

Decision 08-04-009 April 10, 2008

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Continue Implementation and Administration of California Renewables Portfolio Standard Program.

Rulemaking 06-05-027
(Filed May 25, 2006)

**INTERIM OPINION COMPILING
STANDARD TERMS AND CONDITIONS**

The Commission has been informed that it would be useful to compile in one document the current Commission-adopted language for the 14 standard terms and conditions (STCs) used in contracts pursuant to the Renewables Portfolio Standard (RPS) Program.¹ We do that here with one exception.

The exception is that we now exclude STC 3 (Supplemental Energy Payment (SEP) Awards, Contingencies). Pacific Gas and Electric Company (PG&E) recommended we do so in 2007. We declined at that time, however, given that STC 3 was modifiable, it did not need to be included in a final contract when it was not applicable, and implementation of Senate Bill (SB) 1036 was pending.² (Decision (D.) 07-11-025, p. 21.) In early 2008, we affirmed the

¹ See, for example, the "Comments of San Diego Gas & Electric Company to the Proposed Decision Conditionally Accepting Procurement Plans for 2008 RPS," January 31, 2008, page 7.

² SB 1036 (Stats. 2007, Ch. 685) removed SEP funding of the above market costs incurred by certain projects.

interpretation of STC 3, as requested by Southern California Edison Company, but did so noting that the relevance of STC 3 would decline over time as SB 1036 was implemented. (D.08-02-008, p. 25.)

The California Energy Commission is now transferring (or has transferred) to utilities all relevant remaining unencumbered funds that were available to fund SEPs, as required by SB 1036. Draft Resolution E-4160 is under consideration regarding our implementation of SB 1036. As a result, STC 3 has no continuing relevance for future model contracts, and we will delete it today from the STCs.

That leaves 13 STCs. Of these, 4 are not modifiable, and 9 are modifiable. The most recent Commission-adopted language for these 13 STCs is shown in Appendix A. The 4 non-modifiable STCs are listed first, followed by the 9 modifiable STCs. The STCs are treated as follows:

Non-Modifiable: Each contract used for RPS compliance by an investor-owned utility (IOU), including a small or multi-jurisdictional utility (SMJU), must contain the 4 non-modifiable STCs. (See Decision (D.) 04-06-014, Appendix A, D.07-02-011; D.07-05-057; D.07-11-025, Attachment A.) Each contract used for RPS compliance by a load-serving entity (LSE) other than an IOU must also contain the non-modifiable STCs, with the exception of STC 1 (CPUC Approval.) (See D.06-10-019.)

Modifiable: The model contract initially used by each buyer³ in soliciting bids from project developers/sellers for purposes of RPS compliance must include the Commission's most recently adopted language for the 9 modifiable STCs. Model contracts of electrical corporations may, in the alternative, employ language

³ This includes all LSEs under the RPS Program, such as IOUs (including SMJUs), electric service providers (ESPs) and community choice aggregators (CCAs).

subsequently accepted by the Commission as part of the periodic review and acceptance, rejection or modification of an electrical corporation's procurement plan. Such language, however, must continue to apply the principles behind each modifiable STC, and remain consistent with all applicable laws and regulations. Electrical corporations must use reasonable efforts to propose uniform and consistent language in their model contracts over time and among electrical corporations. For the final contract, seller and buyer (inclusive of all LSEs under the RPS program) may negotiate different language for each modifiable STC (or agree to delete the term if it is not applicable), as long as the result remains consistent with all applicable laws and regulations. (See D.04-06-014, Appendix A; D.07-11-025, in particular pp. 22-23, 26 and Ordering Paragraph 1.)

Finally, we note that work is underway in Rulemaking 06-02-012 on the issue of tradable renewable energy credits (RECs), and implementation of tradable RECs may necessitate further changes to STC 2. We also note that some parties are discussing possible further modifications to STCs, including STC 2, and additional changes to STC 2 are possible depending upon the outcome of these discussions and subsequent petitions for modification. We will continue to make changes to STC 2 and other STCs, as necessary and appropriate. Parties are encouraged to employ the most efficient methods available for consideration of changes. (See, for example, the discussion in D.07-11-025, pp. 23-27.)

Comments on Proposed Decision

On March 5, 2008, the proposed decision of Administrative Law Judge (ALJ) Mattson in this matter was mailed to parties in accordance with Section 311 of the Public Utilities Code and Rule 14.3 of the Commission's Rules of Practice and Procedure (Rules). On March 25, 2008 comments were filed by PG&E, the Alliance for Retail Energy Markets (AREM), and jointly by Sustainable Conservation, the Inland Empire Utilities Agency, the California Farm Bureau

Federation and the Green Power Institute (Joint Parties). On April 1, 2008, reply comments were jointly filed by Sustainable Conservation, the California Farm Bureau Federation and the Green Power Institute. We have carefully considered comments and make changes in the body of the order where appropriate. We briefly explain here why we reject certain comments.

Modifiable STCs for Non-IOU LSEs

In its comments, AReM asserts that the Commission does not require ESPs to use any of the modifiable STCs in model contracts, and proposes clarifying language. AReM is mistaken. We make appropriate changes above, and take this opportunity to make the requirement clear.

In our most recent order regarding STCs, we make no distinction between STCs required of LSEs that are or are not IOUs. (D.07-11-025.) Rather, we require the model contract initially used by each LSE for the purpose of soliciting bids or seeking projects for RPS compliance to contain all STCs. Buyer and seller may not modify the non-modifiable STCs, but may negotiate and modify the modifiable STC (or delete a modifiable STC when it is not applicable). As we said regarding the 10 modifiable STCs (now 9 with the deletion of STC 3 in today's order), we repeat for clarity here:

“Each of the ten remaining terms [the modifiable STCs] is important, and each contract should contain something on each item, to the extent applicable. Each contract, for example, should address important matters such as contract duration (STC 5: Contract Term), certain expectations (STC 7: Performance Standards), applicable definitions (STC 8: Product Definitions), and consequences of failure (STC 9: Non-Performance or Termination Penalties and Default Provisions). The desire for flexibility does not outweigh the state's interest in each contract containing something on a minimum number of important terms. In fact, STCs must include ‘performance requirements for renewable generators.’ (§ 399.14(a)(2)(D).) Even if we desired to

grant this part of petitioners' request, we could not do so."
(D.07-11-025, p. 20.)

