to any damage to or loss of use of the System or that could reasonably be expected to adversely affect the System.
- d. **No Alteration of Facility.** Purchaser shall not make any alterations or repairs to the Facility which may adversely affect the operation and maintenance of the System without Seller's prior written consent. If Purchaser wishes to make such alterations or repairs, Purchaser shall give prior written notice to Seller, setting forth the work to be undertaken (except for emergency repairs, for which notice may be given by telephone), and give Seller the opportunity to advise Purchaser in making such alterations or repairs in a manner that avoids damage to the System. Purchaser shall be responsible for all damage to the System caused by Purchaser or its contractors, excluding damages resulting from alterations or repairs performed at the Seller's written direction. To the extent that temporary disconnection or removal of the System is necessary to perform such alterations or repairs, such work and any replacement of the System after completion of Purchaser's alterations and repairs, shall be done by Seller or its contractors at Purchaser's cost. All of Purchaser's alterations and repairs will be done in a good and workmanlike manner and in compliance with all applicable laws, codes and permits.
- e. **Outages.** Purchaser shall be permitted to be off line for two (2) full twenty-four (24) hour days (each, a "Scheduled Outage") per calendar year during the Term, during which days Purchaser shall not be obligated to accept or pay for electricity from the System; provided, however, that Purchaser must notify Seller in writing of each such Scheduled Outage at least forty-eight (48) hours in advance of the commencement of a Scheduled Outage. In the event that Scheduled Outages exceed two (2) days per calendar year or there are unscheduled outages, in each case for a reason other than a Force Majeure event, Seller shall reasonably estimate the amount of electricity that would have been delivered to Purchaser during such excess Scheduled Outages or unscheduled outages and shall invoice Purchaser for such amount in accordance with Section 4.
- f. **Liens.** Purchaser shall not directly or indirectly cause, create, incur, assume or allow to exist any mortgage, pledge, lien, charge, security interest, encumbrance or other claim of any nature on or with respect to the System or any interest therein. Purchaser shall immediately notify Seller in writing of the existence of any such mortgage, pledge, lien, charge, security interest, encumbrance or other claim, shall promptly cause the same to be discharged and released of record without cost to Seller, and shall indemnify Seller against all costs and expenses (including reasonable attorneys' fees) incurred in discharging and releasing any such mortgage, pledge, lien, charge, security interest, encumbrance or other claim.

- g. Security.** Purchaser shall be responsible for maintaining the physical security of the Facility and the System. Purchaser will not conduct activities on, in or about the License Area or the Facility that have a reasonable likelihood of causing damage, impairment or otherwise adversely affecting the System.
- h. Insolation.** Purchaser understands that unobstructed access to sunlight ("**Insolation**") is essential to Seller's performance of its obligations and a material term of this Agreement. Purchaser shall not in any way cause and, where possible, shall not in any way permit any interference with the System's Insolation. If Purchaser becomes aware of any activity or condition that could diminish the Insolation of the System, Purchaser shall notify Seller immediately and shall cooperate with Seller in preserving the System's existing Insolation levels. The Parties agree that reducing Insolation would irreparably injure Seller, that such injury may not be adequately compensated by an award of money damages, and that Seller is entitled to seek specific enforcement of this Section 8(h) against Purchaser.
- i. Data Line.** Purchaser shall provide Seller a high speed internet data line during the Term to enable Seller to record the electric energy generated by the System. If Purchaser fails to provide such high speed internet data line, or if such line ceases to function and is not repaired, Seller may reasonably estimate the amount of electric energy that was generated and invoice Purchaser for such amount in accordance with Section 4.
- j. Breakdown Notice.** Purchaser shall notify Seller within twenty-four (24) hours following the discovery by it of (A) any material malfunction in the operation of the System; or (B) any occurrences that could reasonably be expected to adversely affect the System. Purchaser shall notify Seller immediately upon (A) an interruption in the supply of electrical energy from the System; or (B) the discovery of an emergency condition respecting the System. Purchaser and Seller shall each designate personnel and establish procedures such that each Party may provide notice of such conditions requiring Seller's repair or alteration at all times, twenty-four (24) hours per day, including weekends and holidays.

9. Change in Law.

"**Change in Law**" means (i) the enactment, adoption, promulgation, modification or repeal after the Effective Date of any applicable law or regulation; (ii) the imposition of any material conditions on the issuance or renewal of any applicable permit after the Effective Date of this Agreement (notwithstanding the general requirements contained in any applicable Permit at the time of application or issue to comply with future laws, ordinances, codes, rules, regulations or similar legislation), or (iii) a change in any SMUD rate schedule or tariff approved by any Governmental Authority which in the case of any of (i), (ii) or (iii), establishes requirements affecting owning, supplying, constructing, installing, operating or maintaining the System, or other performance of the Seller's obligations hereunder and which has a material adverse effect on the cost to Seller of performing such obligations; provided, that a change in federal, state, county or any other tax law after the Effective Date of this Agreement shall not be a Change in Law pursuant to this Agreement.

If any Change in Law occurs that has a material adverse effect on the cost to Seller of performing its obligations under this Agreement, then the Parties shall, within thirty (30) days following receipt by Purchaser from Seller of notice of such Change in Law, meet and attempt in good faith to negotiate amendments to this Agreement as are reasonably necessary to preserve the economic value of this Agreement to both Parties. If the Parties are unable to agree upon such amendments within such thirty (30) day period, then Seller shall have the right to terminate this Agreement without further liability to either Party except with respect to payment of amounts accrued prior to termination.

10. Relocation of System.

If Purchaser ceases to conduct business operations at and/or vacates the Facility or is prevented from operating the System at the Facility prior to the expiration of the Term, Purchaser shall have the option to provide Seller with a mutually agreeable substitute premises located within SMUD as the terminated System or in a location with similar Utility rates and Insolation. Purchaser shall provide written notice at least sixty (60) days but not more than one hundred eighty (180) days prior to the date that it wants to make this substitution. In connection with such substitution, Purchaser shall execute an amended agreement that shall have all of the same terms as this Agreement except for the (i) Effective Date; (ii) License, which will be amended to grant rights in the real property where the System relocated to; and (iii) Term, which will be the remainder of the Term of this Agreement and such amended agreement shall be deemed to be a continuation of this Agreement without termination. Purchaser shall also provide any new Purchaser, owner, lessor or mortgagee consents or releases required by Seller or Seller's Financing Parties in connection with the substitute facility. Purchaser shall pay all costs associated with relocation of the System, including all costs and expenses incurred by or on behalf of Seller in connection with removal of the System from the Facility and installation and testing of the System at the substitute facility and all applicable interconnection fees and expenses at the substitute facility, as well as costs of new title search and other out-of-pocket

expenses connected to preserving and refiling the security interests of Seller's Financing Parties in the System. Seller shall remove the System from the vacated Facility prior to the termination of Purchaser's ownership, lease or other rights to use such Facility. Seller will not be required to restore the Facility to its prior condition but shall promptly pay Purchaser for any damage caused by Seller during removal of the System, but not for normal wear and tear. If the substitute facility has inferior Insolation as compared to the original Facility, Seller shall have the right to make an adjustment to Exhibit 1 such that Purchaser's payments to Seller are the same as if the System were located at the original Facility. If Purchaser is unable to provide such substitute facility and to relocate the System as provided, any early termination will be treated as a default by Purchaser.

11. Removal of System at Expiration.

Upon the expiration or earlier termination of this Agreement (provided Purchaser does not exercise its purchase option), Seller shall, at its expense, remove all of its tangible property comprising the System from the Facility on a mutually convenient date, but in no event later than ninety (90) days after the expiration of the Term. Excluding ordinary wear and tear, the Facility shall be returned to its original condition including the removal of System mounting pads or other support structures. In no case shall Seller's removal of the System affect the integrity of Purchaser's roof, which shall be as leak proof as it was prior to removal of the System and shall be flashed and/or patched to existing roof specifications. Seller shall leave the Facility in neat and clean order. If Seller fails to remove or commence substantial efforts to remove the System by such agreed upon date, Purchaser shall have the right, at its option, to remove the System to a public warehouse and restore the Facility to its original condition (other than ordinary wear and tear) at Seller's cost. Purchaser shall provide sufficient space for the temporary storage and staging of tools, materials and equipment and for the parking of construction crew vehicles and temporary construction trailers and facilities reasonably necessary during System removal.

12. Measurement.

Electricity delivered to the Facility shall be measured by the SolarGuard monitoring system installed and maintained by Seller as part of the System.

13. Default, Remedies and Damages.

a. **Default.** Any Party that fails to perform its responsibilities as listed below or experiences any of the circumstances listed below shall be deemed a "**Defaulting Party**" and each event of default shall be a "**Default Event**":

- (1) failure of a Party to pay any amount due and payable under this Agreement, other than an amount that is subject to a good faith dispute, within ten (10) days following receipt of written notice from the other Party (the "**Non-Defaulting Party**") of such failure to pay ("**Payment Default**");
- (2) failure of a Party to substantially perform any other material obligation under this Agreement within thirty (30) days following receipt of written notice from the Non-Defaulting Party demanding such cure; provided, that such thirty (30) day cure period shall be extended (but not beyond ninety (90) days) if and to the extent reasonably necessary to cure the Default Event, if (i) the Defaulting Party initiates such cure with the thirty (30) day period and continues such cure to completion and (ii) there is no material adverse affect on the Non-Defaulting Party resulting from the failure to cure the Default Event;
- (3) if any representation or warranty of a Party proves at any time to have been incorrect in any material respect when made and is material to the transactions contemplated hereby, if the effect of such incorrectness is not cured within thirty (30) days following receipt of written notice from the Non-Defaulting Party demanding such cure;
- (4) Purchaser loses its rights to occupy and enjoy the Premises;
- (5) a Party, or its guarantor, becomes insolvent or is a party to a bankruptcy, reorganization, insolvency, liquidation, receivership, dissolution, winding-up or relief of debtors, or any general assignment for the benefit of creditors or other similar arrangement or any event occurs or proceedings are taken in any jurisdiction with respect to the Party which has a similar effect; or
- (6) Purchaser prevents Seller from installing the System or otherwise failing to perform in a way that prevents the delivery of electric energy from the System. Such Default Event shall not excuse

Purchaser's obligations to make payments that otherwise would have been due under this Agreement.

b. Remedies.

- (1) **Remedies for Payment Default.** If a Payment Default occurs, the Non-Defaulting Party may suspend performance of its obligations under this Agreement. Further, the Non-Defaulting Party may pursue any remedy under this Agreement, at law or in equity, including an action for damages and termination of this Agreement, upon five (5) days prior written notice to the Defaulting Party following the Payment Default.
- (2) **Remedies for Other Defaults.** On the occurrence of a Default Event other than a Payment Default, the Non-Defaulting Party may pursue any remedy under this Agreement, at law or in equity, including an action for damages and termination of this Agreement or suspension of performance of its obligations under this Agreement, upon five (5) days prior written notice to the Defaulting Party following the occurrence of the Default Event. Nothing herein shall limit either Party's right to collect damages upon the occurrence of a breach or a default by the other Party that does not become a Default Event. If Purchaser terminates this contract without cause prior to System Installation, Purchaser shall pay Seller for all reasonable costs incurred to date. This shall be Seller's sole remedy against Purchaser in the event of default prior to System Installation.
- (3) **Damages Upon Termination by Default.** Upon a termination of this Agreement by the Non-Defaulting Party as a result of a Default Event by the Defaulting Party, the Defaulting Party shall pay a Termination Payment to the Non-Defaulting Party determined as follows (the "Termination Payment"):
 - A. **Purchaser.** If Purchaser is the Defaulting Party and Seller terminates this Agreement, the Termination Payment to Seller shall be equal to the sum of (i) the termination value set forth in **Exhibit 1** (the "Termination Value") for such Contract Year, (ii) commercially reasonable removal costs as provided in **Section 13(b)(2)(C)** and (iii) any and all other amounts previously accrued under this Agreement and then owed by Purchaser to Seller. The Parties agree that actual damages to Seller in the event this Agreement terminates prior to the expiration of the Term as the result of a Default Event by Purchaser would be difficult to ascertain, and the applicable Termination Value set forth in **Exhibit 1** is a reasonable approximation of the damages suffered by Seller as a result of early termination of this Agreement. The Termination Payment shall not be less than zero.
 - B. **Seller.** If Seller is the Defaulting Party and Purchaser terminates this Agreement, the Termination Payment to Purchaser shall be equal to the sum of (i) the present value (using a discount rate of 9.5%) of the excess, if any, of the reasonably expected cost of electric energy from SMUD over the Contract Price for the reasonably expected production of the System for the remainder of the Initial Term or the then current Additional Term, as applicable; (ii) all costs reasonably incurred by Purchaser in re-converting its electric supply to service from SMUD; (iii) any removal costs incurred by Purchaser, and (iv) any and all other amounts previously accrued under this Agreement and then owed by Seller to Purchaser. The Termination Payment shall not be less than zero.
 - C. **Obligations Following Termination.** If a Non-Defaulting Party terminates this Agreement pursuant to this **Section 13(b)**, then following such termination, Seller shall, at the sole cost and expense of the Defaulting Party, remove the equipment (except for mounting pads and support structures) constituting the System. The Non-Defaulting Party shall take all commercially reasonable efforts to mitigate its damages as the result of a Default Event.

14. Representations and Warranties.

- a. **General Representations and Warranties.** Each Party represents and warrants to the other the following:

- (1) Such Party is duly organized, validly existing and in good standing under the laws of the jurisdiction of its formation; the execution, delivery and performance by such Party of this Agreement have been duly authorized by all necessary corporate, partnership or limited liability company action, as applicable, and do not and shall not violate any law; and this Agreement is valid obligation of such Party, enforceable against such Party in accordance with its terms (except as may be limited by applicable bankruptcy, insolvency, reorganization, moratorium and other similar laws now or hereafter in effect relating to creditors' rights generally).
- (2) Such Party has obtained all licenses, authorizations, consents and approvals required by any Governmental Authority or other third party and necessary for such Party to own its assets, carry on its business and to execute and deliver this Agreement; and such Party is in compliance with all laws that relate to this Agreement in all material respects.

b. Purchaser's Representations and Warranties. Purchaser represents and warrants to Seller the following:

- (1) License. Purchaser has the full right, power and authority to grant the License contained in Section 8(a). Such grant of the License does not violate any law, ordinance, rule or other governmental restriction applicable to Purchaser or the Facility and is not inconsistent with and will not result in a breach or default under any agreement by which Purchaser is bound or that affects the Facility.
- (2) Other Agreements. Neither the execution and delivery of this Agreement by Purchaser nor the performance by Purchaser of any of its obligations under this Agreement conflicts with or will result in a breach or default under any agreement or obligation to which Purchaser is a party or by which Purchaser or the Facility is bound.
- (3) Accuracy of Information. All information provided by Purchaser to Seller, as it pertains to the Facility's physical configuration, Purchaser's planned use of the Facility, and Purchaser's estimated electricity requirements, is accurate in all material respects.
- (4) Purchaser Status. Purchaser is not a public utility or a public utility holding company and is not subject to regulation as a public utility or a public utility holding company.
- (5) No Pool Use. No electricity generated by the System will be used to heat a swimming pool.
- (6) Oregon Only: The electricity generated by the System will be used solely for commercial and business purposes. No portion of the electricity generated will be used for personal, family, household or agricultural purposes.

15. System and Facility Damage and Insurance.

a. System and Facility Damage.

- (1) Seller's Obligations. If the **System** is damaged or destroyed other than by Purchaser's gross negligence or willful misconduct, Seller shall promptly repair and restore the System to its pre-existing condition; provided, however, that if more than fifty percent (50%) of the System is destroyed during the last five (5) years of the Initial Term or during any Additional Term, Seller shall not be required to restore the System, but may instead terminate this Agreement, unless Purchaser agrees (i) to pay for the cost of such restoration of the System or (ii) to purchase the System "AS-IS" at the greater of (A) then current fair market value of the System and (B) the sum of the amounts described in Section 13.b(3)A)(i) (using the date of purchase to determine the appropriate Contract Year) and Section 13.b(3)A)(iii).
- (2) Purchaser's Obligations. If the **Facility** is damaged or destroyed by casualty of any kind or any other occurrence other than Seller's gross negligence or willful misconduct, such that the operation of the System and/or Purchaser's ability to accept the electric energy produced by the System are materially impaired or prevented, Purchaser shall promptly repair and restore the Facility to its pre-existing condition; provided, however, that if more than 50% of the Facility is destroyed during the last five years of the Initial Term or during any Additional Term, Purchaser may elect either (i) to restore the Facility or (ii) to pay the Termination Value set forth in Exhibit

1 and all other costs previously accrued but unpaid under this Agreement and thereupon terminate this Agreement.

- b. Insurance Coverage.** At all times during the Term, Seller and Purchaser shall maintain the following insurance:
- i. **Seller's Insurance.** Seller shall maintain (i) property insurance on the System for the replacement cost thereof, (ii) comprehensive general liability insurance with coverage of at least \$1,000,000 per occurrence and \$2,000,000 annual aggregate, (iii) employer's liability insurance with coverage of at least \$1,000,000 and (iv) worker's compensation insurance as required by law.
 - ii. **Purchaser's Insurance.** Seller acknowledges that Purchaser is a self-insured public entity. Within (30) days after execution of this Agreement, Purchaser shall provide a letter of self-insurance stating that Purchaser's self-insurance program adequately protects against liabilities and claims arising out of the performance of this agreement.
- c. Policy Provisions.** Seller's insurance policies provided hereunder shall (i) contain a provision whereby the insurer agrees to give the party not providing the insurance thirty (30) days (ten (10) days in the event of non-payment of premiums) written notice before the insurance is cancelled, terminated or materially altered, (ii) be written on an occurrence basis, (iii) with respect to the liability insurance policies, include the other Party as an additional insured as its interest may appear, (iv) include waivers of subrogation, (v) provide for primary coverage without right of contribution from any insurance of the other Party, and (vi) be maintained with companies either rated no less than A- as to Policy Holder's Rating in the current edition of Best's Insurance Guide or otherwise reasonably acceptable to the other party.
- d. Certificates.** Within thirty (30) days after execution of this Agreement and upon the other Party's request and annually thereafter, Seller shall deliver the other Party certificates of insurance evidencing the above required coverage. A Party's receipt, review or acceptance of such certificate shall in no way limit or relieve the other Party of the duties and responsibilities to maintain insurance as set forth in this Agreement.
- e. Deductibles.** Unless and to the extent that a claim is covered by an indemnity set forth in this Agreement, each Party shall be responsible for the payment of its own deductibles.

16. **Ownership; Option to Purchase.**

- a. **Ownership of System.** Throughout the Term, Seller shall be the legal and beneficial owner of the System at all times, including all Environmental Attributes, and the System shall remain the personal property of Seller and shall not attach to or be deemed a part of, or fixture to, the Facility or the Premises. Each of the Seller and Purchaser agree that the Seller is the tax owner of the System and all tax filings and reports will be filed in a manner consistent with this Agreement. The System shall at all times retain the legal status of personal property as defined under Article 9 of the Uniform Commercial Code. Purchaser covenants that it will use commercially reasonable efforts to place all parties having an interest in or a mortgage, pledge, lien, charge, security interest, encumbrance or other claim of any nature on the Facility or the Premises on notice of the ownership of the System and the legal status or classification of the System as personal property. If there is any mortgage or fixture filing against the Premises which could reasonably be construed as prospectively attaching to the System as a fixture of the Premises, Purchaser shall provide a disclaimer or release from such lienholder. If Purchaser is the fee owner of the Premises, Purchaser consents to the filing of a disclaimer of the System as a fixture of the Premises in the office where real estate records are customarily filed in the jurisdiction where the Facility is located. If Purchaser is not the fee owner, Purchaser will obtain such consent from such owner. Purchaser agrees to deliver to Seller a non-disturbance agreement in a form reasonably acceptable to Seller from the owner of the Facility (if the Facility is leased by Purchaser), any mortgage with a lien on the Premises, and other Persons holding a similar interest in the Premises.
- b. **Option to Purchase.** At the end of the sixth (6th) and tenth (10th) Contract Years and at the end of the Initial Term and each Additional Term, so long as Purchaser is not in default under this Agreement, Purchaser may purchase the System from Seller on any such date for a purchase price equal to (i) with respect to an option exercised at the end of the sixth (6th) or tenth (10th) Contract Years the *greater* of (A) the amount set forth at such time in the Purchase Option Price schedule in Exhibit 1, and (B) the Fair Market Value of the System, and (ii) with respect to an option exercised at the end of the Term or an Additional Term, the Fair Market Value of the System. The “**Fair Market Value**” of the System shall be determined by mutual agreement of Purchaser and Seller; **provided, however**, if Purchaser and Seller cannot agree to a Fair Market Value within thirty (30) days after Purchaser has exercised its option, the Parties shall select a nationally recognized independent appraiser with experience and expertise in the solar photovoltaic industry to determine the Fair Market Value of the System. Such appraiser shall act reasonably and in good faith to determine the Fair Market Value of the System on an installed basis and shall set forth such determination in a written opinion delivered to the Parties. The valuation made by the appraiser shall be binding upon the Parties in the absence of grounds for vacation of an arbitration award under Code of Civil Procedure section 1286.2. The costs of the appraisal shall be borne by the Parties equally. Purchaser must provide a notification to Seller of its intent to purchase at least ninety (90) days and not more than one hundred eighty (180) days prior to the end of the applicable Contract Year or the Initial Term or Additional Term, as applicable, and the purchase shall be complete prior to the end of the applicable Contract Year or the Initial Term or Additional Term, as applicable. Upon purchase of the System, Purchaser will assume complete responsibility for the operation and maintenance of the System and liability for the performance of the System, and Seller shall have no further liabilities or obligations hereunder.

17. **Indemnification and Limitations of Liability.**

- a. **General.** Each Party (the “**Indemnifying Party**”) shall defend, indemnify and hold harmless the other Party and the directors, officers, shareholders, partners, members, agents and employees of such other Party, and the respective affiliates of each thereof (collectively, the “**Indemnified Parties**”), from and against all loss, damage, expense, liability and other claims, including court costs and reasonable attorneys’ fees (collectively, “**Liabilities**”) resulting from any third party actions relating to the breach of any representation or warranty set forth in Section 14 and from injury to or death of persons, and damage to or loss of property to the extent caused by or arising out of the negligent acts or omissions of, or the willful misconduct of, the Indemnifying Party (or its contractors, agents or employees) in connection with this Agreement; **provided, however**, that nothing herein shall require the Indemnifying Party to indemnify the Indemnified Party for any Liabilities to the extent caused by or arising out of the negligent acts or omissions of, or the willful misconduct of, the Indemnified Party. This Section 17(a) however, shall not apply to liability arising from any form of hazardous substances or other environmental contamination, such matters being addressed exclusively by Section 17(c).
- b. **Notice and Participation in Third Party Claims.** The Indemnified Party shall give the Indemnifying Party written notice with respect to any Liability asserted by a third party (a “**Claim**”), as soon as possible upon the receipt of information of any possible Claim or of the commencement of such Claim. The Indemnifying Party may assume the defense of any Claim, at its sole cost and expense, with counsel designated by the Indemnifying Party, to include the City Attorney’s Office in the event the Purchaser is the Indemnifying Party, and reasonably satisfactory to the

Indemnified Party. The Indemnified Party may, however, select separate counsel if both Parties are defendants in the Claim and such defense or other form of participation is not reasonably available to the Indemnifying Party. The Indemnifying Party shall pay the reasonable attorneys' fees incurred by such separate counsel until such time as the need for separate counsel expires. The Indemnified Party may also, at the sole cost and expense of the Indemnifying Party, assume the defense of any Claim if the Indemnifying Party fails to assume the defense of the Claim within a reasonable time. Neither Party shall settle any Claim covered by this Section 17(b) unless it has obtained the prior written consent of the other Party, which consent shall not be unreasonably withheld or delayed. The Indemnifying Party shall have no liability under this Section 17(b) for any Claim for which such notice is not provided if that the failure to give notice prejudices the Indemnifying Party.

