

VALLEY CLEAN ENERGY ALLIANCE

Staff Report – Item 14

TO: Board of Directors

FROM: Mitch Sears, Interim General Manager
Gordon Samuel, Assistant General Manager & Director of Power Services

SUBJECT: First Amendment to the Westlands Solar Park Power Purchase Agreement

DATE: April 8, 2021

RECOMMENDATION

Authorize the Interim General Manager to execute the first amendment to the Westlands Solar Park Power Purchase Agreement (PPA) modifying force majeure and liability provisions.

BACKGROUND

In February 2020, Valley Clean Energy Alliance (VCE) entered into a fifteen (15) year PPA with Aquamarine Westside LLC for 50 MW ac of output from the Aquamarine Solar photovoltaic project located in Kings County, California. The project is currently under construction and is anticipated to be on-line in the third quarter of 2021. VCE has contracted for 50 MW of output from the larger 250 MW Westlands Solar Park facility.

ANALYSIS

As the developer finalizes its short-term and long-term financing for the overall facility, the project's lenders have asked for several modifications to the PPA. The material aspects of the requested amendments relate to (1) force majeure and (2) buyer (VCE) liability.

Force Majeure

Generally, a force majeure provision in a PPA contract relates to uncontrollable events (such as natural disasters), that are not the fault of any party and that make it difficult or impossible to carry out certain contract provisions typically related to project construction.

The developer's lenders have requested that the force majeure language in the PPA be updated to reflect what is more customarily seen in the market today. In response, with concurrence from VCE's outside PPA legal counsel (Keyes & Fox), staff offered force majeure replacement language from the recent PPA approved by the Board in January 2021. The developer's lenders have accepted this language and staff and legal counsel are comfortable that this approach maintains needed protections for VCE. An added benefit of this approach to VCE would be that it provides consistency between several of VCE's PPAs.

Buyers Liability

The second material change in the recommended amendment relates to uncapping damages that VCE could be exposed to while the developer completes construction of the overall 250 MW facility. To obtain loans to complete construction of the Westlands Solar Park facility, of which the VCE Aquamarine project is a part, the developer's lenders have asked for a short-term removal of the cap on VCE's liability in the event VCE defaults under the PPA; the requested term for removal of the cap is through March 2022 or when the financing for the overall project is complete, whichever occurs first. The request also seeks to modify how the developer's "losses" will be determined in such an event. Although this would expose VCE to increased liability¹ should VCE default under the PPA for up to approximately one year (to March 2022), staff believes the risk of default is extremely low due to the following factors:

- VCE has very few performance obligations under the PPA prior to the project achieving commercial operation, as the project will still be under construction and will not be delivering more than a *de minimis* amount of energy to VCE until approximately September 2021.
- When the Aquamarine project achieves commercial operation, VCE's energy deliveries will increase. The term of the liability waiver will, however, end in March 2022.
- VCE's obligations under the contract are largely limited to making timely payment for delivered energy, which VCE intends to do.
- Staff does not foresee any likelihood of VCE being unable to make payments on invoices that may become due between the November 2021 timeframe, when the first invoice for delivered energy would likely become payable, and March 2022 when the cap on liability is reinstated.

Additionally, as negotiated by staff, after March 2022, the cap on damages reverts back to the original capped amount. In exchange for agreeing to this proposed amendment, the developer has agreed to remove an April 2021 deadline from the contract by which time VCE would have had to make an election of obtaining a credit rating, posting collateral or paying a higher price for the 15-year term of the agreement. This amendment removes the April 2021 date, and if at any point during the 15-year term of this agreement VCE elects to post collateral or obtains a credit rating, the contract price will adjust to a lower amount representing an approximately 7%% reduction in price/kWh. Staff believes that it is likely that VCE will be able to meet one or both of these scenarios in the future to achieve the lower price, which results in a benefit for VCE's customers.

¹ As with the original PPA contract for the Aquamarine Solar project approved by the VCE Board in February 2020, certain contract business terms in the proposed Amendment 1 are treated as confidential to maintain VCE's ability to successfully negotiate future power contracts and to protect the counterparty's trade secrets, among other reasons. These confidential business terms include, but are not limited to, contracted energy price and buyer/seller liability amounts. VCE, in consultation with SMUD and outside legal counsel, negotiates these terms using best industry practices and available market data to optimize customer value and manage risk. Aside from the terms outlined above, the existing terms of the PPA remain unchanged.

Based on the limited risk profile outlined above and the consideration agreed to by the developer, staff, in consultation with outside PPA legal counsel, believe the proposed amendments are reasonable.

CONCLUSION

Staff is recommending that the Board approve the attached resolution authorizing the Interim General Manager to execute the first amendment.

ATTACHMENTS

1. First Amendment to Power Purchase Agreement
2. Redlines Showing first Amendment to Westlands Solar Park Power Purchase Agreement
3. Resolution

FIRST AMENDMENT TO POWER PURCHASE AGREEMENT

This First Amendment to the Westlands Solar Park Power Purchase Agreement (this “*First Amendment*”), dated as of [] (the “**Amendment Date**”), is made and entered into by and among Aquamarine Westside, LLC, a Delaware limited liability company (“*Seller*”) and Valley Clean Energy Alliance, a California Joint Powers Authority (“*Buyer*”). Seller and Buyer are each referred to as a “*Party*” and collectively referred to as the “*Parties*.” Capitalized terms used but not defined in this First Amendment shall have the meanings given to such terms in the PPA (as hereinafter defined).

WHEREAS, Seller and Buyer have entered into, and desire to amend as set forth below, that certain Westlands Solar Park Power Purchase Agreement dated as of February 14, 2020 (the “*PPA*”);

WHEREAS, the Parties desire to amend certain matters as more specifically set forth in this First Amendment.

NOW, THEREFORE, in consideration of the mutual promises and covenants set forth herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

1. **Amendments to the PPA.** Notwithstanding anything to the contrary in the PPA, the Parties agree that the following amendments to the PPA are made effective as of the Amendment Date:

(a) The definition of “Force Majeure Event” appearing in Section 1.1 of the PPA is hereby deleted and replaced with the following:

“*Force Majeure Event*” means:

(a) any act or event that delays or prevents a Party from timely performing all or a portion of its obligations under this Agreement or from complying with all or a portion of the conditions under this Agreement if such act or event, despite the exercise of reasonable efforts, cannot be avoided by and is beyond the reasonable control (whether direct or indirect) of and without the fault or negligence of the Party relying thereon as justification for such delay, nonperformance, or noncompliance.