In deciding to retain five specific modifiable STCs we said:

"Second, we do not eliminate but keep the five remaining terms as modifiable. These are: STC 7 (Performance Standards), STC 8 (Product Definitions), STC 9 (Non-Performance Penalties), STC 12 (Credit Terms), and STC 18 (Prevailing Wages). We do this, as stated above, because we believe every contract should contain something on each of these minimal but important items, and in the case of performance requirements, the contract must contain this term." (*Id.*, pp. 21-22.)

Moreover, regarding modifications to the modifiable terms, the permissible modifications are not limitless. For example:

"We point out regarding parties' modifications to any of the ten modifiable STC that such modifications, if any, must continue to be consistent with law and government regulation. For example, parties may modify the STC regarding confidentiality, but the modified term must still comply with all applicable laws regarding confidentiality, including all Commission orders (*e.g.*, D.06-06-066)." (*Id.*, p. 22.)

This last item is particularly worth mentioning here given that our confidentiality decisions specifically address certain matters with respect to LSEs other than IOUs. Accordingly, ESPs and CCAs must not only have a modifiable confidentiality term in their model contract (used to initially solicit RPS electricity), but when modified, the term must still comply with Commission orders, such as D.06-06-066 or successor decisions as they relate to ESPs or CCAs.

Edits to STC 2

In its comments, PG&E suggests several changes to STC 2 which PG&E characterizes as non-substantive. In reply comments, a subgroup of Joint Parties contend the changes may adversely affect the interest of parties. We decline to

make a change to the proposed decision given controversy about its effects absent adequate vetting of the change and its implications.

Assignment of Proceeding

Michael R. Peevey is the assigned Commissioner, and Anne E. Simon and Burton W. Mattson are the assigned ALJs for this proceeding.

Finding of Fact

It would be useful to compile in one document the current Commission-adopted language for the STCs used in contracts pursuant to the RPS Program.

Conclusions of Law

1. Given implementation of SB 1036, STC 3 has no continuing relevance and should be deleted from the current 14 STCs.
2. The remaining 13 STCs should be compiled in one document.
3. This order should be effective today so that the compiled STCs are available without delay.

INTERIM ORDER

IT IS ORDERED that Commission-adopted language for the 13 standard terms and conditions used in contracts pursuant to the Renewables Portfolio Standard Program is compiled in Appendix A. This proceeding remains open.

This order is effective today.

Dated April 10, 2008, at San Francisco, California.

MICHAEL R. PEEVEY

President

DIAN M. GRUENEICH

JOHN A. BOHN

RACHELLE B. CHONG

TIMOTHY ALAN SIMON

Commissioners

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STANDARD TERMS AND CONDITIONS
(April 10, 2008)

LINE No.	STC No.	STANDARD TERM AND CONDITION
NON-MODIFIABLE		
1	1	CPUC Approval
2	2	RECs and Green Attributes
3	6	Eligibility
4	17	Applicable Law
MODIFIABLE		
5	4	Confidentiality
6	5	Contract Term
7	7	Performance Standards/Requirements
8	8	Product Definitions
9	9	Non-Performance or Termination Penalties and Default Provisions
10	12	Credit Terms
11	15	Contract Modifications
12	16	Assignment
13	18	Application of Prevailing Wages

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**FOUR NON-MODIFIABLE
STANDARD TERMS AND CONDITIONS**

STC 1: CPUC Approval

STC 2: RECs and Green Attributes

STC 6: Eligibility

STC 17: Applicable Law

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Non-Modifiable

STC 1: CPUC Approval

“CPUC Approval” means a final and non-appealable order of the CPUC, without conditions or modifications unacceptable to the Parties, or either of them, which contains the following terms:

- (a) approves this Agreement in its entirety, including payments to be made by the Buyer, subject to CPUC review of the Buyer’s administration of the Agreement; and
- (b) finds that any procurement pursuant to this Agreement is procurement from an eligible renewable energy resource for purposes of determining Buyer’s compliance with any obligation that it may have to procure eligible renewable energy resources pursuant to the California Renewables Portfolio Standard (Public Utilities Code Section 399.11 *et seq.*), Decision 03-06-071, or other applicable law.

CPUC Approval will be deemed to have occurred on the date that a CPUC decision containing such findings becomes final and non-appealable.

(End of STC 1.)

(Source: D.07-11-025, Attachment A.)

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Non-Modifiable

STC 2: RECs and Green Attributes

“Green Attributes” means any and all credits, benefits, emissions reductions, offsets, and allowances, howsoever entitled, attributable to the generation from the Project, and its displacement of conventional Energy generation. Green Attributes include but are not limited to Renewable Energy Credits, as well as: (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; (3) the reporting rights to these avoided emissions, such as Green Tag Reporting Rights. Green Tag Reporting Rights are the right of a Green Tag Purchaser to report the ownership of accumulated Green Tags in compliance with federal or state law, if applicable, and to a federal or state agency or any other party at the Green Tag Purchaser’s discretion, and include without limitation those Green Tag Reporting Rights accruing under Section 1605(b) of The Energy Policy Act of 1992 and any present or future federal, state, or local law, regulation or bill, and international or foreign emissions trading program. Green Tags are accumulated on a MWh basis and one Green Tag represents the Green Attributes associated with one (1) MWh of Energy. Green Attributes do not include (i) any energy, capacity, reliability or other power attributes from the Project, (ii) production tax credits associated with the construction or operation of the Project and other financial incentives in the form of credits, reductions, or allowances associated with the project that are applicable to a state or federal income taxation obligation, (iii) fuel-related subsidies or “tipping fees” that may be paid to Seller to accept certain fuels, or local subsidies received by the generator for the destruction of particular preexisting pollutants or the promotion of local environmental benefits, or (iv) emission reduction credits encumbered or used by the Project for compliance with local, state, or federal operating and/or air quality permits. If the Project is a biomass or landfill gas facility and Seller receives any tradable Green Attributes based on the greenhouse gas reduction benefits or other emission offsets attributed to its fuel usage, it shall provide Buyer with sufficient Green Attributes to ensure that there are zero net emissions associated with the production of electricity from the Project.