- c. **Environmental Indemnification.** Seller shall indemnify, defend and hold harmless all of Purchaser's Indemnified Parties from and against all Liabilities arising out of or relating to the existence at, on, above, below or near the License Area of any Hazardous Substance (as defined in Section 17(c)(i)) to the extent deposited, spilled or otherwise caused by Seller or any of its contractors or agents. Purchaser shall indemnify, defend and hold harmless all of Seller's Indemnified Parties from and against all Liabilities arising out of or relating to the existence at, on, above, below or near the Premises of any Hazardous Substance, except to the extent deposited, spilled or otherwise caused by Seller or any of its contractors or agents. Each Party shall promptly notify the other Party if it becomes aware of any Hazardous Substance on or about the License Area or the Premises generally or any deposit, spill or release of any Hazardous Substance.

- i. **"Hazardous Substance"** means any chemical, waste or other substance (a) which now or hereafter becomes defined as or included in the definition of "hazardous substances," "hazardous wastes," "hazardous materials," "extremely hazardous wastes," "restricted hazardous wastes," "toxic substances," "toxic pollutants," "pollution," "pollutants," "regulated substances," or words of similar import under any laws pertaining to the environment, health, safety or welfare, (b) which is declared to be hazardous, toxic, or polluting by any Governmental Authority, (c) exposure to which is now or hereafter prohibited, limited or regulated by any Governmental Authority, (d) the storage, use, handling, disposal or release of which is restricted or regulated by any Governmental Authority, or (e) for which remediation or cleanup is required by any Governmental Authority.

d. **Limitations on Liability.**

- i. **No Consequential Damages.** Neither Party nor its directors, officers, shareholders, partners, members, agents and employees subcontractors or suppliers shall be liable for any indirect, special, incidental, exemplary, or consequential loss or damage of any nature arising out of their performance or non-performance hereunder even if advised of such.
- ii. **Actual Damages.** Seller's aggregate liability under this Agreement arising out of or in connection with the performance or non-performance of this Agreement shall not exceed the *lesser* of (A) the total payments made by Purchaser under this Agreement as of the date that the events that first gave rise to such liability occurred; and (B) the total of the prior twelve (12) monthly payments preceding the date that the events that first gave rise to such liability occurred. The provisions of this Section (17)(d)(ii) shall apply whether such liability arises in contract, tort (including negligence), strict liability or otherwise. Any action against either party must be brought within two (2) years after the cause of action accrues.

18. **Force Majeure.**

- a. **"Force Majeure Event"** means any act or event that prevents the affected Party from performing its obligations in accordance with the Agreement, if such act or event is beyond the reasonable control, and not the result of the fault or negligence, of the affected Party and such Party had been unable to overcome such act or event with the exercise of due diligence (including the expenditure of reasonable sums). Subject to the foregoing conditions, "Force Majeure Event" shall include without limitation the following acts or events: (i) natural phenomena, such as storms, hurricanes, floods, lightning, volcanic eruptions and earthquakes; (ii) explosions or fires arising from lightning or other causes unrelated to the acts or omissions of the Party seeking to be excused from performance; (iii) acts of war or public disorders, civil disturbances, riots, insurrection, sabotage, epidemic, terrorist acts, or rebellion; (iv) strikes or labor disputes (except strikes or labor disputes caused solely by employees of the Provider or as a result of such party's failure to comply with a collective bargaining agreement); (v) action by a Governmental Authority, including a moratorium on any activities related to the Agreement; and (vi) the inability for one of the Parties, despite its reasonable efforts, to obtain, in a timely manner, any Governmental Approval necessary to enable the affected Party to fulfill its obligations in accordance with the Agreement, provided that the delay or non-obtaining of such

Governmental Approval is not attributable to the Party in question and that such Party has exercised its reasonable efforts to obtain such Permit.

A Force Majeure Event shall not be based on the economic hardship of either Party, except as described in the following paragraph. Due to the constitutional limitations on cities pertaining to multiple year contracts, a Force Majeure event shall include a "budget non-appropriation event" in which the City's appropriation for any year covered in this Agreement does not appropriate funds for the procurement of any utility services for City. During the continuation of a budget non-appropriation event as defined above, if the City does not otherwise have other funds available to make payments otherwise due on this Agreement, the City shall not be obligated to pay for (and the Seller shall not be required to deliver) electric energy provided under this Agreement until the budget non-appropriation event has terminated. City agrees that it shall use its best efforts to seek appropriation for utility services during the term of this Agreement. If a budget non-appropriation event continues for more than 180 days, Seller (but not Purchaser) may terminate this Agreement.

- b. **Excused Performance.** Except as otherwise specifically provided in the Agreement, neither Party shall be considered in breach of the Agreement or liable for any delay or failure to comply with the Agreement (other than the failure to pay amounts due hereunder), if and to the extent that such delay or failure is attributable to the occurrence of a Force Majeure Event; provided that the Party claiming relief under this Section 10 shall immediately (i) notify the other Party in writing of the existence of the Force Majeure Event, (ii) exercise all reasonable efforts necessary to minimize delay caused by such Force Majeure Event, (iii) notify the other Party in writing of the cessation or termination of said Force Majeure Event and (iv) resume performance of its obligations hereunder as soon as practicable thereafter; provided, however, that Purchaser shall not be excused from making any payments and paying any unpaid amounts due in respect of Solar Services delivered to Purchaser prior to the Force Majeure Event performance interruption.
- c. **Termination in Consequence of Force Majeure Event.** If a Force Majeure Event shall have occurred that has affected Seller's performance of its obligations hereunder and that has continued for a continuous period of one hundred eighty (180) days, then Purchaser shall be entitled to terminate the Agreement upon ninety (90) days' prior written notice to Seller. If at the end of such ninety (90) day period such Force Majeure Event shall still continue, the Agreement shall automatically terminate. Upon such termination for a Force Majeure Event, neither Party shall have any liability to the other (other than any such liabilities that have accrued prior to such termination), and the provisions of Section 2.2 (Early Termination) shall be inapplicable."

19. **Assignment and Financing.**

- a. **Assignment.** This Agreement may not be assigned in whole or in part by either Party without the prior written consent of the other Party, which consent shall not be unreasonably withheld or delayed. Notwithstanding the foregoing, Seller may, without the prior written consent of Purchaser, (i) assign, mortgage, pledge or otherwise collaterally assign its interests in this Agreement to any Financing Party, (ii) directly or indirectly assign this Agreement to an affiliate of Seller, (iii) assign this Agreement to any entity through which Seller is obtaining financing or capital for the System and (iv) assign this Agreement to any person succeeding to all or substantially all of the assets of Seller (provided that Seller shall be released from liability hereunder as a result of any of the foregoing permitted assignments only upon assumption of Seller's obligations hereunder by the assignee). Purchaser's consent to any other assignment shall not be unreasonably withheld if Purchaser has been provided with reasonable proof that the proposed assignee (x) has comparable experience in operating and maintaining photovoltaic solar systems comparable to the System and providing services comparable to those contemplated by this Agreement and (y) has the financial capability to maintain the System and provide the services contemplated by this Agreement in the manner required by this Agreement. This Agreement shall be binding on and inure to the benefit of the successors and permitted assignees.
- b. **Financing.** The Parties acknowledge that Seller may obtain construction and long-term financing or other credit support from lenders or third parties ("**Financing Parties**") in connection with the installation, construction, ownership, operation and maintenance of the System. Both Parties agree in good faith to consider and to negotiate changes or additions to this Agreement that may be reasonably requested by the Financing Parties; provided, that such changes do not alter the fundamental economic terms of this Agreement. The Parties also agree that Seller may assign this Agreement to the Financing Parties as collateral, and in connection with any such assignment, Purchaser agrees to execute a consent to assignment in customary form and reasonably acceptable to the Financing Parties.

20. Contractor Information.

- a. All proprietary and other information received from Seller by Purchaser, whether received in connection with Seller's proposal to Purchaser or in connection with any services performed by Seller, will be disclosed upon receipt of a request for disclosure, pursuant to the California Public Records Act; provided, however, that, if any information is set apart and clearly marked "trade secret" or "confidential" or otherwise indicated as such to Purchaser when it is provided to Purchaser, Purchaser shall give notice to Seller of any request for the disclosure of such information. The Seller shall then have five (5) days from the date it receives such notice to enter into an agreement with the Purchaser, satisfactory to the City Attorney, providing for the defense of, and complete indemnification and reimbursement for all costs (including plaintiff's attorney fees) incurred by Purchaser in any legal action to compel the disclosure of such information under the California Public Records Act. If Purchaser and Seller enter into such an agreement, Purchaser shall not disclose the requested information or documents. The Seller shall have sole responsibility for defense of the actual "trade secret" or "confidential" designation of such information.
- b. The parties understand and agree that any failure by Seller to respond to the notice provided by Purchaser and/or to enter into an agreement with Purchaser, in accordance with the provisions of subsection a, above, shall constitute a complete waiver by Seller of any rights regarding the information designated "trade secret" or "confidential" by Seller, and such information shall be disclosed by Purchaser pursuant to applicable procedures required by the Public Records Act.

21. **Goodwill and Publicity.** Neither Party shall use any name, trade name, service mark or trademark of the other Party in any promotional or advertising material without the prior written consent of such other Party. The Parties shall coordinate and cooperate with each other when making public announcements related to the execution and existence of this Agreement, and each Party shall have the right to promptly review, comment upon and approve any publicity materials, press releases or other public statements by the other Party that refer to, or that describe any aspect of, this Agreement. Neither Party shall make any press release or public announcement of the specific terms of this Agreement (except for filings or other statements or releases as may be required by applicable law) without the specific prior written consent of the other Party. Without limiting the generality of the foregoing, all public statements must accurately reflect the rights and obligations of the Parties under this Agreement, including the ownership of Environmental Attributes and Environmental Incentives and any related reporting rights.

22. General Provisions

- a. **Choice of Law.** The law of the state where the System is located shall govern this Agreement without giving effect to conflict of laws principles.
- b. **Arbitration and Attorneys' Fees.** Any dispute arising from or relating to this Agreement shall be arbitrated in Sacramento, California. The arbitration shall be administered by JAMS in accordance with its Comprehensive Arbitration Rules and Procedures, and judgment on any award may be entered in any court of competent jurisdiction. If the Parties agree, a mediator may be consulted prior to arbitration. The prevailing party in any dispute arising out of this Agreement shall be entitled to reasonable attorneys' fees and costs.
- c. **Notices.** All notices under this Agreement shall be in writing and shall be by personal delivery, facsimile transmission, electronic mail, overnight courier, or regular, certified, or registered mail, return receipt requested, and deemed received upon personal delivery, acknowledgment of receipt of electronic transmission, the promised delivery date after deposit with overnight courier, or five (5) days after deposit in the mail. Notices shall be sent to the person identified in this Agreement at the addresses set forth in this Agreement or such other address as either party may specify in writing. Each party shall deem a document faxed, emailed or electronically sent in PDF form to it as an original document.
- d. **Survival.** Provisions of this Agreement that should reasonably be considered to survive termination of this Agreement shall survive. For the avoidance of doubt, surviving provisions shall include, without limitation, Section 14 (Representations and Warranties), Section 7(h) (No Warranty), Section 15(b) (Insurance Coverage), Section 17 (Indemnification and Limits of Liability), Section 20 (Confidentiality and Publicity), Section 22(a) (Choice of Law), Section 22(b) (Arbitration and Attorneys' Fees), Section 22(c) (Notices), Section 22(g) (Comparative Negligence), Section 22(h) (Non-Dedication of Facilities), Section 22(j) (Service Contract), Section 22(k) (No Partnership), Section 22(l) (Full Agreement, Modification, Invalidity, Counterparts, Captions) and Section 22(n) (No Third Party Beneficiaries).

- e. **Further Assurances.** Each of the Parties hereto agree to provide such information, execute and deliver any instruments and documents and to take such other actions as may be necessary or reasonably requested by the other Party which are not inconsistent with the provisions of this Agreement and which do not involve the assumptions of obligations other than those provided for in this Agreement, to give full effect to this Agreement and to carry out the intent of this Agreement.
- f. **Right of Waiver.** Each Party, in its sole discretion, shall have the right to waive, defer or reduce any of the requirements to which the other Party is subject under this Agreement at any time; provided, however that neither Party shall be deemed to have waived, deferred or reduced any such requirements unless such action is in writing and signed by the waiving Party. No waiver will be implied by any usage of trade, course of dealing or course of performance. A Party's exercise of any rights hereunder shall apply only to such requirements and on such occasions as such Party may specify and shall in no event relieve the other Party of any requirements or other obligations not so specified. No failure of either Party to enforce any term of this Agreement will be deemed to be a waiver. No exercise of any right or remedy under this Agreement by Purchaser or Seller shall constitute a waiver of any other right or remedy contained or provided by law. Any delay or failure of a Party to exercise, or any partial exercise of, its rights and remedies under this Agreement shall not operate to limit or otherwise affect such rights or remedies. Any waiver of performance under this Agreement shall be limited to the specific performance waived and shall not, unless otherwise expressly stated in writing, constitute a continuous waiver or a waiver of future performance.
- g. **Comparative Negligence.** It is the intent of the Parties that where negligence is determined to have been joint, contributory or concurrent, each Party shall bear the proportionate cost of any Liability.
- h. **Non-Dedication of Facilities.** Nothing herein shall be construed as the dedication by either Party of its facilities or equipment to the public or any part thereof. Neither Party shall knowingly take any action that would subject the other Party, or other Party's facilities or equipment, to the jurisdiction of any Governmental Authority as a public utility or similar entity. Neither Party shall assert in any proceeding before a court or regulatory body that the other Party is a public utility by virtue of such other Party's performance under this agreement. If Seller is reasonably likely to become subject to regulation as a public utility, then the Parties shall use all reasonable efforts to restructure their relationship under this Agreement in a manner that preserves their relative economic interests while ensuring that Seller does not become subject to any such regulation. If the Parties are unable to agree upon such restructuring, Seller shall have the right to terminate this Agreement without further liability, and Seller shall remove the System in accordance with Section 11 of this Agreement.
- i. **Estoppel.** Either Party hereto, without charge, at any time and from time to time, within five (5) business days after receipt of a written request by the other party hereto, shall deliver a written instrument, duly executed, certifying to such requesting party, or any other person specified by such requesting Party: (i) that this Agreement is unmodified and in full force and effect, or if there has been any modification, that the same is in full force and effect as so modified, and identifying any such modification; (ii) whether or not to the knowledge of any such party there are then existing any offsets or defenses in favor of such party against enforcement of any of the terms, covenants and conditions of this Agreement and, if so, specifying the same and also whether or not to the knowledge of such party the other party has observed and performed all of the terms, covenants and conditions on its part to be observed and performed, and if not, specifying the same; and (iii) such other information as may be reasonably requested by the requesting Party. Any written instrument given hereunder may be relied upon by the recipient of such instrument, except to the extent the recipient has actual knowledge of facts contained in the certificate.
- j. **Service Contract.** The Parties intend this Agreement to be a "service contract" within the meaning of Section 7701(e)(3) of the Internal Revenue Code of 1986. Purchaser will not take the position on any tax return or in any other filings suggesting that it is anything other than a purchase of electricity from the System.
- k. **No Partnership.** No provision of this Agreement shall be construed or represented as creating a partnership, trust, joint venture, fiduciary or any similar relationship between the Parties. No Party is authorized to act on behalf of the other Party, and neither shall be considered the agent of the other.
- l. **Full Agreement, Modification, Invalidity, Counterparts, Captions.** This Agreement, together with any Exhibits, completely and exclusively states the agreement of the parties regarding its subject matter and supersedes all prior proposals, agreements, or other communications between the parties, oral or written, regarding its subject matter. This Agreement may be modified only by a writing signed by both Parties, and any such modification must not violate Purchaser's Master Lease Program or jeopardize the tax-exempt status of bonds issued through that program. If any provision of this Agreement is found unenforceable or invalid, such unenforceability or invalidity shall not

render this Agreement unenforceable or invalid as a whole. In such event, such provision shall be changed and interpreted so as to best accomplish the objectives of such unenforceable or invalid provision within the limits of applicable law. This Agreement may be executed in any number of separate counterparts and each counterpart shall be considered an original and together shall comprise the same Agreement. The captions or headings in this Agreement are strictly for convenience and shall not be considered in interpreting this Agreement.

- m. **Forward Contract.** The transaction contemplated under this Agreement constitutes a “forward contract” within the meaning of the United States Bankruptcy Code, and the Parties further acknowledge and agree that each Party is a “forward contract merchant” within the meaning of the United States Bankruptcy Code.
- n. **No Third Party Beneficiaries.** Except as otherwise expressly provided herein, this Agreement and all rights hereunder are intended for the sole benefit of the Parties hereto and shall not imply or create any rights on the part of, or obligations to, any other Person.

Exhibit 5

RECORDING REQUESTED BY)
AND)
WHEN RECORDED, MAIL TO:)
)
SolarCity Corporation)
393 Vintage Park Drive, Suite 140)
Foster City, CA 94404)
Attn: General Counsel)
Facsimile (650) 560-6182)
Email: contracts@solarcity.com)

(Space Above This Line for Recorder's Use)

NON-DISTURBANCE AGREEMENT (LENDER)

The undersigned ("Lender") acknowledges that, [Customer Company Name] (the "Host") will be benefited by entering into a power purchase agreement with SolarCity Corporation, a Delaware corporation ("SolarCity"), pursuant to which SolarCity will install its solar power generation system, including photovoltaic panels, racks, wiring and other electrical devices, conduit, weatherproof housings, hardware, inverter(s), remote monitoring system, connectors, disconnects and overcurrent devices (collectively the "PV System"), on the real property described on Exhibit A hereto (the "Premises"), for the purpose of generating power and selling it to the Host and granted a license to enter on the Premises and install, construct, own, operate, maintain, access, remove and replace the PV System (the "License"). As an inducement to SolarCity to install its PV System on the Premises and sell power generated by such PV System to the Host, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the undersigned hereby agrees, waives and undertakes as follows:

1. The PV System shall not be, or be deemed to be, a part of or an accession or addition to or a fixture on the Premises even though the PV System is installed on the Premises; nor shall the PV System be moved from the Premises by the undersigned unless SolarCity's prior written consent to such move has been obtained.
2. The undersigned waives any and all right, title and interest in the PV System and shall not acquire any such right title or interest by virtue of the installation of the PV System on the Premises. The undersigned further waives any right to seize, or to claim any interest, whatsoever in the PV System on account of any claim or right the undersigned may have against any person, including, without limitation, any claim or right the undersigned may have or assert against the Host, by levy of distraint or otherwise; *provided, however*, to the extent that the undersigned forecloses on the Premises, receives a deed in lieu of foreclosure or otherwise becomes the owner of the Premises (and has provided written notification of the same to SolarCity pursuant to Section 6 below), the undersigned or the successful bidder at a foreclosure sale may request in writing that SolarCity remove the PV System. SolarCity shall commence such removal within thirty (30) days of receipt of such notification and shall use commercially reasonable efforts to complete such removal within a commercially reasonable period of time. If SolarCity does not commence removal within such thirty (30) day period, the undersigned may itself remove the PV System, using the degree of care it would use if the PV System was its own property, at SolarCity's cost and expense for all documented reasonable costs incurred.
3. SolarCity may at any time, at its option, enter upon the Premises and inspect, maintain, remove or repair the PV System, sell the PV System while it is installed on the Premises, by auction or otherwise (for the avoidance of doubt, such auction shall not be held on the Premises), or remove the PV System at its sole cost and expense, and SolarCity by its acceptance hereof agrees to make such repairs following any such removal to the extent reasonably necessary to restore the Premises to its condition immediately prior to such removal.
4. All of the terms and conditions of this waiver shall run with the land and be binding upon and benefit the heirs, devisees, personal representatives, successors, assigns or encumbrancers of the undersigned and shall inure to the benefit of SolarCity, its successors and assigns. As used herein the term "Host" shall include the heirs, devisees, personal representatives, successors and assigns of the Host.
5. In the event of any foreclosure, trustee's sale, conveyance in lieu of foreclosure, eviction or other transaction that results in Host surrendering or losing its right to occupy and enjoy the Premises, SolarCity's rights and interests under the License shall not be affected or impaired thereby and the License shall continue in effect in accordance with its terms.

6. When sending to Host any notice of impending or actual foreclosure of the Premises, the undersigned shall concurrently provide SolarCity a copy of the same.

7. This agreement may be executed in any number of separate counterparts. Each counterpart shall be deemed an original.

Executed this ____ day of _____, _____.

Lender: [Lender/MortgageHolder/Company Name]

By: _____

Host: [Customer Company Name]

By: _____

Accepted by:

SolarCity Corporation

By: David White

DAVID WHITE

CFD

Exhibit A

The Premises

A PARCEL OF LAND LOCATED IN THE STATE OF CALIFORNIA, COUNTY OF SACRAMENTO, WITH A SITUS ADDRESS OF 5730 24TH ST, SACRAMENTO, CA 95822-3604 CURRENTLY OWNED BY CITY OF SACRAMENTO HAVING A TAX ASSESSOR NUMBER OF 035-0010-048-0000 AND BEING THE SAME PROPERTY MORE FULLY DESCRIBED AS POR OF THE CITY OF SACRAMENTO DES AS: BEG AT A PT ON THE N-S 1/4 SEC LN OF SEC 25, T8N, R4E, MDB&M, LOC S))505'00W 245.01 FT FR THE SE COR OF TERRA BONITA VISTA UNIT NO 2; TH FR SD POB E'LY 1,420 FT M/L TO INTERSECTION OF THE W LN OF NORMAN WAY WITH THE S LN OF 34TH AVE; TH ALG SD S LN E'LY 1,252.9 FT TO THE W LN OF 24TH ST; TH ALG SD LN S 1,209.06 FT; TH W'LY 1,240 FT M/L TO THE E'LY LN OF SACRAMENTO EXECUTIVE AIRPORT; TH ALG SD LN DUE N 304.20 FT; TH N29°23'17E 1,076.05 FT; TH ALG THE N'LY LN OF SD AIRPORT S89°42'15W 330.02'; TH S00°05'00W 30'; TH S89°42'15W 1,611.51 FT TO SD N-S 1/4 SEC LN; TH ALG SD LN N00°05'00E 200 FT M/L TO THE POB. CONTG 41.25 N AC M/L



Requires Council Approval: No YES Meeting:

Real Estate

Other Party Signature Needed

Recording Requested

General Information

Type: Select Contract Type	PO Type: Select PO Type	Attachment: Original No.:
\$ Not to Exceed: \$		Original Doc Number:
Other Party: SolarCity		Certified Copies of Document: 1
Project Name: Solar Power Purchase Agreement		Deed: <input checked="" type="checkbox"/> None <input type="checkbox"/> Included <input type="checkbox"/> Separate
Project Number:	Bid Transaction #:	E/SBE-DBE-M/WBE:

Department Information

Department: **General Services**

Division: **Office of the Director**

Project Mgr: **Yvette Rincon**

Supervisor: **Reina Schwartz**

Contract Services:

Date:

Division Mgr:

Phone Number: **808-5827**

Org Number:

Comment:

Review and Signature Routing

Department	Signature or Initial	Date
Project Mgr:	<i>YR</i>	3/25/11
Accounting:		
Contract Services:		
Supervisor:		
Division Manager:		

City Attorney	Signature or Initial	Date
City Attorney:	<i>KCB</i>	3/25/11

Send Interoffice Mail Notify for Pick Up

Authorization	Signature or Initial	Date
Choose Director		
Department Director:		
City Mgr: yes <input type="checkbox"/> No <input type="checkbox"/>		

Contract Cover/Routing Form: Must Accompany ALL Contracts; however, is not part of the contract. (01-01-09)

For City Clerk Processing

Finalized:

Initial:

Date:

Imaged:

Initial:

Date:

Received:
(City Clerk Stamp Here)



Solar Power Purchase Agreement (Commercial California)

This Solar Power Purchase Agreement (this "Agreement") is entered into by the parties listed below (each a "Party" and collectively the "Parties") as of the date signed by Seller below (the "Effective Date").

Purchaser:		Seller:	
Name and Address	City of Sacramento 5730 24th Street Building 1 Sacramento, California 95822 Attention: Reina Schwartz	Name and Address	SolarCity Corporation 3055 Clearview Way San Mateo, CA 94402 Attention: Legal Department
Phone	(916) 808-7195	Phone	(650) 638-1028
Fax	(916) 399-9263	Fax	(650) 638-1029
E-mail	rschwartz@cityofsacramento.org	E-mail	Contracts@solarcity.com
Facility Ownership	Purchaser owns the Facility		Contractor's License Numbers CA: CSLB 888104

This Agreement sets forth the terms and conditions of the purchase and sale of solar generated electric energy from the solar panel system described in **Exhibit 2** (the "System") and installed at the Purchaser's facility described in **Exhibit 3** (the "Facility").