(b) Without limiting the generality of the foregoing, so long as the following events, despite the exercise of reasonable efforts, cannot be avoided by, and are beyond the reasonable control (whether direct or indirect) of and without the fault or negligence of the Party relying thereon as justification for such delay, nonperformance or noncompliance, a Force Majeure Event may include an act of God or the elements, such as flooding, lightning, hurricanes, tornadoes, or ice storms; explosion; fire; volcanic eruption; flood; epidemic; landslide; mudslide; sabotage; terrorism; earthquake; or other cataclysmic events; an act of public enemy; war; blockade; civil insurrection; riot; civil disturbance; or strikes or other labor difficulties caused or suffered by a Party or any third party except as set forth below.

(c) Notwithstanding the foregoing, the term “*Force Majeure Event*” does not include (i) economic conditions or changes in Law that render a Party’s performance of this Agreement at the Contract Price unprofitable or otherwise uneconomic (including an increase in component or compliance costs for any reason, including foreign or domestic tariffs, Buyer’s ability to buy Product at a lower price, or Seller’s ability to sell the Product, or any component thereof, at a higher price, than under this Agreement); (ii) Seller’s inability to obtain permits or approvals of any type for the construction, operation, or maintenance of the Facility, except to the extent such inability is caused by a Force Majeure Event; (iii) the inability of a Party to make payments when due under this Agreement, unless the cause of such inability is an event that would otherwise constitute a Force Majeure Event as described above; (iv) a Buyer Curtailment Order, except to the extent such Curtailment Period is caused by a Force Majeure Event; (v) Seller’s inability to obtain sufficient labor, equipment, materials, or other resources to build or operate the Facility, including the lack of wind, sun or other fuel source of an inherently intermittent nature, except to the extent such inability is caused by a Force Majeure Event; (vi) a strike, work stoppage or labor dispute limited only to any one or more of Seller, Seller’s Affiliates, Seller’s contractors, their subcontractors thereof or any other third party employed by Seller to work on the Facility; (vii) any equipment failure, except if such equipment failure is caused by a Force Majeure Event; or (viii) any action or inaction by any third party, including Transmission Provider, that delays or prevents the approval, construction or placement in service of any of Seller’s Interconnection Facilities, except to the extent caused by a Force Majeure Event.

(b) The following shall be added as new definitions to Section 1.1 of the PPA:

“*Final TE Contribution Date*” means the date that is the earlier of (i) the date that the Tax Equity Investor has made its final equity capital contribution in connection with the completion of construction of the Facility and (ii) March 31, 2022.”

(c) The PPA shall be amended by adding the following as a new Section 2.6(c):

“(c) Seller shall provide notice to Buyer of the Final TE Contribution Date within five (5) Business Days after the occurrence of the Final TE Contribution Date.”

(d) Section 2.5(f) of the PPA is hereby amended by adding after “October 30, 2021” the following phrase: “after giving effect to all Permitted Extensions and which shall be extended, on a day-for-day basis, for every [REDACTED] that Seller pays to Buyer as Daily Delay Damages pursuant to Section 2.5(e)” at the end thereof.

(e) The definition of “*Losses*” appearing in Section 1.1 of the PPA is hereby amended by deleting the last sentence of such definition in its entirety.

(f) Section 2.10(d)(i) of the PPA is hereby amended by adding the phrase “or IDS” immediately after “FCDS”.

(g) Section 3.4(c)(i) of the PPA is hereby amended by deleting the following phrase in its entirety, “which shall in no event”, and inserting the phrase, “which in the case of an Event of Default occurring on or after the Final TE Contribution Date shall not” in lieu thereof.

(h) Section 5.4(a) of the PPA is hereby amended by deleting the phrase “, on or before April 21, 2021,”.

(i) Exhibit B to the PPA is hereby amended and restated by deleting Exhibit B in its entirety and replacing it with Annex I attached hereto.¹

(j) Section 8.5 of the PPA is hereby deleted and replaced with the following:

“8.5 ***Force Majeure.***

(a) No Liability If a Force Majeure Event Occurs. Except as provided in Section 8.5(c), neither Seller nor Buyer shall be liable to the other Party in the event it is prevented from performing its obligations hereunder in whole or in part due to a Force Majeure Event. The Party rendered unable to fulfill any obligation by reason of a Force Majeure Event shall take reasonable actions necessary to remove such inability with due speed and diligence. Nothing herein shall be construed as permitting that Party to continue to fail to perform after said cause has been removed. The obligation to use due speed and diligence shall not be interpreted to require resolution of labor disputes by acceding to demands of the opposition when such course is inadvisable in the discretion of the Party having such difficulty. Neither Party shall be considered in breach or default of this Agreement if and to the extent that any failure or delay in the Party’s performance of one or more of its obligations hereunder is caused by a Force Majeure Event. The occurrence and continuation of a Force Majeure Event shall not suspend or excuse the obligation of a Party to make any payments due hereunder.

(b) Notice. In the event of any delay or nonperformance resulting from a Force Majeure Event, the Party suffering the Force Majeure Event shall (i) as soon as practicable, notify the other Party in writing of the nature, cause, estimated date of commencement thereof, and the anticipated extent of any delay or interruption in performance, and (ii) notify the other Party in writing of the cessation or termination of such Force Majeure Event, all as known or estimated in good faith by the affected Party; provided, a Party’s failure to give timely Notice shall not affect such Party’s ability to assert that a Force Majeure Event has occurred unless the delay in giving Notice materially prejudices the other Party.

(c) Termination Following Force Majeure Event. If a Force Majeure Event has occurred after the Commercial Operation Date that has caused either Party to be wholly or partially unable to perform its obligations hereunder in any material respect, and the impacted Party has claimed and received relief from performance of its obligations for a consecutive twelve (12) month period, then either Party may terminate this Agreement upon written Notice to the other Party. Upon any such termination, neither Party shall have any liability to the other Party, save and except for

¹ Note to Parties: Exhibit B (description of the Facility) to be provided.

those obligations which survive termination of this Agreement specified in Section 8.10, and Buyer shall promptly return to Seller any Performance Security then held by Buyer, less any amounts drawn in accordance with this Agreement.”

