

**POWER PURCHASE AGREEMENT**

This Power Purchase Agreement is entered into this 2<sup>nd</sup> day of February 2005 by and between Alameda Power & Telecom, a department of the City of Alameda, California, and Ameresco Half Moon Bay LLC, a Delaware limited liability company.

**RECITALS**

1. Seller intends to develop, finance, build, own and operate a Landfill Gas electric generating facility to be located at the Ox Mountain Landfill (the "Landfill") in the City of Half Moon Bay, California, on a site leased from Browning-Ferris Industries of California, Inc. ("BFI"), which owns the Landfill.
2. Buyer is engaged in the procurement and supply of electricity to residential and commercial customers in the City of Alameda.
3. Buyer wishes to purchase a portion of the Output of the Plant and intends to resell related Energy to its residential and commercial customers.
4. Buyer is willing to purchase, and Seller is willing to sell, a portion of the Output of the Plant, on the terms and conditions and at the prices set forth in this Agreement.
5. Seller may determine to expand the Plant in the future depending on the availability of Landfill Gas and other factors in accordance with the terms of this Agreement.
6. Buyer will have a right of first refusal to purchase Expansion Plant Output, such right to be exercisable as provided in this Agreement.

**NOW THEREFORE**, in consideration of these premises and the mutual promises set forth below, Seller and Buyer agree as follows.

# AGREEMENT

## ARTICLE I - DEFINITIONS

Initially capitalized terms, whenever used in this Agreement, have the meanings set forth below unless otherwise herein defined. The term “including,” when used in this Agreement, shall mean to include “without limitation.”

- 1.1 Agreement:** This Power Purchase Agreement, including all appendices, as it may be amended from time to time.
- 1.2 Availability Threshold:** The mechanical availability of the Plant calculated as of the end of each calendar month during the Term as a percentage in accordance with the following:

$$A = 100 \times \frac{\text{Available Hours}}{\text{Base Hours}}$$

Where:

A = Availability Threshold

Available Hours = the number of hours during the twenty-four (24) prior months in which the Plant is capable of delivering Energy to the Point of Interconnection; provided that, to the extent that the Plant is not capable of delivering all of the net Initial Capacity in any hour, the Available Hours with respect to such hour shall be reduced *pro rata* to reflect the fraction of the net Initial Capacity the Plant is capable of delivering in such hour.

Base Hours = the number of hours during the twenty-four (24) prior months; provided that, to the extent that the Plant is partially or wholly incapable or otherwise unable to deliver Energy in any hour as a result of a Force Majeure Event or because of fuel unavailability in any hour due to no fault or negligence of Seller, that hour (or if the Plant's capacity is only partially constrained, the *pro rata* portion of that hour) shall be excluded from the Base Hours.

There shall be no Availability Threshold during the first twelve (12) months following the Commercial Operation Date. Starting with the thirteenth (13th) month after the Commercial Operation Date and continuing through the twenty-fourth (24th) month, the above formula will be used to determine the

Availability Threshold with the exception that both Available Hours and Base Hours will be calculated starting with the first hour of operation on the Commercial Operation Date and including all relevant hours thereafter to the end of the month relevant. Starting with the twenty-fifth (25th) month, the Availability Threshold shall be calculated on a rolling basis using the previous twenty-four (24) months.

- 1.3 **BFI:** As defined in the Recitals
- 1.4 **Buyer:** Alameda Power & Telecom, a department of the City of Alameda, California, and any successor or permitted assignee.
- 1.5 **Change in Law:** The enactment or issuance of any new law or regulation, the amendment, alteration, modification or repeal of any existing law or regulation or any authoritative interpretation of any existing law or regulation issued by a competent court, tribunal or Governmental Authority contrary to the existing official interpretation thereof, in each case coming into effect after the date of this Agreement and which must be complied with in order for the Plant to be constructed and operated lawfully.
- 1.6 **Commercial Operation:** The condition of the Plant whereupon it (a) is certified by Seller to be complete in accordance with manufacturers' recommendations except for punch list items, and (b) has passed the performance test set forth in Appendix E while synchronized with the LDC System or ISO transmission grid.
- 1.7 **Commercial Operation Date:** The date upon which Commercial Operation first occurs.
- 1.8 **Contractual Obligations:** As to Seller, any material agreement, instrument or undertaking to which Seller is a party or by which it or any of its property is bound.
- 1.9 **EA Agency:** Any local, state or federal entity, or any other Person, that has responsibility for or jurisdiction over a program involving transferability of Environmental Attributes, including the Clean Air Markets Division of the United States Environmental Protection Agency, the California Resources, Conservation and Development Commission, the California Public Utilities Commission, and any successor agency thereto.

- 1.10 Emergency:** Any condition or situation which (i) endangers life or property or (ii) affects Buyer's physical ability to maintain safe, adequate, and continuous electric power and energy to Buyer's customers.
- 1.11 Energy:** The electricity generated by the Plant and delivered to Buyer and Palo Alto by the Seller, pursuant to this Agreement and the Palo Alto Agreement, respectively, at the Point of Interconnection, as expressed in units of kilowatt-hours (kWh) or megawatt-hours (MWh), including Test Energy.
- 1.12 Environmental Attributes:** Any and all credits, benefits, emissions reductions, offsets, and allowances, howsoever entitled, attributable to the generation from the Plant or Expansion Plant(s), as the case may be, and its displacement of conventional energy generation. Environmental Attributes include but are not limited to: (1) any avoided emissions of pollutants to the air, soil or water such as sulfur oxides (SO<sub>x</sub>), nitrogen oxides (NO<sub>x</sub>), carbon monoxide (CO) and other pollutants; (2) any avoided emissions of carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>) and other greenhouse gases (GHGs) that have been determined by the United Nations Intergovernmental Panel on Climate Change to contribute to the actual or potential threat of altering the Earth's climate by trapping heat in the atmosphere; and (3) the reporting rights 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 kWh basis and one Green Tag represents the Environmental Attributes associated with one (1) MWh of energy. Environmental Attributes do not include (i) any energy, capacity, reliability or other power attributes from the Plant or Expansion Plant(s), (ii) production tax credits associated with the construction or operation of the Plant, Expansion Plant(s), Landfill, or any other associated contract or right, and other financial incentives in the form of credits, reductions, or allowances associated with the Plant, Expansion Plant(s), Landfill, or any other associated contract or right, 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 Seller or the owner of the Landfill for the destruction of particular pre-existing pollutants or the promotion of local environmental benefits, or (iv) emission reduction credits encumbered or used by the Plant or Expansion Plant(s) for compliance with local, state, or federal operating and/or air quality permits.

- 1.13 Environmental Attributes Reporting Rights:** All rights to report ownership of the Environmental Attributes to any person or entity, under Section 1605(b) of the Energy Policy Act of 1992 or otherwise.
- 1.14 Environmental Law:** Any federal, state and local laws including statutes, regulations, rulings, orders, administrative interpretations and other governmental restrictions and requirements relating to the discharge of air pollutants, water pollutants or process waste water or otherwise relating to the environment or hazardous substances, as amended from time to time.
- 1.15 Expansion Plant:** Any expansion of the Plant from its Initial Capacity, or any other electricity generating facility owned or controlled by Seller or its affiliate(s) located at the Landfill and fueled by Landfill Gas. Each such expansion of the Plant or additional facility shall be deemed to be an “Expansion Plant.”
- 1.16 Expansion Plant Output:** All capacity, energy, associated Environmental Attributes, ancillary services, contributions towards resource adequacy or reserve requirements (if any) and any other reliability or power attributes produced by Seller at any Expansion Plant.
- 1.17 FERC:** Federal Energy Regulatory Commission and its successor organization, if any.
- 1.18 Force Majeure Event:** Any act or event that delays or prevents a Party from timely performing obligations under this Agreement or from complying with conditions required under this Agreement to the extent that such act or event is reasonably unforeseeable and beyond the reasonable control of and without the fault or negligence of the Party relying thereon as justification for such delay, nonperformance, or noncompliance. Force Majeure Events typically include: (i) acts of God or the elements, extreme or severe weather conditions, explosion, fire, epidemic, landslide, mudslide, sabotage, lightning, earthquake, flood or similar cataclysmic event, acts of public enemy, war, blockade, civil

insurrection, riot, civil disturbance or strike or other labor difficulty caused or suffered by a Party; (ii) any restraint or restriction imposed by law or by rule, regulation or other acts or omissions of governmental authorities, whether federal, state or local which by exercise of due diligence and in compliance with applicable law a Party could not reasonably have been expected to avoid and to the extent which, by exercise of due diligence and in compliance with applicable law, has been unable to overcome (so long as the affected Party has not applied for or assisted such act by a governmental authority); and (iii) electric transmission interruptions or curtailments (not including any such event that results from a failure by Buyer to obtain firm transmission or similar rights, or otherwise to make congestion-related payments); *provided that* the term “Force Majeure Event” does not include (a) economic conditions that render a Party’s performance of this Agreement at the Price unprofitable or otherwise uneconomic (including Buyer’s ability to buy Energy or Environmental Attributes at a lower price, or Seller’s ability to sell Energy or Environmental Attributes at a higher price, than the Price), (b) a governmental act by Buyer that delays or prevents Buyer from timely performing its obligations under this Agreement, (c) a Plant Outage, including as a result of a failure or shortage of landfill gas, except, in any case, if caused by an event or circumstance that meets the requirements set forth in this Section 1.18 (other than as described in (iii) above), (d) failure or delay in grant of Permits, or (e) failures or delays by the LDC or the ISO in entering into all agreements with Seller contemplated by this Agreement.

**1.19 Governmental Authority:** Any federal or state government, or political subdivision thereof, including, without limitation, any municipality, township or county, or any entity or authority exercising executive, legislative, judicial, regulatory or administrative functions of or pertaining to government, including, without limitation, any corporation or other entity owned or controlled by any of the foregoing.

**1.20 Initial Capacity:** The installed gross capacity of the Plant on the Commercial Operation Date, such capacity to be not less than 5.7 MW and not more than 13.4 MW (gross nameplate), and not less than 5.3 MW and not more than 12.6 MW (net at the Point of Interconnection) and as further specified pursuant to Section 4.3(c).

**1.21 Interconnection:** Construction, installation, operation and maintenance of all Interconnection Facilities.

- 1.22 Interconnection Agreement:** The agreement between Seller and LDC pursuant to which Seller and LDC set forth the terms and conditions for Interconnection of the Plant to the LDC System, as amended from time to time.
- 1.23 Interconnection Facilities:** All the facilities installed for the purpose of interconnecting the Plant to the LDC System, including, but not limited to, transformers and associated equipment, relay and switching equipment and safety equipment.
- 1.24 ISO:** The California Independent System Operator Corporation, or its functional successor.
- 1.25 Landfill Gas:** The gas (and its constituent elements) generated from decomposition of materials deposited in the Landfill.
- 1.26 LD Amount:** The Monthly LD Amount multiplied by 12 (twelve).
- 1.27 LDC:** Pacific Gas and Electric Company, a California corporation.
- 1.28 LDC System:** The electric power generation, transmission, substation and distribution facilities owned, operated and/or maintained by LDC, which shall include, without limitation, after construction and installation, the circuit reinforcements, extensions, and associated terminal facility reinforcements or additions required to interconnect LDC's facilities with the Plant.
- 1.29 Lender(s):** Any Person(s) providing money or extending credit (including any capital lease) to Seller for (i) the construction of the Plant, (ii) the term or permanent financing of the Plant, or (iii) working capital or other ordinary business requirements for the Plant. "Lender(s)" shall not include trade creditors of Seller.
- 1.30 LFG Agreement:** As defined in Section 4.2(d).
- 1.31 Monthly LD Amount:** The product of (i) \$7000 per MW, (ii) Buyer's Percentage Share and (iii) the Initial Capacity specified under Section 4.3(c) (net at the Point of Interconnection).
- 1.32 MW:** Megawatt.