The exhibits listed below are incorporated by reference and made part of this Agreement.

- Exhibit 1 Pricing Attachment
- Exhibit 2 System Description, Delivery Point and License Area
- Exhibit 3 Memorandum of License
- Exhibit 4 Solar Power Purchase Agreement General Terms and Conditions
- Exhibit 5 Non-Disturbance Agreement (Lender)

LEGAL APPROVED

INITIAL	
DATE	3/24/11

Purchaser: City of Sacramento

SolarCity Corporation

Signature: _____

Signature:

Printed Name: _____

Printed Name: LYNDON RIVE

Title: _____

Title: CEO

Date: _____

Date: 3/24/2011

APPROVED AS TO FORM:

ATTEST:

City Attorney:

City Clerk: _____

Exhibit 1
Pricing Attachment

1. **Term:** Twenty (20) years, beginning on the Commercial Operation Date.
2. **Additional Terms:** Up to two (2) Additional Terms of five (5) years each.
3. **Environmental Incentives and Environment Attributes Accrue to Seller.**
4. **Contract Price:**

YEAR	CONTRACT PRICE PER KWH
1	\$0.0930
2	\$0.0949
3	\$0.0968
4	\$0.0987
5	\$0.1007
6	\$0.1027
7	\$0.1047
8	\$0.1068
9	\$0.1090
10	\$0.1111
11	\$0.1134
12	\$0.1156
13	\$0.1179
14	\$0.1203
15	\$0.1227
16	\$0.1252
17	\$0.1277
18	\$0.1302
19	\$0.1328
20	\$0.1355

Includes ACH invoicing. If manual invoicing is required, a \$25 handling charge will be added to each invoice.

5. **Condition Satisfaction Date:** 180 days after the Effective Date
6. **Anticipated Commercial Operation Date:** 270 days after the Effective Date
7. **Outside Commercial Operation Date:** 365 days after the Effective Date
8. **Purchase Option**

YEAR	PURCHASE PRICE
6	\$787,928
10	\$757,350
20	Fair Market Value

*Buyer shall have the right to purchase the System at the greater of the price set forth above and the then current fair market value.

9. **Termination Value:**

YEAR	TERMINATION VALUE
1	\$1,801,095
2	\$1,562,109
3	\$1,238,720
4	\$989,064
5	\$783,301
6	\$573,336
7	\$528,701
8	\$519,013
9	\$508,304
10	\$496,512
11	\$483,577
12	\$469,432
13	\$454,009
14	\$437,235
15	\$419,035
16	\$399,327
17	\$378,029
18	\$355,050
19	\$330,299
20	\$303,676

10. **Rebate Variance.** All prices in this Agreement are calculated based on an upfront rebate of \$0 and an ongoing incentive of \$0.3/kWh for 5 years. If the actual rebate is lower than calculated, prices will be adjusted pro-rata to reflect the actual rebate received.

Exhibit 2

System Description, Delivery Point and License Area

1. **System Location:** 2812 Meadowview Road, Sacramento, California 95832
2. **System Size (DC kW):** 275.080
3. **Expected First Year Energy Production (kWh):** 355,428
4. **Expected Structure:** Roof Mount and Solar Support Structure
5. **Expected Module(s):**

QUANTITY	MAKE	MODEL	STC WATTS	PTC WATTS
1,196	Yingli Green Energy	YL230P-29b	230.0 W	206.6 W

6. **Expected Inverter(s):**

QUANTITY	MAKE	MODEL	RATED POWER	EFFICIENCY
1	SatCon Technology	PVS-250 (480 V)	250.00 kW	96.0 %

7. **Includes:**

SolarCity Limited Warranty, installation of a solar energy system (includes: design, engineering, permitting, installation, monitoring, rebate application and paperwork processing for solar energy system).

8. **Excludes:**

Unforeseen groundwork (including, but not limited to, excavation/circumvention of underground obstacles), upgrades or repair to customer or utility electrical infrastructure, payment bonds, performance bond(s), prevailing wage construction, tree removal, tree trimming.

9. **Delivery Point and License Area:** SolarCity shall attach a schematic that contains the:

- (i) array;
- (ii) Delivery Point; and
- (iii) access points needed to install and service System (bldg access, electrical room, stairs etc.)



State of _____)
County of _____)

On _____, before me, _____, Notary Public, personally appeared _____, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of _____ that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature of the Notary Public

State of California)
County of San Mateo)

On _____, before me, _____, Notary Public, personally appeared _____, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature of the Notary Public

Exhibit A
To Memorandum of License

Legal Description of Premises

That certain real property located in the County of Sacramento, State of California described as follows:

A PARCEL OF LAND LOCATED IN THE STATE OF CALIFORNIA, COUNTY OF SACRAMENTO, WITH A SITUS ADDRESS OF 2812 MEADOWVIEW RD, SACRAMENTO, CA 95832-1441 CURRENTLY OWNED BY CITY OF SACRAMENTO HAVING A TAX ASSESSOR NUMBER OF 053-0010-065-0000 AND BEING THE SAME PROPERTY MORE FULLY DESCRIBED AS POR SEC 7, T7N, R5E, M.D.B. & M. DES AS: BEG AT A PT LOC N89°20'37E 1969.33', & S00°17'35E 40' FR THE NW COR OF SD SEC, TH FR SD P.O.B. N89°20'37E 455.05'; TH S00°55'32E 465.56'; TH S89°04'28W 38'; TH S00°55'32E 20.50'; TH S89°20'37W 422.41'; TH N00°17'35W 486.24' TO THE P.O.B. CONTG 5.0915 AC AND DESCRIBED IN DOCUMENT NUMBER 30430-2939 DATED 04/03/2003 AND RECORDED 04/30/2003.

Exhibit 4

Solar Power Purchase Agreement General Terms and Conditions

1. **Definitions and Interpretation.** Unless otherwise defined or required by the context in which any term appears: (a) the singular includes the plural and vice versa; (b) the words “herein,” “hereof” and “hereunder” refer to this Agreement as a whole and not to any particular section or subsection of this Agreement; (c) references to any agreement, document or instrument mean such agreement, document or instrument as amended, modified, supplemented or replaced from time to time; and (d) the words “include,” “includes” and “including” mean include, includes and including “without limitation.” The captions or headings in this Agreement are strictly for convenience and shall not be considered in interpreting this Agreement.

2. **Purchase and Sale of Electricity.** Purchaser shall purchase from Seller, and Seller shall sell to Purchaser, all of the electric energy generated by the System during the Initial Term and any Additional Term (as defined in Exhibit 1, and collectively the “Term”). Electric energy generated by the System will be delivered to Purchaser at the delivery point identified on Exhibit 3 (the “Delivery Point”). Purchaser shall take title to the electric energy generated by the System at the Delivery Point, and risk of loss will pass from Seller to Purchaser at the Delivery Point. Purchaser may purchase electric energy for the Facility from other sources if the Purchaser's electric requirements at the Facility exceed the output of the System.

3. **Term and Termination.**
 - a. **Initial Term.** The initial term (“Initial Term”) of this Agreement shall commence on the Commercial Operation Date (as defined below) and continue for the length of time specified in Exhibit 1, unless earlier terminated as provided for in this Agreement. The “Commercial Operation Date” is the date Seller gives Purchaser written notice that the System is mechanically complete and capable of providing electric energy to the Delivery Point. Upon Purchaser's request, Seller will give Purchaser copies of certificates of completion or similar documentation from Seller's contractor and the interconnection or similar agreement with SMUD. This Agreement is effective as of the Effective Date and Purchaser's failure to enable Seller to provide the electric energy by preventing it from installing the System or otherwise not performing shall not excuse Purchaser's obligations to make payments that otherwise would have been due under this Agreement. **Additional Terms.** If Purchaser has not exercised its option to purchase the System by the end of the Initial Term, either Party may give the other Party written notice of its desire to extend this Agreement on the terms and conditions set forth herein for the number and length of additional periods specified in Exhibit 1 (each an “Additional Term”). Such notice shall be given, if at all, not more than one hundred twenty (120) and not less than sixty (60) days before the last day of the Initial Term or the then current Additional Term, as applicable. The Party receiving the notice requesting an Additional Term shall respond positively or negatively to that request in writing within thirty (30) days after receipt of the request. Failure to respond within such thirty (30) day period shall be deemed a rejection of the offer for an Additional Term. If both Parties agree to an Additional Term, the Additional Term shall begin immediately upon the conclusion of the Initial Term or the then current term on the same terms and conditions as set forth in this Agreement. If the Party receiving the request for an Additional Term rejects or is deemed to reject the first Party's offer, this Agreement shall terminate at the end of the Initial Term (if the same has not been extended) or the then current Additional Term.

4. **Billing and Payment.**
 - a. **Monthly Charges.** Purchaser shall pay Seller monthly for the electric energy generated by the System and delivered to the Delivery Point at the \$/kWh rate shown in Exhibit 1 (the “Contract Price”). The monthly payment for such energy will be equal to the applicable \$/kWh rate multiplied by the number of kWh of energy generated during the applicable month, as measured by the System meter.

 - b. **Monthly Invoices.** Seller shall invoice Purchaser monthly, either manually or through ACH. Such monthly invoices shall state (i) the amount of electric energy produced by the System and delivered to the Delivery Point, (ii) the rates applicable to, and charges incurred by, Purchaser under this Agreement and (iii) the total amount due from Purchaser.

 - c. **Taxes.** Purchaser shall either pay or reimburse Seller for any and all taxes assessed on the generation, sale, delivery or consumption of electric energy produced by the System or the interconnection of the System to SMUD's electric distribution system, including property taxes on the System; provided, however, Purchaser will not be required to pay or reimburse Seller for any taxes during periods when Seller fails to deliver electric energy to Purchaser for

reasons other than Force Majeure. For purposes of this Section 4(d), “Taxes” means any federal, state and local ad valorem, property, occupation, generation, privilege, sales, use, consumption, excise, transaction, and other taxes, regulatory fees, surcharges or other similar charges, but shall not include any income taxes or similar taxes imposed on Seller’s revenues due to the sale of energy under this Agreement, which shall be Seller’s responsibility.

- d. **Payment Terms.** All amounts due under this Agreement shall be due and payable net thirty (30) days from receipt of invoice. Any undisputed portion of the invoice amount not paid within the thirty (30) day period shall accrue interest as permitted under Civil Code section 3289.

5. Environmental Attributes and Environmental Incentives.

Unless otherwise specified on Exhibit 1, Seller is the owner of all Environmental Attributes and Environmental Incentives and is entitled to the benefit of all Tax Credits, and Purchaser’s purchase of electricity under this Agreement does not include Environmental Attributes, Environmental Incentives or the right to Tax Credits or any other attributes of ownership and operation of the System, all of which shall be retained by Seller. Purchaser shall cooperate with Seller in obtaining, securing and transferring all Environmental Attributes and Environmental Incentives and the benefit of all Tax Credits, including by using the electric energy generated by the System in a manner necessary to qualify for such available Environmental Attributes, Environmental Incentives and Tax Credits. Purchaser shall not be obligated to incur any out-of-pocket costs or expenses in connection with such actions unless reimbursed by Seller. If any Environmental Incentives are paid directly to Purchaser, Purchaser shall immediately pay such amounts over to Seller. To avoid any conflicts with fair trade rules regarding claims of solar or renewable energy use, Purchaser, if engaged in commerce and/or trade, shall submit to Seller for approval any press releases regarding Purchaser’s use of solar or renewable energy and shall not submit for publication any such releases without the written approval of Seller. Approval shall not be unreasonably withheld, and Seller’s review and approval shall be made in a timely manner to permit Purchaser’s timely publication.

“**Environmental Attributes**” means any and all credits, benefits, emissions reductions, offsets, and allowances, howsoever entitled, attributable to the System, the production of electrical energy from the System and its displacement of conventional energy generation, including (1) any avoided emissions of pollutants to the air, soil or water such as sulfur oxides (SO_x), nitrogen oxides (NO_x), carbon monoxide (CO) and other pollutants; (2) any avoided emissions of carbon dioxide (CO₂), methane (CH₄), nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride and other greenhouse gases (GHGs) that have been determined by the United Nations Intergovernmental Panel on Climate Change, or otherwise by law, 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 related to these avoided emissions, such as Green Tag Reporting Rights and Renewable Energy Credits. Green Tag Reporting Rights are the right of a party to report the ownership of accumulated Green Tags in compliance with federal or state law, if applicable, and to a federal or state agency or any other party, and include Green Tag Reporting Rights accruing under Section 1605(b) of The Energy Policy Act of 1992 and any present or future federal, state, or local law, regulation or bill, and international or foreign emissions trading program. Environmental Attributes do not include Environmental Incentives and Tax Credits. Seller shall file all tax returns in a manner consistent with this Section 5. Without limiting the generality of the foregoing, Environmental Attributes include carbon trading credits, renewable energy credits or certificates, emissions reduction credits, investment credits, emissions allowances, green tags, tradeable renewable credits and Green-e® products.

“**Environmental Incentives**” means any and credits, rebates, subsidies, payments or other incentives that relate to self-generation of electricity, the use of technology incorporated into the System, environmental benefits of using the System, or other similar programs available from SMUD, any other regulated entity, the manufacturer of any part of the System or any Governmental Authority.

“**Governmental Authority**” means any national, state or local government (whether domestic or foreign), any political subdivision thereof or any other governmental, quasi-governmental, judicial, public or statutory instrumentality, authority, body, agency, bureau or entity (including the Federal Energy Regulatory Commission or the California Public Utilities Commission), or any arbitrator with authority to bind a party at law.

“**Tax Credits**” means any and all (i) investment tax credits, (ii) production tax credits and (iii) similar tax credits or grants under federal, state or local law relating to the construction, ownership or production of energy from the System.

6. Conditions to Obligations.

- a. **Conditions to Seller’s Obligations.**

Seller's obligations under this Agreement are conditioned on the completion of the following conditions to Seller's reasonable satisfaction on or before the Condition Satisfaction Date:

- i. Completion of a physical inspection of the Facility and the property upon which the Facility is located (the "Premises") including, if applicable, geotechnical work, and real estate due diligence to confirm the suitability of the Facility and the Premises for the System;
- ii. Approval of (A) this Agreement and (B) the Construction Agreement (if any) for the System by Seller's Financing Parties. "Construction Agreement" as used in this subsection means an agreement between SolarCity and a subcontractor to install the System;
- iii. Confirmation that Seller will obtain all applicable SMUD PBI incentives;
- iv. Confirmation that Seller will obtain all applicable Environmental Incentives (including SMUD PBI incentives) and Tax Credits;
- v. Receipt of all necessary zoning, land use and building permits;
- vi. Execution of all necessary agreements with SMUD for interconnection of the System to SMUD's electric distribution system; and

Prior to Seller commencing construction and installation of the System, Purchaser shall give Seller proof of self insurance for all insurance required to be maintained by Purchaser under this Agreement

b. Conditions to Purchaser's Obligations.

- i. Purchaser's obligations under this Agreement are conditioned on the occurrence of the Commercial Operation Date for the System on or before the Outside Commercial Operation Date (See Exhibit 1).

c. Failure of Conditions.

If any of the conditions listed in subsections a or b above are not satisfied by the applicable dates specified in those subsections, the Parties will attempt in good faith to negotiate new dates for the satisfaction of the failed conditions. If the parties are unable to negotiate new dates then the Party that has not failed to meet an obligation may terminate this Agreement upon ten (10) days written notice to the other Party without liability for costs or damages or triggering a default under this Agreement.

7. Seller's Rights and Obligations.

- a. Permits and Approvals.** Seller, consistent with applicable laws, shall use commercially reasonable efforts to obtain, at its sole cost and expense:

- i. any zoning, land use and building permits required to construct, install and operate the System; and
- ii. any agreements and approvals from SMUD necessary in order to interconnect the System to SMUD's electric distribution system.

Purchaser, consistent with applicable laws, shall cooperate with Seller's reasonable efforts to obtain such agreements, permits and approvals

- b. Standard System Repair and Maintenance.** Seller shall construct and install the System at the Facility. During the Term, Seller will operate and perform all routine and emergency repairs to, and maintenance of, the System at its sole cost and expense, except for any repairs or maintenance resulting from Purchaser's negligence, willful misconduct or breach of this Agreement or the Site Lease (if applicable). Seller shall not be responsible for any work done by others on any part of the System unless Seller authorizes that work in advance in writing. Seller shall not be responsible for any loss, damage, cost or expense arising out of or resulting from improper environmental controls or improper operation or maintenance of the System by anyone other than Seller or Seller's contractors. If the System requires repairs for which Seller is not responsible, Purchaser shall pay Seller for diagnosing and correcting the problem at Seller or Seller's contractors' then current reasonable rates. Seller shall provide Purchaser with reasonable notice prior to accessing the Facility to make standard repairs.

- c. **Non-Standard System Repair and Maintenance.** If Seller incurs unexpected costs to maintain the System due to conditions at the Facility that impair the functioning of the System and these conditions were: caused by the Purchaser or the Purchaser knew or should have known of these conditions; and the Purchaser failed to remedy these conditions or inform the Seller of these conditions prior to entering into this Agreement, the pricing, schedule and other terms of this Agreement will be equitably adjusted to compensate for any work in excess of normally expected work required to be performed by Seller. In such event, the Parties will negotiate such equitable adjustment in good faith.
- d. **Breakdown Notice.** Seller shall notify Purchaser within twenty-four (24) hours following Seller's discovery of (i) any material malfunction in the operation of the System or (ii) an interruption in the supply of electrical energy from the System. Purchaser and Seller shall each designate personnel and establish procedures such that each Party may provide notice of such conditions requiring Seller's repair or alteration at all times, twenty-four (24) hours per day, including weekends and holidays. Purchaser shall notify Seller immediately upon the discovery of an emergency condition affecting the System.
- e. **Suspension.** Notwithstanding anything to the contrary herein, Seller shall be entitled to suspend delivery of electricity from the System to the Delivery Point for the purpose of maintaining and repairing the System and such suspension of service shall not constitute a breach of this Agreement; provided, that Seller shall use commercially reasonable efforts to minimize any interruption in service to the Purchaser. A suspension of delivery of electricity under this provision shall not extend the term of the Agreement.
- f. **Use of Contractors and Subcontractors.** Seller shall be permitted to use contractors and subcontractors to perform its obligations under this Agreement. However, Seller shall continue to be responsible for the quality of the work performed by its contractors and subcontractors. If a list of pre-approved contractors and subcontractors is desired, such list shall be scheduled on an appendix to this Exhibit. All contractors and subcontractors, other than those that may be scheduled on an appendix to this Exhibit, shall be subject to Purchaser's prior written consent, not to be unreasonably withheld.
- g. **Liens and Payment of Contractors and Suppliers.** Seller shall pay when due all valid charges from all contractors, subcontractors and suppliers supplying goods or services to Seller under this Agreement and shall keep the Facility free and clear of any liens related to such charges. Seller shall indemnify Purchaser for all claims, losses, damages, liabilities and expenses resulting from any liens filed against the Facility or the Premises in connection with such charges; provided, however, that Seller shall have the right to contest any such lien, so long as it provides a statutory bond or other reasonable assurances of payment that either remove such lien from title to the Facility and the Premises or that assure that any adverse judgment with respect to such lien will be paid without affecting title to the Facility and the Premises.

Unless otherwise provided in this agreement, Seller shall not directly or indirectly cause, create, incur, assume or allow to exist any mortgage, pledge, lien, charge, security interest, encumbrance or other claim of any nature on or with respect to the System or any interest therein. Seller shall immediately notify Purchaser in writing of the existence of any such mortgage, pledge, lien, charge, security interest, encumbrance or other claim, shall promptly cause the same to be discharged and released of record without cost to Purchaser, and shall indemnify Purchaser against all costs and expenses (including reasonable attorneys' fees) incurred in discharging and releasing any such mortgage, pledge, lien, charge, security interest, encumbrance or other claim.

- h. **No Warranty.** NO WARRANTY OR REMEDY, WHETHER STATUTORY, WRITTEN, ORAL, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, OR WARRANTIES ARISING FROM COURSE OF DEALING OR USAGE OF TRADE SHALL APPLY. The remedies set forth in this Agreement shall be Purchaser's sole and exclusive remedies for any claim or liability arising out of or in connection with this Agreement, whether arising in contract, tort (including negligence), strict liability or otherwise. The Limited Warranty SolarCity will provide Purchaser with is a separate contract from this Agreement. No rights provided to Purchaser by the Limited Warranty may be asserted under this Agreement. No warranty is made in this Agreement. Therefore, any warranty claim must be made independently of this Agreement and will not affect Purchaser's obligations under this Agreement.

8. Purchaser's Rights and Obligations.

- a. **Facility Access Rights.** Purchaser grants to Seller and to Seller's agents, employees and contractors an irrevocable non-exclusive license running with the Premises (the "**License**") for access to, on, over, under and across the Premises as more particularly described in Exhibit A to **Exhibit 3** (the "**License Area**") for the purposes of (a)

installing, constructing, operating, owning, maintaining, accessing, removing and replacing the System; (b) performing all of Seller's obligations and enforcing all of Seller's rights set forth in this Agreement; and (c) installing, using and maintaining electric lines and equipment, including inverters and meters, necessary to interconnect the System to Purchaser's electric system at the Facility and/or to SMUD's electric distribution system or that otherwise may from time to time be useful or necessary in connection with the construction, installation, operation, maintenance or repair of the System. Seller shall notify Purchaser prior to entering the Facility except in situations where there is imminent risk of damage to persons or property. Purchaser shall provide Seller access during normal business hours, excluding weekends and holidays and during emergency situations when it is reasonable to enter the premises, for the purposes and on the terms set forth in the Agreement. Seller will provide twenty-four (24) hour notice or as much time as is reasonably possible to Purchaser in the event that it needs to access the System during excluded periods.. The term of the License shall continue until the date that is one hundred and twenty (120) days following the date of expiration or termination of this Agreement (the "License Term"). During the License Term, Purchaser shall ensure that Seller's rights under the License and Seller's access to the License Area are preserved and protected and shall not interfere with or permit any third parties to interfere with such rights or access. The grant of the License shall survive termination of this agreement by either Party. Purchaser agrees that Seller may record a memorandum of license in substantially the same form attached hereto as **Exhibit 3** in the land records respecting the License.

- b. **OSHA Compliance.** Both parties shall ensure that all Occupational Safety and Health Act (OSHA) requirements and other similar applicable safety laws or codes are adhered to in their performance under this Agreement.
- c. **Maintenance of Facility.** Purchaser shall, at its sole cost and expense, maintain the Facility in good condition and repair. Purchaser will ensure that the Facility remains interconnected to the local utility (SMUD) grid at all times and will not permit cessation of electric service to the Facility from the local utility (SMUD). Purchaser is fully responsible for the maintenance and repair of the Facility's electrical system and of all of Purchaser's equipment that utilizes the System's outputs. Purchaser shall properly maintain in full working order all of Purchaser's electric supply or generation equipment that Purchaser may shut down while utilizing the System. Purchaser shall promptly notify Seller of any matters of which it is aware pertaining to any damage to or loss of use of the System or that could reasonably be expected to adversely affect the System.
- d. **No Alteration of Facility.** Purchaser shall not make any alterations or repairs to the Facility which may adversely affect the operation and maintenance of the System without Seller's prior written consent. If Purchaser wishes to make such alterations or repairs, Purchaser shall give prior written notice to Seller, setting forth the work to be undertaken (except for emergency repairs, for which notice may be given by telephone), and give Seller the opportunity to advise Purchaser in making such alterations or repairs in a manner that avoids damage to the System. Purchaser shall be responsible for all damage to the System caused by Purchaser or its contractors, excluding damages resulting from alterations or repairs performed at the Seller's written direction. To the extent that temporary disconnection or removal of the System is necessary to perform such alterations or repairs, such work and any replacement of the System after completion of Purchaser's alterations and repairs, shall be done by Seller or its contractors at Purchaser's cost. All of Purchaser's alterations and repairs will be done in a good and workmanlike manner and in compliance with all applicable laws, codes and permits.
- e. **Outages.** Purchaser shall be permitted to be off line for two (2) full twenty-four (24) hour days (each, a "Scheduled Outage") per calendar year during the Term, during which days Purchaser shall not be obligated to accept or pay for electricity from the System; provided, however, that Purchaser must notify Seller in writing of each such Scheduled Outage at least forty-eight (48) hours in advance of the commencement of a Scheduled Outage. In the event that Scheduled Outages exceed two (2) days per calendar year or there are unscheduled outages, in each case for a reason other than a Force Majeure event, Seller shall reasonably estimate the amount of electricity that would have been delivered to Purchaser during such excess Scheduled Outages or unscheduled outages and shall invoice Purchaser for such amount in accordance with Section 4.
- f. **Liens.** Purchaser shall not directly or indirectly cause, create, incur, assume or allow to exist any mortgage, pledge, lien, charge, security interest, encumbrance or other claim of any nature on or with respect to the System or any interest therein. Purchaser shall immediately notify Seller in writing of the existence of any such mortgage, pledge, lien, charge, security interest, encumbrance or other claim, shall promptly cause the same to be discharged and released of record without cost to Seller, and shall indemnify Seller against all costs and expenses (including reasonable attorneys' fees) incurred in discharging and releasing any such mortgage, pledge, lien, charge, security interest, encumbrance or other claim.