2. **Confirmation.** Except as otherwise provided herein, the provisions of the PPA shall remain in full force and effect in accordance with their respective terms following the execution of this First Amendment.

3. **Conflicts.** Section 1 of this First Amendment amends the terms and conditions of the PPA. If any provision of this First Amendment is construed to conflict with any provision of the PPA (except as otherwise expressly provided in this First Amendment), the provisions of this First Amendment shall be deemed controlling to the extent of that conflict.

4. **Entire Agreement.** This First Amendment, the PPA and the Exhibits to the PPA collectively constitute the entire agreement between the Parties pertaining to the subject matter hereof and supersede all prior agreements, understandings, negotiations, and discussions, whether oral or written, of the Parties pertaining to the subject matter hereof or thereof except as specifically set forth herein or therein.

5. **Choice of Law.** This First Amendment and any claim, controversy or dispute arising under or related to this First Amendment or the transactions contemplated hereby or the rights, duties and relationship of the parties hereto and thereto, shall be governed by and construed and enforced in accordance with the laws of the State of California, excluding any conflicts of law, rule or principle that might refer construction of provisions to the Laws of another jurisdiction.

6. **Amendment.** This First Amendment may be amended, restated, supplemented or otherwise modified only by an instrument in writing executed by all Parties specifically referring to the terms to be amended, restated, supplemented and/or modified and expressly identified as an amendment, restatement, supplement or modification.

7. **Counterparts.** This First Amendment may be executed in any number of counterparts, and each such counterpart hereof shall be deemed to be an original instrument, but all of such counterparts shall constitute for all purposes one agreement. Any signature hereto delivered by a Party by facsimile or other electronic transmission shall be deemed an original signature hereto.

[SIGNATURE PAGE FOLLOWS.]

IN WITNESS WHEREOF, the Parties have executed and delivered this First Amendment as of the date first written above.

SELLER:

AQUAMARINE WESTSIDE, LLC,
a Delaware limited liability company

A handwritten signature in blue ink, consisting of a large, stylized loop followed by a horizontal stroke extending to the right.

By: _____
Name: David Thompson
Title: Vice President and CFO

BUYER:

VALLEY CLEAN ENERGY ALLIANCE,
a California Joint Powers Authority

By: _____

Name: Mitch Sears

Title: Interim General Manager

EXHIBIT B

DESCRIPTION OF FACILITY

1. Facility name:

Aquamarine Solar

2. Facility location:

The Facility is located just south of the intersection of South Avenal Cutoff & 25th Avenue in Kings County, in the State of California

3. Technology type:

Solar photovoltaic

4. Interconnection Point of Facility:

The Facility's Interconnection Point shall be Gates 230 kV, which is the point of first interconnection of the Facility with the CAISO Controlled Grid

5. Service territory of the Facility:

Pacific Gas & Electric Company

6. Description of Facility equipment:

The Facility is a solar photovoltaic power generation facility and high-voltage substation with capacity of 250 MW (AC) measured at the Point of Interconnection. The Facility consists of two (2) main power transformers, eighty-eight (88) skids (each include inverters and a medium voltage transformer) with a power rating of 3.28 MVA each, and approximately eight hundred thirty-eight thousand six hundred and fifty-one (838,651) monofacial solar modules mounted to horizontal single-axis trackers with a total power rating of 325.399± MW (DC).

7. Description of Site:

The Aquamarine solar project is located along 25th avenue south of Avenal Cutoff Road in Kings County, CA. The site will encompass between 1,825-2,000 acres of drainage impaired farm ground that pursuant to approved CUP 17-04 in Kings County, CA using the address 24999 Laurel Avenue, Stratford, CA.

8. Maps:

The Facility is identified in the following map:

Redlines Showing
First Amendment to Westlands Solar Park
Power Purchase Agreement

“Expected Energy” means the Energy expected to be delivered to the Delivery Point for each Contract Year as specified in **Exhibit H**.

“Excused Energy” means Buyer’s Allocation of Energy, expressed in MWh, that would have been produced by the Facility and made available at the Delivery Point, absent: (i) a Curtailment Period, except for a Curtailment Period that results from a Forced Outage or Planned Outage, (ii) a Buyer Curtailment Order, or (iii) a period of Seller suspension due to a Buyer Event of Default pursuant to Section 3.4(b)(ii). For avoidance of doubt, Energy that Seller would have produced and delivered but for a Forced Outage or Planned Outage shall not be counted as Excused Energy. The amount of Excused Energy shall be determined by Seller using the best information available at the time including weather conditions or physical limitations and any other factors relevant to the determination. Seller shall be responsible for collecting and archiving Site insolation in order to determine the Excused Energy for the Facility.

“Facility” means Seller’s 250 MW-AC Aquamarine project, located in Kings County, California, together with any and all additions, replacements or modifications thereto, together with other electrical infrastructure, including metering, Seller Interconnection Facilities, SCADA System, and a step-up transformer(s), with a maximum generating Capacity for the Facility at the Delivery Point of 250 MW-AC, as more particularly described in **Exhibits B and B-1**.

“Facility Construction” means the start of construction for the Facility, as demonstrated by Seller’s initiation of physical activities at the Site, including the movement of soil, at a sufficient level to reasonably demonstrate that Seller is preparing for the construction of the Facility.

“Facility Operator” means Seller or an Affiliate of Seller that operates the Facility.

“Final TE Contribution Date” means the date that is the earlier of (i) the date that the Tax Equity Investor has made its final equity capital contribution in connection with the completion of construction of the Facility and (ii) March 31, 2022.

“FERC” means the Federal Energy Regulatory Commission.

“Force Majeure Event” means:

(a) any act or event that delays or prevents a Party from timely performing all or a portion of its obligations under this Agreement or from complying with all or a portion of the conditions under this Agreement if such act or event, despite the exercise of reasonable efforts, cannot be avoided by and is beyond the reasonable control (whether direct or indirect) of and without the fault or negligence of the Party relying thereon as justification for such delay, nonperformance, or noncompliance.