- 1.33 MWh:** Megawatt hour.
- 1.34 Outage:** A physical state in which all or a portion of the Plant is unavailable to provide Energy to the Point of Interconnection, or in which any portion of the LDC System is unavailable to receive Energy, to the extent that the unavailability affects the LDC System's ability to accept delivery of Energy at the Point of Interconnection, whether planned or unplanned.
- 1.35 Output:** All actual capacity of the Initial Capacity and associated Energy, as well as the following, as associated with the Initial Capacity and/or associated Energy: Environmental Attributes; ancillary services; contributions towards resource adequacy or reserve requirements (if any) and any other reliability or power attributes.
- 1.36 Palo Alto:** The City of Palo Alto, a chartered city and municipal utility organized under the laws of the State of California.
- 1.37 Palo Alto Agreement:** That certain power purchase agreement entered into by Palo Alto and Seller on or about the date hereof concerning a portion of the Output of the Plant.
- 1.38 Parties:** Buyer and Seller, and their respective successors and permitted assignees.
- 1.39 Party:** Buyer or Seller, and each such Party's respective successors and permitted assignees.
- 1.40 Percentage Share:** Fifty percent (50%), as may be adjusted from time to time in accordance with Section 2.2(e).
- 1.41 Permits:** All material federal, state or local authorizations, certificates, permits, licenses and approvals required by any Governmental Authority for the construction, ownership, operation and maintenance of the Plant.
- 1.42 Person:** An individual, partnership, corporation (including a business trust), limited liability company, joint stock company, trust, unincorporated association, joint venture, Governmental Authority or other entity.

- 1.43 Plant:** The generation facilities described in the Recitals to be constructed and owned by Seller and located on the Site for the generation and delivery of electricity, including the step-up transformer, revenue quality meter and all other facilities up to the Point of Interconnection, but not including any Expansion Plant.
- 1.44 Point of Interconnection:** The point on the electrical system where the Plant is physically interconnected with the LDC System, which is anticipated to be at the high side of Seller's step-up transformers at the Plant.
- 1.45 Price:** As defined in Section 2.3.
- 1.46 Production Incentives:** Any and all tax credits, deductions, allowances and exemptions applicable to federal, state and local taxes and any other payment, credit, deduction, benefit, grant or monetary incentive provided by any federal, state or local governmental authority or any Person, and all air emission credits, reductions or offsets, whether now in effect or arising in the future, in each case arising from the activities contemplated by this Agreement, including the extraction, sale, purchase, processing and/or distribution of Landfill Gas and/or the generation and sale of electricity using Landfill Gas as a fuel, including "Renewable Energy Production Incentive Payments" from the U.S. Department of Energy, emission credits, reductions, offsets or any other similar benefits arising from the generation, collection, production, purchase, use, reduction, conversion, destruction or resale of Landfill Gas. Notwithstanding the foregoing, Production Incentives shall not include anything that qualifies as Output as defined herein (including any Environmental Attributes), and shall include Section 29 Credits and Section 45 Credits.
- 1.47 Prudent Utility Practice:** Those practices, methods and equipment, as changed from time to time, that:
- (i) when engaged in are commonly used in the United States of America in prudent electrical engineering and operations to operate landfill gas generation electric equipment and related electrical equipment lawfully and with safety, reliability, efficiency and expedition; or
  - (ii) in the exercise of reasonable judgment considering the facts known, when engaged in could have been expected to achieve the desired result

consistent with applicable law, safety, reliability, efficiency and expedition.

Prudent Utility Practices are not limited to an optimum practice, method, selection of equipment or act, but rather are a range of acceptable practices, methods, selections of equipment or acts.

- 1.48 Requirements of Law:** Collectively, any federal or state law, treaty, franchise, rule, regulation, order, writ, judgment, injunction, decree, award or determination of any arbitrator or a court or other Governmental Authority, in each case applicable to or binding upon Seller or Buyer or any of their property or to which Seller or Buyer or any of their respective properties are subject.
- 1.49 BFI:** As defined in the Recitals.
- 1.50 Section 29 Credits:** Those tax credits available under Section 29 of Subtitle A, Chap. 1A, Part IV of the Internal Revenue Code of 1986, as amended as of the date of this Agreement.
- 1.51 Section 45 Credits:** Those tax credits available under Section 45 of Subtitle A, Chap. 1A, Part IV of the Internal Revenue Code of 1986, as amended, or any other similar state, federal or local tax credits, deductions, payments or benefits arising from the purchase of Landfill Gas or the generation and sale of electricity using Landfill Gas as a fuel, not including any Environmental Attributes.
- 1.52 Seller:** Ameresco Half Moon Bay LLC, a Delaware limited liability company, and any successor or permitted assignee.
- 1.53 Site:** The real property in the Half Moon Bay, California on which the Plant is to be built and located, as more particularly described in Appendix A.
- 1.54 Site Control:** The point at which Seller satisfies one or more of the following conditions: (1) Seller is (a) the lessee under a lease, or (b) the grantee under an exclusive easement, with the owner (or its subsidiary) of the Landfill that allows Seller to construct and operate the Plant at the Site during the Term in accordance with this Agreement; (2) Seller has a fee ownership of the Site; or (3) any other form of site control acceptable to Buyer in its reasonable discretion.

- 1.55 Station Service Power:** The energy used by Seller to operate the Plant.
- 1.56 Term:** The period of time during which the Agreement is in effect.
- 1.57 Test Energy:** Energy generated by the Plant and delivered to the Point of Interconnection prior to the Commercial Operation Date.

## ARTICLE II

### TERM, PURCHASE AND SALE

#### 2.1 Term

This Agreement shall be effective upon execution by authorized representatives of both Parties and, unless earlier terminated pursuant to an express provision of this Agreement, shall continue until the twentieth (20<sup>th</sup>) anniversary of the Commercial Operation Date.

#### 2.2 Purchase and Sale of the Output

(a) In accordance with the terms and conditions hereof, commencing on the Commercial Operation Date and continuing throughout the Term, Seller shall sell and deliver at the Point of Interconnection, and Buyer shall purchase, accept from Seller at the Point of Interconnection and pay for, its Percentage Share of the Output produced during the Term pursuant to the terms of this Agreement. Prior to the Commercial Operation Date, Buyer shall purchase and accept from Seller at the Point of Interconnection and pay for, the Percentage Share of Output relating to Test Energy pursuant to the terms of this Agreement. All Test Energy shall be scheduled in accordance with the procedures set forth in Appendix D. The Parties acknowledge that Palo Alto has agreed to purchase, accept from Seller at the Point of Interconnection and pay for, the remainder of the Output produced during the Term pursuant to the terms of the Palo Alto Agreement. Seller shall not sell to any other party, and Buyer may claim credit for, Buyer's Percentage Share of the Output as may be available from time to time.

(b) Throughout the Term, Seller shall sell and transfer to Buyer, and Buyer shall purchase and receive from Seller, all right, title and interest in and to the Environmental Attributes associated with Buyer's Percentage Share of the Output, if any, whether now existing or subsequently generated or acquired (other than by direct purchase from a third party) by Seller, or that hereafter come into existence, during the Term, as a component of the Output purchased by Buyer from Seller hereunder. Seller agrees to transfer and make such Environmental Attributes available to Buyer immediately to the fullest extent allowed by applicable law upon Seller's production or acquisition of the Environmental Attributes. If Seller receives any tradable Environmental Attributes based on the greenhouse gas reduction benefits or other emission offsets attributed to its fuel usage, it shall be entitled to retain sufficient Environmental Attributes to ensure that there are zero net emissions associated with the production of electricity from such facility. Seller shall not assign, transfer, convey, encumber, sell or otherwise dispose of all or any portion of the Buyer's Percentage Share of the Environmental Attributes to any Person other than Buyer. Seller makes no written or oral representation or warranty, either express or implied, regarding the current or future existence of any Environmental Attributes.

(c) During the Term, Seller shall not report to any person or entity that the Environmental Attributes granted hereunder to Buyer belong to anyone other than Buyer, and Buyer may report under any program that such Environmental Attributes purchased hereunder belong to it.

(d) Seller will document the production of Environmental Attributes under this Agreement by delivering with each invoice to Buyer an attestation for Environmental Attributes produced by the Plant and purchased by Buyer in the preceding calendar month. The form of attestation is set forth as Appendix B. Appendix B shall be updated or changed by the Parties, as necessary, to ensure that Buyer receives full and complete title to, and the ability to record with any EA Agency as its own, all of the Environmental Attributes purchased hereunder. At Buyer's request, the Parties, each at their own expense, shall execute all such documents and instruments in order to effect the transfer of the Environmental Attributes specified in this Agreement to Buyer or its designees as Buyer may reasonably request. In the event of the promulgation of a scheme involving Environmental Attributes administered by EA Agency, upon notification by EA Agency that any transfers contemplated by this Agreement will not be recorded, the Parties shall promptly cooperate in taking all reasonable actions necessary so that such transfer can be recorded. Each Party

shall promptly give the other Party copies of all documents it submits to the EA Agency to effectuate any transfers.

(e) From time to time during any portion of the Term when the Palo Alto Agreement is in effect, upon notice to Seller signed by both Buyer and Palo Alto, Buyer and Palo Alto may adjust the Percentage Share in their sole, unlimited discretion, provided that the sum of Buyer's Percentage Share and the percentage share of Palo Alto under the Palo Alto Agreement shall equal 100%.

(1) In the event that Palo Alto fails, for any reason, to purchase or accept delivery of its share of the Output, or any portion thereof, under the Palo Alto Agreement and such failure can reasonably be expected to continue for less than thirty (30) consecutive days, Seller shall, as soon as practicable, offer to Buyer in writing the right to purchase such Output under the same terms as set forth in this Agreement. Buyer shall have twenty-four (24) hours to accept such offer. Should such failure reach thirty (30) consecutive days, and is reasonably expected to continue for an additional twenty-nine (29) consecutive days or less, then Buyer shall again have the opportunity to purchase such Output under the same terms as set forth in this Agreement. Buyer shall have twenty-four (24) hours from the time Seller notifies Buyer in writing of such extension to accept such offer. The foregoing shall be repeated for each failure that is reasonably expected to last for less than thirty (30) consecutive days. Should any such failure be reasonably expected to continue for thirty (30) consecutive days or more, the Parties shall employ the procedure set forth in Section 2.2(e)(2) below.