- g. **Security.** Purchaser shall be responsible for maintaining the physical security of the Facility and the System. Purchaser will not conduct activities on, in or about the ~~License Area~~ of the Facility that have a reasonable likelihood of causing damage, impairment or otherwise adversely affecting the System.
- h. **Insolation.** Purchaser understands that unobstructed access to sunlight (“**Insolation**”) is essential to Seller’s performance of its obligations and a material term of this Agreement. Purchaser shall not in any way cause and, where possible, shall not in any way permit any interference with the System’s Insolation. If Purchaser becomes aware of any activity or condition that could diminish the Insolation of the System, Purchaser shall notify Seller immediately and shall cooperate with Seller in preserving the System’s existing Insolation levels. The Parties agree that reducing Insolation would irreparably injure Seller, that such injury may not be adequately compensated by an award of money damages, and that Seller is entitled to seek specific enforcement of this Section 8(h) against Purchaser.
- i. **Data Line.** Purchaser shall provide Seller a high speed internet data line during the Term to enable Seller to record the electric energy generated by the System. If Purchaser fails to provide such high speed internet data line, or if such line ceases to function and is not repaired, Seller may reasonably estimate the amount of electric energy that was generated and invoice Purchaser for such amount in accordance with Section 4.
- j. **Breakdown Notice.** Purchaser shall notify Seller within twenty-four (24) hours following the discovery by it of (A) any material malfunction in the operation of the System; or (B) any occurrences that could reasonably be expected to adversely affect the System. Purchaser shall notify Seller immediately upon (A) an interruption in the supply of electrical energy from the System; or (B) the discovery of an emergency condition respecting the System. Purchaser and Seller shall each designate personnel and establish procedures such that each Party may provide notice of such conditions requiring Seller’s repair or alteration at all times, twenty-four (24) hours per day, including weekends and holidays.

9. **Change in Law.**

“**Change in Law**” means (i) the enactment, adoption, promulgation, modification or repeal after the Effective Date of any applicable law or regulation; (ii) the imposition of any material conditions on the issuance or renewal of any applicable permit after the Effective Date of this Agreement (notwithstanding the general requirements contained in any applicable Permit at the time of application or issue to comply with future laws, ordinances, codes, rules, regulations or similar legislation), or (iii) a change in any SMUD rate schedule or tariff approved by any Governmental Authority which in the case of any of (i), (ii) or (iii), establishes requirements affecting owning, supplying, constructing, installing, operating or maintaining the System, or other performance of the Seller’s obligations hereunder and which has a material adverse effect on the cost to Seller of performing such obligations; provided, that a change in federal, state, county or any other tax law after the Effective Date of this Agreement shall not be a Change in Law pursuant to this Agreement.

If any Change in Law occurs that has a material adverse effect on the cost to Seller of performing its obligations under this Agreement, then the Parties shall, within thirty (30) days following receipt by Purchaser from Seller of notice of such Change in Law, meet and attempt in good faith to negotiate amendments to this Agreement as are reasonably necessary to preserve the economic value of this Agreement to both Parties. If the Parties are unable to agree upon such amendments within such thirty (30) day period, then Seller shall have the right to terminate this Agreement without further liability to either Party except with respect to payment of amounts accrued prior to termination.

10. **Relocation of System.**

If Purchaser ceases to conduct business operations at and/or vacates the Facility or is prevented from operating the System at the Facility prior to the expiration of the Term, Purchaser shall have the option to provide Seller with a mutually agreeable substitute premises located within SMUD as the terminated System or in a location with similar Utility rates and Insolation. Purchaser shall provide written notice at least sixty (60) days but not more than one hundred eighty (180) days prior to the date that it wants to make this substitution. In connection with such substitution, Purchaser shall execute an amended agreement that shall have all of the same terms as this Agreement except for the (i) Effective Date; (ii) License, which will be amended to grant rights in the real property where the System relocated to; and (iii) Term, which will be the remainder of the Term of this Agreement and such amended agreement shall be deemed to be a continuation of this Agreement without termination. Purchaser shall also provide any new Purchaser, owner, lessor or mortgagee consents or releases required by Seller or Seller’s Financing Parties in connection with the substitute facility. Purchaser shall pay all costs associated with relocation of the System, including all costs and expenses incurred by or on behalf of Seller in connection with removal of the System from the Facility and installation and testing of the System at the substitute facility and all applicable interconnection fees and expenses at the substitute facility, as well as costs of new title search and other out-of-pocket

expenses connected to preserving and refiling the security interests of Seller's Financing Parties in the System. Seller shall remove the System from the vacated Facility prior to the termination of Purchaser's ownership, lease or other rights to use such Facility. Seller will not be required to restore the Facility to its prior condition but shall promptly pay Purchaser for any damage caused by Seller during removal of the System, but not for normal wear and tear. If the substitute facility has inferior Insulation as compared to the original Facility, Seller shall have the right to make an adjustment to **Exhibit 1** such that Purchaser's payments to Seller are the same as if the System were located at the original Facility. If Purchaser is unable to provide such substitute facility and to relocate the System as provided, any early termination will be treated as a default by Purchaser.

11. Removal of System at Expiration.

Upon the expiration or earlier termination of this Agreement (provided Purchaser does not exercise its purchase option), Seller shall, at its expense, remove all of its tangible property comprising the System from the Facility on a mutually convenient date, but in no event later than ninety (90) days after the expiration of the Term. Excluding ordinary wear and tear, the Facility shall be returned to its original condition including the removal of System mounting pads or other support structures. In no case shall Seller's removal of the System affect the integrity of Purchaser's roof, which shall be as leak proof as it was prior to removal of the System and shall be flashed and/or patched to existing roof specifications. Seller shall leave the Facility in neat and clean order. If Seller fails to remove or commence substantial efforts to remove the System by such agreed upon date, Purchaser shall have the right, at its option, to remove the System to a public warehouse and restore the Facility to its original condition (other than ordinary wear and tear) at Seller's cost. Purchaser shall provide sufficient space for the temporary storage and staging of tools, materials and equipment and for the parking of construction crew vehicles and temporary construction trailers and facilities reasonably necessary during System removal.

12. Measurement.

Electricity delivered to the Facility shall be measured by the SolarGuard monitoring system installed and maintained by Seller as part of the System.

13. Default, Remedies and Damages.

a. **Default.** Any Party that fails to perform its responsibilities as listed below or experiences any of the circumstances listed below shall be deemed a "Defaulting Party" and each event of default shall be a "Default Event":

- (1) failure of a Party to pay any amount due and payable under this Agreement, other than an amount that is subject to a good faith dispute, within ten (10) days following receipt of written notice from the other Party (the "Non-Defaulting Party") of such failure to pay ("Payment Default");
- (2) failure of a Party to substantially perform any other material obligation under this Agreement within thirty (30) days following receipt of written notice from the Non-Defaulting Party demanding such cure; provided, that such thirty (30) day cure period shall be extended (but not beyond ninety (90) days) if and to the extent reasonably necessary to cure the Default Event, if (i) the Defaulting Party initiates such cure with the thirty (30) day period and continues such cure to completion and (ii) there is no material adverse affect on the Non-Defaulting Party resulting from the failure to cure the Default Event;
- (3) if any representation or warranty of a Party proves at any time to have been incorrect in any material respect when made and is material to the transactions contemplated hereby, if the effect of such incorrectness is not cured within thirty (30) days following receipt of written notice from the Non-Defaulting Party demanding such cure;
- (4) Purchaser loses its rights to occupy and enjoy the Premises;
- (5) a Party, or its guarantor, becomes insolvent or is a party to a bankruptcy, reorganization, insolvency, liquidation, receivership, dissolution, winding-up or relief of debtors, or any general assignment for the benefit of creditors or other similar arrangement or any event occurs or proceedings are taken in any jurisdiction with respect to the Party which has a similar effect; or
- (6) Purchaser prevents Seller from installing the System or otherwise failing to perform in a way that prevents the delivery of electric energy from the System. Such Default Event shall not excuse

Purchaser's obligations to make payments that otherwise would have been due under this Agreement.

b. **Remedies.**

- (1) **Remedies for Payment Default.** If a Payment Default occurs, the Non-Defaulting Party may suspend performance of its obligations under this Agreement. Further, the Non-Defaulting Party may pursue any remedy under this Agreement, at law or in equity, including an action for damages and termination of this Agreement, upon five (5) days prior written notice to the Defaulting Party following the Payment Default.
- (2) **Remedies for Other Defaults.** On the occurrence of a Default Event other than a Payment Default, the Non-Defaulting Party may pursue any remedy under this Agreement, at law or in equity, including an action for damages and termination of this Agreement or suspension of performance of its obligations under this Agreement, upon five (5) days prior written notice to the Defaulting Party following the occurrence of the Default Event. Nothing herein shall limit either Party's right to collect damages upon the occurrence of a breach or a default by the other Party that does not become a Default Event. If Purchaser terminates this contract without cause prior to System Installation, Purchaser shall pay Seller for all reasonable costs incurred to date. This shall be Seller's sole remedy against Purchaser in the event of default prior to System Installation.
- (3) **Damages Upon Termination by Default.** Upon a termination of this Agreement by the Non-Defaulting Party as a result of a Default Event by the Defaulting Party, the Defaulting Party shall pay a Termination Payment to the Non-Defaulting Party determined as follows (the "**Termination Payment**"):
 - A. **Purchaser.** If Purchaser is the Defaulting Party and Seller terminates this Agreement, the Termination Payment to Seller shall be equal to the sum of (i) the termination value set forth in **Exhibit 1** (the "**Termination Value**") for such Contract Year, (ii) commercially reasonable removal costs as provided in **Section 13(b)(2)(C)** and (iii) any and all other amounts previously accrued under this Agreement and then owed by Purchaser to Seller. The Parties agree that actual damages to Seller in the event this Agreement terminates prior to the expiration of the Term as the result of an Default Event by Purchaser would be difficult to ascertain, and the applicable Termination Value set forth in **Exhibit 1** is a reasonable approximation of the damages suffered by Seller as a result of early termination of this Agreement. The Termination Payment shall not be less than zero.
 - B. **Seller.** If Seller is the Defaulting Party and Purchaser terminates this Agreement, the Termination Payment to Purchaser shall be equal to the sum of (i) the present value (using a discount rate of 9.5%) of the excess, if any, of the reasonably expected cost of electric energy from SMUD over the Contract Price for the reasonably expected production of the System for the remainder of the Initial Term or the then current Additional Term, as applicable; (ii) all costs reasonably incurred by Purchaser in re-converting its electric supply to service from SMUD; (iii) any removal costs incurred by Purchaser, and (iv) any and all other amounts previously accrued under this Agreement and then owed by Seller to Purchaser. The Termination Payment shall not be less than zero.
 - C. **Obligations Following Termination.** If a Non-Defaulting Party terminates this Agreement pursuant to this **Section 13(b)**, then following such termination, Seller shall, at the sole cost and expense of the Defaulting Party, remove the equipment (except for mounting pads and support structures) constituting the System. The Non-Defaulting Party shall take all commercially reasonable efforts to mitigate its damages as the result of a Default Event.

14. **Representations and Warranties.**

- a. **General Representations and Warranties.** Each Party represents and warrants to the other the following:

- (1) Such Party is duly organized, validly existing and in good standing under the laws of the jurisdiction of its formation; the execution, delivery and performance by such Party of this Agreement have been duly authorized by all necessary corporate, partnership or limited liability company action, as applicable, and do not and shall not violate any law; and this Agreement is valid obligation of such Party, enforceable against such Party in accordance with its terms (except as may be limited by applicable bankruptcy, insolvency, reorganization, moratorium and other similar laws now or hereafter in effect relating to creditors' rights generally).
- (2) Such Party has obtained all licenses, authorizations, consents and approvals required by any Governmental Authority or other third party and necessary for such Party to own its assets, carry on its business and to execute and deliver this Agreement; and such Party is in compliance with all laws that relate to this Agreement in all material respects.

b. **Purchaser's Representations and Warranties.** Purchaser represents and warrants to Seller the following:

- (1) **License.** Purchaser has the full right, power and authority to grant the License contained in Section 8(a). Such grant of the License does not violate any law, ordinance, rule or other governmental restriction applicable to Purchaser or the Facility and is not inconsistent with and will not result in a breach or default under any agreement by which Purchaser is bound or that affects the Facility.
- (2) **Other Agreements.** Neither the execution and delivery of this Agreement by Purchaser nor the performance by Purchaser of any of its obligations under this Agreement conflicts with or will result in a breach or default under any agreement or obligation to which Purchaser is a party or by which Purchaser or the Facility is bound.
- (3) **Accuracy of Information.** All information provided by Purchaser to Seller, as it pertains to the Facility's physical configuration, Purchaser's planned use of the Facility, and Purchaser's estimated electricity requirements, is accurate in all material respects.
- (4) **Purchaser Status.** Purchaser is not a public utility or a public utility holding company and is not subject to regulation as a public utility or a public utility holding company.
- (5) **No Pool Use.** No electricity generated by the System will be used to heat a swimming pool.
- (6) **Oregon Only:** The electricity generated by the System will be used solely for commercial and business purposes. No portion of the electricity generated will be used for personal, family, household or agricultural purposes.

15. **System and Facility Damage and Insurance.**

a. **System and Facility Damage.**

- (1) **Seller's Obligations.** If the **System** is damaged or destroyed other than by Purchaser's gross negligence or willful misconduct, Seller shall promptly repair and restore the System to its pre-existing condition; provided, however, that if more than fifty percent (50%) of the System is destroyed during the last five (5) years of the Initial Term or during any Additional Term, Seller shall not be required to restore the System, but may instead terminate this Agreement, unless Purchaser agrees (i) to pay for the cost of such restoration of the System or (ii) to purchase the System "AS-IS" at the greater of (A) then current fair market value of the System and (B) the sum of the amounts described in Section 13.b(3)A)(i) (using the date of purchase to determine the appropriate Contract Year) and Section 13.b(3)A)(iii).
- (2) **Purchaser's Obligations.** If the **Facility** is damaged or destroyed by casualty of any kind or any other occurrence other than Seller's gross negligence or willful misconduct, such that the operation of the System and/or Purchaser's ability to accept the electric energy produced by the System are materially impaired or prevented, Purchaser shall promptly repair and restore the Facility to its pre-existing condition; provided, however, that if more than 50% of the Facility is destroyed during the last five years of the Initial Term or during any Additional Term, Purchaser may elect either (i) to restore the Facility or (ii) to pay the Termination Value set forth in **Exhibit**

1 and all other costs previously accrued but unpaid under this Agreement and thereupon terminate this Agreement.

- b. **Insurance Coverage.** At all times during the Term, Seller and Purchaser shall maintain the following insurance:
- i. **Seller's Insurance.** Seller shall maintain (i) property insurance on the System for the replacement cost thereof, (ii) comprehensive general liability insurance with coverage of at least \$1,000,000 per occurrence and \$2,000,000 annual aggregate, (iii) employer's liability insurance with coverage of at least \$1,000,000 and (iv) worker's compensation insurance as required by law.
 - ii. **Purchaser's Insurance.** Seller acknowledges that Purchaser is a self-insured public entity. Within (30) days after execution of this Agreement, Purchaser shall provide a letter of self-insurance stating that Purchaser's self-insurance program adequately protects against liabilities and claims arising out of the performance of this agreement.
- c. **Policy Provisions.** Seller's insurance policies provided hereunder shall (i) contain a provision whereby the insurer agrees to give the party not providing the insurance thirty (30) days (ten (10) days in the event of non-payment of premiums) written notice before the insurance is cancelled, terminated or materially altered, (ii) be written on an occurrence basis, (iii) with respect to the liability insurance policies, include the other Party as an additional insured as its interest may appear, (iv) include waivers of subrogation, (v) provide for primary coverage without right of contribution from any insurance of the other Party, and (vi) be maintained with companies either rated no less than A- as to Policy Holder's Rating in the current edition of Best's Insurance Guide or otherwise reasonably acceptable to the other party.
- d. **Certificates.** Within thirty (30) days after execution of this Agreement and upon the other Party's request and annually thereafter, Seller shall deliver the other Party certificates of insurance evidencing the above required coverage. A Party's receipt, review or acceptance of such certificate shall in no way limit or relieve the other Party of the duties and responsibilities to maintain insurance as set forth in this Agreement.
- e. **Deductibles.** Unless and to the extent that a claim is covered by an indemnity set forth in this Agreement, each Party shall be responsible for the payment of its own deductibles.

16. Ownership; Option to Purchase.

- a. **Ownership of System.** Throughout the Term, Seller shall be the legal and beneficial owner of the System at all times, including all Environmental Attributes, and the System shall remain the personal property of Seller and shall not attach to or be deemed a part of, or fixture to, the Facility or the Premises. Each of the Seller and Purchaser agree that the Seller is the tax owner of the System and all tax filings and reports will be filed in a manner consistent with this Agreement. The System shall at all times retain the legal status of personal property as defined under Article 9 of the Uniform Commercial Code. Purchaser covenants that it will use commercially reasonable efforts to place all parties having an interest in or a mortgage, pledge, lien, charge, security interest, encumbrance or other claim of any nature on the Facility or the Premises on notice of the ownership of the System and the legal status or classification of the System as personal property. If there is any mortgage or fixture filing against the Premises which could reasonably be construed as prospectively attaching to the System as a fixture of the Premises, Purchaser shall provide a disclaimer or release from such lienholder. If Purchaser is the fee owner of the Premises, Purchaser consents to the filing of a disclaimer of the System as a fixture of the Premises in the office where real estate records are customarily filed in the jurisdiction where the Facility is located. If Purchaser is not the fee owner, Purchaser will obtain such consent from such owner. Purchaser agrees to deliver to Seller a non-disturbance agreement in a form reasonably acceptable to Seller from the owner of the Facility (if the Facility is leased by Purchaser), any mortgage with a lien on the Premises, and other Persons holding a similar interest in the Premises.
- b. **Option to Purchase.** At the end of the sixth (6th) and tenth (10th) Contract Years and at the end of the Initial Term and each Additional Term, so long as Purchaser is not in default under this Agreement, Purchaser may purchase the System from Seller on any such date for a purchase price equal to (i) with respect to an option exercised at the end of the sixth (6th) or tenth (10th) Contract Years the *greater* of (A) the amount set forth at such time in the Purchase Option Price schedule in Exhibit 1, and (B) the Fair Market Value of the System, and (ii) with respect to an option exercised at the end of the Term or an Additional Term, the Fair Market Value of the System. The “Fair Market Value” of the System shall be determined by mutual agreement of Purchaser and Seller; provided, however, if Purchaser and Seller cannot agree to a Fair Market Value within thirty (30) days after Purchaser has exercised its option, the Parties shall select a nationally recognized independent appraiser with experience and expertise in the solar photovoltaic industry to determine the Fair Market Value of the System. Such appraiser shall act reasonably and in good faith to determine the Fair Market Value of the System on an installed basis and shall set forth such determination in a written opinion delivered to the Parties. The valuation made by the appraiser shall be binding upon the Parties in the absence of grounds for vacation of an arbitration award under Code of Civil Procedure section 1286.2. The costs of the appraisal shall be borne by the Parties equally. Purchaser must provide a notification to Seller of its intent to purchase at least ninety (90) days and not more than one hundred eighty (180) days prior to the end of the applicable Contract Year or the Initial Term or Additional Term, as applicable, and the purchase shall be complete prior to the end of the applicable Contract Year or the Initial Term or Additional Term, as applicable. Upon purchase of the System, Purchaser will assume complete responsibility for the operation and maintenance of the System and liability for the performance of the System, and Seller shall have no further liabilities or obligations hereunder.

17. Indemnification and Limitations of Liability.

- a. **General.** Each Party (the “Indemnifying Party”) shall defend, indemnify and hold harmless the other Party and the directors, officers, shareholders, partners, members, agents and employees of such other Party, and the respective affiliates of each thereof (collectively, the “Indemnified Parties”), from and against all loss, damage, expense, liability and other claims, including court costs and reasonable attorneys’ fees (collectively, “Liabilities”) resulting from any third party actions relating to the breach of any representation or warranty set forth in Section 14 and from injury to or death of persons, and damage to or loss of property to the extent caused by or arising out of the negligent acts or omissions of, or the willful misconduct of, the Indemnifying Party (or its contractors, agents or employees) in connection with this Agreement; provided, however, that nothing herein shall require the Indemnifying Party to indemnify the Indemnified Party for any Liabilities to the extent caused by or arising out of the negligent acts or omissions of, or the willful misconduct of, the Indemnified Party. This Section 17(a) however, shall not apply to liability arising from any form of hazardous substances or other environmental contamination, such matters being addressed exclusively by Section 17(c).
- b. **Notice and Participation in Third Party Claims.** The Indemnified Party shall give the Indemnifying Party written notice with respect to any Liability asserted by a third party (a “Claim”), as soon as possible upon the receipt of information of any possible Claim or of the commencement of such Claim. The Indemnifying Party may assume the defense of any Claim, at its sole cost and expense, with counsel designated by the Indemnifying Party, to include the City Attorney’s Office in the event the Purchaser is the Indemnifying Party, and reasonably satisfactory to the

Indemnified Party. The Indemnified Party may, however, select separate counsel if both Parties are defendants in the Claim and such defense or other form of participation is not reasonably available to the Indemnifying Party. The Indemnifying Party shall pay the reasonable attorneys' fees incurred by such separate counsel until such time as the need for separate counsel expires. The Indemnified Party may also, at the sole cost and expense of the Indemnifying Party, assume the defense of any Claim if the Indemnifying Party fails to assume the defense of the Claim within a reasonable time. Neither Party shall settle any Claim covered by this Section 17(b) unless it has obtained the prior written consent of the other Party, which consent shall not be unreasonably withheld or delayed. The Indemnifying Party shall have no liability under this Section 17(b) for any Claim for which such notice is not provided if that the failure to give notice prejudices the Indemnifying Party.

c. **Environmental Indemnification.** Seller shall indemnify, defend and hold harmless all of Purchaser's Indemnified Parties from and against all Liabilities arising out of or relating to the existence at, on, above, below or near the License Area of any Hazardous Substance (as defined in Section 17(c)(i)) to the extent deposited, spilled or otherwise caused by Seller or any of its contractors or agents. Purchaser shall indemnify, defend and hold harmless all of Seller's Indemnified Parties from and against all Liabilities arising out of or relating to the existence at, on, above, below or near the Premises of any Hazardous Substance, except to the extent deposited, spilled or otherwise caused by Seller or any of its contractors or agents. Each Party shall promptly notify the other Party if it becomes aware of any Hazardous Substance on or about the License Area or the Premises generally or any deposit, spill or release of any Hazardous Substance.

i. **"Hazardous Substance"** means any chemical, waste or other substance (a) which now or hereafter becomes defined as or included in the definition of "hazardous substances," "hazardous wastes," "hazardous materials," "extremely hazardous wastes," "restricted hazardous wastes," "toxic substances," "toxic pollutants," "pollution," "pollutants," "regulated substances," or words of similar import under any laws pertaining to the environment, health, safety or welfare, (b) which is declared to be hazardous, toxic, or polluting by any Governmental Authority, (c) exposure to which is now or hereafter prohibited, limited or regulated by any Governmental Authority, (d) the storage, use, handling, disposal or release of which is restricted or regulated by any Governmental Authority, or (e) for which remediation or cleanup is required by any Governmental Authority.

d. **Limitations on Liability.**

i. **No Consequential Damages.** Neither Party nor its directors, officers, shareholders, partners, members, agents and employees subcontractors or suppliers shall be liable for any indirect, special, incidental, exemplary, or consequential loss or damage of any nature arising out of their performance or non-performance hereunder even if advised of such.

ii. **Actual Damages.** Seller's aggregate liability under this Agreement arising out of or in connection with the performance or non-performance of this Agreement shall not exceed the *lesser* of (A) the total payments made by Purchaser under this Agreement as of the date that the events that first gave rise to such liability occurred; and (B) the total of the prior twelve (12) monthly payments preceding the date that the events that first gave rise to such liability occurred. The provisions of this Section (17)(d)(ii) shall apply whether such liability arises in contract, tort (including negligence), strict liability or otherwise. Any action against either party must be brought within two (2) years after the cause of action accrues.