(b) Without limiting the generality of the foregoing, so long as the following events, despite the exercise of reasonable efforts, cannot be avoided by, and are beyond the

reasonable control (whether direct or indirect) of and without the fault or negligence of the Party relying thereon as justification for such delay, nonperformance or noncompliance, a Force Majeure Event may include an act of God or the elements, such as flooding, lightning, hurricanes, tornadoes, or ice storms; explosion; fire; volcanic eruption; flood; epidemic; landslide; mudslide; sabotage; terrorism; earthquake; or other cataclysmic events; an act of public enemy; war; blockade; civil insurrection; riot; civil disturbance; or strikes or other labor difficulties caused or suffered by a Party or any third party except as set forth below.

(c) Notwithstanding the foregoing, the term “*Force Majeure Event*” does not include (i) economic conditions or changes in Law that render a Party’s performance of this Agreement at the Contract Price unprofitable or otherwise uneconomic (including an increase in component or compliance costs for any reason, including foreign or domestic tariffs, Buyer’s ability to buy Product at a lower price, or Seller’s ability to sell the Product, or any component thereof, at a higher price, than under this Agreement); (ii) Seller’s inability to obtain permits or approvals of any type for the construction, operation, or maintenance of the Facility, except to the extent such inability is caused by a Force Majeure Event; (iii) the inability of a Party to make payments when due under this Agreement, unless the cause of such inability is an event that would otherwise constitute a Force Majeure Event as described above; (iv) a Buyer Curtailment Order, except to the extent such Curtailment Period is caused by a Force Majeure Event; (v) Seller’s inability to obtain sufficient labor, equipment, materials, or other resources to build or operate the Facility, including the lack of wind, sun or other fuel source of an inherently intermittent nature, except to the extent such inability is caused by a Force Majeure Event; (vi) a strike, work stoppage or labor dispute limited only to any one or more of Seller, Seller’s Affiliates, Seller’s contractors, their subcontractors thereof or any other third party employed by Seller to work on the Facility; (vii) any equipment failure, except if such equipment failure is caused by a Force Majeure Event; or (viii) any action or inaction by any third party, including Transmission Provider, that delays or prevents the approval, construction or placement in service of any of Seller’s Interconnection Facilities, except to the extent caused by a Force Majeure Event.

~~-any act of God (including fire, flood, earthquake, extremely severe storm, lightning strike, tornado, volcanic eruption, hurricane or other natural disaster), labor disturbance, strike or lockout of a national scope, act of the public enemy, war, insurrection, riot, explosion, terrorist activities or any order, regulation or restriction imposed by governmental, military, or lawfully established civilian authorities that (i) prevents one Party from performing any of its obligations under this Agreement, (ii) could not reasonably be anticipated as of the Effective Date, (iii) is not within the reasonable control of, or the result of negligence, willful misconduct, breach of contract, intentional act or omission or wrongdoing on the part of the affected Party (or any subcontractor or Affiliate of that Party, or any Person under the control of that Party or any of its subcontractors or Affiliates, or any Person for whose acts such subcontractor or Affiliate is responsible), and (iv) by the exercise of due diligence the affected Party is unable to overcome or avoid or cause to be avoided; provided, nothing in clause (iv) shall be construed so as to require a Party to accede or agree to any provision not satisfactory to it in order to settle and terminate a strike or labor dispute in which it may be involved. Any Party rendered unable to fulfill any of its~~

~~obligations by reason of a Force Majeure Event shall exercise due diligence to remove such inability with reasonable dispatch within a reasonable time period and mitigate the effects of the Force Majeure. The relief from performance shall be of no greater scope and of no longer duration than is required by the Force Majeure. Without limiting the generality of the foregoing, a Force Majeure Event does not include any of the following: (1) any requirement to meet an Applicable Law or any change (whether voluntary or mandatory) in any Applicable Law that may affect the value of the Product; (2) events arising from the failure by Seller to operate or maintain the Facility in accordance with this Agreement; (3) any increase of any kind in any cost of a Party to perform under this Agreement (except as expressly provided for otherwise herein); (4) delays in or inability of a Party to obtain financing or other economic hardship of any kind; (5) Seller's ability to sell any Product at a price in excess of those provided in this Agreement; (6) curtailment or other interruption of any Transmission Service, except due to Force Majeure; (7) failure of third parties to provide goods or services essential to a Party's performance, except due to Force Majeure; (8) Facility or equipment failure of any kind, except due to Force Majeure; or (9) any changes in the financial condition of Buyer, Seller, a Lender, or any subcontractor or supplier impacting the affected Party's ability to perform its obligations under this Agreement.~~

"Forced Outage" means an unplanned reduction, interruption or suspension of the Facility's ability to generate or deliver Energy to the Delivery Point that is not the result of a Force Majeure Event or a Planned Outage.

"Forward Certificate Transfer" has the meaning set forth in the WREGIS Operating Rules.

"Full Capacity Deliverability Status" or **"FCDS"** has the meaning set forth in the CAISO Tariff.

"GEP Damages" has the meaning set forth in Section 5.5(a).

"Generator Operator" means an operator that meets the requirements of Generator Operator as defined by NERC in its Statement of Compliance Registry Criteria (Revision 6.0), as amended or in a successor document.

"Governmental Authority" means any supranational, federal, state or other political subdivision thereof, having jurisdiction over Seller, Buyer or this Agreement, including any municipality, township or county, and any entity or body exercising executive, legislative, judicial, regulatory or administrative functions of or pertaining to government, including any corporation or other entity owned or controlled by any of the foregoing. For purposes of this Agreement, the term Government Authority shall include FERC, NERC (if applicable), WECC, CAISO, CPUC and CEC.

"Green Attributes" means any and all credits, benefits, emissions reductions, offsets, and allowances, howsoever entitled, attributable to the generation of Energy from the Facility and its avoided emission of pollutants. Green Attributes include but are not limited to

in-service date of all the required Network Upgrades required for its requested Full Capacity Deliverability Status.

“Investment Grade” means a Credit Rating of at least “Baa3” with respect to Moody’s and at least “BBB-” with respect to S&P.

“Lender” means any and all Persons or successors in interest thereof, other than an Affiliate of Seller, (a) lending money or extending credit (whether directly to Seller or to an Affiliate of Seller) as follows: (i) for the construction, interim or permanent financing or refinancing of the Facility; (ii) for working capital or other ordinary business requirements of the Facility (including the maintenance, repair, replacement or improvement of the Facility); (iii) for any development financing, bridge financing, credit support, credit enhancement or interest rate protection in connection with the Facility; (iv) for any capital improvement or replacement related to the Facility; or (v) in connection with the financing of a portfolio of projects that includes the Facility; (b) participating (directly or indirectly) as a Tax Equity Investor; or (c) a lessor under a lease finance arrangement of the Facility.