(2) In the event that Palo Alto fails, for any reason, to purchase or accept delivery of its share of the Output, or any portion thereof, under the Palo Alto Agreement and such failure can be reasonably expect to continue for thirty (30) consecutive days or more, Seller shall, as soon as practicable, offer to Buyer in writing the right to purchase such Output at the price determined by Seller in good faith to reflect the prevailing market price for the Output, but, in other respects, under the terms of this Agreement. Buyer shall have five (5) days to inform Seller, in writing, of its intent to consider the offer. Should Buyer inform Seller that it is considering the offer, Buyer shall have sixty (60) days in which to notify Seller, in writing, of its acceptance or rejection of the offer. During the period in which Buyer is considering Seller's offer (which period may be terminated upon twenty-four (24) hours written notice to Seller), Buyer shall purchase such Output, in addition to its own Percentage Share of

Output, under the same terms as set forth in this Agreement. If Buyer accepts Seller's offer to purchase the Palo Alto Output, the parties shall execute an amendment to this Agreement setting forth the price of the additional Output. If Buyer rejects Seller's offer to purchase the Palo Alto Output, Seller shall have the right to sell to one or more third party buyers. In such case, Seller shall promptly certify in writing to Buyer that the terms and conditions of the sale to such third party buyer(s), taken as a whole, are at least as favorable to Seller as the price and other terms and conditions set forth in Seller's offer to Buyer, and Seller shall provide the relevant contract and any other supporting documentation for such certification. If such terms are less favorable to Seller than as previously offered to Buyer, Buyer shall have the right of first refusal consistent with the terms offered to the third party buyer(s). Buyer shall have sixty (60) days to notify Seller in writing of its intent to accept such offer. Upon the sale of such Output to any third party buyer(s), Buyer shall have no further rights to be offered or to purchase such Output.

Buyer consents to a corresponding provision being included in the Palo Alto Agreement, and agrees that if the conditions requiring Seller to offer Buyer's share of the Output to Palo Alto are satisfied, Seller's duties to mitigate damages, if any, shall be affected by Seller's obligations as stated herein in Section 2.2(e).

(f) Seller agrees that it shall not consent to an assignment, amend or waive any of its material rights under the Palo Alto Agreement, administer the Palo Alto Agreement in a manner materially different than its administration of this Agreement, or otherwise treat Palo Alto materially differently than Buyer, without Buyer's express prior written approval, which approval may be withheld in Buyer's sole and unlimited discretion.

## **2.3 Price**

Subject to the provisions of Section 4.1(k), Buyer shall pay Seller \$0.052 per kWh of Energy delivered or tendered to Buyer at the Point of Interconnection, which price shall be escalated at a rate of 1.5% (of the then-current price) annually on the anniversary of (i) the first day of the first full month following the Commercial Operation Date or (ii) if the Commercial Operation Date falls on the first day of the month, the Commercial Operation Date. The Price shall be the total compensation owed by Buyer for Output delivered or tendered to Buyer hereunder.

## 2.4 Tax Credits

Buyer agrees and acknowledges that all Production Incentives shall be owned by Seller and/or the owner of the Landfill. Buyer shall not claim Production Incentives. Buyer agrees to cooperate with Palo Alto and Seller and/or the owner of the Landfill as may be necessary to allow maximization of the value of, and realization of, all Production Incentives; provided that Buyer shall not be required to incur additional costs or accept any diminution in value of its rights under this Agreement or of the Output purchased hereunder. In addition, Buyer shall not take any action (except as otherwise permitted under this Agreement), that would in any way reduce or eliminate the availability to Seller or the owner of the Landfill of any Production Incentive, including without limitation the Section 29 Credits, and Buyer shall forego any credits or benefits available to it (other than Environmental Attributes) to the extent necessary to allow Seller and the owner of the Landfill to obtain the full benefit of the Production Incentives, but in no event shall Buyer be required to forego receipt of Energy.

## 2.5 Right of First Refusal for Expansion Plant and Expansion Plant Output

(a) Seller may in its sole discretion determine, from time to time, during the Term to develop, finance, construct and/or operate an Expansion Plant. Each time such a determination is made, Seller shall notify Buyer of such determination and shall offer in writing to sell the Percentage Share of the Expansion Plant Output to Buyer. Seller shall offer the remainder of the Expansion Plant Output to Palo Alto under the same terms and conditions as are offered to Buyer. If Palo Alto does not take such share of this Expansion Plant Output or if Palo Alto desires and Seller allows Palo Alto to take a portion of such share of this Expansion Plant Output, then Buyer shall have the right to take all or a portion of the rejected Expansion Plant Output under the same terms as those offered in connection with Buyer's Percentage Share of the Expansion Plant Output, such right to be exercised by Buyer within sixty (60) days following written notice from Seller or be deemed irrevocably to have been waived. The offer shall include the price to be paid by Buyer for the Percentage Share of the Expansion Plant Output, the term of the proposed power purchase agreement and the other principal terms and conditions of the proposed sale. If Buyer wishes to accept such offer to purchase all (but not less than all) of such Percentage Share of the Expansion Plant Output, Buyer shall so notify Seller within sixty (60) days of its receipt of such offer. Buyer and

Seller shall promptly thereafter enter into good faith negotiation of a definitive power purchase agreement incorporating the terms of such offer. Until such an Expansion Plant PPA is executed, the Seller's proposal, accepted by Buyer (including any modifications agreed upon in writing by both parties), shall control all dealings between the Parties relating to the Expansion Plant. Should any issue arise that is not covered by such documentation, the terms of this Agreement shall apply.

(b) If Buyer does not accept Seller's offer to purchase its Percentage Share of the Expansion Plant Output within sixty (60) days of receipt of Seller's offer, Seller shall be free to offer to sell that portion of the Expansion Plant Output to one or more third parties at a price and on other terms and conditions which, taken as a whole, are at least as favorable to Seller as the price and other terms and conditions set forth in Seller's offer to Buyer. If Seller offers to break up Buyer's Percentage Share of the Expansion Plant Output to sell to multiple independent buyers, Seller shall notify Buyer in writing of the terms and conditions of such offers and Buyer shall again have the right of first refusal consistent with the terms set forth above for each of the lesser amounts being offered to the third parties. If Buyer does not purchase its Percentage Share of the Expansion Plant Output and Seller sells such Expansion Plant Output to a third party, it shall promptly certify in writing to Buyer that the terms and conditions of sale of such Expansion Plant Output to such third party, taken as a whole, are at least as favorable to Seller as the price and other terms and conditions set forth in Seller's offer to Buyer, and Seller shall provide the relevant contract and any other supporting documentation for such certification. Upon the sale of such Expansion Plant Output in compliance with this Agreement, Buyer shall have no further rights to be offered or to purchase such Expansion Plant Output. Buyer's refusal of its Percentage Share of the Expansion Plant Output from one Expansion Plant shall not affect Buyer's right to purchase its Percentage Share of the Expansion Plant Output from a later Expansion Plant under the terms of this Agreement. Seller shall not sell or provide Buyer's Percentage Share of the Expansion Plant Output to any third party unless it can do so without compromising in any material way its ability to provide Buyer's Percentage Share of the Output to Buyer hereunder. The materiality of any such impact shall be determined by Buyer in its reasonable discretion. If Seller sells or provides Expansion Plant Output to any third party, Seller shall not employ Landfill Gas to fuel the Expansion Capacity in any hour unless the Landfill Gas flow requirements of the Initial Capacity have been, and shall continue to be, met.

## **2.6 Option to Install Emission Controls**

Buyer and Palo Alto may at their option, exercised jointly from time to time, install emission controls on the Plant in connection with the Initial Capacity and on any Expansion Plant from which Buyer or Palo Alto purchases Expansion Plant Output (so long as Buyer and/or Palo Alto purchase all such Expansion Plant Output) beyond those then required to meet the Requirements of Law applicable to Seller or the Plant; provided that (a) Buyer and Palo Alto shall (i) bear all costs and financial, regulatory and operational risks thereof, including without limitation the capital cost thereof and any increase in operation or maintenance expenses, and (ii) shall keep Seller whole in all respects, including for decreases in Output and other adverse effects on the Initial Capacity and the Expansion Capacity and its performance, increases in operations and maintenance costs and failures of such emission controls to operate, and (b) neither Buyer nor Palo Alto shall make any such changes to the Initial Capacity or the Expansion Capacity without the consent of Seller to the design and plan for implementation of such changes, such approval not to be unreasonably withheld.

## **ARTICLE III**

### **METERING AND BILLING**

#### **3.1 Metering Requirements**

The transfer of Energy from Seller to Buyer shall be measured by revenue quality metering equipment at the Point of Interconnection. Such metering equipment, including any equipment required for communicating meter data (e.g., a dedicated data line) to Buyer or the ISO, shall be selected, provided, installed, owned, maintained and operated, at Seller's sole cost and expense, by Seller or its designee in accordance with applicable ISO rules. Seller shall exercise reasonable care in the maintenance and operation of any such metering equipment, and shall test and verify the accuracy of each meter at least annually. Seller shall inform Buyer in advance of the time and date of these tests, and shall permit Buyer to be present at such tests and to receive the results of such tests. Subject to Buyer paying for its Percentage Share of the cost of any update or upgrade to such metering equipment pursuant to a new

requirement of the ISO, the LDC or any other Governmental Authority adopted following the Commercial Operation Date, each of Seller's meters shall be accurate to the metering specifications then in effect for ISO meter accuracy. Seller shall further install and maintain all equipment and data circuits necessary to transmit all monitored real time supervisory control and data acquisition ("SCADA") system data and real time data from the ISO meter to the ISO and NCPA, while adhering to both ISO and NCPA communications protocols. Seller shall provide a copy of each Certificate of Compliance issued by ISO, if any.

Buyer and NCPA shall be provided access to all monitored SCADA points to be used at their discretion in real time monitoring. Buyer may further, at its sole cost and expense, install and maintain check meters and all associated measuring equipment necessary to permit an accurate determination of the quantities of Energy delivered under this Agreement provided that said equipment does not interfere with the Seller's metering equipment. Seller shall permit Buyer or Buyer's representative access to its Plant for the purpose of installing and maintaining such check meters. Seller shall submit to the ISO, or allow the ISO to retrieve, any meter data required by the ISO related to the Plant output in accordance with the ISO's settlement and billing protocol and meter data tariffs. Buyer shall have reasonable access to relevant meters and associated facilities, as well as real time access to all meter data, as is necessary for Buyer or its agent to perform its duties as scheduling coordinator and comply with the requirements of the ISO Tariff.

Buyer shall use commercially reasonable efforts to coordinate with Palo Alto concerning check meters, associated measuring equipment and meter tests so as to avoid unnecessary duplication of equipment or efforts.

### **3.2 Billing**

Seller shall read the meter at the end of each calendar month of the Term, and provide to Buyer on or before the 10<sup>th</sup> day of the following month an invoice based upon the meter data for Energy delivered in such calendar month and the corresponding attestation pursuant to Section 2.2(d). Such invoice may be transmitted electronically via e-mail to \*AcctsPayable@ncpa.com, or to any other email address designated in writing by Buyer, with a copy to follow via United States Mail to the notice address designated below. Should either the Seller or the Buyer determine at a later date, but in no event later than two (2)

years after the original invoice date, that the invoice amount was incorrect, that Party shall promptly notify the other Party of the error. If the amount invoiced was too low, Buyer shall, upon receiving verification of the error and supporting documentation from the Seller, pay any undisputed portion of the difference within thirty (30) days of receipt of verification. If the amount invoiced was too high, Seller shall, upon receiving verification of the error and supporting documentation from the Buyer, pay any undisputed portion of the difference within thirty (30) days of receipt of verification. Any such amount shall be subject to the interest rate as designated in Section 3.3 running from the original due date of payment.