18. **Force Majeure.**

a. **"Force Majeure Event"** means any act or event that prevents the affected Party from performing its obligations in accordance with the Agreement, if such act or event is beyond the reasonable control, and not the result of the fault or negligence, of the affected Party and such Party had been unable to overcome such act or event with the exercise of due diligence (including the expenditure of reasonable sums). Subject to the foregoing conditions, "Force Majeure Event" shall include without limitation the following acts or events: (i) natural phenomena, such as storms, hurricanes, floods, lightning, volcanic eruptions and earthquakes; (ii) explosions or fires arising from lightning or other causes unrelated to the acts or omissions of the Party seeking to be excused from performance; (iii) acts of war or public disorders, civil disturbances, riots, insurrection, sabotage, epidemic, terrorist acts, or rebellion; (iv) strikes or labor disputes (except strikes or labor disputes caused solely by employees of the Provider or as a result of such party's failure to comply with a collective bargaining agreement); (v) action by a Governmental Authority, including a moratorium on any activities related to the Agreement; and (vi) the inability for one of the Parties, despite its reasonable efforts, to obtain, in a timely manner, any Governmental Approval necessary to enable the affected Party to fulfill its obligations in accordance with the Agreement, provided that the delay or non-obtaining of such

Governmental Approval is not attributable to the Party in question and that such Party has exercised its reasonable efforts to obtain such Permit.

A Force Majeure Event shall not be based on the economic hardship of either Party, except as described in the following paragraph. Due to the constitutional limitations on cities pertaining to multiple year contracts, a Force Majeure event shall include a "budget non-appropriation event" in which the City's appropriation for any year covered in this Agreement does not appropriate funds for the procurement of any utility services for City. During the continuation of a budget non-appropriation event as defined above, if the City does not otherwise have other funds available to make payments otherwise due on this Agreement, the City shall not be obligated to pay for (and the Seller shall not be required to deliver) electric energy provided under this Agreement until the budget non-appropriation event has terminated. City agrees that it shall use its best efforts to seek appropriation for utility services during the term of this Agreement. If a budget non-appropriation event continues for more than 180 days, Seller (but not Purchaser) may terminate this Agreement.

- b. **Excused Performance.** Except as otherwise specifically provided in the Agreement, neither Party shall be considered in breach of the Agreement or liable for any delay or failure to comply with the Agreement (other than the failure to pay amounts due hereunder), if and to the extent that such delay or failure is attributable to the occurrence of a Force Majeure Event; provided that the Party claiming relief under this Section 10 shall immediately (i) notify the other Party in writing of the existence of the Force Majeure Event, (ii) exercise all reasonable efforts necessary to minimize delay caused by such Force Majeure Event, (iii) notify the other Party in writing of the cessation or termination of said Force Majeure Event and (iv) resume performance of its obligations hereunder as soon as practicable thereafter; provided, however, that Purchaser shall not be excused from making any payments and paying any unpaid amounts due in respect of Solar Services delivered to Purchaser prior to the Force Majeure Event performance interruption.
- c. **Termination in Consequence of Force Majeure Event.** If a Force Majeure Event shall have occurred that has affected Seller's performance of its obligations hereunder and that has continued for a continuous period of one hundred eighty (180) days, then Purchaser shall be entitled to terminate the Agreement upon ninety (90) days' prior written notice to Seller. If at the end of such ninety (90) day period such Force Majeure Event shall still continue, the Agreement shall automatically terminate. Upon such termination for a Force Majeure Event, neither Party shall have any liability to the other (other than any such liabilities that have accrued prior to such termination), and the provisions of Section 2.2 (Early Termination) shall be inapplicable."

19. **Assignment and Financing.**

- a. **Assignment.** This Agreement may not be assigned in whole or in part by either Party without the prior written consent of the other Party, which consent shall not be unreasonably withheld or delayed. Notwithstanding the foregoing, Seller may, without the prior written consent of Purchaser, (i) assign, mortgage, pledge or otherwise collaterally assign its interests in this Agreement to any Financing Party, (ii) directly or indirectly assign this Agreement to an affiliate of Seller, (iii) assign this Agreement to any entity through which Seller is obtaining financing or capital for the System and (iv) assign this Agreement to any person succeeding to all or substantially all of the assets of Seller (provided that Seller shall be released from liability hereunder as a result of any of the foregoing permitted assignments only upon assumption of Seller's obligations hereunder by the assignee). Purchaser's consent to any other assignment shall not be unreasonably withheld if Purchaser has been provided with reasonable proof that the proposed assignee (x) has comparable experience in operating and maintaining photovoltaic solar systems comparable to the System and providing services comparable to those contemplated by this Agreement and (y) has the financial capability to maintain the System and provide the services contemplated by this Agreement in the manner required by this Agreement. This Agreement shall be binding on and inure to the benefit of the successors and permitted assignees.
- b. **Financing.** The Parties acknowledge that Seller may obtain construction and long-term financing or other credit support from lenders or third parties ("**Financing Parties**") in connection with the installation, construction, ownership, operation and maintenance of the System. Both Parties agree in good faith to consider and to negotiate changes or additions to this Agreement that may be reasonably requested by the Financing Parties; provided, that such changes do not alter the fundamental economic terms of this Agreement. The Parties also agree that Seller may assign this Agreement to the Financing Parties as collateral, and in connection with any such assignment, Purchaser agrees to execute a consent to assignment in customary form and reasonably acceptable to the Financing Parties.

20. Contractor Information.

- a. All proprietary and other information received from Seller by Purchaser, whether received in connection with Seller's proposal to Purchaser or in connection with any services performed by Seller, will be disclosed upon receipt of a request for disclosure, pursuant to the California Public Records Act; provided, however, that, if any information is set apart and clearly marked "trade secret" or "confidential" or otherwise indicated as such to Purchaser when it is provided to Purchaser, Purchaser shall give notice to Seller of any request for the disclosure of such information. The Seller shall then have five (5) days from the date it receives such notice to enter into an agreement with the Purchaser, satisfactory to the City Attorney, providing for the defense of, and complete indemnification and reimbursement for all costs (including plaintiff's attorney fees) incurred by Purchaser in any legal action to compel the disclosure of such information under the California Public Records Act. If Purchaser and Seller enter into such an agreement, Purchaser shall not disclose the requested information or documents. The Seller shall have sole responsibility for defense of the actual "trade secret" or "confidential" designation of such information.
- b. The parties understand and agree that any failure by Seller to respond to the notice provided by Purchaser and/or to enter into an agreement with Purchaser, in accordance with the provisions of subsection a, above, shall constitute a complete waiver by Seller of any rights regarding the information designated "trade secret" or "confidential" by Seller, and such information shall be disclosed by Purchaser pursuant to applicable procedures required by the Public Records Act.

- 21. Goodwill and Publicity.** Neither Party shall use any name, trade name, service mark or trademark of the other Party in any promotional or advertising material without the prior written consent of such other Party. The Parties shall coordinate and cooperate with each other when making public announcements related to the execution and existence of this Agreement, and each Party shall have the right to promptly review, comment upon and approve any publicity materials, press releases or other public statements by the other Party that refer to, or that describe any aspect of, this Agreement. Neither Party shall make any press release or public announcement of the specific terms of this Agreement (except for filings or other statements or releases as may be required by applicable law) without the specific prior written consent of the other Party. Without limiting the generality of the foregoing, all public statements must accurately reflect the rights and obligations of the Parties under this Agreement, including the ownership of Environmental Attributes and Environmental Incentives and any related reporting rights.

22. General Provisions

- a. **Choice of Law.** The law of the state where the System is located shall govern this Agreement without giving effect to conflict of laws principles.
- b. **Arbitration and Attorneys' Fees.** Any dispute arising from or relating to this Agreement shall be arbitrated in Sacramento, California. The arbitration shall be administered by JAMS in accordance with its Comprehensive Arbitration Rules and Procedures, and judgment on any award may be entered in any court of competent jurisdiction. If the Parties agree, a mediator may be consulted prior to arbitration. The prevailing party in any dispute arising out of this Agreement shall be entitled to reasonable attorneys' fees and costs.
- c. **Notices.** All notices under this Agreement shall be in writing and shall be by personal delivery, facsimile transmission, electronic mail, overnight courier, or regular, certified, or registered mail, return receipt requested, and deemed received upon personal delivery, acknowledgment of receipt of electronic transmission, the promised delivery date after deposit with overnight courier, or five (5) days after deposit in the mail. Notices shall be sent to the person identified in this Agreement at the addresses set forth in this Agreement or such other address as either party may specify in writing. Each party shall deem a document faxed, emailed or electronically sent in PDF form to it as an original document.
- d. **Survival.** Provisions of this Agreement that should reasonably be considered to survive termination of this Agreement shall survive. For the avoidance of doubt, surviving provisions shall include, without limitation, Section 14 (Representations and Warranties), Section 7(h) (No Warranty), Section 15(b) (Insurance Coverage), Section 17 (Indemnification and Limits of Liability), Section 20 (Confidentiality and Publicity), Section 22(a) (Choice of Law), Section 22(b) (Arbitration and Attorneys' Fees), Section 22(c) (Notices), Section 22(g) (Comparative Negligence), Section 22(h) (Non-Dedication of Facilities), Section 22(j) (Service Contract), Section 22(k) (No Partnership), Section 22(l) (Full Agreement, Modification, Invalidity, Counterparts, Captions) and Section 22(n) (No Third Party Beneficiaries).

- e. **Further Assurances.** Each of the Parties hereto agree to provide such information, execute and deliver any instruments and documents and to take such other actions as may be necessary or reasonably requested by the other Party which are not inconsistent with the provisions of this Agreement and which do not involve the assumptions of obligations other than those provided for in this Agreement, to give full effect to this Agreement and to carry out the intent of this Agreement.
- f. **Right of Waiver.** Each Party, in its sole discretion, shall have the right to waive, defer or reduce any of the requirements to which the other Party is subject under this Agreement at any time; provided, however that neither Party shall be deemed to have waived, deferred or reduced any such requirements unless such action is in writing and signed by the waiving Party. No waiver will be implied by any usage of trade, course of dealing or course of performance. A Party's exercise of any rights hereunder shall apply only to such requirements and on such occasions as such Party may specify and shall in no event relieve the other Party of any requirements or other obligations not so specified. No failure of either Party to enforce any term of this Agreement will be deemed to be a waiver. No exercise of any right or remedy under this Agreement by Purchaser or Seller shall constitute a waiver of any other right or remedy contained or provided by law. Any delay or failure of a Party to exercise, or any partial exercise of, its rights and remedies under this Agreement shall not operate to limit or otherwise affect such rights or remedies. Any waiver of performance under this Agreement shall be limited to the specific performance waived and shall not, unless otherwise expressly stated in writing, constitute a continuous waiver or a waiver of future performance.
- g. **Comparative Negligence.** It is the intent of the Parties that where negligence is determined to have been joint, contributory or concurrent, each Party shall bear the proportionate cost of any Liability.
- h. **Non-Dedication of Facilities.** Nothing herein shall be construed as the dedication by either Party of its facilities or equipment to the public or any part thereof. Neither Party shall knowingly take any action that would subject the other Party, or other Party's facilities or equipment, to the jurisdiction of any Governmental Authority as a public utility or similar entity. Neither Party shall assert in any proceeding before a court or regulatory body that the other Party is a public utility by virtue of such other Party's performance under this agreement. If Seller is reasonably likely to become subject to regulation as a public utility, then the Parties shall use all reasonable efforts to restructure their relationship under this Agreement in a manner that preserves their relative economic interests while ensuring that Seller does not become subject to any such regulation. If the Parties are unable to agree upon such restructuring, Seller shall have the right to terminate this Agreement without further liability, and Seller shall remove the System in accordance with Section 11 of this Agreement.
- i. **Estoppel.** Either Party hereto, without charge, at any time and from time to time, within five (5) business days after receipt of a written request by the other party hereto, shall deliver a written instrument, duly executed, certifying to such requesting party, or any other person specified by such requesting Party: (i) that this Agreement is unmodified and in full force and effect, or if there has been any modification, that the same is in full force and effect as so modified, and identifying any such modification; (ii) whether or not to the knowledge of any such party there are then existing any offsets or defenses in favor of such party against enforcement of any of the terms, covenants and conditions of this Agreement and, if so, specifying the same and also whether or not to the knowledge of such party the other party has observed and performed all of the terms, covenants and conditions on its part to be observed and performed, and if not, specifying the same; and (iii) such other information as may be reasonably requested by the requesting Party. Any written instrument given hereunder may be relied upon by the recipient of such instrument, except to the extent the recipient has actual knowledge of facts contained in the certificate.
- j. **Service Contract.** The Parties intend this Agreement to be a "service contract" within the meaning of Section 7701(e)(3) of the Internal Revenue Code of 1986. Purchaser will not take the position on any tax return or in any other filings suggesting that it is anything other than a purchase of electricity from the System.
- k. **No Partnership.** No provision of this Agreement shall be construed or represented as creating a partnership, trust, joint venture, fiduciary or any similar relationship between the Parties. No Party is authorized to act on behalf of the other Party, and neither shall be considered the agent of the other.
- l. **Full Agreement, Modification, Invalidity, Counterparts, Captions.** This Agreement, together with any Exhibits, completely and exclusively states the agreement of the parties regarding its subject matter and supersedes all prior proposals, agreements, or other communications between the parties, oral or written, regarding its subject matter. This Agreement may be modified only by a writing signed by both Parties, and any such modification must not violate Purchaser's Master Lease Program or jeopardize the tax-exempt status of bonds issued through that program. If any provision of this Agreement is found unenforceable or invalid, such unenforceability or invalidity shall not

render this Agreement unenforceable or invalid as a whole. In such event, such provision shall be changed and interpreted so as to best accomplish the objectives of such unenforceable or invalid provision within the limits of applicable law. This Agreement may be executed in any number of separate counterparts and each counterpart shall be considered an original and together shall comprise the same Agreement. The captions or headings in this Agreement are strictly for convenience and shall not be considered in interpreting this Agreement.

- m. **Forward Contract.** The transaction contemplated under this Agreement constitutes a “forward contract” within the meaning of the United States Bankruptcy Code, and the Parties further acknowledge and agree that each Party is a “forward contract merchant” within the meaning of the United States Bankruptcy Code.
- n. **No Third Party Beneficiaries.** Except as otherwise expressly provided herein, this Agreement and all rights hereunder are intended for the sole benefit of the Parties hereto and shall not imply or create any rights on the part of, or obligations to, any other Person.

Exhibit 5

RECORDING REQUESTED BY)
AND)
WHEN RECORDED, MAIL TO:)
)
SolarCity Corporation)
393 Vintage Park Drive, Suite 140)
Foster City, CA 94404)
Attn: General Counsel)
Facsimile (650) 560-6182)
Email: contracts@solarcity.com)

(Space Above This Line for Recorder's Use)

NON-DISTURBANCE AGREEMENT (LENDER)

The undersigned ("Lender") acknowledges that, [Customer Company Name] (the "Host") will be benefited by entering into a power purchase agreement with SolarCity Corporation, a Delaware corporation ("SolarCity"), pursuant to which SolarCity will install its solar power generation system, including photovoltaic panels, racks, wiring and other electrical devices, conduit, weatherproof housings, hardware, inverter(s), remote monitoring system, connectors, disconnects and overcurrent devices (collectively the "PV System"), on the real property described on Exhibit A hereto (the "Premises"), for the purpose of generating power and selling it to the Host and granted a license to enter on the Premises and install, construct, own, operate, maintain, access, remove and replace the PV System (the "License"). As an inducement to SolarCity to install its PV System on the Premises and sell power generated by such PV System to the Host, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the undersigned hereby agrees, waives and undertakes as follows:

1. The PV System shall not be, or be deemed to be, a part of or an accession or addition to or a fixture on the Premises even though the PV System is installed on the Premises; nor shall the PV System be moved from the Premises by the undersigned unless SolarCity's prior written consent to such move has been obtained.
2. The undersigned waives any and all right, title and interest in the PV System and shall not acquire any such right title or interest by virtue of the installation of the PV System on the Premises. The undersigned further waives any right to seize, or to claim any interest, whatsoever in the PV System on account of any claim or right the undersigned may have against any person, including, without limitation, any claim or right the undersigned may have or assert against the Host, by levy of distraint or otherwise; *provided, however*, to the extent that the undersigned forecloses on the Premises, receives a deed in lieu of foreclosure or otherwise becomes the owner of the Premises (and has provided written notification of the same to SolarCity pursuant to Section 6 below), the undersigned or the successful bidder at a foreclosure sale may request in writing that SolarCity remove the PV System. SolarCity shall commence such removal within thirty (30) days of receipt of such notification and shall use commercially reasonable efforts to complete such removal within a commercially reasonable period of time. If SolarCity does not commence removal within such thirty (30) day period, the undersigned may itself remove the PV System, using the degree of care it would use if the PV System was its own property, at SolarCity's cost and expense for all documented reasonable costs incurred.
3. SolarCity may at any time, at its option, enter upon the Premises and inspect, maintain, remove or repair the PV System, sell the PV System while it is installed on the Premises, by auction or otherwise (for the avoidance of doubt, such auction shall not be held on the Premises), or remove the PV System at its sole cost and expense, and SolarCity by its acceptance hereof agrees to make such repairs following any such removal to the extent reasonably necessary to restore the Premises to its condition immediately prior to such removal.
4. All of the terms and conditions of this waiver shall run with the land and be binding upon and benefit the heirs, devisees, personal representatives, successors, assigns or encumbrancers of the undersigned and shall inure to the benefit of SolarCity, its successors and assigns. As used herein the term "Host" shall include the heirs, devisees, personal representatives, successors and assigns of the Host.

5. In the event of any foreclosure, trustee's sale, conveyance in lieu of foreclosure, eviction or other transaction that results in Host surrendering or losing its right to occupy and enjoy the Premises, SolarCity's rights and interests under the License shall not be affected or impaired thereby and the License shall continue in effect in accordance with its terms.
6. When sending to Host any notice of impending or actual foreclosure of the Premises, the undersigned shall concurrently provide SolarCity a copy of the same.
7. This agreement may be executed in any number of separate counterparts. Each counterpart shall be deemed an original.

Executed this ____ day of _____, _____.

Lender: [Lender/MortgageHolder/Company Name]

By: _____

Host: [Customer Company Name]

By: _____

Accepted by:

SolarCity Corporation

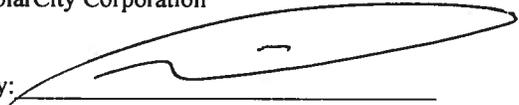
By:  _____

Exhibit A

The Premises

A PARCEL OF LAND LOCATED IN THE STATE OF CALIFORNIA, COUNTY OF SACRAMENTO, WITH A SITUS ADDRESS OF 2812 MEADOWVIEW RD, SACRAMENTO, CA 95832-1441 CURRENTLY OWNED BY CITY OF SACRAMENTO HAVING A TAX ASSESSOR NUMBER OF 053-0010-065-0000 AND BEING THE SAME PROPERTY MORE FULLY DESCRIBED AS POR SEC 7, T7N, R5E, M.D.B. & M. DES AS: BEG AT A PT LOC N89°20'37E 1969.33', & S00°17'35E 40' FR THE NW COR OF SD SEC, TH FR SD P.O.B. N89°20'37E 455.05', TH S00°55'32E 465.56', TH S89°04'28W 38', TH S00°55'32E 20.50', TH S89°20'37W 422.41', TH N00°17'35W 486.24' TO THE P.O.B. CONTG 5.0915 AC AND DESCRIBED IN DOCUMENT NUMBER 30430-2939 DATED 04/03/2003 AND RECORDED 04/30/2003.



City of Sacramento

Tax ID # if applicable:

Requires Council Approval: No **YES** Meeting:

Real Estate

Other Party Signature Needed

Recording Requested

General Information

Type: Select Contract Type	PO Type: Select PO Type	Attachment: Original No.:
\$ Not to Exceed: \$		Original Doc Number:
Other Party: SolarCity		Certified Copies of Document:: 1
Project Name: Solar Power Purchase Agreement		Deed: <input checked="" type="checkbox"/> None <input type="checkbox"/> Included <input type="checkbox"/> Separate
Project Number:	Bid Transaction #:	E/SBE-DBE-M/WBE:

Department Information

Department: General Services

Division: Office of the Director

Project Mgr: Yvette Rincon

Supervisor: Reina Schwartz

Contract Services:

Date:

Division Mgr:

Phone Number: 808-5827

Org Number:

Comment:

Review and Signature Routing

Department	Signature or Initial	Date
Project Mgr:	<i>UR</i>	3/25/11
Accounting:		
Contract Services:		
Supervisor:		
Division Manager:		

City Attorney	Signature or Initial	Date
City Attorney:	<i>KCB</i>	3/25/11

Send Interoffice Mail Notify for Pick Up

Authorization	Signature or Initial	Date
Choose Director Department Director:		
City Mgr: yes <input type="checkbox"/> No <input type="checkbox"/>		

Contract Cover/Routing Form: Must Accompany ALL Contracts; however, is not part of the contract. (01-01-09)

For City Clerk Processing

Finalized:
Initial: _____

Date: _____

Imaged:
Initial: _____

Date: _____

Received:
(City Clerk Stamp Here)



Solar Power Purchase Agreement (Commercial California)

This Solar Power Purchase Agreement (this "Agreement") is entered into by the parties listed below (each a "Party" and collectively the "Parties") as of the date signed by Seller below (the "Effective Date").

Table with 4 columns: Purchaser, Seller, Name and Address, Phone, Fax, E-mail, Facility Ownership. Rows include contact information for City of Sacramento and SolarCity Corporation, and facility ownership details.

This Agreement sets forth the terms and conditions of the purchase and sale of solar generated electric energy from the solar panel system described in Exhibit 2 (the "System") and installed at the Purchaser's facility described in Exhibit 3 (the "Facility").

The exhibits listed below are incorporated by reference and made part of this Agreement.

- Exhibit 1 Pricing Attachment
Exhibit 2 System Description, Delivery Point and License Area
Exhibit 3 Memorandum of License
Exhibit 4 Solar Power Purchase Agreement General Terms and Conditions
Exhibit 5 Non Disturbance Agreement (Lender)



Purchaser: City of Sacramento

SolarCity Corporation

Signature: _____

Signature: _____

Printed Name: _____

Printed Name: LYNDON RIVE

Title: _____

Title: CEO

Date: _____

Date: 3/24/2011

APPROVED AS TO FORM:

ATTEST:

City Attorney: [Signature]

City Clerk: _____

Exhibit 1
Pricing Attachment

1. **Term:** Twenty (20) years, beginning on the Commercial Operation Date.
2. **Additional Terms:** Up to two (2) Additional Terms of five (5) years each.
3. **Environmental Incentives and Environment Attributes Accrue to Seller.**
4. **Contract Price:**

YEAR	CONTRACT PRICE PER KWH
1	\$0.0950
2	\$0.0969
3	\$0.0988
4	\$0.1008
5	\$0.1028
6	\$0.1049
7	\$0.1070
8	\$0.1091
9	\$0.1113
10	\$0.1135
11	\$0.1158
12	\$0.1181
13	\$0.1205
14	\$0.1229
15	\$0.1254
16	\$0.1279
17	\$0.1304
18	\$0.1330
19	\$0.1357
20	\$0.1384

Includes ACH invoicing. If manual invoicing is required, a \$25 handling charge will be added to each invoice.