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- 3.2. Green Attributes. Seller hereby provides and conveys all Green Attributes associated with all electricity generation from the Project to Buyer as part of the Product being delivered. Seller represents and warrants that Seller holds the rights to all Green Attributes from the Project, and Seller agrees to convey and hereby conveys all such Green Attributes to Buyer as included in the delivery of the Product from the Project.

(End of STC 2.)

(Source: First part from D.07-02-011, as modified by D.07-05-057; second part from D.07-11-025, Attachment A.)

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Non-Modifiable

STC 6: Eligibility

Seller, and, if applicable, its successors, represents and warrants that throughout the Delivery Term of this Agreement that: (i) the Project qualifies and is certified by the CEC as an Eligible Renewable Energy Resource (“ERR”) as such term is defined in Public Utilities Code Section 399.12 or Section 399.16; and (ii) the Project’s output delivered to Buyer qualifies under the requirements of the California Renewables Portfolio Standard. To the extent a change in law occurs after execution of this Agreement that causes this representation and warranty to be materially false or misleading, it shall not be an Event of Default if Seller has used commercially reasonable efforts to comply with such change in law.

(End of STC 6.)

(Source: D.07-11-025, Attachment A.)

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Non-Modifiable

STC 17: Applicable Law

Governing Law. This agreement and the rights and duties of the parties hereunder shall be governed by and construed, enforced and performed in accordance with the laws of the state of California, without regard to principles of conflicts of law. To the extent enforceable at such time, each party waives its respective right to any jury trial with respect to any litigation arising under or in connection with this agreement.

(End of STC 17.)

(Source: D.07-11-025, Attachment A.)

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**NINE MODIFIABLE
STANDARD TERMS AND CONDITIONS**

- STC 4: Confidentiality**
- STC 5: Contract Term**
- STC 7: Performance Standards/Requirements**
- STC 8: Product Definitions**
- STC 9: Non-Performance or Termination Penalties and Default Provisions**
- STC 12: Credit Terms**
- STC 15: Contract Modifications**
- STC 16: Assignment**
- STC 18: Application of Prevailing Wages**

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Modifiable

STC 4: Confidentiality

Section 10.11 of the Agreement is deleted in its entirety and is replaced with the following provision, irrespective of the election made by Seller on the Cover Sheet:

“Confidentiality: Neither Party shall disclose the non-public terms or conditions of this Agreement or any Transaction hereunder to a third party, other than (i) the Party’s employees, lenders, counsel, accountants or advisors who have a need to know such information and have agreed to keep such terms confidential, (ii) for disclosure to the Buyer’s Procurement Review Group, as defined in CPUC Decision (D.) 02-08-071, subject to a confidentiality agreement, (iii) to the CPUC under seal for purposes of review, (iv) disclosure of terms specified in and pursuant to Section 10.12 of this Agreement; (v) in order to comply with any applicable law, regulation, or any exchange, control area or ISO rule, or order issued by a court or entity with competent jurisdiction over the disclosing Party (‘Disclosing Party’), other than to those entities set forth in subsection (vi); or (vi) in order to comply with any applicable regulation, rule, or order of the CPUC, CEC, or the Federal Energy Regulatory Commission. In connection with requests made pursuant to clause (v) of this Section 10.11 (‘Disclosure Order’) each Party shall, to the extent practicable, use reasonable efforts: (i) to notify the other Party prior to disclosing the confidential information and (ii) prevent or limit such disclosure. After using such reasonable efforts, the Disclosing Party shall not be: (i) prohibited from complying with a Disclosure Order or (ii) liable to the other Party for monetary or other damages incurred in connection with the disclosure of the confidential information. Except as provided in the preceding sentence, the Parties shall be entitled to all remedies available at law or in equity to enforce, or seek relief in connection with, this confidentiality obligation.”

The following new Section 10.12 shall be added as follows:

“10.12 RPS Confidentiality. Notwithstanding Section 10.11 of this Agreement at any time on or after the date on which the Buyer makes its advice filing letter seeking CPUC Approval of the Agreement either Party shall be permitted to disclose the following terms with respect to such Transaction: Party names, resource type, delivery term, project location, and project capacity. If Option B is checked on the Cover

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Sheet, neither Party shall disclose party name or project location, pursuant to this Section 10.12, until six months after such CPUC Approval.”

The Cover Sheet of the Agreement shall be amended by adding to Article 10, Confidentiality, a new “Option B,” as follows:

- Option B RPS Confidentiality Applicable. If not checked, inapplicable”
- Option C Confidentiality Notification: If Option C is checked on the Cover Sheet, Seller has waived its right to notification in accordance with Section 10.11 (v).”

(End of STC 4.)

(Source: D.04-06-014, Appendix A.)

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Modifiable

STC 5: Contract Term

The following provision shall be included as a standard term in the Confirmation(s) for the Transaction(s) entered into under the Agreement:

“Delivery Term: The Parties shall specify the period of Product delivery for the ‘Delivery Term,’ as defined herein, by checking one of the following boxes:

- Delivery shall be for a period of ten (10) years.
- Delivery shall be for a period of fifteen (15) years.
- Delivery shall be for a period of twenty (20) years.
- Non-standard Delivery shall be for a period of ___ years.”

If the “Non-standard Delivery” contract term is selected, Parties need to apply to the CPUC justifying the need for non-standard delivery.

(End of STC 5.)

(Source: D.04-06-014, Appendix A.)