### **3.3 Payment**

For Energy delivered to Buyer pursuant this Agreement, Buyer or its agent shall pay Seller by electronic transfer of funds by the later of the 20<sup>th</sup> day of the month or the 10<sup>th</sup> business day after the invoice is received in accordance with Section 3.2. If such due date falls on a weekend or legal holiday, such due date shall be the next day which is not a weekend or legal holiday. Payments made after the due date shall be considered late and shall bear interest on the unpaid balance at an annual rate equal to two percent (2%) plus the average daily prime rate as determined from the "Money Rates" section of the West Coast Edition of *The Wall Street Journal* for the days of the late payment period multiplied by the number of days elapsed from and including the day after the due date, to and including the payment date. Interest shall be computed on the basis of a 365-day year. In the event this index is discontinued or its basis is substantially modified, the Parties shall agree on a substitute equivalent index. Should Buyer in good faith dispute the amount of an invoice, Buyer or its agent may withhold such disputed amounts until the dispute is resolved by arbitration or other permissible method. Such disputed amounts shall bear interest at the interest rate described above. Failure of Buyer or its agent to withhold any amount is not a waiver of Buyer's right to challenge such amount. Both Parties shall maintain all records relating to the other Party or this Agreement for a minimum of two (2) years, and shall permit the other Party, upon reasonable notice, to inspect and audit such records as the requesting Party deems reasonably necessary to protect its rights.

## ARTICLE IV

### SELLER'S OBLIGATIONS

During the Term, Seller hereby agrees to perform the following affirmative obligations:

#### 4.1 Development, Finance, Construction and Operation of the Plant

Seller shall:

- (a) Develop, finance and construct the Plant.
- (b) Provide Buyer access to a “real time” Plant monitoring system (which, at a minimum, shall provide “real time” information regarding the net output of the Plant) that is anticipated to be internet-based and include alarms.
- (c) Seek, obtain, maintain, comply with and, as necessary, renew and modify from time to time, all Permits, certificates or other authorizations which are required by any Requirements of Law or Governmental Authority as prerequisites to engaging in the activities required of Seller by the Agreement and to meeting Seller's obligation to operate the Plant consistently with the terms of the Agreement.
- (d) Operate, maintain, and repair the Plant in accordance with this Agreement, all Requirements of Law applicable to Seller or the Plant, Contractual Obligations, Permits and in accordance with Prudent Utility Practice, including with respect to efforts to maintain availability of the Initial Capacity.
- (e) Obtain and maintain the policies of insurance in amounts and with coverages as set forth in Appendix C.
- (f) Operate and maintain in a manner consistent with Prudent Utility Practice the facilities it will own and otherwise cooperate with LDC in the physical interconnection of the Plant to the LDC System in accordance with the Interconnection Agreement.

(g) By October 1st of each year of the Term, provide Buyer and NCPA with an annual projection of scheduled Outages for the following calendar year. Should Seller make any changes to such projection, it will notify Buyer and NCPA of such changes at least fourteen (14) days in advance of any newly scheduled or rescheduled Outage. If Buyer requests a change to the scheduled date of any Outage (including to a date set forth in a change notice from Seller), Seller shall consider such request in good faith and notify Buyer of its decision within seven (7) days. In no instance will Seller schedule Outages of more than twenty-four (24) hours between June 1st and September 30th during the Term. In connection with any Outage, whether a scheduled or unscheduled Outage, Seller shall notify Buyer and NCPA, as soon as practicable, of the percentage of Plant expected to be out of service and how long the Outage is expected to last. If the Outage is total and is due to failure of the Plant rather than the transmission and distribution system beyond the Point of Interconnection, Seller shall give Buyer and NCPA at least four (4) hours notice before re-energizing the Plant. In addition, Seller will comply with NCPA's reasonable scheduling protocols, as they may be changed from time to time. A copy of the current version of NCPA's scheduling protocols, which the Parties agree are reasonable, is attached as Exhibit D. Buyer shall use commercially reasonable efforts to coordinate with Palo Alto regarding any requested changes to scheduled outages to avoid duplication.

(h) Negotiate and enter into an Interconnection Agreement with LDC to enable Buyer to transmit Energy received at the Point of Interconnection through the ISO-controlled grid. Seller shall be responsible for and pay all initial non-recurring costs and charges arising under the Interconnection Agreement (even if not actually incurred) prior to the Commercial Operation Date in compliance with the Interconnection Agreement and associated rules and requirements in place as of the Commercial Operation Date. All other out-of-pocket costs and charges related to interconnection other than these initial non-recurring costs and charges will be reimbursed, on a pro rata, energy basis, by the purchasers of energy from the Plant. During the Term of this Agreement prior to any Expansion Plant becoming available for commercial service, Buyer will reimburse Seller for its Percentage Share of such other out-of-pocket costs and charges under the Interconnection Agreement paid or required to be paid by Seller to LDC or its successor; provided, however, Buyer shall be responsible for its Percentage Share of such other out-of-pocket costs and charges under the Interconnection Agreement only to the extent Buyer has approved in writing, in the sole discretion of Buyer, the

Interconnection Agreement, including any amendments (which shall not include changes in relevant tariffs) from time to time. Upon completion of an Expansion Plant which uses the Interconnection Facilities, such other out-of-pocket costs and charges shall be prorated, on a Percentage Share of energy basis, and Buyer's share would be based on its Percentage Share of Energy compared to the energy of the Expansion Plant delivered to the Point of Interconnection. Seller shall cooperate with Buyer to minimize any such costs as are to be reimbursed by Buyer.

(i) Negotiate and enter into a Participating Generator Agreement and a Meter Service Agreement for ISO Metered Entities with the ISO, who is the load control area operator for the LDC System to which the Plant is interconnected. Buyer shall pay for or reimburse Seller for its Percentage Share of any such costs or charges associated with these agreements, except to the extent such cost or charge is required to be paid by Seller under this Agreement in Sections 3.1 and 4.1(h). Seller shall cooperate with Buyer to minimize any such costs as are to be reimbursed by Buyer.

(j) Coordinate all Plant start-ups and shut-downs, in whole or in part, with Buyer in accordance with ISO scheduling protocols and the reasonable protocols established by Buyer that are not inconsistent with the ISO Tariff and ISO procedures.

(k) Maintain an Availability Threshold of seventy percent (70%). Should Seller fail to maintain such an Availability Threshold, the Price applicable to Output sold and purchased during each month during which the Availability Threshold is below seventy percent (70%) shall be seven and one-half percent (7.5%) below the Price that would otherwise be in effect pursuant to Section 2.3 until the Availability Threshold is increased to at least seventy percent (70%). Except as otherwise expressly stated in Sections 6.4 and 7.6, the foregoing shall be Buyer's sole remedy for any shortfall of or failure to produce Output or failure to maintain any particular Availability Threshold.

## **4.2 General Obligations**

(a) Seller shall obtain in its own name and at its own expense any and all pollution or environmental credits or offsets necessary to operate the Plant in compliance with the Environmental Laws.

(b) Seller shall keep complete and accurate operating and other records and all other data for the purposes of proper administration of the Agreement, including such records as may be required by any Governmental Authority or Prudent Utility Practice.

(c) Seller shall continue to (i) preserve, renew and keep in full force and effect its organizational existence and good standing, and take all reasonable action to maintain all applicable Permits, rights, privileges, licenses and franchises necessary or desirable in the ordinary course of its business; and (ii) comply with all Contractual Obligations and Requirements of Law applicable to Seller or the Plant.

(d) Prior to the date ninety (90) days following the later of (a) the date of this Agreement and (b) the date of the Palo Alto Agreement, Seller shall make available for review by Buyer, and its representatives, at Buyer's offices in Alameda, California, a fully executed copy of its contract with BFI, including all exhibits, attachments, and other supporting documents thereto, for the purchase of Landfill Gas (the "LFG Agreement"). Such contract may be redacted to remove pricing information. If (i) Seller does not fulfill its obligations under the first two sentences of this Section 4.2(d) in the time allowed, or (ii) Seller fulfills such obligations but Buyer in its reasonable discretion does not approve of the terms of the LFG Agreement, then Buyer may, as its sole remedy and without liability of one party to the other, terminate this Agreement by written notice given no later than sixty (60) days after Seller has fulfilled, or failed to fulfill, as the case may be, such obligations under such first two sentences. If Palo Alto exercises its corresponding right of termination under the Palo Alto Agreement, then Seller shall by written notice offer Buyer the option to amend this Agreement to increase the Percentage Share to one hundred percent (100%). If Buyer does not exercise such option by written notice to Seller within sixty (60) days following such written notice from Seller, then such option shall expire and Seller may, at its sole option exercised by written notice to Buyer, terminate this Agreement without liability of one party to the other. Other than increasing the amount of fuel purchased thereunder, Seller shall not allow such contract to be amended or otherwise modified, nor shall it waive or fail to enforce any of its rights thereunder, without Buyer's prior written approval, whose approval shall not be unreasonably withheld. Seller shall make the LFG Agreement available to Buyer for review during normal business hours at Buyer's offices in Alameda,

California throughout the term of this Agreement within seven (7) days of a written request by Buyer.

(e) Seller shall provide to Buyer such other information regarding the permitting, engineering, construction or operations of the Plant as Buyer may from time to time reasonably request, subject to licensing or other restrictions of Seller or a third party with respect to confidentiality, disclosure or use.

(f) Seller shall enter into any agreements with the ISO required by the ISO for generators delivering power into the ISO-controlled grid. Except for such costs and charges as are expressly identified in this Agreement as Seller's costs, Buyer shall reimburse Seller for all costs and charges under such agreements. Seller shall cooperate with Buyer to minimize any such costs as are to be reimbursed by Buyer.

(g) Seller shall provide Buyer with a copy of its ultimate corporate parent's audited financial statements as at the end of its accounting year prepared in accordance with GAAP, no later than four (4) months after the end of such accounting year of such entity. Seller shall also provide, on a quarterly basis, an unaudited financial statement in the form of Appendix F, prepared in accordance with GAAP consistently applied for Seller and for Seller's ultimate corporate parent. Such financial statements shall be certified by an officer of Seller as fairly presenting the financial condition of the Seller subject only to what would typically be included in year-end audit adjustments and footnotes. If, from time to time, an audited year-end financial statement is prepared for Seller, Seller shall provide it to Buyer no later than four (4) months after the end of Seller's accounting year.

#### **4.3 Construction Milestones**

(a) The Parties agree that time is of the essence and that certain milestones ("Milestones") for the development, financing and construction of the Plant must be achieved in a timely fashion or Buyer shall suffer damages. Seller shall provide Buyer with documentation satisfactory to Buyer, in Buyer's reasonable discretion, to support the achievement of Milestones by the dates set forth below.