5. **Condition Satisfaction Date:** 180 days after the Effective Date
6. **Anticipated Commercial Operation Date:** 270 days after the Effective Date
7. **Outside Commercial Operation Date:** 365 days after the Effective Date
8. **Purchase Option**

YEAR	PURCHASE PRICE
6	\$1,083,265
10	\$1,040,065
20	Fair Market Value

*Buyer shall have the right to purchase the System at the greater of the price set forth above and the then current fair market value.

9. Termination Value:

YEAR	TERMINATION VALUE
1	\$2,466,222
2	\$2,140,101
3	\$1,698,858
4	\$1,358,143
5	\$1,077,260
6	\$790,624
7	\$729,422
8	\$715,852
9	\$700,858
10	\$684,358
11	\$666,264
12	\$646,486
13	\$624,928
14	\$601,490
15	\$576,065
16	\$548,541
17	\$518,802
18	\$486,725
19	\$452,179
20	\$415,028

10. Rebate Variance. All prices in this Agreement are calculated based on an upfront rebate of \$0 and an ongoing incentive of \$0.3/kWh for 5 years. If the actual rebate is lower than calculated, prices will be adjusted pro-rata to reflect the actual rebate received.

Exhibit 2

System Description, Delivery Point and License Area

1. **System Location:** 2812 Meadowview Rd., Sacramento, California 95832
2. **System Size (DC kW):** 375.130
3. **Expected First Year Energy Production (kWh):** 482,020
4. **Expected Structure:** Solar Support Structure
5. **Expected Module(s):**

QUANTITY	MAKE	MODEL	STC WATTS	PTC WATTS
1,631	Yingli Green Energy	YL230P-29b	230.0 W	206.6 W

6. **Expected Inverter(s):**

QUANTITY	MAKE	MODEL	RATED POWER	EFFICIENCY
1	SatCon Technology	PVS-375 (480 V)	375.00 kW	95.5 %

7. **Includes:**

SolarCity Limited Warranty, installation of a solar energy system (includes: design, engineering, permitting, installation, monitoring, rebate application and paperwork processing for solar energy system).

8. **Excludes:**

Unforeseen groundwork (including, but not limited to, excavation/circumvention of underground obstacles), upgrades or repair to customer or utility electrical infrastructure, upgrades or repair to building structure or to roofing system, payment bonds, performance bond(s), prevailing wage construction, tree removal, tree trimming.

9. **Delivery Point and License Area:** SolarCity shall attach a schematic that contains the:

- (i) array;
- (ii) Delivery Point; and
- (iii) access points needed to install and service System (bldg access, electrical room, stairs etc.)



Exhibit A
To Memorandum of License

Legal Description of Premises

That certain real property located in the County of Sacramento, State of California described as follows:

A PARCEL OF LAND LOCATED IN THE STATE OF CALIFORNIA, COUNTY OF SACRAMENTO, WITH A SITUS ADDRESS OF 2812 MEADOWVIEW RD, SACRAMENTO, CA 95832-1441 CURRENTLY OWNED BY CITY OF SACRAMENTO HAVING A TAX ASSESSOR NUMBER OF 053-0010-065-0000 AND BEING THE SAME PROPERTY MORE FULLY DESCRIBED AS POR SEC 7, T7N, R5E, M.D.B. & M. DES AS: BEG AT A PT LOC N89°20'37E 1969.33', & S00°17'35E 40' FR THE NW COR OF SD SEC, TH FR SD P.O.B. N89°20'37E 455.05'; TH S00°55'32E 465.56'; TH S89°04'28W 38'; TH S00°55'32E 20.50'; TH S89°20'37W 422.41'; TH N00°17'35W 486.24' TO THE P.O.B. CONTG 5.0915 AC AND DESCRIBED IN DOCUMENT NUMBER 30430-2939 DATED 04/03/2003 AND RECORDED 04/30/2003.

Exhibit 4

Solar Power Purchase Agreement General Terms and Conditions

1. **Definitions and Interpretation:** Unless otherwise defined or required by the context in which any term appears: (a) the singular includes the plural and vice versa; (b) the words "herein," "hereof" and "hereunder" refer to this Agreement as a whole and not to any particular section or subsection of this Agreement; (c) references to any agreement, document or instrument mean such agreement, document or instrument as amended, modified, supplemented or replaced from time to time; and (d) the words "include," "includes" and "including" mean include, includes and including "without limitation." The captions or headings in this Agreement are strictly for convenience and shall not be considered in interpreting this Agreement.

2. **Purchase and Sale of Electricity.** Purchaser shall purchase from Seller, and Seller shall sell to Purchaser, all of the electric energy generated by the System during the Initial Term and any Additional Term (as defined in Exhibit 1, and collectively the "Term"). Electric energy generated by the System will be delivered to Purchaser at the delivery point identified on Exhibit 3 (the "Delivery Point"). Purchaser shall take title to the electric energy generated by the System at the Delivery Point, and risk of loss will pass from Seller to Purchaser at the Delivery Point. Purchaser may purchase electric energy for the Facility from other sources if the Purchaser's electric requirements at the Facility exceed the output of the System.

3. **Term and Termination.**
 - a. **Initial Term.** The initial term ("Initial Term") of this Agreement shall commence on the Commercial Operation Date (as defined below) and continue for the length of time specified in Exhibit 1, unless earlier terminated as provided for in this Agreement. The "Commercial Operation Date" is the date Seller gives Purchaser written notice that the System is mechanically complete and capable of providing electric energy to the Delivery Point. Upon Purchaser's request, Seller will give Purchaser copies of certificates of completion or similar documentation from Seller's contractor and the interconnection or similar agreement with SMUD. This Agreement is effective as of the Effective Date and Purchaser's failure to enable Seller to provide the electric energy by preventing it from installing the System or otherwise not performing shall not excuse Purchaser's obligations to make payments that otherwise would have been due under this Agreement. **Additional Terms.** If Purchaser has not exercised its option to purchase the System by the end of the Initial Term, either Party may give the other Party written notice of its desire to extend this Agreement on the terms and conditions set forth herein for the number and length of additional periods specified in Exhibit 1 (each an "Additional Term"). Such notice shall be given, if at all, not more than one hundred twenty (120) and not less than sixty (60) days before the last day of the Initial Term or the then current Additional Term, as applicable. The Party receiving the notice requesting an Additional Term shall respond positively or negatively to that request in writing within thirty (30) days after receipt of the request. Failure to respond within such thirty (30) day period shall be deemed a rejection of the offer for an Additional Term. If both Parties agree to an Additional Term, the Additional Term shall begin immediately upon the conclusion of the Initial Term or the then current term on the same terms and conditions as set forth in this Agreement. If the Party receiving the request for an Additional Term rejects or is deemed to reject the first Party's offer, this Agreement shall terminate at the end of the Initial Term (if the same has not been extended) or the then current Additional Term.

4. **Billing and Payment.**
 - a. **Monthly Charges.** Purchaser shall pay Seller monthly for the electric energy generated by the System and delivered to the Delivery Point at the \$/kWh rate shown in Exhibit 1 (the "Contract Price"). The monthly payment for such energy will be equal to the applicable \$/kWh rate multiplied by the number of kWh of energy generated during the applicable month, as measured by the System meter.

 - b. **Monthly Invoices.** Seller shall invoice Purchaser monthly, either manually or through ACH. Such monthly invoices shall state (i) the amount of electric energy produced by the System and delivered to the Delivery Point, (ii) the rates applicable to, and charges incurred by, Purchaser under this Agreement and (iii) the total amount due from Purchaser.

 - c. **Taxes.** Purchaser shall either pay or reimburse Seller for any and all taxes assessed on the generation, sale, delivery or consumption of electric energy produced by the System or the interconnection of the System to SMUD's electric distribution system, including property taxes on the System; provided, however, Purchaser will not be required to pay or reimburse Seller for any taxes during periods when Seller fails to deliver electric energy to Purchaser for

reasons other than Force Majeure. For purposes of this Section 4(d), “Taxes” means any federal, state and local ad valorem, property, occupation, generation, privilege, sales, use, consumption, excise, transaction, and other taxes, regulatory fees, surcharges or other similar charges, but shall not include any income taxes or similar taxes imposed on Seller’s revenues due to the sale of energy under this Agreement, which shall be Seller’s responsibility.

- d. **Payment Terms.** All amounts due under this Agreement shall be due and payable net thirty (30) days from receipt of invoice. Any undisputed portion of the invoice amount not paid within the thirty (30) day period shall accrue interest as permitted under Civil Code section 3289.

5. **Environmental Attributes and Environmental Incentives.**

Unless otherwise specified on Exhibit 1, Seller is the owner of all Environmental Attributes and Environmental Incentives and is entitled to the benefit of all Tax Credits, and Purchaser’s purchase of electricity under this Agreement does not include Environmental Attributes, Environmental Incentives or the right to Tax Credits or any other attributes of ownership and operation of the System, all of which shall be retained by Seller. Purchaser shall cooperate with Seller in obtaining, securing and transferring all Environmental Attributes and Environmental Incentives and the benefit of all Tax Credits, including by using the electric energy generated by the System in a manner necessary to qualify for such available Environmental Attributes, Environmental Incentives and Tax Credits. Purchaser shall not be obligated to incur any out-of-pocket costs or expenses in connection with such actions unless reimbursed by Seller. If any Environmental Incentives are paid directly to Purchaser, Purchaser shall immediately pay such amounts over to Seller. To avoid any conflicts with fair trade rules regarding claims of solar or renewable energy use, Purchaser, if engaged in commerce and/or trade, shall submit to Seller for approval any press releases regarding Purchaser’s use of solar or renewable energy and shall not submit for publication any such releases without the written approval of Seller. Approval shall not be unreasonably withheld, and Seller’s review and approval shall be made in a timely manner to permit Purchaser’s timely publication.

“**Environmental Attributes**” means any and all credits, benefits, emissions reductions, offsets, and allowances, howsoever entitled, attributable to the System, the production of electrical energy from the System and its displacement of conventional energy generation, including (1) any avoided emissions of pollutants to the air, soil or water such as sulfur oxides (SO_x), nitrogen oxides (NO_x), carbon monoxide (CO) and other pollutants; (2) any avoided emissions of carbon dioxide (CO₂), methane (CH₄), nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride and other greenhouse gases (GHGs) that have been determined by the United Nations Intergovernmental Panel on Climate Change, or otherwise by law, 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 related to these avoided emissions, such as Green Tag Reporting Rights and Renewable Energy Credits. Green Tag Reporting Rights are the right of a party to report the ownership of accumulated Green Tags in compliance with federal or state law, if applicable, and to a federal or state agency or any other party, and include Green Tag Reporting Rights accruing under Section 1605(b) of The Energy Policy Act of 1992 and any present or future federal, state, or local law, regulation or bill, and international or foreign emissions trading program. Environmental Attributes do not include Environmental Incentives and Tax Credits. Seller shall file all tax returns in a manner consistent with this Section 5. Without limiting the generality of the foregoing, Environmental Attributes include carbon trading credits, renewable energy credits or certificates, emissions reduction credits, investment credits, emissions allowances, green tags, tradeable renewable credits and Green-e® products.

“**Environmental Incentives**” means any and credits, rebates, subsidies, payments or other incentives that relate to self-generation of electricity, the use of technology incorporated into the System, environmental benefits of using the System, or other similar programs available from SMUD, any other regulated entity, the manufacturer of any part of the System or any Governmental Authority.

“**Governmental Authority**” means any national, state or local government (whether domestic or foreign), any political subdivision thereof or any other governmental, quasi-governmental, judicial, public or statutory instrumentality, authority, body, agency, bureau or entity (including the Federal Energy Regulatory Commission or the California Public Utilities Commission), or any arbitrator with authority to bind a party at law.

“**Tax Credits**” means any and all (i) investment tax credits, (ii) production tax credits and (iii) similar tax credits or grants under federal, state or local law relating to the construction, ownership or production of energy from the System.

6. **Conditions to Obligations.**

- a. **Conditions to Seller’s Obligations.**

Seller's obligations under this Agreement are conditioned on the completion of the following conditions to Seller's reasonable satisfaction on or before the Condition Satisfaction Date:

- i. Completion of a physical inspection of the Facility and the property upon which the Facility is located (the "Premises") including, if applicable, geotechnical work, and real estate due diligence to confirm the suitability of the Facility and the Premises for the System;
- ii. Approval of (A) this Agreement and (B) the Construction Agreement (if any) for the System by Seller's Financing Parties. "Construction Agreement" as used in this subsection means an agreement between SolarCity and a subcontractor to install the System;
- iii. Confirmation that Seller will obtain all applicable SMUD PBI incentives;
- iv. Confirmation that Seller will obtain all applicable Environmental Incentives (including SMUD PBI incentives) and Tax Credits;
- v. Receipt of all necessary zoning, land use and building permits;
- vi. Execution of all necessary agreements with SMUD for interconnection of the System to SMUD's electric distribution system; and

Prior to Seller commencing construction and installation of the System, Purchaser shall give Seller proof of self insurance for all insurance required to be maintained by Purchaser under this Agreement

b. Conditions to Purchaser's Obligations.

- i. Purchaser's obligations under this Agreement are conditioned on the occurrence of the Commercial Operation Date for the System on or before the Outside Commercial Operation Date (See **Exhibit 1**).

c. Failure of Conditions.

If any of the conditions listed in subsections a or b above are not satisfied by the applicable dates specified in those subsections, the Parties will attempt in good faith to negotiate new dates for the satisfaction of the failed conditions. If the parties are unable to negotiate new dates then the Party that has not failed to meet an obligation may terminate this Agreement upon ten (10) days written notice to the other Party without liability for costs or damages or triggering a default under this Agreement.

7. Seller's Rights and Obligations.

- a. Permits and Approvals.** Seller, consistent with applicable laws, shall use commercially reasonable efforts to obtain, at its sole cost and expense:

- i. any zoning, land use and building permits required to construct, install and operate the System; and
- ii. any agreements and approvals from SMUD necessary in order to interconnect the System to SMUD's electric distribution system.

Purchaser, consistent with applicable laws, shall cooperate with Seller's reasonable efforts to obtain such agreements, permits and approvals

- b. Standard System Repair and Maintenance.** Seller shall construct and install the System at the Facility. During the Term, Seller will operate and perform all routine and emergency repairs to, and maintenance of, the System at its sole cost and expense, except for any repairs or maintenance resulting from Purchaser's negligence, willful misconduct or breach of this Agreement or the Site Lease (if applicable). Seller shall not be responsible for any work done by others on any part of the System unless Seller authorizes that work in advance in writing. Seller shall not be responsible for any loss, damage, cost or expense arising out of or resulting from improper environmental controls or improper operation or maintenance of the System by anyone other than Seller or Seller's contractors. If the System requires repairs for which Seller is not responsible, Purchaser shall pay Seller for diagnosing and correcting the problem at Seller or Seller's contractors' then current reasonable rates. Seller shall provide Purchaser with reasonable notice prior to accessing the Facility to make standard repairs.

- c. **Non-Standard System Repair and Maintenance.** If Seller incurs unexpected costs to maintain the System due to conditions at the Facility that impair the functioning of the System and these conditions were: caused by the Purchaser or the Purchaser knew or should have known of these conditions; and the Purchaser failed to remedy these conditions or inform the Seller of these conditions prior to entering into this Agreement, the pricing, schedule and other terms of this Agreement will be equitably adjusted to compensate for any work in excess of normally expected work required to be performed by Seller. In such event, the Parties will negotiate such equitable adjustment in good faith.
- d. **Breakdown Notice.** Seller shall notify Purchaser within twenty-four (24) hours following Seller's discovery of (i) any material malfunction in the operation of the System or (ii) an interruption in the supply of electrical energy from the System. Purchaser and Seller shall each designate personnel and establish procedures such that each Party may provide notice of such conditions requiring Seller's repair or alteration at all times, twenty-four (24) hours per day, including weekends and holidays. Purchaser shall notify Seller immediately upon the discovery of an emergency condition affecting the System.
- e. **Suspension.** Notwithstanding anything to the contrary herein, Seller shall be entitled to suspend delivery of electricity from the System to the Delivery Point for the purpose of maintaining and repairing the System and such suspension of service shall not constitute a breach of this Agreement; provided, that Seller shall use commercially reasonable efforts to minimize any interruption in service to the Purchaser. A suspension of delivery of electricity under this provision shall not extend the term of the Agreement.
- f. **Use of Contractors and Subcontractors.** Seller shall be permitted to use contractors and subcontractors to perform its obligations under this Agreement. However, Seller shall continue to be responsible for the quality of the work performed by its contractors and subcontractors. If a list of pre-approved contractors and subcontractors is desired, such list shall be scheduled on an appendix to this Exhibit. All contractors and subcontractors, other than those that may be scheduled on an appendix to this Exhibit, shall be subject to Purchaser's prior written consent, not to be unreasonably withheld.
- g. **Liens and Payment of Contractors and Suppliers.** Seller shall pay when due all valid charges from all contractors, subcontractors and suppliers supplying goods or services to Seller under this Agreement and shall keep the Facility free and clear of any liens related to such charges. Seller shall indemnify Purchaser for all claims, losses, damages, liabilities and expenses resulting from any liens filed against the Facility or the Premises in connection with such charges; provided, however, that Seller shall have the right to contest any such lien, so long as it provides a statutory bond or other reasonable assurances of payment that either remove such lien from title to the Facility and the Premises or that assure that any adverse judgment with respect to such lien will be paid without affecting title to the Facility and the Premises.

Unless otherwise provided in this agreement, Seller shall not directly or indirectly cause, create, incur, assume or allow to exist any mortgage, pledge, lien, charge, security interest, encumbrance or other claim of any nature on or with respect to the System or any interest therein. Seller shall immediately notify Purchaser in writing of the existence of any such mortgage, pledge, lien, charge, security interest, encumbrance or other claim, shall promptly cause the same to be discharged and released of record without cost to Purchaser, and shall indemnify Purchaser against all costs and expenses (including reasonable attorneys' fees) incurred in discharging and releasing any such mortgage, pledge, lien, charge, security interest, encumbrance or other claim.

- h. **No Warranty.** NO WARRANTY OR REMEDY, WHETHER STATUTORY, WRITTEN, ORAL, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, OR WARRANTIES ARISING FROM COURSE OF DEALING OR USAGE OF TRADE SHALL APPLY. The remedies set forth in this Agreement shall be Purchaser's sole and exclusive remedies for any claim or liability arising out of or in connection with this Agreement, whether arising in contract, tort (including negligence), strict liability or otherwise. The Limited Warranty SolarCity will provide Purchaser with is a separate contract from this Agreement. No rights provided to Purchaser by the Limited Warranty may be asserted under this Agreement. No warranty is made in this Agreement. Therefore, any warranty claim must be made independently of this Agreement and will not affect Purchaser's obligations under this Agreement.

8. Purchaser's Rights and Obligations.

- a. **Facility Access Rights.** Purchaser grants to Seller and to Seller's agents, employees and contractors an irrevocable non-exclusive license running with the Premises (the "License") for access to, on, over, under and across the Premises as more particularly described in Exhibit A to **Exhibit 3** (the "License Area") for the purposes of (a)

installing, constructing, operating, owning, maintaining, accessing, removing and replacing the System; (b) performing all of Seller's obligations and enforcing all of Seller's rights set forth in this Agreement; and (c) installing, using and maintaining electric lines and equipment, including inverters and meters, necessary to interconnect the System to Purchaser's electric system at the Facility and/or to SMUD's electric distribution system or that otherwise may from time to time be useful or necessary in connection with the construction, installation, operation, maintenance or repair of the System. Seller shall notify Purchaser prior to entering the Facility except in situations where there is imminent risk of damage to persons or property. Purchaser shall provide Seller access during normal business hours, excluding weekends and holidays and during emergency situations when it is reasonable to enter the premises, for the purposes and on the terms set forth in the Agreement. Seller will provide twenty-four (24) hour notice or as much time as is reasonably possible to Purchaser in the event that it needs to access the System during excluded periods.. The term of the License shall continue until the date that is one hundred and twenty (120) days following the date of expiration or termination of this Agreement (the "**License Term**"). During the License Term, Purchaser shall ensure that Seller's rights under the License and Seller's access to the License Area are preserved and protected and shall not interfere with or permit any third parties to interfere with such rights or access. The grant of the License shall survive termination of this agreement by either Party. Purchaser agrees that Seller may record a memorandum of license in substantially the same form attached hereto as **Exhibit 3** in the land records respecting the License.

- b. **OSHA Compliance.** Both parties shall ensure that all Occupational Safety and Health Act (OSHA) requirements and other similar applicable safety laws or codes are adhered to in their performance under this Agreement.
- c. **Maintenance of Facility.** Purchaser shall, at its sole cost and expense, maintain the Facility in good condition and repair. Purchaser will ensure that the Facility remains interconnected to the local utility (SMUD) grid at all times and will not permit cessation of electric service to the Facility from the local utility (SMUD). Purchaser is fully responsible for the maintenance and repair of the Facility's electrical system and of all of Purchaser's equipment that utilizes the System's outputs. Purchaser shall properly maintain in full working order all of Purchaser's electric supply or generation equipment that Purchaser may shut down while utilizing the System. Purchaser shall promptly notify Seller of any matters of which it is aware pertaining to any damage to or loss of use of the System or that could reasonably be expected to adversely affect the System.
- d. **No Alteration of Facility.** Purchaser shall not make any alterations or repairs to the Facility which may adversely affect the operation and maintenance of the System without Seller's prior written consent. If Purchaser wishes to make such alterations or repairs, Purchaser shall give prior written notice to Seller, setting forth the work to be undertaken (except for emergency repairs, for which notice may be given by telephone), and give Seller the opportunity to advise Purchaser in making such alterations or repairs in a manner that avoids damage to the System. Purchaser shall be responsible for all damage to the System caused by Purchaser or its contractors, excluding damages resulting from alterations or repairs performed at the Seller's written direction. To the extent that temporary disconnection or removal of the System is necessary to perform such alterations or repairs, such work and any replacement of the System after completion of Purchaser's alterations and repairs, shall be done by Seller or its contractors at Purchaser's cost. All of Purchaser's alterations and repairs will be done in a good and workmanlike manner and in compliance with all applicable laws, codes and permits.
- e. **Outages.** Purchaser shall be permitted to be off line for two (2) full twenty-four (24) hour days (each, a "**Scheduled Outage**") per calendar year during the Term, during which days Purchaser shall not be obligated to accept or pay for electricity from the System; provided, however, that Purchaser must notify Seller in writing of each such Scheduled Outage at least forty-eight (48) hours in advance of the commencement of a Scheduled Outage. In the event that Scheduled Outages exceed two (2) days per calendar year or there are unscheduled outages, in each case for a reason other than a Force Majeure event, Seller shall reasonably estimate the amount of electricity that would have been delivered to Purchaser during such excess Scheduled Outages or unscheduled outages and shall invoice Purchaser for such amount in accordance with Section 4.
- f. **Liens.** Purchaser shall not directly or indirectly cause, create, incur, assume or allow to exist any mortgage, pledge, lien, charge, security interest, encumbrance or other claim of any nature on or with respect to the System or any interest therein. Purchaser shall immediately notify Seller in writing of the existence of any such mortgage, pledge, lien, charge, security interest, encumbrance or other claim, shall promptly cause the same to be discharged and released of record without cost to Seller, and shall indemnify Seller against all costs and expenses (including reasonable attorneys' fees) incurred in discharging and releasing any such mortgage, pledge, lien, charge, security interest, encumbrance or other claim.