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Modifiable

STC 7: Performance Standards/Requirements

- A. The following shall be included in the applicable post Commercial Operation Date performance standards/requirement provisions of the Agreement or Confirmation for “As Available” projects:

“Energy Production Guarantees

The Buyer shall in its sole discretion have the right to declare an Event of Default if Seller fails to achieve the Guaranteed Energy Production in any [12 month period] [or] [24 month period] and such failure is not excused by the reasons set forth in subsections (ii), (iii), or (v) of Section __ of this Agreement, “Excuses for Failure to Perform.”

Guaranteed Energy Production = _____MWh.”

- B. The following shall be included in the applicable performance standards/requirement provisions, as “Excuses for Failure to Perform” in the Agreement or Confirmation for “As Available” projects:

“Seller shall not be liable to Buyer for any damages determined pursuant to Article Four of the Agreement in the event that Seller fails to deliver the Product to Buyer for any of the following reasons:

- i. if the specified generation asset(s) are unavailable as a result of a Forced Outage (as defined in the NERC Generating Unit Availability Data System (GADS) Forced Outage reporting guidelines) and such Forced Outage is not the result of Seller’s negligence or willful misconduct;
- ii. Force Majeure;
- iii. by the Buyer’s failure to perform;
- iv. by scheduled maintenance outages of the specified units;
- v. a reduction in Output as ordered under terms of the dispatch down and Curtailment provisions (including CAISO or Buyer’s system emergencies); or
- vi. [the unavailability of landfill gas which was not anticipated as of the date this [Confirmation] was agreed to, which is not within the

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reasonable control of, or the result of negligence of, Seller or the party supplying such landfill gas to the Project, and which by the exercise of reasonable due diligence, Seller is unable to overcome or avoid or causes to be avoided; OR

insufficient wind power for the specified units to generate energy as determined by the best wind speed and direction standards utilized by other wind producers or purchasers in the vicinity of the Project or if wind speeds exceed the specified units' technical specifications; OR

the unavailability of water or the unavailability of sufficient pressure required for operation of the hydroelectric turbine-generator as reasonably determined by Seller within its operating procedures, neither of which was anticipated as of the date this [Confirmation] was agreed to, which is not within the reasonable control of, or the result of negligence of, Seller or the party supplying such water to the Project, and which by the exercise of due diligence, such Seller or the party supplying the water is unable to overcome or avoid or causes to be avoided.]

The performance of the Buyer to receive the Product may be excused only (i) during periods of Force Majeure, (ii) by the Seller's failure to perform or (iii) during dispatch down periods."

- C. The following shall be included in the applicable performance standards/requirement provisions as "Excuses for Failure to Perform" in the Agreement or Confirmation for "Unit Firm" projects:

Net Rated Output Capacity. If the Net Rated Output Capacity at the Commercial Operation Date or at the end of the first twelve (12) consecutive months after the Commercial Operation Date [and every twelve (12) consecutive months thereafter] is less than ___ MW, Buyer shall have the right to declare an Event of Default. For subsequent contract years, Buyer shall trigger an Annual Capacity Test to determine each year's Net Rated Output Capacity by scheduling Deliveries from the facility for two consecutive weeks. Buyer shall provide Seller two (2) weeks notice of the Annual Capacity Test. For the second year and thereafter the Net Rated Output Capacity shall be the ratio of the sum of average hourly Energy Delivered for two (2) weeks divided by 336 hours (24 hours x 14 days). Energy Delivered shall exclude any energy greater than ___ MW average in each hour. The resulting Net Rated Output Capacity shall remain in effect until the next Annual Capacity Test. The Net Rated Output Capacity shall not exceed the Contract Capacity of ___MW.

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Additional Event of Default. It shall be an additional Event of Default if (i) the Availability.

Adjustment Factor is less than ____% for ___ consecutive months, or (ii) Net Rated Output.

Capacity falls below ___ MW. In no event shall the Seller have the right to procure Energy from sources other than the Facility for sale and delivery pursuant to this Agreement.”

- D. The following shall be included in the applicable performance standards/requirement provisions of the Agreement or Confirmation for “Unit Firm” projects:

“Seller shall be excused from achieving the Availability Adjustment Factor for the applicable time period, in the event that Seller fails to deliver the Product to Buyer for any of the following reason:

- i. during Force Majeure;
- ii. by Buyer’s failure to perform; or,
- iii. a reduction in Output as ordered under terms of the dispatch-down and Curtailment provisions (including CAISO or Buyer’s system emergencies.)”

- E. The following shall be included in the applicable performance standards/requirement provisions as “Excuses for Failure to Perform” in the Agreement or Confirmation for “Unit Firm,” “Baseload,” “Peaking,” and “Dispatchable” Products:

“Seller shall not be liable to Buyer for any damages determined pursuant to Article Four of the Agreement, in the event that Seller fails to deliver the Product to Buyer for any of the following reason:

- iv. if the specified generation asset(s) are unavailable as a result of a Forced Outage (as defined in the NERC Generating Unit Availability Data System (GADS) Forced Outage reporting guidelines) and such Forced Outage is not the result of Seller’s negligence or willful misconduct;
- v. Force Majeure;
- vi. by the Buyer’s failure to perform;
- vii. by scheduled maintenance outages of the specified units; or, a reduction in Output as ordered under terms of the dispatch down and Curtailment provisions (including CAISO or Buyer’s system emergencies).

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The performance of the Buyer to receive the product may be excused only (i) during periods of Force Majeure, (ii) during periods of dispatch-down, or (iii) by the Seller's failure to perform."

(End of STC 7.)

(Source: D.04-06-014, Appendix A.)

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Modifiable

STC 8: Product Definitions

The following new Product Definition shall be added to Schedule P of the EEI Agreement:

“ ‘As Available’ means, with respect to a Transaction, that Seller shall deliver to Buyer and Buyer shall purchase at the Delivery Point the Product from the Units, in accordance with the terms of this Agreement and subject to the excuses for performance specified in this Agreement.”