“Lender Consent” means a consent substantially in the form of **Exhibit E**, with such modifications as may be reasonably requested by Lenders, subject to Buyer’s reasonable approval.

“Letter of Credit” means one or more irrevocable, non-transferable standby letters of credit issued by a Qualified Institution and substantially in the form of **Exhibit G**.

“Losses” means, with respect to the non-defaulting Party, an amount equal to the present value of the economic loss to it (if any), exclusive of Costs, resulting from termination of this Agreement, determined in a commercially reasonable manner, which economic loss (if any) shall be the loss (if any) to such Party represented by the difference (if any) between the present value of the payments required to be made during the remaining Term of this Agreement and the present value of the payments that would be required to be made under transaction(s) replacing this Agreement. The non-defaulting Party’s Losses shall be zero (\$0) if such Party receives an economic benefit due to the termination of this Agreement. ~~If the non-defaulting Party is the Seller, then Losses shall exclude any loss of the PTC, or other federal or state tax credits, grants, or benefits related to the Facility or generation therefrom.~~

“Meter” means the revenue quality meters, data processing gateways or remote intelligence gateways, telemetering equipment and data acquisition services that are dedicated to the Facility and are sufficient for monitoring, recording and reporting, in real time, all Energy from the Facility, as required and specified in the CAISO Tariff.

“Milestone Schedule” means Seller’s schedule to develop the Facility, as set forth in **Exhibit I**.

“Minimum Annual Energy Production” means for each Contract Year the quantity of Energy specified in **Exhibit F**.

Construction is initiated. Seller shall pay Daily Delay Damages to Buyer in advance, on a monthly basis, for each full month during which any Daily Delay Damages will be due. A prorated amount shall be returned to Seller if Seller initiates Facility Construction during a month for which Daily Delay Damages were paid in advance. In the event that Seller achieves Commercial Operation on or before the Guaranteed Commercial Operation Date, Buyer shall return any previously paid Daily Delay Damages resulting from Seller's failure to initiate Facility Construction on or prior to the Guaranteed Construction Date.

(e) Guaranteed Commercial Operation Date. Seller shall have demonstrated Commercial Operation no later than September 24, 2021 (the "Guaranteed Commercial Operation Date"). If Commercial Operation has not occurred on or prior to the Guaranteed Commercial Operation Date, after giving effect to all Permitted Extensions, then Seller shall pay to Buyer liquidated damages equal to Daily Delay Damages for each day until such time as Commercial Operation is achieved. Seller shall pay Daily Delay Damages to Buyer in advance, on a monthly basis, for each full month during which any Daily Delay Damages will be due. A prorated amount shall be returned to Seller if Commercial Operation is achieved during a month for which Daily Delay Damages were paid in advance.

(f) Guaranteed Contract Capacity Date. Seller shall have demonstrated Commercial Operation of the full Contract Capacity of the Facility no later than October 30, 2021 after giving effect to all Permitted Extensions and which shall be extended, on a day-for-day basis, for every [REDACTED] that Seller pays to Buyer as Daily Delay Damages pursuant to Section 2.5(e) (the "Guaranteed Contract Capacity Date"). Seller shall demonstrate Commercial Operation of the full Contract Capacity of the Facility by satisfying the conditions precedent in Section 2.6(a)(ii)-(vi) with respect to the full Contract Capacity. If Seller fails to demonstrate Commercial Operation of the full Contract Capacity on or prior to the Guaranteed Contract Capacity Date, after giving effect to all Permitted Extensions, then Seller shall pay to Buyer liquidated damages equal to one hundred thousand dollars (\$100,000) for each MW, or fraction thereof, of Contract Capacity that fails to reach Commercial Operation by the Guaranteed Contract Capacity Date (the "Contract Capacity Damages").

(g) Permitted Extensions. If Seller complies with Section 2.5(g)(i), the Guaranteed Construction Start Date, the Guaranteed Commercial Operation Date, and the Guaranteed Contract Capacity Date, as applicable, may each be extended on a day-for-day basis: (i) for a time period no longer than one-hundred eighty (180) days as a result of a Force Majeure Event or due to a delay caused by transmission provider (e.g., the CAISO), transmission owner, or Buyer through no fault of Seller; and (ii) for a time period no longer than three-hundred and sixty (360) days for a delay due to action or inaction by a Government Authority, through no fault of Seller, that prevents Seller from obtaining Permits or Government Approvals required for the operation of the Facility (together (i) and (ii) shall be considered "Permitted Extensions"). Any Permitted Extensions allowed pursuant to (i) and (ii) shall run concurrently such that total day-for-day extensions shall be no longer than three-hundred and sixty (360) days on a cumulative basis; provided that such Permitted Extensions shall only be granted so long as Seller has used commercially reasonable efforts (including but not limited to Seller's timely filing of required documents and payment of all applicable fees) to overcome the cause of such Permitted Extension.

(vii) Seller has installed and commissioned Facility Capacity sufficient for Buyer's Allocation of the Capacity to equal at least ninety-five percent (95%) of the Contract Capacity;

(viii) Seller has satisfied the Insurance Obligations in Section 6.2, and Seller has provided evidence of such insurance to Buyer; and

(ix) Seller has delivered to Buyer the Operating Security.

(b) Seller shall provide notice of expected Commercial Operation to Buyer in writing no less than thirty (30) days in advance of such date. Seller shall provide the Commercial Operation Certificate and all documentation required in Section 2.6(a) to Buyer when Seller believes it has met the conditions for achieving Commercial Operation. Buyer shall have five (5) Business Days to provide Seller with written notice acknowledging or disputing that Commercial Operation has been achieved. In the event Buyer disputes that Commercial Operation has been achieved, Buyer's written notice shall state the basis for such dispute in reasonable detail and the matter shall be subject to the dispute resolution procedures in Section 8.16. Buyer's failure to respond in writing within five (5) days of Seller's delivery of the Commercial Operation Certificate shall be deemed notice of acceptance that Commercial Operation has been achieved. Upon Buyer's written acknowledgement, the Commercial Operation Date shall be the date of Seller's delivery to Buyer of the Commercial Operation Certificate, or the date upon which outstanding issues related to the satisfaction of the conditions in Section 2.6(a) have been resolved.