- g. **Security.** Purchaser shall be responsible for maintaining the physical security of the Facility and the System. Purchaser will not conduct activities on, in or about the License Area or the Facility that have a reasonable likelihood of causing damage, impairment or otherwise adversely affecting the System.
- h. **Insolation.** Purchaser understands that unobstructed access to sunlight ("**Insolation**") is essential to Seller's performance of its obligations and a material term of this Agreement. Purchaser shall not in any way cause and, where possible, shall not in any way permit any interference with the System's Insolation. If Purchaser becomes aware of any activity or condition that could diminish the Insolation of the System, Purchaser shall notify Seller immediately and shall cooperate with Seller in preserving the System's existing Insolation levels. The Parties agree that reducing Insolation would irreparably injure Seller, that such injury may not be adequately compensated by an award of money damages, and that Seller is entitled to seek specific enforcement of this Section 8(h) against Purchaser.
- i. **Data Line.** Purchaser shall provide Seller a high speed internet data line during the Term to enable Seller to record the electric energy generated by the System. If Purchaser fails to provide such high speed internet data line, or if such line ceases to function and is not repaired, Seller may reasonably estimate the amount of electric energy that was generated and invoice Purchaser for such amount in accordance with Section 4.
- j. **Breakdown Notice.** Purchaser shall notify Seller within twenty-four (24) hours following the discovery by it of (A) any material malfunction in the operation of the System; or (B) any occurrences that could reasonably be expected to adversely affect the System. Purchaser shall notify Seller immediately upon (A) an interruption in the supply of electrical energy from the System; or (B) the discovery of an emergency condition respecting the System. Purchaser and Seller shall each designate personnel and establish procedures such that each Party may provide notice of such conditions requiring Seller's repair or alteration at all times, twenty-four (24) hours per day, including weekends and holidays.

9. **Change in Law.**

"Change in Law" means (i) the enactment, adoption, promulgation, modification or repeal after the Effective Date of any applicable law or regulation; (ii) the imposition of any material conditions on the issuance or renewal of any applicable permit after the Effective Date of this Agreement (notwithstanding the general requirements contained in any applicable Permit at the time of application or issue to comply with future laws, ordinances, codes, rules, regulations or similar legislation), or (iii) a change in any SMUD rate schedule or tariff approved by any Governmental Authority which in the case of any of (i), (ii) or (iii), establishes requirements affecting owning, supplying, constructing, installing, operating or maintaining the System, or other performance of the Seller's obligations hereunder and which has a material adverse effect on the cost to Seller of performing such obligations; provided, that a change in federal, state, county or any other tax law after the Effective Date of this Agreement shall not be a Change in Law pursuant to this Agreement.

If any Change in Law occurs that has a material adverse effect on the cost to Seller of performing its obligations under this Agreement, then the Parties shall, within thirty (30) days following receipt by Purchaser from Seller of notice of such Change in Law, meet and attempt in good faith to negotiate amendments to this Agreement as are reasonably necessary to preserve the economic value of this Agreement to both Parties. If the Parties are unable to agree upon such amendments within such thirty (30) day period, then Seller shall have the right to terminate this Agreement without further liability to either Party except with respect to payment of amounts accrued prior to termination.

10. **Relocation of System.**

If Purchaser ceases to conduct business operations at and/or vacates the Facility or is prevented from operating the System at the Facility prior to the expiration of the Term, Purchaser shall have the option to provide Seller with a mutually agreeable substitute premises located within SMUD as the terminated System or in a location with similar Utility rates and Insolation. Purchaser shall provide written notice at least sixty (60) days but not more than one hundred eighty (180) days prior to the date that it wants to make this substitution. In connection with such substitution, Purchaser shall execute an amended agreement that shall have all of the same terms as this Agreement except for the (i) Effective Date; (ii) License, which will be amended to grant rights in the real property where the System relocated to; and (iii) Term, which will be the remainder of the Term of this Agreement and such amended agreement shall be deemed to be a continuation of this Agreement without termination. Purchaser shall also provide any new Purchaser, owner, lessor or mortgagee consents or releases required by Seller or Seller's Financing Parties in connection with the substitute facility. Purchaser shall pay all costs associated with relocation of the System, including all costs and expenses incurred by or on behalf of Seller in connection with removal of the System from the Facility and installation and testing of the System at the substitute facility and all applicable interconnection fees and expenses at the substitute facility, as well as costs of new title search and other out-of-pocket

expenses connected to preserving and refiling the security interests of Seller's Financing Parties in the System. Seller shall remove the System from the vacated Facility prior to the termination of Purchaser's ownership, lease or other rights to use such Facility. Seller will not be required to restore the Facility to its prior condition but shall promptly pay Purchaser for any damage caused by Seller during removal of the System, but not for normal wear and tear. If the substitute facility has inferior Insolation as compared to the original Facility, Seller shall have the right to make an adjustment to Exhibit 1 such that Purchaser's payments to Seller are the same as if the System were located at the original Facility. If Purchaser is unable to provide such substitute facility and to relocate the System as provided, any early termination will be treated as a default by Purchaser.

11. Removal of System at Expiration.

Upon the expiration or earlier termination of this Agreement (provided Purchaser does not exercise its purchase option), Seller shall, at its expense, remove all of its tangible property comprising the System from the Facility on a mutually convenient date, but in no event later than ninety (90) days after the expiration of the Term. Excluding ordinary wear and tear, the Facility shall be returned to its original condition including the removal of System mounting pads or other support structures. In no case shall Seller's removal of the System affect the integrity of Purchaser's roof, which shall be as leak proof as it was prior to removal of the System and shall be flashed and/or patched to existing roof specifications. Seller shall leave the Facility in neat and clean order. If Seller fails to remove or commence substantial efforts to remove the System by such agreed upon date, Purchaser shall have the right, at its option, to remove the System to a public warehouse and restore the Facility to its original condition (other than ordinary wear and tear) at Seller's cost. Purchaser shall provide sufficient space for the temporary storage and staging of tools, materials and equipment and for the parking of construction crew vehicles and temporary construction trailers and facilities reasonably necessary during System removal.

12. Measurement.

Electricity delivered to the Facility shall be measured by the SolarGuard monitoring system installed and maintained by Seller as part of the System.

13. Default, Remedies and Damages.

a. **Default.** Any Party that fails to perform its responsibilities as listed below or experiences any of the circumstances listed below shall be deemed a "**Defaulting Party**" and each event of default shall be a "**Default Event**":

- (1) failure of a Party to pay any amount due and payable under this Agreement, other than an amount that is subject to a good faith dispute, within ten (10) days following receipt of written notice from the other Party (the "**Non-Defaulting Party**") of such failure to pay ("**Payment Default**");
- (2) failure of a Party to substantially perform any other material obligation under this Agreement within thirty (30) days following receipt of written notice from the Non-Defaulting Party demanding such cure; provided, that such thirty (30) day cure period shall be extended (but not beyond ninety (90) days) if and to the extent reasonably necessary to cure the Default Event, if (i) the Defaulting Party initiates such cure with the thirty (30) day period and continues such cure to completion and (ii) there is no material adverse affect on the Non-Defaulting Party resulting from the failure to cure the Default Event;
- (3) if any representation or warranty of a Party proves at any time to have been incorrect in any material respect when made and is material to the transactions contemplated hereby, if the effect of such incorrectness is not cured within thirty (30) days following receipt of written notice from the Non-Defaulting Party demanding such cure;
- (4) Purchaser loses its rights to occupy and enjoy the Premises;
- (5) a Party, or its guarantor, becomes insolvent or is a party to a bankruptcy, reorganization, insolvency, liquidation, receivership, dissolution, winding-up or relief of debtors, or any general assignment for the benefit of creditors or other similar arrangement or any event occurs or proceedings are taken in any jurisdiction with respect to the Party which has a similar effect; or
- (6) Purchaser prevents Seller from installing the System or otherwise failing to perform in a way that prevents the delivery of electric energy from the System. Such Default Event shall not excuse

Purchaser's obligations to make payments that otherwise would have been due under this Agreement.

b. Remedies.

- (1) **Remedies for Payment Default.** If a Payment Default occurs, the Non-Defaulting Party may suspend performance of its obligations under this Agreement. Further, the Non-Defaulting Party may pursue any remedy under this Agreement, at law or in equity, including an action for damages and termination of this Agreement, upon five (5) days prior written notice to the Defaulting Party following the Payment Default.
- (2) **Remedies for Other Defaults.** On the occurrence of a Default Event other than a Payment Default, the Non-Defaulting Party may pursue any remedy under this Agreement, at law or in equity, including an action for damages and termination of this Agreement or suspension of performance of its obligations under this Agreement, upon five (5) days prior written notice to the Defaulting Party following the occurrence of the Default Event. Nothing herein shall limit either Party's right to collect damages upon the occurrence of a breach or a default by the other Party that does not become a Default Event. If Purchaser terminates this contract without cause prior to System Installation, Purchaser shall pay Seller for all reasonable costs incurred to date. This shall be Seller's sole remedy against Purchaser in the event of default prior to System Installation.
- (3) **Damages Upon Termination by Default.** Upon a termination of this Agreement by the Non-Defaulting Party as a result of a Default Event by the Defaulting Party, the Defaulting Party shall pay a Termination Payment to the Non-Defaulting Party determined as follows (the "**Termination Payment**"):
 - A. **Purchaser.** If Purchaser is the Defaulting Party and Seller terminates this Agreement, the Termination Payment to Seller shall be equal to the sum of (i) the termination value set forth in **Exhibit 1** (the "**Termination Value**") for such Contract Year, (ii) commercially reasonable removal costs as provided in **Section 13(b)(2)(C)** and (iii) any and all other amounts previously accrued under this Agreement and then owed by Purchaser to Seller. The Parties agree that actual damages to Seller in the event this Agreement terminates prior to the expiration of the Term as the result of an Default Event by Purchaser would be difficult to ascertain, and the applicable Termination Value set forth in **Exhibit 1** is a reasonable approximation of the damages suffered by Seller as a result of early termination of this Agreement. The Termination Payment shall not be less than zero.
 - B. **Seller.** If Seller is the Defaulting Party and Purchaser terminates this Agreement, the Termination Payment to Purchaser shall be equal to the sum of (i) the present value (using a discount rate of 9.5%) of the excess, if any, of the reasonably expected cost of electric energy from SMUD over the Contract Price for the reasonably expected production of the System for the remainder of the Initial Term or the then current Additional Term, as applicable; (ii) all costs reasonably incurred by Purchaser in re-converting its electric supply to service from SMUD; (iii) any removal costs incurred by Purchaser, and (iv) any and all other amounts previously accrued under this Agreement and then owed by Seller to Purchaser. The Termination Payment shall not be less than zero.
 - C. **Obligations Following Termination.** If a Non-Defaulting Party terminates this Agreement pursuant to this **Section 13(b)**, then following such termination, Seller shall, at the sole cost and expense of the Defaulting Party, remove the equipment (except for mounting pads and support structures) constituting the System. The Non-Defaulting Party shall take all commercially reasonable efforts to mitigate its damages as the result of a Default Event.

14. Representations and Warranties.

- a. General Representations and Warranties.** Each Party represents and warrants to the other the following:

- (1) Such Party is duly organized, validly existing and in good standing under the laws of the jurisdiction of its formation; the execution, delivery and performance by such Party of this Agreement have been duly authorized by all necessary corporate, partnership or limited liability company action, as applicable, and do not and shall not violate any law; and this Agreement is valid obligation of such Party, enforceable against such Party in accordance with its terms (except as may be limited by applicable bankruptcy, insolvency, reorganization, moratorium and other similar laws now or hereafter in effect relating to creditors' rights generally).
- (2) Such Party has obtained all licenses, authorizations, consents and approvals required by any Governmental Authority or other third party and necessary for such Party to own its assets, carry on its business and to execute and deliver this Agreement; and such Party is in compliance with all laws that relate to this Agreement in all material respects.

b. Purchaser's Representations and Warranties. Purchaser represents and warrants to Seller the following:

- (1) License. Purchaser has the full right, power and authority to grant the License contained in Section 8(a). Such grant of the License does not violate any law, ordinance, rule or other governmental restriction applicable to Purchaser or the Facility and is not inconsistent with and will not result in a breach or default under any agreement by which Purchaser is bound or that affects the Facility.
- (2) Other Agreements. Neither the execution and delivery of this Agreement by Purchaser nor the performance by Purchaser of any of its obligations under this Agreement conflicts with or will result in a breach or default under any agreement or obligation to which Purchaser is a party or by which Purchaser or the Facility is bound.
- (3) Accuracy of Information. All information provided by Purchaser to Seller, as it pertains to the Facility's physical configuration, Purchaser's planned use of the Facility, and Purchaser's estimated electricity requirements, is accurate in all material respects.
- (4) Purchaser Status. Purchaser is not a public utility or a public utility holding company and is not subject to regulation as a public utility or a public utility holding company.
- (5) No Pool Use. No electricity generated by the System will be used to heat a swimming pool.
- (6) Oregon Only: The electricity generated by the System will be used solely for commercial and business purposes. No portion of the electricity generated will be used for personal, family, household or agricultural purposes.

15. System and Facility Damage and Insurance.

a. System and Facility Damage.

- (1) Seller's Obligations. If the **System** is damaged or destroyed other than by Purchaser's gross negligence or willful misconduct, Seller shall promptly repair and restore the System to its pre-existing condition; provided, however, that if more than fifty percent (50%) of the System is destroyed during the last five (5) years of the Initial Term or during any Additional Term, Seller shall not be required to restore the System, but may instead terminate this Agreement, unless Purchaser agrees (i) to pay for the cost of such restoration of the System or (ii) to purchase the System "AS-IS" at the greater of (A) then current fair market value of the System and (B) the sum of the amounts described in Section 13.b(3)A)(i) (using the date of purchase to determine the appropriate Contract Year) and Section 13.b(3)A)(iii).
- (2) Purchaser's Obligations. If the **Facility** is damaged or destroyed by casualty of any kind or any other occurrence other than Seller's gross negligence or willful misconduct, such that the operation of the System and/or Purchaser's ability to accept the electric energy produced by the System are materially impaired or prevented, Purchaser shall promptly repair and restore the Facility to its pre-existing condition; provided, however, that if more than 50% of the Facility is destroyed during the last five years of the Initial Term or during any Additional Term, Purchaser may elect either (i) to restore the Facility or (ii) to pay the Termination Value set forth in Exhibit

1 and all other costs previously accrued but unpaid under this Agreement and thereupon terminate this Agreement.

- b. Insurance Coverage.** At all times during the Term, Seller and Purchaser shall maintain the following insurance:
- i. **Seller's Insurance.** Seller shall maintain (i) property insurance on the System for the replacement cost thereof, (ii) comprehensive general liability insurance with coverage of at least \$1,000,000 per occurrence and \$2,000,000 annual aggregate, (iii) employer's liability insurance with coverage of at least \$1,000,000 and (iv) worker's compensation insurance as required by law.
 - ii. **Purchaser's Insurance.** Seller acknowledges that Purchaser is a self-insured public entity. Within (30) days after execution of this Agreement, Purchaser shall provide a letter of self-insurance stating that Purchaser's self-insurance program adequately protects against liabilities and claims arising out of the performance of this agreement.
- c. Policy Provisions.** Seller's insurance policies provided hereunder shall (i) contain a provision whereby the insurer agrees to give the party not providing the insurance thirty (30) days (ten (10) days in the event of non-payment of premiums) written notice before the insurance is cancelled, terminated or materially altered, (ii) be written on an occurrence basis, (iii) with respect to the liability insurance policies, include the other Party as an additional insured as its interest may appear, (iv) include waivers of subrogation, (v) provide for primary coverage without right of contribution from any insurance of the other Party, and (vi) be maintained with companies either rated no less than A- as to Policy Holder's Rating in the current edition of Best's Insurance Guide or otherwise reasonably acceptable to the other party.
- d. Certificates.** Within thirty (30) days after execution of this Agreement and upon the other Party's request and annually thereafter, Seller shall deliver the other Party certificates of insurance evidencing the above required coverage. A Party's receipt, review or acceptance of such certificate shall in no way limit or relieve the other Party of the duties and responsibilities to maintain insurance as set forth in this Agreement.
- e. Deductibles.** Unless and to the extent that a claim is covered by an indemnity set forth in this Agreement, each Party shall be responsible for the payment of its own deductibles.

16. **Ownership; Option to Purchase.**

- a. **Ownership of System.** Throughout the Term, Seller shall be the legal and beneficial owner of the System at all times, including all Environmental Attributes, and the System shall remain the personal property of Seller and shall not attach to or be deemed a part of, or fixture to, the Facility or the Premises. Each of the Seller and Purchaser agree that the Seller is the tax owner of the System and all tax filings and reports will be filed in a manner consistent with this Agreement. The System shall at all times retain the legal status of personal property as defined under Article 9 of the Uniform Commercial Code. Purchaser covenants that it will use commercially reasonable efforts to place all parties having an interest in or a mortgage, pledge, lien, charge, security interest, encumbrance or other claim of any nature on the Facility or the Premises on notice of the ownership of the System and the legal status or classification of the System as personal property. If there is any mortgage or fixture filing against the Premises which could reasonably be construed as prospectively attaching to the System as a fixture of the Premises, Purchaser shall provide a disclaimer or release from such lienholder. If Purchaser is the fee owner of the Premises, Purchaser consents to the filing of a disclaimer of the System as a fixture of the Premises in the office where real estate records are customarily filed in the jurisdiction where the Facility is located. If Purchaser is not the fee owner, Purchaser will obtain such consent from such owner. Purchaser agrees to deliver to Seller a non-disturbance agreement in a form reasonably acceptable to Seller from the owner of the Facility (if the Facility is leased by Purchaser), any mortgage with a lien on the Premises, and other Persons holding a similar interest in the Premises.
- b. **Option to Purchase.** At the end of the sixth (6th) and tenth (10th) Contract Years and at the end of the Initial Term and each Additional Term, so long as Purchaser is not in default under this Agreement, Purchaser may purchase the System from Seller on any such date for a purchase price equal to (i) with respect to an option exercised at the end of the sixth (6th) or tenth (10th) Contract Years the *greater* of (A) the amount set forth at such time in the Purchase Option Price schedule in Exhibit 1, and (B) the Fair Market Value of the System, and (ii) with respect to an option exercised at the end of the Term or an Additional Term, the Fair Market Value of the System. The “Fair Market Value” of the System shall be determined by mutual agreement of Purchaser and Seller; provided, however, if Purchaser and Seller cannot agree to a Fair Market Value within thirty (30) days after Purchaser has exercised its option, the Parties shall select a nationally recognized independent appraiser with experience and expertise in the solar photovoltaic industry to determine the Fair Market Value of the System. Such appraiser shall act reasonably and in good faith to determine the Fair Market Value of the System on an installed basis and shall set forth such determination in a written opinion delivered to the Parties. The valuation made by the appraiser shall be binding upon the Parties in the absence of grounds for vacation of an arbitration award under Code of Civil Procedure section 1286.2. The costs of the appraisal shall be borne by the Parties equally. Purchaser must provide a notification to Seller of its intent to purchase at least ninety (90) days and not more than one hundred eighty (180) days prior to the end of the applicable Contract Year or the Initial Term or Additional Term, as applicable, and the purchase shall be complete prior to the end of the applicable Contract Year or the Initial Term or Additional Term, as applicable. Upon purchase of the System, Purchaser will assume complete responsibility for the operation and maintenance of the System and liability for the performance of the System, and Seller shall have no further liabilities or obligations hereunder.

17. **Indemnification and Limitations of Liability.**

- a. **General.** Each Party (the “Indemnifying Party”) shall defend, indemnify and hold harmless the other Party and the directors, officers, shareholders, partners, members, agents and employees of such other Party, and the respective affiliates of each thereof (collectively, the “Indemnified Parties”), from and against all loss, damage, expense, liability and other claims, including court costs and reasonable attorneys’ fees (collectively, “Liabilities”) resulting from any third party actions relating to the breach of any representation or warranty set forth in Section 14 and from injury to or death of persons, and damage to or loss of property to the extent caused by or arising out of the negligent acts or omissions of, or the willful misconduct of, the Indemnifying Party (or its contractors, agents or employees) in connection with this Agreement; provided, however, that nothing herein shall require the Indemnifying Party to indemnify the Indemnified Party for any Liabilities to the extent caused by or arising out of the negligent acts or omissions of, or the willful misconduct of, the Indemnified Party. This Section 17(a) however, shall not apply to liability arising from any form of hazardous substances or other environmental contamination, such matters being addressed exclusively by Section 17(c).
- b. **Notice and Participation in Third Party Claims.** The Indemnified Party shall give the Indemnifying Party written notice with respect to any Liability asserted by a third party (a “Claim”), as soon as possible upon the receipt of information of any possible Claim or of the commencement of such Claim. The Indemnifying Party may assume the defense of any Claim, at its sole cost and expense, with counsel designated by the Indemnifying Party, to include the City Attorney’s Office in the event the Purchaser is the Indemnifying Party, and reasonably satisfactory to the

Indemnified Party. The Indemnified Party may, however, select separate counsel if both Parties are defendants in the Claim and such defense or other form of participation is not reasonably available to the Indemnifying Party. The Indemnifying Party shall pay the reasonable attorneys' fees incurred by such separate counsel until such time as the need for separate counsel expires. The Indemnified Party may also, at the sole cost and expense of the Indemnifying Party, assume the defense of any Claim if the Indemnifying Party fails to assume the defense of the Claim within a reasonable time. Neither Party shall settle any Claim covered by this Section 17(b) unless it has obtained the prior written consent of the other Party, which consent shall not be unreasonably withheld or delayed. The Indemnifying Party shall have no liability under this Section 17(b) for any Claim for which such notice is not provided if that the failure to give notice prejudices the Indemnifying Party.

c. **Environmental Indemnification.** Seller shall indemnify, defend and hold harmless all of Purchaser's Indemnified Parties from and against all Liabilities arising out of or relating to the existence at, on, above, below or near the License Area of any Hazardous Substance (as defined in Section 17(c)(i)) to the extent deposited, spilled or otherwise caused by Seller or any of its contractors or agents. Purchaser shall indemnify, defend and hold harmless all of Seller's Indemnified Parties from and against all Liabilities arising out of or relating to the existence at, on, above, below or near the Premises of any Hazardous Substance, except to the extent deposited, spilled or otherwise caused by Seller or any of its contractors or agents. Each Party shall promptly notify the other Party if it becomes aware of any Hazardous Substance on or about the License Area or the Premises generally or any deposit, spill or release of any Hazardous Substance.

i. **"Hazardous Substance"** means any chemical, waste or other substance (a) which now or hereafter becomes defined as or included in the definition of "hazardous substances," "hazardous wastes," "hazardous materials," "extremely hazardous wastes," "restricted hazardous wastes," "toxic substances," "toxic pollutants," "pollution," "pollutants," "regulated substances," or words of similar import under any laws pertaining to the environment, health, safety or welfare, (b) which is declared to be hazardous, toxic, or polluting by any Governmental Authority, (c) exposure to which is now or hereafter prohibited, limited or regulated by any Governmental Authority, (d) the storage, use, handling, disposal or release of which is restricted or regulated by any Governmental Authority, or (e) for which remediation or cleanup is required by any Governmental Authority.

d. **Limitations on Liability.**

i. **No Consequential Damages.** Neither Party nor its directors, officers, shareholders, partners, members, agents and employees subcontractors or suppliers shall be liable for any indirect, special, incidental, exemplary, or consequential loss or damage of any nature arising out of their performance or non-performance hereunder even if advised of such.

ii. **Actual Damages.** Seller's aggregate liability under this Agreement arising out of or in connection with the performance or non-performance of this Agreement shall not exceed the *lesser* of (A) the total payments made by Purchaser under this Agreement as of the date that the events that first gave rise to such liability occurred; and (B) the total of the prior twelve (12) monthly payments preceding the date that the events that first gave rise to such liability occurred. The provisions of this Section (17)(d)(ii) shall apply whether such liability arises in contract, tort (including negligence), strict liability or otherwise. Any action against either party must be brought within two (2) years after the cause of action accrues.

18. **Force Majeure.**

a. **"Force Majeure Event"** means any act or event that prevents the affected Party from performing its obligations in accordance with the Agreement, if such act or event is beyond the reasonable control, and not the result of the fault or negligence, of the affected Party and such Party had been unable to overcome such act or event with the exercise of due diligence (including the expenditure of reasonable sums). Subject to the foregoing conditions, "Force Majeure Event" shall include without limitation the following acts or events: (i) natural phenomena, such as storms, hurricanes, floods, lightning, volcanic eruptions and earthquakes; (ii) explosions or fires arising from lightning or other causes unrelated to the acts or omissions of the Party seeking to be excused from performance; (iii) acts of war or public disorders, civil disturbances, riots, insurrection, sabotage, epidemic, terrorist acts, or rebellion; (iv) strikes or labor disputes (except strikes or labor disputes caused solely by employees of the Provider or as a result of such party's failure to comply with a collective bargaining agreement); (v) action by a Governmental Authority, including a moratorium on any activities related to the Agreement; and (vi) the inability for one of the Parties, despite its reasonable efforts, to obtain, in a timely manner, any Governmental Approval necessary to enable the affected Party to fulfill its obligations in accordance with the Agreement, provided that the delay or non-obtaining of such

Governmental Approval is not attributable to the Party in question and that such Party has exercised its reasonable efforts to obtain such Permit.