The “Unit Firm” Product Definition in Schedule P of the EEI Agreement shall be deleted in its entirety and replaced with the following:

“ ‘Unit Firm’ means, with respect to a Transaction, that the Product subject to the Transaction is intended to be supplied from a specified generation asset or assets specified in the Transaction. The following Products shall be considered “Unit Firm” products:

‘Peaking’ means with respect to a Transaction, a Product for which Delivery Periods coincide with Peak Periods, as defined by Buyer.

‘Baseload’ means with respect to a Transaction, a Product for which Delivery levels are uniform for all Delivery Periods.

‘Dispatchable’ means with respect to a Transaction, a Product for which Seller makes available unit-contingent capacity for a Buyer to schedule and dispatch up or down at Buyer’s option.”

(End of STC 8.)

(Source: D.04-06-014, Appendix A.)

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Modifiable

STC 9: Non-Performance or Termination Penalties and Default Provisions

DEFAULT PROVISIONS

The following provisions are offered as “Default Provisions” for the Agreement:

Section 5.1 of the EEI Agreement shall be adopted in its entirety and included in the Agreement as follows:

“5.1 Events of Default. An ‘Event of Default’ shall mean, with respect to a Party (a ‘Defaulting Party’), the occurrence of any of the following:

- (a) the failure to make, when due, any payment required pursuant to this Agreement if such failure is not remedied within three (3) Business Days after written notice;
- (b) any representation or warranty made by such Party herein is false or misleading in any material respect when made or when deemed made or repeated;
- (c) the failure to perform any material covenant or obligation set forth in this Agreement (except to the extent constituting a separate Event of Default, and except for such Party’s obligations to deliver or receive the Product, the exclusive remedy for which is provided in Article Four) if such failure is not remedied within three (3) Business Days after written notice;
- (d) such Party becomes Bankrupt;
- (e) the failure of such Party to satisfy the creditworthiness/collateral requirements agreed to pursuant to Article Eight hereof;
- (f) such Party consolidates or amalgamates with, or merges with or into, or transfers all or substantially all of its assets to, another entity and, at the time of such consolidation, amalgamation, merger or transfer, the resulting, surviving or transferee entity fails to assume all the obligations of such Party under this Agreement to which it or its predecessor was a party by operation of law or pursuant to an agreement reasonably satisfactory to the other Party;
- (g) if the applicable cross default section in the Cover Sheet is indicated for such Party, the occurrence and continuation of (i) a default, event of default or other similar condition or event in respect of such Party or any

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other party specified in the Cover Sheet for such Party under one or more agreements or instruments, individually or collectively, relating to indebtedness for borrowed money in an aggregate amount of not less than the applicable Cross Default Amount (as specified in the Cover Sheet), which results in such indebtedness becoming, or becoming capable at such time of being declared, immediately due and payable or (ii) a default by such Party or any other party specified in the Cover Sheet for such Party in making on the due date therefore one or more payments, individually or collectively, in an aggregate amount of not less than the applicable Cross Default Amount (as specified in the Cover Sheet);

- (h) with respect to such Party's Guarantor, if any:
 - (i) if any representation or warranty made by a Guarantor in connection with this Agreement is false or misleading in any material respect when made or when deemed made or repeated;
 - (ii) the failure of a Guarantor to make any payment required or to perform any other material covenant or obligation in any guaranty made in connection with this Agreement and such failure shall not be remedied within three (3) Business Days after written notice;
 - (iii) a Guarantor becomes Bankrupt; the failure of a Guarantor's guaranty to be in full force and effect for purposes of this Agreement (other than in accordance with its terms) prior to the satisfaction of all obligations of such Party under each Transaction to which such guaranty shall relate without the written consent of the other Party; or
 - (v) a Guarantor shall repudiate, disaffirm, disclaim, or reject, in whole or in part, or challenge the validity of any guaranty."

Section 5.1 of the Agreement, as provided above, shall be modified as follows:

Section 5.1(c) is amended by deleting the reference to "three (3) Business Days" and replacing it with "thirty (30) days;" and

Sections 5.1(b) and 5.1(h)(i) are amended by adding the following at the end thereof: "or with respect to the representations and warranties made pursuant to Section 10.2 of this Agreement or any additional representations and warranties agreed upon by the parties, any such representation and warranty becomes false or misleading in any material respect during the term of this Agreement or any Transaction entered into hereunder."

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The following new “Events of Default” shall be included in Section 5.1 of the Agreement, as amended:

Section 5.1 (i) is added as follows: “if at any time during the Term of Agreement, Seller delivers or attempts to deliver to the Delivery Point for sale under this Agreement electrical power that was not generated by the Unit(s)”; and

Section 5.1(j) is added as follows: “failure to meet the performance requirements agreed to pursuant to Section __ hereof.”

NON- PERFORMANCE/TERMINATION PENALITES:

The following modifications to Article One of the EEI Agreement are offered as “Non-Performance/Termination Penalties” for the Agreement:

The definition of “Gains” shall be deleted in its entirety and replaced with the following:

“ ‘Gains’ means with respect to any Party, an amount equal to the present value of the economic benefit to it, if any (exclusive of Costs), resulting from the termination of a Terminated Transaction for the remaining term of such Transaction, determined in a commercially reasonable manner. Factors used in determining economic benefit may include, without limitation, reference to information either available to it internally or supplied by one or more third parties, including, without limitation, quotations (either firm or indicative) of relevant rates, prices, yields, yield curves, volatilities, spreads or other relevant market data in the relevant markets market referent prices for renewable power set by the CPUC, comparable transactions, forward price curves based on economic analysis of the relevant markets, settlement prices for comparable transactions at liquid trading hubs (e.g., NYMEX), all of which should be calculated for the remaining term of the applicable Transaction and include the value of Environmental Attributes.”