~~(b)~~(c) Seller shall provide notice to Buyer of the Final TE Contribution Date within five (5) Business Days after the occurrence of the Final TE Contribution Date.

2.7 Title; Risk of Loss.

Seller shall hold all rights, title and interest to all Product which Seller has conveyed to Buyer hereunder. Title to and risk of loss with respect to any Energy purchased by and delivered to Buyer by Seller in accordance with this Agreement shall pass from Seller to Buyer at the Delivery Point, and such Energy shall be free and clear of all liens, security interests, claims and encumbrances or any interest therein or thereto by any other Person at the time of Seller's delivery. Until title passes, Seller shall be deemed in exclusive control of the same and shall be responsible for any damage or injury caused thereby. After title to Product passes to Buyer, as between the Parties, Buyer shall be deemed in exclusive control of such Product and shall be responsible for any damage or injury caused thereby. Seller shall bear all risks, financial and otherwise throughout the Term, associated with Seller's or the Facility's eligibility to receive incentive or other tax benefits, or qualify for accelerated depreciation for Seller's accounting, reporting or tax purposes. The obligations of the Parties hereunder, including those obligations set forth herein regarding the purchase and price for and Seller's obligation to deliver Product, shall be effective regardless of whether the Seller is eligible for, or receives, incentive tax credits or any other tax benefits.

2.8 Transmission; CAISO Payments and Charges; Curtailment.

(a) Seller's Transmission Service Obligations. Prior to the Commercial Operation

(d) At all times during the Term, Seller shall install such meters and power electronics as are necessary so that Buyer's Allocation of the Facility's Capacity Rights may be delivered to Buyer. For Seller to obtain the Contract Price corresponding to having delivered Buyer's Allocation of the Facility's Capacity Rights to Buyer, Seller shall (i) have obtained FCDS or IDS for Facility Capacity sufficient for Buyer's Allocation of the Facility's Capacity Rights to equal the Contract Capacity, and (ii) have delivered Capacity Rights to Buyer for the corresponding Showing Month of the Delivery Term. The total amount of Capacity Rights identified and confirmed for each day of such Showing Month shall equal the then applicable NQC of the Facility. Seller shall deliver the Capacity Rights by submitting the Facility and its NQC to the CAISO in Seller's Supply Plan. The Capacity Rights shall be deemed delivered and received when the CIRA Tool shows the Supply Plan accepted for the NQC from the Facility by CAISO or Seller complies with Buyer's instruction to withhold all or part of the NQC from Seller's Supply Plan for any Showing Month during the Delivery Term but Seller otherwise delivers the amount of NQC that Buyer does not direct Seller to withhold. Seller has failed to deliver the Capacity Rights if (i) Buyer has elected to submit the NQC from the Facility in its Resource Adequacy Plan and such submission is accepted by the CPUC and the CAISO but the Supply Plan and Resource Adequacy Plan are not matched in the CIRA Tool and are rejected by CAISO, or (ii) Seller fails to submit in its Supply Plan the volume of NQC for any Showing Month in such amount as instructed by Buyer for the applicable Showing Month. Seller will not have failed to deliver the Capacity Rights if Buyer fails to submit or chooses not to submit the Facility and the NQC in its Resource Adequacy Plan with the CPUC or CAISO

(e) Notwithstanding anything herein to the contrary, Seller shall have no obligation to deliver Capacity Rights pursuant to this Section 2.10, and Seller shall not be subject to any Contract Price reduction pursuant to Section 2.10(a), in the event of changes to Applicable Law that result in Buyer no longer being subject to RA procurement requirements under the CAISO Tariff and Applicable Laws.

2.11 *Sales for Resale.*

All Energy delivered to Buyer hereunder shall be sales for resale, with Buyer reselling such Energy. Buyer shall provide Seller with any documentation reasonably requested by Seller to evidence that the deliveries of Energy hereunder are sales for resale.

ARTICLE 3 TERM; TERMINATION; DEFAULTS

3.1 *Term.*

The "Term" of this Agreement shall commence on the Effective Date and continue until 23:59 pm PPT on the date that is fifteen (15) years after the first day of the Delivery Term, unless sooner terminated in accordance with the terms hereof. The Term may be renewed or extended by mutual consent of the Parties, upon terms and conditions and for a price upon which the Parties mutually agree in connection with such extension or renewal.

3.2 *Regulatory Approvals; Certifications; Qualifications.*

Agreements, or (D) a period of Seller suspension due to a Buyer Event of Default pursuant to Section 3.4(b)(ii); or

(xii) Any other default in performance or observance by a Party of any agreement, undertaking, covenant or other obligation contained in this Agreement that has a material adverse effect on the other Party if such default has not been cured by the defaulting Party within thirty (30) Days after receiving written notice from the non-defaulting Party setting forth, in reasonable detail, the nature of such default and its impact on the non-defaulting Party; provided, however, that, in the case of any such default that is not reasonably capable of being cured within the thirty (30) Day cure period, the defaulting Party shall have up to an additional sixty (60) Days if it commences to cure the default within such initial thirty (30) Day cure period and it diligently and continuously pursues such cure.

(b) Remedies. Upon the occurrence of, and during the continuation of, an Event of Default by a Party, the non-defaulting Party shall have the right but not the obligation to:

(i) Subject to Section 8.8, pursue all remedies given under this Agreement or now or hereafter existing at law, in equity or otherwise;

(ii) Suspend performance of its obligations and duties hereunder immediately upon delivering written notice to the defaulting Party of its intent to exercise its suspension rights; and

(iii) Terminate this Agreement by notice to the other Party, designating a Day no less than thirty (30) Days after such notice, as an early termination date (the "Early Termination Date") to accelerate all amounts then owing between the Parties and to liquidate and terminate this Agreement.

(c) Termination Payment.

(i) As soon as practicable after the declaration of an Early Termination Date, notice shall be given by the non-defaulting Party to the defaulting Party of the amount of the Termination Payment, ~~which shall in no event which in the case of an Event of Default occurring on or after the Final TE Contribution Date shall not~~ exceed [REDACTED]. The non-defaulting Party shall calculate the Termination Payment in a commercially reasonable manner as of the Early Termination Date. The notice shall include a written statement explaining in reasonable detail the calculation of such amount. The Termination Payment, if any, shall be made by the Party owing the Termination Payment within five (5) Business Days after such notice is effective and shall bear interest at the Prime Rate from the due date until paid.