A Force Majeure Event shall not be based on the economic hardship of either Party, except as described in the following paragraph. Due to the constitutional limitations on cities pertaining to multiple year contracts, a Force Majeure event shall include a "budget non-appropriation event" in which the City's appropriation for any year covered in this Agreement does not appropriate funds for the procurement of any utility services for City. During the continuation of a budget non-appropriation event as defined above, if the City does not otherwise have other funds available to make payments otherwise due on this Agreement, the City shall not be obligated to pay for (and the Seller shall not be required to deliver) electric energy provided under this Agreement until the budget non-appropriation event has terminated. City agrees that it shall use its best efforts to seek appropriation for utility services during the term of this Agreement. If a budget non-appropriation event continues for more than 180 days, Seller (but not Purchaser) may terminate this Agreement.

- b. **Excused Performance.** Except as otherwise specifically provided in the Agreement, neither Party shall be considered in breach of the Agreement or liable for any delay or failure to comply with the Agreement (other than the failure to pay amounts due hereunder), if and to the extent that such delay or failure is attributable to the occurrence of a Force Majeure Event; provided that the Party claiming relief under this Section 10 shall immediately (i) notify the other Party in writing of the existence of the Force Majeure Event, (ii) exercise all reasonable efforts necessary to minimize delay caused by such Force Majeure Event, (iii) notify the other Party in writing of the cessation or termination of said Force Majeure Event and (iv) resume performance of its obligations hereunder as soon as practicable thereafter; provided, however, that Purchaser shall not be excused from making any payments and paying any unpaid amounts due in respect of Solar Services delivered to Purchaser prior to the Force Majeure Event performance interruption.
- c. **Termination in Consequence of Force Majeure Event.** If a Force Majeure Event shall have occurred that has affected Seller's performance of its obligations hereunder and that has continued for a continuous period of one hundred eighty (180) days, then Purchaser shall be entitled to terminate the Agreement upon ninety (90) days' prior written notice to Seller. If at the end of such ninety (90) day period such Force Majeure Event shall still continue, the Agreement shall automatically terminate. Upon such termination for a Force Majeure Event, neither Party shall have any liability to the other (other than any such liabilities that have accrued prior to such termination), and the provisions of Section 2.2 (Early Termination) shall be inapplicable."

19. **Assignment and Financing.**

- a. **Assignment.** This Agreement may not be assigned in whole or in part by either Party without the prior written consent of the other Party, which consent shall not be unreasonably withheld or delayed. Notwithstanding the foregoing, Seller may, without the prior written consent of Purchaser, (i) assign, mortgage, pledge or otherwise collaterally assign its interests in this Agreement to any Financing Party, (ii) directly or indirectly assign this Agreement to an affiliate of Seller, (iii) assign this Agreement to any entity through which Seller is obtaining financing or capital for the System and (iv) assign this Agreement to any person succeeding to all or substantially all of the assets of Seller (provided that Seller shall be released from liability hereunder as a result of any of the foregoing permitted assignments only upon assumption of Seller's obligations hereunder by the assignee). Purchaser's consent to any other assignment shall not be unreasonably withheld if Purchaser has been provided with reasonable proof that the proposed assignee (x) has comparable experience in operating and maintaining photovoltaic solar systems comparable to the System and providing services comparable to those contemplated by this Agreement and (y) has the financial capability to maintain the System and provide the services contemplated by this Agreement in the manner required by this Agreement. This Agreement shall be binding on and inure to the benefit of the successors and permitted assignees.
- b. **Financing.** The Parties acknowledge that Seller may obtain construction and long-term financing or other credit support from lenders or third parties ("**Financing Parties**") in connection with the installation, construction, ownership, operation and maintenance of the System. Both Parties agree in good faith to consider and to negotiate changes or additions to this Agreement that may be reasonably requested by the Financing Parties; provided, that such changes do not alter the fundamental economic terms of this Agreement. The Parties also agree that Seller may assign this Agreement to the Financing Parties as collateral, and in connection with any such assignment, Purchaser agrees to execute a consent to assignment in customary form and reasonably acceptable to the Financing Parties.

20. Contractor Information.

- a. All proprietary and other information received from Seller by Purchaser, whether received in connection with Seller's proposal to Purchaser or in connection with any services performed by Seller, will be disclosed upon receipt of a request for disclosure, pursuant to the California Public Records Act; provided, however, that, if any information is set apart and clearly marked "trade secret" or "confidential" or otherwise indicated as such to Purchaser when it is provided to Purchaser, Purchaser shall give notice to Seller of any request for the disclosure of such information. The Seller shall then have five (5) days from the date it receives such notice to enter into an agreement with the Purchaser, satisfactory to the City Attorney, providing for the defense of, and complete indemnification and reimbursement for all costs (including plaintiff's attorney fees) incurred by Purchaser in any legal action to compel the disclosure of such information under the California Public Records Act. If Purchaser and Seller enter into such an agreement, Purchaser shall not disclose the requested information or documents. The Seller shall have sole responsibility for defense of the actual "trade secret" or "confidential" designation of such information.
- b. The parties understand and agree that any failure by Seller to respond to the notice provided by Purchaser and/or to enter into an agreement with Purchaser, in accordance with the provisions of subsection a, above, shall constitute a complete waiver by Seller of any rights regarding the information designated "trade secret" or "confidential" by Seller, and such information shall be disclosed by Purchaser pursuant to applicable procedures required by the Public Records Act.

- 21. Goodwill and Publicity.** Neither Party shall use any name, trade name, service mark or trademark of the other Party in any promotional or advertising material without the prior written consent of such other Party. The Parties shall coordinate and cooperate with each other when making public announcements related to the execution and existence of this Agreement, and each Party shall have the right to promptly review, comment upon and approve any publicity materials, press releases or other public statements by the other Party that refer to, or that describe any aspect of, this Agreement. Neither Party shall make any press release or public announcement of the specific terms of this Agreement (except for filings or other statements or releases as may be required by applicable law) without the specific prior written consent of the other Party. Without limiting the generality of the foregoing, all public statements must accurately reflect the rights and obligations of the Parties under this Agreement, including the ownership of Environmental Attributes and Environmental Incentives and any related reporting rights.

22. General Provisions

- a. **Choice of Law.** The law of the state where the System is located shall govern this Agreement without giving effect to conflict of laws principles.
- b. **Arbitration and Attorneys' Fees.** Any dispute arising from or relating to this Agreement shall be arbitrated in Sacramento, California. The arbitration shall be administered by JAMS in accordance with its Comprehensive Arbitration Rules and Procedures, and judgment on any award may be entered in any court of competent jurisdiction. If the Parties agree, a mediator may be consulted prior to arbitration. The prevailing party in any dispute arising out of this Agreement shall be entitled to reasonable attorneys' fees and costs.
- c. **Notices.** All notices under this Agreement shall be in writing and shall be by personal delivery, facsimile transmission, electronic mail, overnight courier, or regular, certified, or registered mail, return receipt requested, and deemed received upon personal delivery, acknowledgment of receipt of electronic transmission, the promised delivery date after deposit with overnight courier, or five (5) days after deposit in the mail. Notices shall be sent to the person identified in this Agreement at the addresses set forth in this Agreement or such other address as either party may specify in writing. Each party shall deem a document faxed, emailed or electronically sent in PDF form to it as an original document.
- d. **Survival.** Provisions of this Agreement that should reasonably be considered to survive termination of this Agreement shall survive. For the avoidance of doubt, surviving provisions shall include, without limitation, Section 14 (Representations and Warranties), Section 7(h) (No Warranty), Section 15(b) (Insurance Coverage), Section 17 (Indemnification and Limits of Liability), Section 20 (Confidentiality and Publicity), Section 22(a) (Choice of Law), Section 22 (b) (Arbitration and Attorneys' Fees), Section 22(c) (Notices), Section 22 (g) (Comparative Negligence), Section 22(h) (Non-Dedication of Facilities), Section 22(j) (Service Contract), Section 22(k) (No Partnership), Section 22(l) (Full Agreement, Modification, Invalidity, Counterparts, Captions) and Section 22(n) (No Third Party Beneficiaries).

- e. **Further Assurances.** Each of the Parties hereto agree to provide such information, execute and deliver any instruments and documents and to take such other actions as may be necessary or reasonably requested by the other Party which are not inconsistent with the provisions of this Agreement and which do not involve the assumptions of obligations other than those provided for in this Agreement, to give full effect to this Agreement and to carry out the intent of this Agreement.
- f. **Right of Waiver.** Each Party, in its sole discretion, shall have the right to waive, defer or reduce any of the requirements to which the other Party is subject under this Agreement at any time; provided, however that neither Party shall be deemed to have waived, deferred or reduced any such requirements unless such action is in writing and signed by the waiving Party. No waiver will be implied by any usage of trade, course of dealing or course of performance. A Party's exercise of any rights hereunder shall apply only to such requirements and on such occasions as such Party may specify and shall in no event relieve the other Party of any requirements or other obligations not so specified. No failure of either Party to enforce any term of this Agreement will be deemed to be a waiver. No exercise of any right or remedy under this Agreement by Purchaser or Seller shall constitute a waiver of any other right or remedy contained or provided by law. Any delay or failure of a Party to exercise, or any partial exercise of, its rights and remedies under this Agreement shall not operate to limit or otherwise affect such rights or remedies. Any waiver of performance under this Agreement shall be limited to the specific performance waived and shall not, unless otherwise expressly stated in writing, constitute a continuous waiver or a waiver of future performance.
- g. **Comparative Negligence.** It is the intent of the Parties that where negligence is determined to have been joint, contributory or concurrent, each Party shall bear the proportionate cost of any Liability.
- h. **Non-Dedication of Facilities.** Nothing herein shall be construed as the dedication by either Party of its facilities or equipment to the public or any part thereof. Neither Party shall knowingly take any action that would subject the other Party, or other Party's facilities or equipment, to the jurisdiction of any Governmental Authority as a public utility or similar entity. Neither Party shall assert in any proceeding before a court or regulatory body that the other Party is a public utility by virtue of such other Party's performance under this agreement. If Seller is reasonably likely to become subject to regulation as a public utility, then the Parties shall use all reasonable efforts to restructure their relationship under this Agreement in a manner that preserves their relative economic interests while ensuring that Seller does not become subject to any such regulation. If the Parties are unable to agree upon such restructuring, Seller shall have the right to terminate this Agreement without further liability, and Seller shall remove the System in accordance with Section 11 of this Agreement.
- i. **Estoppel.** Either Party hereto, without charge, at any time and from time to time, within five (5) business days after receipt of a written request by the other party hereto, shall deliver a written instrument, duly executed, certifying to such requesting party, or any other person specified by such requesting Party: (i) that this Agreement is unmodified and in full force and effect, or if there has been any modification, that the same is in full force and effect as so modified, and identifying any such modification; (ii) whether or not to the knowledge of any such party there are then existing any offsets or defenses in favor of such party against enforcement of any of the terms, covenants and conditions of this Agreement and, if so, specifying the same and also whether or not to the knowledge of such party the other party has observed and performed all of the terms, covenants and conditions on its part to be observed and performed, and if not, specifying the same; and (iii) such other information as may be reasonably requested by the requesting Party. Any written instrument given hereunder may be relied upon by the recipient of such instrument, except to the extent the recipient has actual knowledge of facts contained in the certificate.
- j. **Service Contract.** The Parties intend this Agreement to be a "service contract" within the meaning of Section 7701(e)(3) of the Internal Revenue Code of 1986. Purchaser will not take the position on any tax return or in any other filings suggesting that it is anything other than a purchase of electricity from the System.
- k. **No Partnership.** No provision of this Agreement shall be construed or represented as creating a partnership, trust, joint venture, fiduciary or any similar relationship between the Parties. No Party is authorized to act on behalf of the other Party, and neither shall be considered the agent of the other.
- l. **Full Agreement, Modification, Invalidity, Counterparts, Captions.** This Agreement, together with any Exhibits, completely and exclusively states the agreement of the parties regarding its subject matter and supersedes all prior proposals, agreements, or other communications between the parties, oral or written, regarding its subject matter. This Agreement may be modified only by a writing signed by both Parties, and any such modification must not violate Purchaser's Master Lease Program or jeopardize the tax-exempt status of bonds issued through that program. If any provision of this Agreement is found unenforceable or invalid, such unenforceability or invalidity shall not

render this Agreement unenforceable or invalid as a whole. In such event, such provision shall be changed and interpreted so as to best accomplish the objectives of such unenforceable or invalid provision within the limits of applicable law. This Agreement may be executed in any number of separate counterparts and each counterpart shall be considered an original and together shall comprise the same Agreement. The captions or headings in this Agreement are strictly for convenience and shall not be considered in interpreting this Agreement.

- m. **Forward Contract.** The transaction contemplated under this Agreement constitutes a “forward contract” within the meaning of the United States Bankruptcy Code, and the Parties further acknowledge and agree that each Party is a “forward contract merchant” within the meaning of the United States Bankruptcy Code.
- n. **No Third Party Beneficiaries.** Except as otherwise expressly provided herein, this Agreement and all rights hereunder are intended for the sole benefit of the Parties hereto and shall not imply or create any rights on the part of, or obligations to, any other Person.

Exhibit 5

RECORDING REQUESTED BY)
AND)
WHEN RECORDED, MAIL TO:)
)
SolarCity Corporation)
393 Vintage Park Drive, Suite 140)
Foster City, CA 94404)
Attn: General Counsel)
Facsimile (650) 560-6182)
Email: contracts@solarcity.com)

(Space Above This Line for Recorder's Use)

NON-DISTURBANCE AGREEMENT (LENDER)

The undersigned ("Lender") acknowledges that, [Customer Company Name] (the "Host") will be benefited by entering into a power purchase agreement with SolarCity Corporation, a Delaware corporation ("SolarCity"), pursuant to which SolarCity will install its solar power generation system, including photovoltaic panels, racks, wiring and other electrical devices, conduit, weatherproof housings, hardware, inverter(s), remote monitoring system, connectors, disconnects and overcurrent devices (collectively the "PV System"), on the real property described on Exhibit A hereto (the "Premises"), for the purpose of generating power and selling it to the Host and granted a license to enter on the Premises and install, construct, own, operate, maintain, access, remove and replace the PV System (the "License"). As an inducement to SolarCity to install its PV System on the Premises and sell power generated by such PV System to the Host, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the undersigned hereby agrees, waives and undertakes as follows:

1. The PV System shall not be, or be deemed to be, a part of or an accession or addition to or a fixture on the Premises even though the PV System is installed on the Premises; nor shall the PV System be moved from the Premises by the undersigned unless SolarCity's prior written consent to such move has been obtained.
2. The undersigned waives any and all right, title and interest in the PV System and shall not acquire any such right title or interest by virtue of the installation of the PV System on the Premises. The undersigned further waives any right to seize, or to claim any interest, whatsoever in the PV System on account of any claim or right the undersigned may have against any person, including, without limitation, any claim or right the undersigned may have or assert against the Host, by levy of distraint or otherwise; *provided, however*, to the extent that the undersigned forecloses on the Premises, receives a deed in lieu of foreclosure or otherwise becomes the owner of the Premises (and has provided written notification of the same to SolarCity pursuant to Section 6 below), the undersigned or the successful bidder at a foreclosure sale may request in writing that SolarCity remove the PV System. SolarCity shall commence such removal within thirty (30) days of receipt of such notification and shall use commercially reasonable efforts to complete such removal within a commercially reasonable period of time. If SolarCity does not commence removal within such thirty (30) day period, the undersigned may itself remove the PV System, using the degree of care it would use if the PV System was its own property, at SolarCity's cost and expense for all documented reasonable costs incurred.
3. SolarCity may at any time, at its option, enter upon the Premises and inspect, maintain, remove or repair the PV System, sell the PV System while it is installed on the Premises, by auction or otherwise (for the avoidance of doubt, such auction shall not be held on the Premises), or remove the PV System at its sole cost and expense, and SolarCity by its acceptance hereof agrees to make such repairs following any such removal to the extent reasonably necessary to restore the Premises to its condition immediately prior to such removal.
4. All of the terms and conditions of this waiver shall run with the land and be binding upon and benefit the heirs, devisees, personal representatives, successors, assigns or encumbrancers of the undersigned and shall inure to the benefit of SolarCity, its successors and assigns. As used herein the term "Host" shall include the heirs, devisees, personal representatives, successors and assigns of the Host.
5. In the event of any foreclosure, trustee's sale, conveyance in lieu of foreclosure, eviction or other transaction that results in Host surrendering or losing its right to occupy and enjoy the Premises, SolarCity's rights and interests under the License shall not be affected or impaired thereby and the License shall continue in effect in accordance with its terms.

6. When sending to Host any notice of impending or actual foreclosure of the Premises, the undersigned shall concurrently provide SolarCity a copy of the same.

7. This agreement may be executed in any number of separate counterparts. Each counterpart shall be deemed an original.

Executed this ____ day of _____, _____.

Lender: [Lender/MortgageHolder/Company Name]

By: _____

Host: [Customer Company Name]

By: _____

Accepted by:

SolarCity Corporation

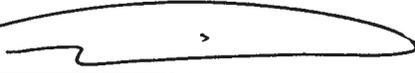
By:  _____

Exhibit A

The Premises

A PARCEL OF LAND LOCATED IN THE STATE OF CALIFORNIA, COUNTY OF SACRAMENTO, WITH A SITUS ADDRESS OF 2812 MEADOWVIEW RD, SACRAMENTO, CA 95832-1441 CURRENTLY OWNED BY CITY OF SACRAMENTO HAVING A TAX ASSESSOR NUMBER OF 053-0010-065-0000 AND BEING THE SAME PROPERTY MORE FULLY DESCRIBED AS POR SEC 7, T7N, R5E, M.D.B. & M. DES AS: BEG AT A PT LOC N89°20'37E 1969.33', & S00°17'35E 40' FR THE NW COR OF SD SEC, TH FR SD P.O.B. N89°20'37E 455.05'; TH S00°55'32E 465.56'; TH S89°04'28W 38'; TH S00°55'32E 20.50'; TH S89°20'37W 422.41'; TH N00°17'35W 486.24' TO THE P.O.B. CONTG 5.0915 AC AND DESCRIBED IN DOCUMENT NUMBER 30430-2939 DATED 04/03/2003 AND RECORDED 04/30/2003.



Requires Council Approval: No YES Meeting:

Real Estate Other Party Signature Needed Recording Requested

General Information

Type: Select Contract Type	PO Type: Select PO Type	Attachment: Original No.:
\$ Not to Exceed: \$		Original Doc Number:
Other Party: SolarCity		Certified Copies of Document:: 1
Project Name: Solar Power Purchase Agreement		Deed: <input checked="" type="checkbox"/> None <input type="checkbox"/> Included <input type="checkbox"/> Separate
Project Number:	Bid Transaction #:	E/SBE-DBE-M/WBE:

Department Information

Department: General Services Division: Office of the Director
 Project Mgr: Yvette Rincon Supervisor: Reina Schwartz
 Contract Services: Date: Division Mgr:
 Phone Number: 808-5827 Org Number:
 Comment:

Review and Signature Routing

Department	Signature or Initial	Date
Project Mgr:	<i>YR</i>	3/22/11
Accounting:		
Contract Services:		
Supervisor:		
Division Manager:		

City Attorney	Signature or Initial	Date
City Attorney:	<i>VCS</i>	3/22/11

Send Interoffice Mail Notify for Pick Up

Authorization	Signature or Initial	Date
Choose Director		
Department Director:		
City Mgr: yes <input type="checkbox"/> No <input type="checkbox"/>		

Contract Cover/Routing Form: Must Accompany ALL Contracts; however, is not part of the contract. (01-01-09)

For City Clerk Processing	
Finalized:	<div style="border: 1px solid black; width: 100%; height: 100%;"></div>
Initial:	
Date:	
Imaged:	
Initial:	
Date:	
Received:	
<small>(City Clerk Stamp Here)</small>	

CITY OF SACRAMENTO

AGREEMENT TO PAY EXPENSES FOR ADMINISTRATION OF PURCHASE POWER AGREEMENT

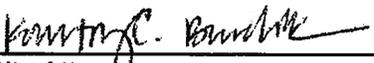
THIS AGREEMENT is made at Sacramento, California, as of MARCH 21, 2011, by and between the City of Sacramento, a municipal corporation ("City"), and SolarCity, a corporation ("SolarCity").

City and SolarCity agree as follows:

1. SolarCity will reimburse the City of Sacramento (the "City") for the City's documented reasonable staffing costs directly associated with the administration of the Solar Power Purchase Agreements, entered into between City and SolarCity on MARCH 21, 2011, including but not limited to: environmental review, design review, project management, construction management and quality control inspections. This reimbursement will be capped at an amount equal to \$ 0.14 per Watt-DC of each Site System (each a "Site System Cap") installed as part of the project. The overall cap for the project will be the aggregate total of each Site System Cap. The \$0.14 cap applies to the project as a whole, not each site. It is understood that the City may spend more time on some sites than others, exceeding the pro-rata amount of the cap on a particular site, but in total not exceeding the overall cap on the overall project. The City will invoice SolarCity for these amounts at the end of each quarter of the City's fiscal year. The fiscal quarters are, July-September, October-December, January- March and April-June. SolarCity shall pay the full undisputed amount of the invoice within 30 days of the billing date. SolarCity shall pay the City interest on any payment which is received by the City more than 30 days after the billing date (for the avoidance of doubt, not to include any amount disputed in good faith). Said interest shall be paid per Civil Code sec. 3289 and shall begin to accrue upon the expiration of said 30 day period.
2. The above reimbursement does not include building permit fees. SolarCity will be required to obtain and pay for building permits from the appropriate agencies.
3. SolarCity represents and warrants that (a) it has full power and authority to enter into this agreement and perform its obligations hereunder, (b) its execution, delivery and performance of this agreement has been duly authorized by all necessary action on its part, and (c) this agreement constitutes the valid and binding obligation of SolarCity, enforceable against SolarCity in accordance with its terms.
4. SolarCity may not pledge, transfer or assign this agreement or any of its rights or obligations hereunder without the prior written consent of the City in each instance.
5. Each payment pursuant to this agreement will be paid in U.S. Dollars in immediately available funds, and without any claim, offset or reduction of any kind whatsoever, by check made payable to City of Sacramento.
6. In the event of any litigation resulting from any dispute between the parties relating to this agreement, both parties agree that the other party will pay the prevailing parties' reasonable legal fees and expenses incurred in connection therewith.
7. No attempted modification or waiver of any of the provisions hereof shall be binding on either party unless in writing and signed by both SolarCity and the City.

8. It is the intention of the parties hereto that all questions with respect to the construction and performance of this agreement and the rights and liabilities of the parties hereto shall be determined in accordance with the laws of the State of California.
9. Any dispute arising from or relating to this MSA shall be resolved by neutral, binding arbitration in Sacramento, California. The arbitration shall be administered by JAMS in accordance with its Comprehensive Arbitration Rules and Procedures, and judgment on any award may be entered in any court of competent jurisdiction. The prevailing party in any dispute arising out of this MSA shall be entitled to reasonable attorneys' fees and costs.
10. This agreement and all provisions contained herein shall be binding upon, inure to the benefit of and be enforceable by and against each party's respective successors and permitted assigns to the same extent as if any such successor or permitted assign were named as a party.
11. This agreement may be executed in counterparts, each of which shall be deemed to be an original hereof, but all of which together shall constitute one and the same instrument.

Executed as of the day and year first above stated.

<p>SOLAR CITY A Corporation</p> <p>By: <u></u></p> <p><u>DAVID WHITE / CFO</u> Print Name and Title</p> <div style="border: 1px solid black; padding: 5px; margin-top: 10px;"> <p>LEGAL APPROVAL</p> <p>INITIAL <u></u></p> <p>DATE <u>3/21/11</u></p> <p></p> </div>	<p>CITY OF SACRAMENTO A Municipal Corporation</p> <p>By: _____</p> <p>_____ Print Name and Title</p> <p>APPROVED AS TO FORM:</p> <p><u></u> City Attorney</p> <p>ATTEST:</p> <p>_____ City Attorney Clerk</p>
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