The definition of “Losses” shall be deleted in its entirety and replaced with the following:

“ ‘Losses’ means with respect to any Party, an amount equal to the present value of the economic loss to it, if any (exclusive of Costs), resulting from the termination of a Terminated Transaction for the remaining term of such Transaction, determined in a commercially reasonable manner. Factors used in determining the loss of economic benefit may include, without limitation, reference to information either available to it internally or supplied by one or more third parties including without limitation, quotations (either firm or indicative) of relevant rates, prices, yields, yield curves, volatilities, spreads or other relevant market data in the relevant markets, market

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referent prices for renewable power set by the CPUC, comparable transactions, forward price curves based on economic analysis of the relevant markets, settlement prices for comparable transactions at liquid trading hubs (e.g. NYMEX), all of which should be calculated for the remaining term of the applicable Transaction and include value of Environmental Attributes.”

The definition of “Costs” shall be deleted in its entirety and replaced with the following:

“ ‘Costs’ means, with respect to the Non-Defaulting Party, brokerage fees, commissions and other similar third party transaction costs and expenses reasonably incurred by such Party either in terminating any arrangement pursuant to which it has hedged its obligations or entering into new arrangements which replace a Terminated Transaction; and all reasonable attorneys’ fees and expenses incurred by the Non-Defaulting Party in connection with the termination of a Transaction.”

The definition of “Settlement Amount” shall be adopted in its entirety as follows:

“1.56 ‘Settlement Amount’ means, with respect to a Transaction and the Non-Defaulting Party, the Losses or Gains, and Costs, expressed in U.S. Dollars, which such party incurs as a result of the liquidation of a Terminated Transaction pursuant to Section 5.2.”

Section 5.2 of the Agreement shall be deleted in its entirety and replaced with the following:

“5.2 Declaration of Early Termination Date and Calculation of Settlement Amounts:

If an Event of Default with respect to a Defaulting Party shall have occurred and be continuing, the other Party (‘Non-Defaulting Party’) shall have the right to (i) designate a day, no earlier than the day such notice is effective and no later than 20 days after such notice is effective, as an early termination date (‘Early Termination Date’) to accelerate all amounts owing between the Parties and to liquidate and terminate all, but not less than all, Transactions (each referred to as a ‘Terminated Transaction’) between the Parties, (ii) withhold any payments due to the Defaulting Party under this Agreement and (iii) suspend performance. The Non-defaulting Party shall calculate, in a commercially reasonable manner, a Settlement Amount for each such Terminated Transaction as of the Early Termination Date. Third parties supplying information for purposes of the calculation of Gains or Losses may include, without limitation, dealers in the relevant markets, end-users of the relevant product, information vendors and other sources of market information. The Settlement Amount shall not include consequential, incidental, punitive, exemplary, indirect or business interruption

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damages. The Non-Defaulting Party shall not have to enter into replacement transactions to establish a Settlement Amount.”

Section 5.3 through 5.5 of the Agreement shall be adopted in their entirety. For reference Section 5.3 – 5.5 are as follows:

- “5.3 Net Out of Settlement Amounts. The Non-Defaulting Party shall aggregate all Settlement Amounts into a single amount by: netting out (a) all Settlement Amounts that are due to the Defaulting Party, plus, at the option of the Non-Defaulting Party, any cash or other form of security then available to the Non-Defaulting Party pursuant to Article Eight, plus any or all other amounts due to the Defaulting Party under this Agreement against (b) all Settlement Amounts that are due to the Non-Defaulting Party, plus any or all other amounts due to the Non-Defaulting Party under this Agreement, so that all such amounts shall be netted out to a single liquidated amount (the ‘Termination Payment’). If the Non-Defaulting Party’s aggregate Gains exceed its aggregate Losses and Costs, if any, resulting from the termination of this Agreement, the Termination Payment shall be zero.
- 5.4 Notice of Payment of Termination Payment. As soon as practicable after a liquidation, notice shall be given by the Non-Defaulting Party to the Defaulting Party of the amount of the Termination Payment and whether the Termination Payment is due to the Non-Defaulting Party. The notice shall include a written statement explaining in reasonable detail the calculation of such amount and the sources for such calculation. The Termination Payment shall be made to the Non-Defaulting Party, as applicable, within two (2) Business Days after such notice is effective.
- 5.5 Disputes With Respect to Termination Payment. If the Defaulting Party disputes the Non-Defaulting Party’s calculation of the Termination Payment, in whole or in part, the Defaulting Party shall, within five (5) Business Days of receipt of Non-Defaulting Party’s calculation of the Termination Payment, provide to the Non-Defaulting Party a detailed written explanation of the basis for such dispute; provided, however, that if the Termination Payment is due from the Defaulting Party, the

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Defaulting Party shall first transfer Performance Assurance to the Non-defaulting Party in an amount equal to the Termination Payment.”

(End of STC 9.)

(Source: D.04-06-014, Appendix A.)

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STC 12: Credit Terms

Sections 8.1 through 8.3 of the EEI Agreement shall be adopted in their entirety for inclusion in the Agreement as follows:

“8.1 Party A Credit Protection. The applicable credit and collateral requirements shall be as specified on the Cover Sheet and shall only apply if marked as “Applicable” on the Cover Sheet.

(a) Financial Information. Option A: If requested by Party A, Party B shall deliver (i) within 120 days following the end of each fiscal year, a copy of Party B’s annual report containing audited consolidated financial statements for such fiscal year and (ii) within 60 days after the end of each of its first three fiscal quarters of each fiscal year, a copy of Party B’s quarterly report containing unaudited consolidated financial statements for such fiscal quarter. In all cases the statements shall be for the most recent accounting period and prepared in accordance with generally accepted accounting principles; provided, however, that should any such statements not be available on a timely basis due to a delay in preparation or certification, such delay shall not be an Event of Default so long as Party B diligently pursues the preparation, certification and delivery of the statements.

Option B: If requested by Party A, Party B shall deliver (i) within 120 days following the end of each fiscal year, a copy of the annual report containing audited consolidated financial statements for such fiscal year for the party(s) specified on the Cover Sheet and (ii) within 60 days after the end of each of its first three fiscal quarters of each fiscal year, a copy of quarterly report containing unaudited consolidated financial statements for such fiscal quarter for the party(s) specified on the Cover Sheet. In all cases the statements shall be for the most recent accounting period and shall be prepared in accordance with generally accepted accounting principles; provided, however, that should any such statements not be available on a timely basis due to a delay in preparation or certification, such delay shall not be an Event of Default so long as the relevant entity diligently pursues the preparation, certification and delivery of the statements.