(b) The following events are all of the Milestones:

- (i) By the date ninety (90) days following the date of the later of (a) this Agreement and (b) the Palo Alto Agreement, Seller shall have signed an LFG Agreement with BFI and have obtained Site Control.
- (ii) By the date twenty (20) months following the later of (a) the later of the date that (i) Buyer and (ii) Palo Alto approves the LFG Agreement, and (b) if applicable pursuant to Section 4.2(d), the date Buyer exercises an option to increase its Percentage Share to one hundred percent (100%) or such option expires, Seller shall (a) have obtained all Permits necessary, in final form, to commence construction of the Plant and (b) have entered into an Interconnection Agreement.
- (iii) By the date one (1) month following the later of (a) the finalization of all necessary Permits described in Section 4.3(b)(ii), and (b) entering into an Interconnection Agreement, Seller shall have arranged financing for construction of the Plant or otherwise made funds available to commence and complete construction.
- (iv) By the date twelve (12) months following the later of (a) the finalization of all necessary Permits described in Section 4.3(b)(ii), and (b) entering into an Interconnection Agreement, Seller shall have commenced construction of the Plant.
- (v) By the date eighteen (18) months following the arrangement of financing or availability of funds for construction, Seller shall have achieved the Commercial Operation Date.

(c) Starting on the effective date of this Agreement, Seller shall provide to Buyer monthly progress reports concerning the progress towards completion of the Milestones. In addition, within five business days of the completion of each Milestone, Seller shall provide a certification to Buyer (along with any supporting documentation, demonstrating the satisfaction of the Milestone. Seller shall provide to Buyer additional information concerning Seller's progress towards, or confirmation of, achievement of the Milestones, as Buyer may reasonably request from time to time. Within seven (7) days of the later of (i) obtaining the authority to construct for the Plant from the applicable air quality management district or (ii) Seller's receipt of the system impact and facility cost studies from the LDC, but in no event later than the date set forth in Section 4.3(b)(ii), Seller shall specify the Initial Capacity of the Plant (which shall be subject to the limits contained in Section 1.20).

(d) Upon becoming aware that it will, or is reasonably likely to, fail to achieve a Milestone by the required date, for any reason including Force Majeure Event, Seller shall so notify Buyer in writing as soon as is reasonably practical. Such notice shall explain the cause the delay, provide an updated date for achievement of the Milestone(s) and describe Seller's plan for meeting the Milestone. Seller's notice will also explain any impact such delay may or will have on any other Milestone, and measures to be taken to mitigate such impact.

(e) In the event that a Force Majeure Event causes any delay to the achievement of the Milestones set forth in Sections 4.3(b)(iii), (iv), or (v), such Milestone's deadline may be extended, together with any Force Majeure Event extensions for other Milestones, for a period not to exceed six (6) months. The extension of the deadline for any Milestone shall extend the deadline for all subsequent Milestones, provided that in no event shall the combined extensions for Force Majeure Events for any or all of the Milestones exceed six (6) months.

(f) In the event that Seller fails to meet the Milestone set forth in Section 4.3(b)(i) for any reason, Buyer may terminate this Agreement, without liability of either Party to the other, by giving notice to Seller in writing of such termination at any time prior to Seller curing its failure. Such option to terminate shall be Buyer's sole remedy for any failure to meet the Milestone set forth in Section 4.3(b)(i).

(g) In the event that Seller fails to meet the Milestone set forth in Section 4.3(b)(ii) for any reason, Buyer may terminate this Agreement, without liability of either Party to the other, within ten (10) business days after the Milestone date by giving notice to Seller in writing of such termination. If Seller meets the Milestone set forth in Section 4.3(b)(ii) prior to Buyer giving written notice of termination, this Agreement shall remain in full force and effect. If Buyer does not terminate this Agreement within ten (10) business days after the Milestone date, Seller shall continue to pursue satisfaction of the relevant Milestone and Buyer must give Seller sixty (60) days notice to terminate this Agreement, during which period if Seller cures such defect and achieves the relevant Milestone, such termination shall be void and this Agreement shall remain in full force and effect. Such option to terminate shall be Buyer's sole remedy for any failure to meet the Milestone set forth in Section 4.3(b)(ii).

(h) In the event that Seller fails to meet the Milestone set forth in Section 4.3(b)(iv) within six (6) months after the relevant Milestone date for any reason (or up to twelve (12) months if also delayed by a Force Majeure Event), Seller may deposit an amount, per month, equal to the Monthly LD Amount into a segregated escrow account reasonably acceptable to Buyer by the first day of such month, for every month after such date until the Milestone is met. Such funds will be used towards any liquidated damages as set forth in Section 7.4(c), and shall be held in escrow until such time that liquidated damages, if any, become payable to Buyer. Should the amount in the escrow account exceed the final amount of liquidated damages, such excess funds shall be returned to Seller. Should Seller (i) at any time fail to make such monthly deposits or (ii) fail to satisfy the Milestone set forth in Section 4.3(b)(iv) for more than twelve (12) months, Buyer may terminate this Agreement upon written notice to Seller of such termination. Upon such termination, Seller will pay to Buyer, within thirty (30) days of the termination notice, an amount equal to the LD Amount as liquidated damages. Such Seller escrow option, Buyer option to terminate, and liquidated damages shall be Buyer's sole remedy for any failure of Seller to meet the Milestones set forth in Section 4.3(b)(iii) or (iv).

(i) Seller covenants that it will diligently pursue all Milestones including the Commercial Operation Date, which Seller envisions will occur within thirty (30) months following the execution of this Agreement.

(j) In the event that any of the approvals described in Section 4.3(b)(ii) are not obtained by the date specified in Section 4.3(b)(ii) for satisfaction of the relevant Milestone or are obtained on a basis not reasonably satisfactory to Seller, including without limitation, in the case of the air permit, approval of construction and operation of the Plant on a basis not consistent with internal combustion engines without emission controls, pollution or environmental credits or offsets, Seller may terminate this Agreement without liability of either Party to the other by giving notice to Buyer in writing of such termination; provided that such notice must be given no later than fourteen (14) days following the earlier of (a) the date on which a given approval not satisfactory to Seller is received in writing or (b) the date specified in Section 4.3(b)(ii) for satisfaction of the relevant Milestone. Failure to provide notice of termination by the date specified above shall constitute a waiver of the right to terminate this Agreement as provided in this Section 4.3(j). In the event that

Seller exercises such termination right, Buyer shall have a right of first refusal to purchase the output of any electricity generating facility owned or controlled by Seller or its affiliate(s) located at the Landfill and fueled by Landfill Gas. Such right of first refusal shall conform to the provisions of Section 2.5. The provisions of this Section 4.3(j) shall survive termination of this Agreement under this Section 4.3(j) for a period of five (5) years from such termination.

## ARTICLE V

### BUYER'S OBLIGATIONS

#### 5.1 Delivery and Transmission

Except for Seller's obligations pursuant to Sections 3.1 and 4.1(h), Buyer shall be solely responsible for paying its Percentage Share of costs and charges associated with the receipt of Energy, under this Agreement, at the Point of Interconnection and for the transmission and delivery of the Energy from the Point of Interconnection to any other point downstream of the Point of Interconnection (including, without limitation, transmission costs and charges, competition transition charges, applicable control area service charges, transmission congestion charges, inadvertent energy flows, any other ISO charges related to the transmission of such Energy by the ISO and any charge assessed or collected in the future pursuant to any utility tariff or rate schedule, however defined, for transmission or transmission-related service rendered by or for any transmission-owning or operating entity). The Northern California Power Agency ("NCPA"), acting on behalf of Buyer, shall be scheduling coordinator for the transmission of Energy from the Plant in accordance with applicable ISO rules. Buyer's duties as scheduling coordinator shall be limited to those duties as are specifically required of scheduling coordinators in the ISO Tariff and the ISO protocols. Commercial arrangements for such transmission and delivery services will be coordinated and settled by NCPA directly with the ISO or other third parties. At the option of Buyer and Palo Alto, to be exercised jointly, the Plant may be included within NCPA's metered sub-system in connection with the scheduling of power over the ISO grid and related functions; provided that such inclusion shall have no adverse effect on Plant operations or Seller (or any such effect shall be fully mitigated by Buyer and/or Palo Alto). Seller will do all things reasonably needed to allow Buyer to comply with any obligations, and minimize any potential

liability, under the ISO Tariff; provided, that if such actions require any actions beyond the giving of notice provided by Buyer, then Buyer shall reimburse its Percentage Share of all out-of-pocket costs and charges of such actions. If and to the extent that Seller fails to comply with the notice provision in Section 4.1(g) concerning Outages or with its obligations as outlined in the previous sentence, Seller shall be wholly responsible for all imbalances, deviations, or any other ISO charges or penalties associated with such Outage or ISO Tariff obligation. Buyer may, jointly with Palo Alto, replace NCPA as Scheduling Coordinator for the Plant. If NCPA ceases to be Scheduling Coordinator for the Plant and Buyer and Palo Alto are unable, upon fourteen days notice from Seller, to appoint jointly a replacement Scheduling Coordinator, Seller shall have the right to appoint a replacement Scheduling Coordinator on their behalf, and Buyer and Palo Alto shall enter into all reasonable and appropriate agreements with such replacement Scheduling Coordinator at their own cost.

## **5.2 Taxes**

Buyer shall pay and be fully responsible for any sales, use, gross receipts, utility or other taxes, assessments or fees, if any, incurred or imposed on the sale or transfer of Energy from Seller to Buyer under this Agreement. Buyer shall not be responsible for any taxes measured on the net income of Seller or *ad valorem* taxes paid by Seller or BFI associated with the Site or the Landfill.

## **5.3 Notification of Transmission Outages**

Buyer will exercise reasonable efforts to provide Seller with as much advance notice as practicable of any Outage on the LDC System or other transmission or delivery facilities which may adversely affect the delivery of Energy to Buyer.

# **ARTICLE VI**

## **FORCE MAJEURE**

### **6.1 Force Majeure Events**

It is understood that at times unavoidable delays or interruptions in delivery or performance may result from Force Majeure Events. The performance of each

Party under this Agreement may be subject to interruptions or reductions due to a Force Majeure Event. Both Parties shall in good faith use such effort as is reasonable under all the circumstances known to that Party affected by the Force Majeure Event at the time to remove or remedy the cause(s) and mitigate the inability to perform. However, the obligation to use such reasonable efforts 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.

## **6.2 Remedial Action**

Subject to the limitation on extensions of Milestones set forth in Section 4.3(e), a Party shall not be liable to the other Party if the Party is prevented from performing its obligations hereunder due to a Force Majeure Event. The Party rendered unable to fulfill an obligation by reason of a Force Majeure Event shall take all action necessary to remove such inability with all due speed and diligence. The nonperforming Party shall be prompt and diligent in attempting to remove the cause of its failure to perform, and nothing herein shall be construed as permitting that Party to continue to fail to perform after said cause has been removed. Notwithstanding the foregoing, the existence of a Force Majeure Event shall not excuse any Party from its obligations to make payment of amounts due hereunder.