(ii) "Termination Payment" means an amount equal to the sum of all Losses (if any) and all Costs (if any) incurred by the non-defaulting Party as a result of the termination of this Agreement, plus all amounts then currently due from the defaulting Party to the non-defaulting Party under this Agreement, minus all amounts due to the defaulting Party under this Agreement, so that all such amounts shall be netted to a single liquidated amount payable by the defaulting Party to the non-defaulting Party.

(iv) Seller shall obtain, maintain, and remain in compliance with all Permits, Interconnection Agreements, and transmission and distribution rights necessary to operate the Facility and to deliver Product to Buyer, including Energy from the Facility to the Delivery Point;

(v) Seller shall maintain Site Control required for the operation of the Facility at the Site and the performance of any obligations of Seller hereunder;

(vi) Seller shall cause its employees to comply with the Occupational Safety and Health Act, and the rules promulgated thereunder by the U.S. Department of Labor, and all applicable California statutes and regulations affecting job safety; and

(vii) Seller shall comply with all federal, state and local laws, statutes, ordinances, rules and regulations, and the orders and decrees of any courts or administrative bodies or tribunals, including, without limitation employment discrimination laws and prevailing wage laws.

5.4 Buyer's Financial Security.

(a) Buyer shall not be required to post financial security during the Term. During the Delivery Term, the Contract Price shall be determined based on whether Buyer has provided Qualifying Credit Support. In the event, ~~on or before April 21, 2021,~~ Buyer either (i) obtains an investment-grade credit rating on its long-term, unsecured indebtedness with either Moody's or S&P; or (ii) posts financial security in the amount of [REDACTED] in the form of a Letter of Credit from a Qualified Institution, a cash deposit, or a combination thereof ("Buyer Financial Security"), then from such date forward for so long as Buyer maintains such credit-rating or credit support, Buyer shall pay "Contract Price B" as set forth in **Exhibit A**. At all other times, Buyer shall pay "Contract Price A" as set forth in **Exhibit A**.

(b) If Buyer elects, in its sole discretion, to post Buyer Financial Security, Seller shall have the right to draw upon the Buyer Financial Security, at Seller's sole discretion, in the event Buyer fails to make any payments owing under this Agreement or to reimburse Seller for costs or damages that Seller has incurred as a result of Buyer's failure to perform under this Agreement. Within five (5) Business Days following any draw by Seller on the Buyer Financial Security, Buyer shall replenish the amount drawn such that the Buyer Financial Security is restored to the full amount; *provided* that in no event shall the maximum recovery by Seller under the Buyer Financial Security exceed [REDACTED]. Seller shall release the Buyer Financial Security, less amounts drawn, if any, to Buyer upon the earlier of (i) termination of this Agreement in accordance with its terms; (ii) on the tenth (10th) Business Day after the expiration of the Term; and (iii) on the tenth (10th) Business Day after the date upon which Buyer provides evidences that it has achieved an investment-grade credit rating on its long-term, unsecured indebtedness with either Moody's or S&P; *provided* that in the event of a subsequent downgrade or loss of such credit rating, Buyer will, within ten (10) Business Days, provide Seller with replacement Buyer Financial Security or begin paying "Contract Price A", as set forth in **Exhibit A**, for subsequent Energy deliveries.

Attn: Kevin T. Fox, Esq.
Telephone: 510.381.3052
Email: kfox@keyesfox.com

With copies of all notices relating to Events of Default, termination (see Section 3.4(b)(iii)) and other legal notices by overnight mail to:

Best, Best & Kreiger
500 Capitol Mall, Suite 1700,
Sacramento, CA 95814
Attn: Harriet Steiner
Telephone: (916) 551-2821

8.5 *Force Majeure.*

(a) No Liability If a Force Majeure Event Occurs. Except as provided in Section 8.5(c), neither Seller nor Buyer shall be liable to the other Party in the event it is prevented from performing its obligations hereunder in whole or in part due to a Force Majeure Event. The Party rendered unable to fulfill any obligation by reason of a Force Majeure Event shall take reasonable actions necessary to remove such inability with due speed and diligence. Nothing herein shall be construed as permitting that Party to continue to fail to perform after said cause has been removed. The obligation to use due speed and diligence shall not be interpreted to require resolution of labor disputes by acceding to demands of the opposition when such course is inadvisable in the discretion of the Party having such difficulty. Neither Party shall be considered in breach or default of this Agreement if and to the extent that any failure or delay in the Party's performance of one or more of its obligations hereunder is caused by a Force Majeure Event. The occurrence and continuation of a Force Majeure Event shall not suspend or excuse the obligation of a Party to make any payments due hereunder. The performance of any obligation required hereunder shall be excused to the extent required by, and during the continuation of, any Force Majeure Event suffered by the Party whose performance is hindered in respect thereof, and the time for performance of any obligation that has been delayed due to the occurrence of a Force Majeure Event shall be extended, as required to overcome the effects of such Force Majeure Event. The Party experiencing the delay or hindrance shall orally notify the other Party as soon as reasonably practicable following the Force Majeure Event, and shall notify the other Party in writing of the occurrence of such Force Majeure Event, including the nature, cause, date and time of commencement of such event, and extent and anticipated period of delay, within fourteen (14) Days after the commencement of the Force Majeure Event; provided, that the failure of the Party experiencing the delay or hindrance to notify the other Party within such fourteen (14) Day period shall preclude such Party from claiming a Force Majeure Event hereunder for any Days prior to its notice. By way of example, if a Party first notifies the other Party of a Force Majeure Event thirty (30) Days after the commencement of such event, the claiming Party will only have its performance excused by reason of such Force Majeure Event for periods after its notice (i.e., on and after day thirty (30)). Each Party suffering a Force Majeure Event shall take, or cause to be taken, such action as may be necessary to overcome or otherwise to mitigate, in all material respects, the effects of any Force Majeure Event suffered by either of them and to resume performance hereunder as soon as practicable under the circumstances.