Option C: Party A may request from Party B the information specified in the Cover Sheet.

(b) Credit Assurances. If Party A has reasonable grounds to believe that Party B’s creditworthiness or performance under this Agreement has become unsatisfactory, Party A will provide Party B with written notice requesting Performance Assurance in

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an amount determined by Party A in a commercially reasonable manner. Upon receipt of such notice Party B shall have three (3) Business Days to remedy the situation by providing such Performance Assurance to Party A. In the event that Party B fails to provide such Performance Assurance, or a guaranty or other credit assurance acceptable to Party A within three (3) Business Days of receipt of notice, then an Event of Default under Article Five will be deemed to have occurred and Party A will be entitled to the remedies set forth in Article Five of this Master Agreement.

(c) Collateral Threshold. If at any time and from time to time during the term of this Agreement (and notwithstanding whether an Event of Default has occurred), the Termination Payment that would be owed to Party A plus Party B's Independent Amount, if any, exceeds the Party B Collateral Threshold, then Party A, on any Business Day, may request that Party B provide Performance Assurance in an amount equal to the amount by which the Termination Payment plus Party B's Independent Amount, if any, exceeds the Party B Collateral Threshold (rounding upwards for any fractional amount to the next Party B Rounding Amount) ("Party B Performance Assurance"), less any Party B Performance Assurance already posted with Party A. Such Party B Performance Assurance shall be delivered to Party A within three (3) Business Days of the date of such request. On any Business Day (but no more frequently than weekly with respect to Letters of Credit and daily with respect to cash), Party B, at its sole cost, may request that such Party B Performance Assurance be reduced correspondingly to the amount of such excess Termination Payment plus Party B's Independent Amount, if any, (rounding upwards for any fractional amount to the next Party B Rounding Amount). In the event that Party B fails to provide Party B Performance Assurance pursuant to the terms of this Article Eight within three (3) Business Days, then an Event of Default under Article Five shall be deemed to have occurred and Party A will be entitled to the remedies set forth in Article Five of this Master Agreement.

For purposes of this Section 8.1(c), the calculation of the Termination Payment shall be calculated pursuant to Section 5.3 by Party A as if all outstanding Transactions had been liquidated, and in addition thereto, shall include all amounts owed but not yet paid by Party B to Party A, whether or not such amounts are due, for performance already provided pursuant to any and all Transactions.

(d) Downgrade Event. If at any time there shall occur a Downgrade Event in respect of Party B, then Party A may require Party B to provide Performance Assurance in an amount determined by Party A in a commercially reasonable manner. In the event Party B shall fail to provide such Performance Assurance or a guaranty or other credit assurance acceptable to Party A within three (3) Business Days of receipt of notice, then an Event of Default shall be deemed to have occurred and Party A will be entitled to the remedies set forth in Article Five of this Master Agreement.

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(e) If specified on the Cover Sheet, Party B shall deliver to Party A, prior to or concurrently with the execution and delivery of this Master Agreement a guarantee in an amount not less than the Guarantee Amount specified on the Cover Sheet and in a form reasonably acceptable to Party A.

8.2 Party B Credit Protection. The applicable credit and collateral requirements shall be as specified on the Cover Sheet and shall only apply if marked as "Applicable" on the Cover Sheet.

(a) Financial Information. Option A: If requested by Party B, Party A shall deliver (i) within 120 days following the end of each fiscal year, a copy of Party A's annual report containing audited consolidated financial statements for such fiscal year and (ii) within 60 days after the end of each of its first three fiscal quarters of each fiscal year, a copy of such Party's quarterly report containing unaudited consolidated financial statements for such fiscal quarter. In all cases the statements shall be for the most recent accounting period and prepared in accordance with generally accepted accounting principles; provided, however, that should any such statements not be available on a timely basis due to a delay in preparation or certification, such delay shall not be an Event of Default so long as such Party diligently pursues the preparation, certification and delivery of the statements.

Option B: If requested by Party B, Party A shall deliver (i) within 120 days following the end of each fiscal year, a copy of the annual report containing audited consolidated financial statements for such fiscal year for the party(s) specified on the Cover Sheet and (ii) within 60 days after the end of each of its first three fiscal quarters of each fiscal year, a copy of quarterly report containing unaudited consolidated financial statements for such fiscal quarter for the party(s) specified on the Cover Sheet. In all cases the statements shall be for the most recent accounting period and shall be prepared in accordance with generally accepted accounting principles; provided, however, that should any such statements not be available on a timely basis due to a delay in preparation or certification, such delay shall not be an Event of Default so long as the relevant entity diligently pursues the preparation, certification and delivery of the statements.

Option C: Party B may request from Party A the information specified in the Cover Sheet.

(b) Credit Assurances. If Party B has reasonable grounds to believe that Party A's creditworthiness or performance under this Agreement has become unsatisfactory, Party B will provide Party A with written notice requesting Performance Assurance in an amount determined by Party B in a commercially reasonable manner. Upon receipt of such notice Party A shall have three (3) Business Days to remedy the situation by

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providing such Performance Assurance to Party B. In the event that Party A fails to provide such Performance Assurance, or a guaranty or other credit assurance acceptable to Party B within three (3) Business Days of receipt of notice, then an Event of Default under Article Five will be deemed to have occurred and Party B will be entitled to the remedies set forth in Article Five of this Master Agreement.