## **6.3 Notice**

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

## **6.4 Termination Due To Force Majeure Event**

Subject to Section 4.3(e), if a Party is prevented from performing its material obligations under this Agreement for a period of twelve (12) consecutive months or longer, the unaffected Party may terminate this Agreement, without liability of either Party to the other, upon thirty (30) days written notice at any time during the Force Majeure Event.

## ARTICLE VII

### DEFAULT/REMEDIES/TERMINATION

#### 7.1 Events of Default by Buyer

The following shall each constitute an “Event of Default” by Buyer:

- (a) Buyer breaches any material obligation (other than one covered by Section 7.1(b) or (c) of this Agreement) and fails to cure such breach within thirty (30) days after written notification of breach by Seller or such longer period as may be necessary to cure such breach as long as Buyer is exercising diligent efforts to cure such default.
- (b) Buyer fails to make any payment due under this Agreement within thirty (30) days after written notice that such payment is due.
- (c) The initiation of an involuntary proceeding against Buyer under the bankruptcy or insolvency laws, which involuntary proceeding remains undismissed for sixty (60) consecutive days, or in the event of the initiation by Buyer of a voluntary proceeding under the bankruptcy or insolvency laws.

#### 7.2 Events of Default by Seller

- (1) The following shall each constitute an “Event of Default” by the Seller if Seller does not cure within the time set forth in clause (2), below:
  - (a) Seller breaches any material obligation (other than ones covered by Sections 7.2(b), (c), (d), (e) or (f) of this Agreement or for which a remedy is specified).
  - (b) Seller fails to make any payment due under this Agreement within thirty (30) days after written notice that such payment is due.
  - (c) The initiation of an involuntary proceeding against Seller under the bankruptcy or insolvency laws, which involuntary proceeding remains undismissed for sixty (60) consecutive days, or in the event of the initiation by Seller of a voluntary proceeding under the bankruptcy or insolvency laws.

(d) Seller sells or transfers Buyer's share of the Output (or any individual component thereof) or Expansion Plant Output (or any individual component thereof) or the right to Buyer's share of the Output (or any individual component thereof) or Expansion Plant Output (or any individual component thereof), to the extent that such Expansion Plant Output is purchased by Buyer, to any Person other than Buyer.

(e) Seller fails to comply with the terms of Buyer's right of first refusal as described in Section 2.6 of this Agreement.

(f) Subject to Section 7.4(c), Seller fails, for any reason other than an unauthorized act or omission by Buyer, to achieve the Commercial Operation Date by the applicable Milestone deadline as set forth in Section 4.3(b)(v), as such deadline may be extended as a result of a Force Majeure Event in accordance with Section 4.3(e).

(2) Time for Cure. Nothing described in Section 7.2(1)(a) above shall constitute an Event of Default if Seller cures the event, failure or circumstance within (30) days after written notification by Buyer or such longer period as may be necessary to cure as long as Seller is exercising diligent efforts to cure.

### **7.3 Termination for Default**

(a) In the event the defaulting Party fails to cure the Event of Default within the period for curative action under Sections 7.1 or 7.2, as applicable, the non-defaulting Party may terminate the Agreement by notifying the defaulting Party in writing of (i) the decision to terminate and (ii) the effective date of the termination.

(b) Upon termination of the Agreement by Buyer pursuant to Section 7.3(a) due to an Event of Default by Seller, Buyer shall have no future or further obligation to purchase the Output of the Plant or to make any payment whatsoever under this Agreement, except for payments for obligations arising or accruing prior to the effective date of termination. Upon termination of the Agreement by Seller pursuant to Section 7.3(a) due to an Event of Default by Buyer, Seller shall have no future or further obligation to deliver the Output of the Plant to Buyer or to satisfy any other obligation of this Agreement, except for payments or other obligations arising or accruing prior to the effective date

of termination. After the effective date of termination, the Agreement shall not be construed to provide any residual value to either Party or any successor or any other Person, for rights to, use of or benefits from the Plant to any Person.

(c) Default by Palo Alto under the Palo Alto Agreement shall not be construed as a default by Buyer, and shall not give rise to any liability hereunder or to of the termination provisions set forth above with respect to Buyer.

#### **7.4 Damages**

(a) For all claims, causes of action and damages the Parties shall be entitled to the recovery of actual damages allowed by law unless otherwise limited by the Agreement. Neither the enumeration of Events of Default in Sections 7.1 and 7.2, nor the termination of this Agreement by a non-defaulting Party pursuant to Section 7.3(a), shall limit the right of a non-defaulting Party to rights and remedies available at law, including, but not limited to, claims for breach of contract or failure to perform by the other Party and for direct damages incurred by the non-defaulting Party as a result of the termination of this Agreement.

(b) Except as otherwise specifically and expressly provided in the Agreement, neither Party shall be liable to the other Party under this Agreement for any indirect, special or consequential damages, including but not limited to loss of use, loss of revenues, loss of profit, interest charges, cost of capital or claims of its customers or members to which service is made. Except as set forth in Section 4.1(k) and except to the extent Seller violates its undertaking not to provide or sell rights to part or all of the Output to a party other than Buyer, Seller shall not be liable to Buyer for failure to provide any specific amount of Output hereunder.

(c) In the event that Seller fails to meet the Commercial Operation Date by the applicable Milestone deadline as set forth in Section 4.3(b)(v), as such deadline may be extended as a result of a Force Majeure Event in accordance with Section 4.3(e), Seller shall be liable for liquidated damages in the amount, per month, equal to the Monthly LD Amount for each full month (with parts of a month *pro rated*) that Seller is late in satisfying the Milestone. So long as Seller is paying such liquidated damages on a monthly basis, up to twelve (12) months, Buyer shall not be permitted to terminate this Agreement. If after

twelve (12) months following the relevant Milestone deadline Seller has failed to achieve Commercial Operation, or if for any reason Seller fails to pay, or discontinues paying, the monthly liquidated damages provide for above, Buyer may terminate this Agreement by written notice to Seller. This twelve (12) month period shall not be extended as a result of a Force Majeure Event. Upon such termination, Seller shall pay Buyer, within thirty (30) days of the termination notice, a lump sum equal to the LD Amount. No other damages or remedy shall be available to Buyer on the basis of such failure to meet the Milestone set forth in Section 4.3(b)(v) or termination of this Agreement based on failure to achieve Commercial Operation within twelve (12) months of that Milestone deadline.

(d) The Parties agree that the liquidated damages set forth in Sections 4.3(h) and 7.4(c) are reasonable and represent a fair and genuine estimate of the damages Buyer will suffer upon the failure of Seller to achieve Commercial Operation by the agreed upon date(s). The Parties acknowledge that it would be impracticable or extremely difficult to fix Buyer's actual damages, and therefore have deemed the liquidated damages set forth above to be the amount of damage sustained by Buyer upon such a failure. The Parties further agree that payment of such amount shall be as liquidated damages and not as a penalty, and is therefore not subject to avoidance under California Civil Code section 1671.

## **7.5 Indemnification**

Seller and Buyer agree to defend, indemnify, and hold each other, and their respective officers, directors, employees and agents, harmless from and against all claims, demands, losses, liabilities, and expenses (including reasonable attorneys' fees) (collectively "Damages") for personal injury or death to persons and damage to each other's physical property or facilities or the property of any other Person to the extent arising out of, resulting from, or caused by the negligent or intentional and wrongful acts, errors, or omissions of the indemnifying Party. This indemnification obligation shall apply notwithstanding any negligent or intentional acts, errors or omissions of the indemnitees but the indemnifying Party's liability to pay Damages to the indemnified Party shall be reduced in proportion to the percentage by which the indemnitees' negligent or intentional acts, errors or omissions caused the Damages. Neither Party shall be indemnified for its Damages resulting from its sole negligence or willful misconduct. These indemnity provisions shall not

be construed to relieve any insurer of its obligation to pay claims consistent with the provisions of a valid insurance policy.

## **7.6 Buyer's Right to Operate**

If Seller (i) fails to maintain the Availability Threshold for a period of nine (9) months in any twelve (12) month period, or (ii) fails to generate Energy for sixty (60) consecutive days, then Buyer or its designee may, but shall not be obligated to, step-in and assume operational control from Seller of the Plant; provided that Buyer shall not be permitted to step-in and take control so long as Seller or any of Seller's Lenders are using commercially reasonable efforts to remedy the failures described in (i) or (ii) above. Buyer, its employees, contractors and designees shall have the unrestricted right to enter the Plant to the extent necessary to operate the Plant. Upon the exercise of this right, Buyer or its designee shall at all times operate the Plant using Prudent Utility Practice and shall comply, to the extent commercially practicable, with the terms of this Agreement and the terms of the Palo Alto Agreement. Notwithstanding the foregoing, Seller shall not be excused from any obligation or remedy available to Buyer as a result of Buyer's operation of, or election not to operate, the Plant. Buyer shall pay Seller the applicable rate for Output provided hereunder, less any costs incurred by Buyer to operate the Plant. Prior to assuming operational control, Buyer shall consult with Palo Alto. In the event that Palo Alto has, and desires to exercise, the right to step-in and assume operational control of the Plant under the Palo Alto Agreement, Buyer shall not exercise its rights hereunder without Palo Alto's written consent. Buyer and Palo Alto may exercise their step-in rights jointly. Buyer shall indemnify and hold Seller harmless from any liability to third parties (including Palo Alto) arising out of Buyer's failure to operate the Plant using Prudent Utility Practice. Upon Buyer's satisfaction that Seller has the ability to operate the Plant in accordance with this Agreement, Seller shall resume operational control.

Should Seller's Lender(s) refuse to finance the Plant, or materially condition such financing, solely as a result of this Section 7.6, and Seller gives Buyer written notice of such refusal to finance, Buyer shall have the following options: (1) terminate this Agreement without liability of one Party to the other; (2) renegotiate this Section 7.6 with Seller and Lender(s) in a manner mutually acceptable; (3) delete this Section 7.6 in its entirety (which deletion will not require Seller's additional consent); or (4) arrange for financing for the

Plant under materially equivalent terms and conditions as the Lender(s) were prepared to provide but for this Section 7.6. If Buyer fails to elect and complete one of these options within sixty (60) days of written notice from Seller, Seller shall have the right to terminate this Agreement without liability of one party to the other. If Palo Alto elects to terminate the Palo Alto Agreement under Section 7.6 of the Palo Alto Agreement, Seller shall offer in writing to Buyer Palo Alto's Percentage Share. If Buyer fails to accept Palo Alto's Percentage Share in writing within sixty (60) days, Seller may terminate this Agreement without liability of one Party to the other.