~~(b) Notice. In the event of any delay or nonperformance resulting from a Force Majeure Event, the Party suffering the Force Majeure Event shall (i) as soon as practicable, notify the other Party in writing of the nature, cause, estimated date of commencement thereof, and the anticipated extent of any delay or interruption in performance, and (ii) notify the other Party in writing of the cessation or termination of such Force Majeure Event, all as known or estimated in good faith by the affected Party; provided, a Party's failure to give timely Notice shall not affect such Party's ability to assert that a Force Majeure Event has occurred unless the delay in giving Notice materially prejudices the other Party. If Seller is unable to deliver, or Buyer is unable to receive, Buyer's Allocation of Energy due to a Force Majeure Event, then Buyer shall have no obligation to pay Seller for Buyer's Allocation of Energy not delivered or received by reason thereof. In no event shall Buyer be obligated to compensate Seller or any other Person for any losses, expenses or liabilities that Seller or such other Person may sustain as a consequence of any Force Majeure. In no event shall any delay or failure of performance caused by any conditions or Force Majeure Event extend this Agreement beyond its stated Term.~~

~~(c) Termination Following Force Majeure Event. If a Force Majeure Event has occurred after the Commercial Operation Date that has caused either Party to be wholly or partially unable to perform its obligations hereunder in any material respect, and the impacted Party has claimed and received relief from performance of its obligations for a consecutive twelve (12) month period, then either Party may terminate this Agreement upon written Notice to the other Party. Upon any such termination, neither Party shall have any liability to the other Party, save and except for those obligations which survive termination of this Agreement specified in Section 8.10, and Buyer shall promptly return to Seller any Performance Security then held by Buyer, less any amounts drawn in accordance with this Agreement. Either Party shall have the absolute and unconditional right, but not the obligation, to terminate this Agreement upon thirty (30) Days written notice to the other Party if: (i) a Force Majeure Event occurs that diminishes the Energy generating capacity of the Facility such that Seller is unable to deliver to Buyer at least fifty percent (50%) of the Expected Energy for a period of eighteen (18) consecutive months; or (ii) the Facility is damaged as a result of a Force Majeure Event and thereby rendered inoperable and an independent engineer that is mutually acceptable to the Parties determines that the Facility cannot be repaired or replaced within a period of time not to exceed twenty four (24) months following the date of the occurrence of the Force Majeure event; or (iii) if a Force Majeure Event prevents the other Party from performing its material obligations under this Agreement for a period of twelve (12) consecutive months or longer.~~

~~(d) — A Party's exercise of its termination right pursuant to Section 8.5(c) shall be "no-fault" and no Party shall have any liability or obligation to the other Party arising out of such termination. Notwithstanding the foregoing, upon any such termination, each Party shall pay the other Party for any and all amounts hereunder that may be owing, including for any outstanding payments due in the ordinary course that occurred prior to the termination, and Buyer shall return Seller's Operating Security (less any amounts drawn by Buyer pursuant to this Agreement) within five (5) Business Days of such termination.~~

8.6 *Amendments.*

EXHIBIT B

DESCRIPTION OF FACILITY

1. Facility name:

Aquamarine Solar

2. Facility location:

The Facility is located just south of the intersection of South Avenal Cutoff & 25th Avenue in Kings County, in the State of California

3. Technology type:

Solar photovoltaic

4. Interconnection Point of Facility:

The Facility's Interconnection Point shall be Gates 230 kV, which is the point of first interconnection of the Facility with the CAISO Controlled Grid

5. Service territory of the Facility:

Pacific Gas & Electric Company

6. Description of Facility equipment:

The Facility is a solar photovoltaic power generation facility and high-voltage substation with capacity of 250 MW (AC) measured at the Point of Interconnection. The Facility consists of two (2) main power transformers, eighty-eight (88) skids (each include inverters and a medium voltage transformer) with a power rating of 3.28 MVA each, and approximately eight hundred thirty-eight thousand six hundred and fifty-one (838,651) monofacial solar modules mounted to horizontal single-axis trackers with a total power rating of 325.399± MW (DC).~~[full description of equipment that will be used]~~

7. Description of Site:

The Aquamarine solar project is located along 25th avenue south of Avenal Cutoff Road in Kings County, CA. The site will encompass between 1,825-2,000 acres of drainage impaired farm ground that pursuant to approved CUP 17-04 in Kings County, CA using the address 24999 Laurel Avenue, Stratford, CA.

8. Maps:

The Facility is identified in the following map:

VALLEY CLEAN ENERGY ALLIANCE

RESOLUTION NO. 2021-___

RESOLUTION OF THE BOARD OF DIRECTORS OF THE VALLEY CLEAN ENERGY ALLIANCE (VCE) APPROVING THE FIRST AMENDMENT TO THE WESTLANDS SOLAR PARK POWER PURCHASE AGREEMENT (PPA) AND AUTHORIZING INTERIM GENERAL MANAGER TO EXECUTE THE AMENDMENT

WHEREAS, the Valley Clean Energy Alliance (“VCE”) is a joint powers agency established under the Joint Exercise of Powers Act of the State of California (Government Code Section 6500 et seq.) (“Act”), and pursuant to a Joint Exercise of Powers Agreement Relating to and Creating the Valley Clean Energy Alliance between the County of Yolo (“County”), the City of Davis (“Davis”), the City of Woodland and the City of Winters (“Cities”) (the “JPA Agreement”), to collectively study, promote, develop, conduct, operate, and manage energy programs;

WHEREAS, on February 13, 2020, the Board of Directors of the Valley Clean Energy Alliance approved Resolution 2020-007, authorizing VCE to enter into a PPA with Aquamarine Westside, LLC; and,

WHEREAS, the developer’s lenders are requesting several modifications to the PPA in order to finalize the financing package, including force majeure and buyer’s liability provisions.

NOW, THEREFORE, the Board of Directors of the Valley Clean Energy Alliance resolves as follows:

1. The Board hereby approves and authorizes the Interim General Manager to execute the first amendment to the Westlands Solar Park PPA in the form attached hereto on behalf of VCE. The Interim General Manager, in consultation with General Counsel, may make minor changes to this First Amendment provided that the terms described in the Staff Report for this First Amendment are not modified as to time or cost to VCE.

PASSED, APPROVED, AND ADOPTED, at a regular meeting of the Valley Clean Energy Alliance, held on the ___ day of _____ 2021, by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

Dan Carson, VCE Chair

Alisa M. Lembke, VCE Board Secretary

Attachment A: First Amendment to Power Purchase Agreement

Attachment A

**First Amendment to Power Purchase Agreement
with Aquamarine Westside, LLC**