(c) Collateral Threshold. If at any time and from time to time during the term of this Agreement (and notwithstanding whether an Event of Default has occurred), the Termination Payment that would be owed to Party B plus Party A's Independent Amount, if any, exceeds the Party A Collateral Threshold, then Party B, on any Business Day, may request that Party A provide Performance Assurance in an amount equal to the amount by which the Termination Payment plus Party A's Independent Amount, if any, exceeds the Party A Collateral Threshold (rounding upwards for any fractional amount to the next Party A Rounding Amount) ("Party A Performance Assurance"), less any Party A Performance Assurance already posted with Party B. Such Party A Performance Assurance shall be delivered to Party B within three (3) Business Days of the date of such request. On any Business Day (but no more frequently than weekly with respect to Letters of Credit and daily with respect to cash), Party A, at its sole cost, may request that such Party A Performance Assurance be reduced correspondingly to the amount of such excess Termination Payment plus Party A's Independent Amount, if any, (rounding upwards for any fractional amount to the next Party A Rounding Amount). In the event that Party A fails to provide Party A Performance Assurance pursuant to the terms of this Article Eight within three (3) Business Days, then an Event of Default under Article Five shall be deemed to have occurred and Party B will be entitled to the remedies set forth in Article Five of this Master Agreement.

For purposes of this Section 8.2(c), the calculation of the Termination Payment shall be calculated pursuant to Section 5.3 by Party B as if all outstanding Transactions had been liquidated, and in addition thereto, shall include all amounts owed but not yet paid by Party A to Party B, whether or not such amounts are due, for performance already provided pursuant to any and all Transactions.

(d) Downgrade Event. If at any time there shall occur a Downgrade Event in respect of Party A, then Party B may require Party A to provide Performance Assurance in an amount determined by Party B in a commercially reasonable manner. In the event Party A shall fail to provide such Performance Assurance or a guaranty or other credit assurance acceptable to Party B within three (3) Business Days of receipt of notice, then an Event of Default shall be deemed to have occurred and Party B will be entitled to the remedies set forth in Article Five of this Master Agreement.

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(e) If specified on the Cover Sheet, Party A shall deliver to Party B, prior to or concurrently with the execution and delivery of this Master Agreement a guarantee in an amount not less than the Guarantee Amount specified on the Cover Sheet and in a form reasonably acceptable to Party B.

8.3 Grant of Security Interest/Remedies. To secure its obligations under this Agreement and to the extent either or both Parties deliver Performance Assurance hereunder, each Party (a "Pledgor") hereby grants to the other Party (the "Secured Party") a present and continuing security interest in, and lien on (and right of setoff against), and assignment of, all cash collateral and cash equivalent collateral and any and all proceeds resulting therefrom or the liquidation thereof, whether now or hereafter held by, on behalf of, or for the benefit of, such Secured Party, and each Party agrees to take such action as the other Party reasonably requires in order to perfect the Secured Party's first-priority security interest in, and lien on (and right of setoff against), such collateral and any and all proceeds resulting therefrom or from the liquidation thereof. Upon or any time after the occurrence or deemed occurrence and during the continuation of an Event of Default or an Early Termination Date, the Non-Defaulting Party may do any one or more of the following: (i) exercise any of the rights and remedies of a Secured Party with respect to all Performance Assurance, including any such rights and remedies under law then in effect; (ii) exercise its rights of setoff against any and all property of the Defaulting Party in the possession of the Non-Defaulting Party or its agent; (iii) draw on any outstanding Letter of Credit issued for its benefit; and (iv) liquidate all Performance Assurance then held by or for the benefit of the Secured Party free from any claim or right of any nature whatsoever of the Defaulting Party, including any equity or right of purchase or redemption by the Defaulting Party. The Secured Party shall apply the proceeds of the collateral realized upon the exercise of any such rights or remedies to reduce the Pledgor's obligations under the Agreement (the Pledgor remaining liable for any amounts owing to the Secured Party after such application), subject to the Secured Party's obligation to return any surplus proceeds remaining after such obligations are satisfied in full."

If the parties elect as being applicable on the Cover Sheet, the following new Section 8.4 shall be added to Article Eight of the EEI Master Agreement:

To secure its obligations under this Agreement, in addition to satisfying any credit terms pursuant to the terms of Section [8.1 or 8.2] to the extent marked applicable, Seller agrees to deliver to Buyer (the "Secured Party") within thirty (30) days of the date on which all of the conditions precedent set forth in Section ___ are either satisfied or waived, and Seller shall maintain in full force and effect a) until the Commercial Operation Date a [INSERT TYPE OF COLLATERAL] in the amount of \$[____], the form of which shall be determined in [the sole discretion of] [or] [by] Buyer and (b)

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from the Commercial Operation Date until the end of the Term [INSERT TYPE OF COLLATERAL]in the amount of \$[____], the form of which shall be determined [in the sole discretion of] [or][by] the Buyer. Any such security shall not be deemed a limitation of damages.”

(End of STC 12.)

(Source: D.04-06-014, Appendix A.)

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STC 15: Contract Modifications

The following provision of Section 10.8 of the EEI Agreement shall be adopted as follows:

“Except to the extent herein provided for, no amendment or modification to this Agreement shall be enforceable unless reduced to writing and executed by both parties.”

(End of STC 15.)

(Source: D.04-06-014, Appendix A.)

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STC 16: Assignment

Section 10.5 of the EEI Agreement, "Assignment," shall be deleted in its entirety and replaced with the following:

"Assignment. Neither Party shall assign this Agreement or its rights hereunder without the prior written consent of the other Party, which consent shall not be unreasonably withheld; provided, however, either Party may, without the consent of the other Party (and without relieving itself from liability hereunder), transfer, sell, pledge, encumber or assign this Agreement or the accounts, revenues or proceeds hereof to its financing providers and the financing provider(s) shall assume the payment and performance obligations provided under this Agreement with respect to the transferring Party provided, however, that in each such case, any such assignee shall agree in writing to be bound by the terms and conditions hereof and so long as the transferring Party delivers such tax and enforceability assurance as the non-transferring Party may reasonably request."

(End of STC 16.)

(Source: D.04-06-014, Appendix A.)

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STC 18: Application of Prevailing Wage

To the extent applicable, Seller shall comply with the prevailing wage requirements of Public Utilities Code section 399.14, subdivision (h).

(End of STC 18.)

(Source: D.04-06-014, Appendix A.)

(END OF APPENDIX A)