## ARTICLE VIII

### REPRESENTATIONS AND WARRANTIES

#### 8.1 Seller's Representations and Warranties

Seller represents and warrants to Buyer that as of the date of execution of this Agreement:

- (i) Seller is duly organized and validly existing as a limited liability company under the laws of Delaware, and has the lawful power to engage in the business it presently conducts and contemplates conducting in this Agreement and Seller is duly qualified in each jurisdiction wherein the nature of the business transacted by it makes such qualification necessary;
- (ii) Seller has the legal power and authority to make and carry out this Agreement and to perform its obligations hereunder; all such actions have been duly authorized by all necessary proceedings on its part. As of the date of execution hereof, (a) the Plant shall on the Commercial Operation Date be a "qualifying small power production facility" as that term is defined in Section 3(17)(C) of the Federal Power Act, and will possess all of the exemptions from regulation provided in 18 CFR Sections 292.601(c) and 292.602; and (b) this Agreement is not required to be filed with FERC and no approval (except with respect to "qualifying small power production facility" status) with respect to this Agreement is required from FERC. In the event that the Plant is not a "qualifying small power production facility" on the Commercial

Operation Date or any date thereafter, Seller shall make appropriate filings under the Federal Power Act within sixty (60) days so as to comply with applicable law, subject at all times to the provisions of Article IX of this Agreement;

- (iii) The execution, delivery and performance of this Agreement by Seller will not conflict with its governing documents, any applicable laws, or any covenant, agreement, understanding, decree or order to which Seller is a party or by which it is bound or affected;
- (iv) This Agreement has been duly and validly executed and delivered by Seller and, as of the date first set forth herein, constitutes a legal, valid and binding obligation of Seller, enforceable in accordance with its terms against Seller, except to the extent that its enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium or other similar laws affecting the rights of creditors generally or by general principles of equity; and
- (v) There are no actions, suits, proceedings or investigations pending or, to the knowledge of Seller, threatened in writing against Seller, at law or in equity before any Governmental Authority, which individually or in the aggregate are reasonably likely to have a materially adverse effect on the business, properties or assets or the condition, financial or otherwise, of Seller, or to result in any impairment of Seller's ability to perform its obligations under this Agreement.

## **8.2 Buyer Representations and Warranties**

Buyer represents and warrants to Seller that as of the date of execution of this Agreement:

- (i) Buyer is a department of the City of Alameda, a chartered city and municipal corporation, duly organized and validly existing, and has the lawful power to engage in the business it presently conducts and contemplates conducting in this Agreement and Buyer is duly qualified in each jurisdiction wherein the nature of the business transacted by it makes such qualification necessary;

- (ii) Buyer has the legal power and authority to make and carry out this Agreement and to perform its obligations hereunder and all such actions have been duly authorized by all necessary proceedings on its part;
- (iii) The execution, delivery and performance of this Agreement by Buyer will not conflict with its governing documents, any applicable laws or any covenant, agreement, understanding, decree or order to which Buyer is a party or by which it is bound or affected;
- (iv) This Agreement has been duly and validly executed and delivered by Buyer and, as of the first date set forth herein, constitutes a legal, valid and binding obligation of Buyer, enforceable in accordance with its terms against Buyer, except to the extent that its enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium or other similar laws affecting the rights of creditors generally or by general principles of equity; and
- (v) There are no actions, suits, proceedings or investigations pending or, to the knowledge of Buyer, threatened in writing against Buyer, at law or in equity before any Governmental Authority, which individually or in the aggregate are reasonably likely to have a materially adverse effect on the business, properties or assets or the condition, financial or otherwise, of Buyer, or to result in any impairment of Buyer's ability to perform its obligations under this Agreement.

## **ARTICLE IX**

### **NO CHANGE TO RATES, TERMS OR CONDITIONS**

No change may be made to the rates, terms or conditions of this Agreement at the request of any Party, or by FERC acting *sua sponte* on behalf of any Party, except as required by FERC in the public interest. To that end and to the extent any such rights exist, each Party waives any and all rights to seek changes to the rates, terms and conditions contained in this Agreement pursuant to sections 205 or 206 of the Federal Power Act or otherwise. The terms of this Agreement shall be interpreted as being fixed and subject only to the "public interest" standard of review, consistent with the interpretation by the Federal Energy Regulatory Commission of *United Gas*

*Pipe Line Co. v. Mobile Gas Svcs.*, 350 U.S. 332 (1956), and *F.P.C. v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956), as of the date of execution of this Agreement.

## ARTICLE X

### MISCELLANEOUS

#### 10.1 Assignment

The rights and obligations of this Agreement may not be assigned by either Party without the prior written consent of the other Party, which consent shall not be unreasonably withheld or delayed. Notwithstanding the foregoing, Seller may use subcontractors without Buyer's consent to comply with the terms of this Agreement provided that notwithstanding the use of said subcontractors, Seller shall remain responsible for all its obligations under this Agreement. Buyer may furthermore use any agent it so designates for scheduling and billing purposes, so long as Buyer remains responsible for all of its obligations under this Agreement. Any purported assignment of this Agreement in the absence of the required consent, except as provided in 10.2, shall be void.

#### 10.2 Financing

Notwithstanding Section 10.1, Seller may, without the consent of Buyer, collaterally assign its rights under this Agreement to Lenders as collateral security in connection with any financing of the purchase or operation of the Plant, provided that such Lender(s) or its designee agree(s) in writing that upon assuming any of Seller's prospective rights under this Agreement, such Lender also shall be bound by all of Seller's prospective obligations under this Agreement. Notwithstanding any such assignment, Seller's obligations under this Agreement shall continue in their entirety in full force and effect and Seller shall remain fully liable for all of its obligations under or relating to this Agreement. Each such collateral assignment and any purchaser or transferee shall be subject to Buyer's rights and defenses hereunder and under applicable law. Seller shall provide prior written notice to Buyer at least seven (7) days prior to any such collateral assignment.

In order to facilitate the obtaining of financing of the Plant, Buyer shall execute, upon request, a commercially reasonable consent to assignment, with

respect to a collateral assignment hereof to Lenders in connection with the documentation of the financing or refinancing for the Plant. Any assignment in violation of this Agreement shall be void, *ab initio*. Buyer shall consider in good faith any amendments to this Agreement proposed by Seller which relate to financing of the Plant or other amendments requested by Seller in order to receive or maintain financing from Lenders.

### 10.3 Notices

Any notice, demand, request, or communication required or authorized by this Agreement shall be delivered either by hand, facsimile, overnight courier or mailed by certified mail, return receipt requested with postage prepaid, to:

Alameda Power & Telecom  
2000 Grand Street  
P.O. Box H  
Alameda, CA 95401  
Attention: General Manager

Telecopier: (510) 748-3956  
Telephone: (510) 748-3905

on behalf of Buyer;

with a copy to:

Northern California Power Agency  
180 Cirby Way  
Roseville, CA 95678  
Attention: Power Contracts Administrator

Telecopier: 916-781-4255

and to:

Ameresco Half Moon Bay LLC  
c/o Ameresco, Inc.  
111 Speen Street, Suite 410

Framingham, MA 01701  
Attention: General Counsel

Telecopier: (508) 661-2201  
Telephone: (508) 661-2200

with a copy to:

Ameresco Half Moon Bay LLC  
c/o Ameresco, Inc.  
111 Speen Street, Suite 410  
Framingham, MA 01701  
Attention: Vice President, Renewable Energy

Telecopier: (508) 661-2201  
Telephone: (508) 661-2200

on behalf of Seller.

The designation and titles of the person to be notified or the address of such person may be changed at any time by written notice delivered in the manner set forth in this Section 10.3. Any such notice, demand, request, or communication shall be deemed received (i) if delivered by hand by a Party or sent by facsimile or (ii) upon receipt by the receiving Party if sent by courier or U.S. mail.

#### **10.4 Captions**

All titles, subject headings, section titles and similar items are provided for the purpose of reference and convenience and are not intended to be inclusive, definitive or to affect the meaning of the contents or scope of the Agreement.

#### **10.5 No Third Party Beneficiary**

No provision of the Agreement is intended to, nor shall it in any way, inure to the benefit of any customer, property owner or any other third party, including Palo Alto, so as to constitute any such Person a third-party beneficiary under the Agreement, or of any one or more of the terms hereof, or otherwise give rise to any cause of action in any Person not a Party hereto.

## **10.6 No Dedication**

No undertaking by one Party to the other under any provision of the Agreement shall constitute the dedication of that Party's system or any portion thereof to the other Party or to the public or affect Seller as an independent entity and not a public utility.

## **10.7 Entire Agreement; Integration**

This Agreement, together with all Appendices attached hereto, constitutes the entire agreement between the Parties and supersedes any and all prior oral or written understandings. No amendment, addition to or modification of any provision hereof shall be binding upon the Parties, and neither Party shall be deemed to have waived any provision or any remedy available to it, unless such amendment, addition, modification or waiver is in writing and signed by a duly authorized officer or representative of the Parties.

## **10.8 Applicable Law**

The Agreement is made in the State of California and shall be interpreted and governed by the laws of the State of California and/or the laws of the United States, as applicable.

## **10.9 Venue**

The Parties hereby submit to the exclusive jurisdiction of the federal courts for the Northern District of the State of California; provided, however, that if such federal courts sitting in the Northern District of the State of California refuse jurisdiction, the Parties agree to the exclusive jurisdiction of the state courts sitting in the County of San Francisco, State of California.

## **10.10 Nature of Relationship**

The duties, obligations and liabilities of the Parties are intended to be several and not joint or collective. The Agreement shall not be interpreted or construed to create an association, joint venture, fiduciary relationship or partnership between Seller and Buyer or to impose any partnership obligation or liability or any trust or agency obligation or relationship upon either Party. Seller and

Buyer shall not have any right, power or authority to enter into any agreement or undertaking for, or act on behalf of, or act as or be an agent or representative of or otherwise bind the other Party.

#### **10.11 Good Faith and Fair Dealing; Reasonableness**

The Parties agree to act reasonably and in accordance with the principles of good faith and fair dealing in the performance of this Agreement. Unless expressly provided otherwise in this Agreement, (i) wherever the Agreement requires the consent, approval or similar action by a Party, such consent, approval or similar action shall not be unreasonably withheld or delayed, and (ii) wherever the Agreement gives a Party a right to determine, require, specify or take similar action with respect to matters, such determination, requirement, specification or similar action shall be reasonable.

#### **10.12 Severability**

Should any provision of the Agreement be or become void, illegal or unenforceable, the validity or enforceability of the other provisions of the Agreement shall not be affected and shall continue in full force and effect. The Parties will, however, use their best endeavors to agree on the replacement of the void, illegal, or unenforceable provision(s) with legally acceptable clauses which correspond as closely as possible to the sense and purpose of the affected provision.

#### **10.13 Confidentiality**

All information disclosed by Seller, including without limitation all engineering documents, designs, specifications and financial information, shall be kept confidential and shall not be disclosed to any third party except as provided in this Section 10.13. Buyer acknowledges Seller's request to hold all information regarding this Agreement confidential. Buyer shall disclose such information to third parties only to the extent required by California law (including, without limitation, the California Constitution, the California Public Records Act and the Brown Act). Notwithstanding the foregoing, either Party may disclose this Agreement to BFI or its representatives, the Northern California Power Agency or its representatives, or to Lenders or potential Lenders or their representatives; provided that prior to such disclosure, the recipient shall agree in writing to keep the material confidential under terms no

less stringent than as set forth in this Section 10.13. Buyer also shall be permitted to disclose this Agreement and related information to the City Council and/or the Public Utilities Board of Alameda and/or the City Council of Palo Alto for the express purpose of obtaining approval to execute this Agreement; provided that in connection with such disclosure Buyer shall only disclose such information to the extent required by California law (including, without limitation, the California Constitution, the California Public Records Act and the Brown Act). Each Party shall be bound by its obligations of confidentiality hereunder for a period of two (2) years from expiration or any earlier termination of this Agreement. Notwithstanding anything to the contrary in this Section 10.13, nothing shall restrict any Party from using or disclosing confidential information in any manner it chooses which (i) is or becomes generally available to the public other than as a result of a disclosure directly or indirectly by the disclosing Party or its representative; (ii) was within the using or disclosing Party's possession prior to it being furnished hereunder, provided that such information is not subject to another confidentiality agreement with, or other contractual, legal or fiduciary obligation of confidentiality to, any other party with respect to such information; (iii) is rightfully obtained by a Party from third parties authorized to make such disclosure without restriction; or (iv) is legally required to be disclosed by judicial or other governmental action as determined by such Party's attorney acting in good faith (including, but not limited to, the California Constitution, the California Public Records Act and the Brown Act), provided that prompt notice of said judicial or other governmental action shall have been given to the non-disclosing Party and that the non-disclosing Party shall, at its sole cost and expense, be afforded the opportunity (consistent with the legal obligations of the disclosing Party) to exhaust all reasonable legal remedies to maintain the confidential information in confidence.

#### **10.14 Cooperation**

The Parties agree to reasonably cooperate with each other in the implementation and performance of the Agreement. Such duty to cooperate shall not require either Party to act in a manner inconsistent with its rights under the Agreement.

**10.15 Counterparts**

This Agreement may be executed in two or more counterparts and by different Parties on separate counterparts, all of which shall be considered one and the same agreement and each of, which shall be deemed an original.

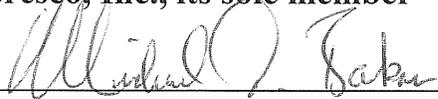
**IN WITNESS WHEREOF**, the Parties have caused this Agreement to be duly executed as of the day and year first above written.

**ALAMEDA POWER & TELECOM**

Approved as to Form  
CITY ATTORNEY  
By:   
Deputy City Attorney

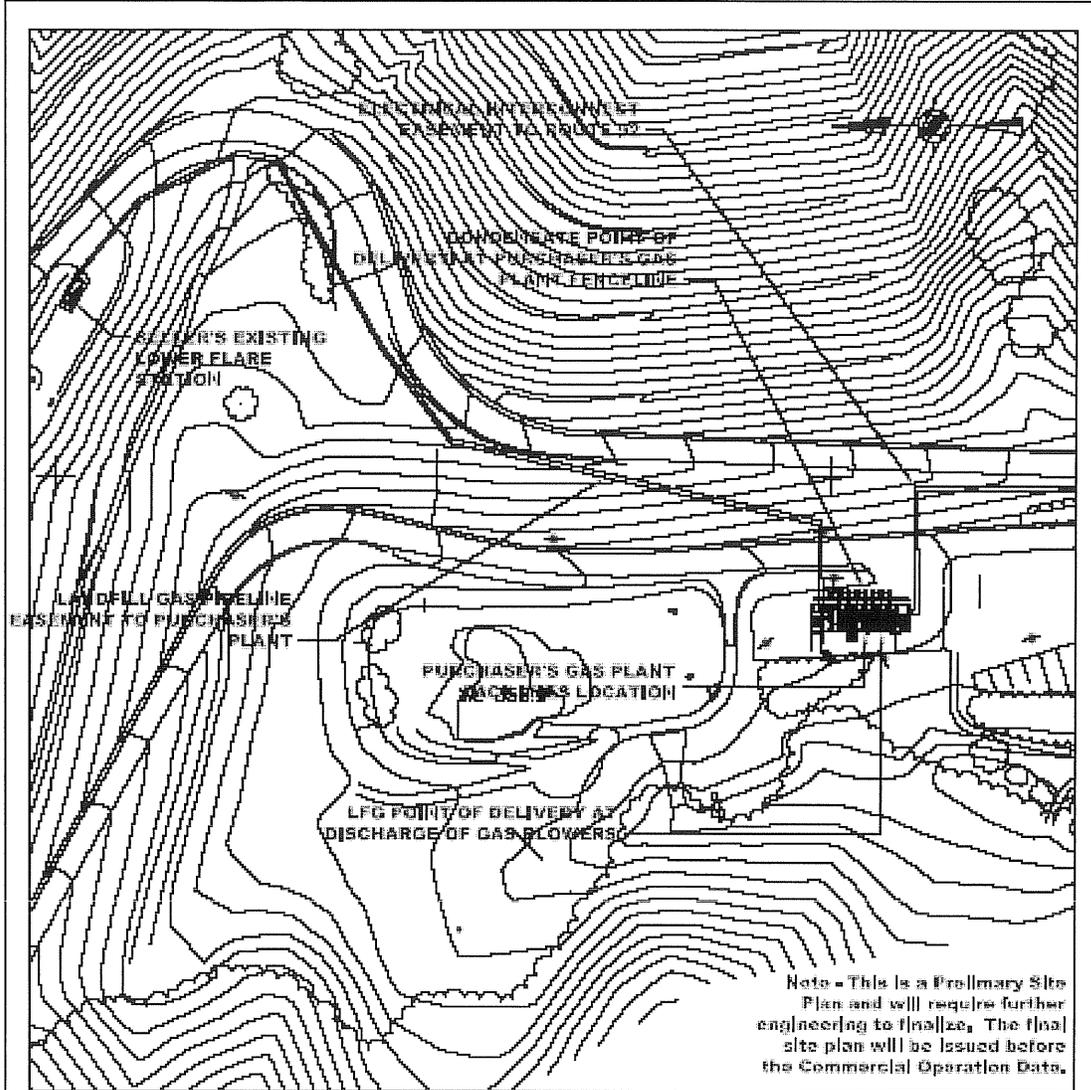
By:                     wfong                      
Name: Valerie O. Fong  
Title: General Manager

**AMERESCO HALF MOON BAY LLC**  
**By Ameresco, Inc., its sole member**

By:   
Name: Michael T. Bakas  
Title: Vice President

# APPENDIX A

## SITE DRAWINGS



POWER PURCHASE AGREEMENT APPENDIX-A SIGHT GEN APPRG. DWG				OX MT. LFGTE SITE PLAN	
			Date	Name	
		Drawn	12/22/04	SWA	
		Chkd	12/22/04	EVS	
		Appr			
				OxMt_Appendix-A_rev2	No. pg 1 of 1
data	Note	Datum	Name	DWG Ref	Proj. Ref

**APPENDIX B**

**FORM OF ATTESTATION**

**Ameresco Half Moon Bay LLC  
Environmental Attribute Attestation and Bill of Sale**

Ameresco Half Moon Bay LLC ("Ameresco") hereby sells, transfers and delivers to \_\_\_\_\_ ("Customer") the Environmental Attributes and Environmental Attribute Reporting Rights associated with the generation of the indicated energy for delivery to the grid (as such term(s) are defined in the \_\_\_\_\_ (identify contract) (the "Contract") dated \_\_\_\_\_, 200\_ between Ameresco and Customer) arising from the generation for delivery to the grid of the energy by the Facility described below:

Facility name and location: \_\_\_\_\_ Fuel Type: \_\_\_\_\_  
Capacity (MW): \_\_\_\_\_ Operational Date: \_\_\_\_\_  
(for facility that has added renewable capacity, show operational date and amount of new capacity)  
As applicable: CEC Reg. no. \_\_\_\_\_ Energy Admin. ID no. \_\_\_\_\_ Q.F. ID no. \_\_\_\_\_

<u>Dates</u>	<u>MWhrs generated</u>
_____ 200_	_____
_____ 200_	_____
_____ 200_	_____

in the amount of one Environmental Attribute or its equivalent for each megawatt hour generated; and Ameresco further attests, warrants and represents as follows:

- i) to the best of its knowledge, the information provided herein is true and correct;
- ii) its sale to Customer is its one and only sale of the Environmental Attributes and associated Environmental Attribute Reporting Rights referenced herein;
- iii) the Facility generated and delivered to the grid the energy in the amount indicated as undifferentiated energy; and

[check one:]

- iv) Ameresco owns the Facility.
- iv) to the best of Ameresco's knowledge, each of the Environmental Attributes and Environmental Attribute Reporting Rights associated with the generation of the indicated energy for delivery to the grid have been generated and sold by the Facility.

This serves as a bill of sale, transferring from Ameresco to Customer all of Ameresco's right, title and interest in and to the Environmental Attributes and Environmental Attribute Reporting Rights associated with the generation of the energy for delivery to the grid.

Contact Person: \_\_\_\_\_ tel: 1-508-661-2200; fax: 1-508-661-2201

WITNESS MY HAND,

AMERESCO HALF MOON BAY LLC  
By: Ameresco, Inc., its sole member

By \_\_\_\_\_  
Its \_\_\_\_\_  
Date: \_\_\_\_\_

**B-1**

## APPENDIX C

### INSURANCE COVERAGES

At its own expense, Seller shall secure and maintain during the Term the following insurance with the coverage amounts indicated for occurrences during and arising out of Seller's performance of this Agreement. Such insurance shall be placed with responsible and reputable insurance companies in compliance with Requirements of Law applicable to Seller.

1. Workers' Compensation/Employer's Liability. Seller shall maintain Workers' Compensation Insurance and Employer's Liability Insurance which comply with Requirements of Law applicable to Seller.
2. Automobile Liability. Seller shall maintain Automobile Liability Insurance in compliance with Requirements of Law applicable to Seller, including coverage for owned, non-owned and hired automobiles for both bodily injury (including death) and property damage, including automobile liability contractual endorsement and uninsured/underinsured motorist protection endorsements.
3. Third Party Liability. Seller shall maintain third party liability insurance in compliance with Requirements of Law applicable to Seller on a project-specific basis covering against legal responsibility to others as a result of bodily injury, property damage and personal injury arising from the operation and maintenance of the Plant. Such policy shall be written with a limit of liability not less than \$10,000,000 and a deductible not to exceed \$10,000. Such liability may be in any combination of primary and excess/umbrella. Coverage shall include, but not be limited to, premises/operations, explosion, collapse, underground hazards, broad form property damage and personal injury liability. Such coverage shall not contain exclusions for punitive or exemplary damages.

## APPENDIX D

### SCHEDULING PROTOCOLS

1. Prior to three (3) workdays before the end of a month, Seller is to provide to NCPA and Buyer a monthly forecast of loads and/or generation for the following month. At a minimum, monthly forecasts will be hourly kilowatt (kW) values by weekday, Saturday, and Sunday/Holiday.
2. No later than 14:00 each Thursday, Seller is to provide a forecast of loads and/or generation for the following week to the extent different from the monthly forecast in Paragraph 1. Weekly forecasts will be hourly kW values for each hour of the week.
3. Daily modifications to forecasts. Unless otherwise mutually agreed, Seller may make changes to the Weekly forecast by providing such changes to NCPA prior to 08:00 two (2) workdays before the active scheduling day.
  - a. Example: For power that is scheduled for generation or delivery on Thursday, March 29, changes must be submitted to NCPA no later than 08:00 on Tuesday, March 27.
4. Hourly modifications to active schedules. Unless otherwise mutually agreed, Seller may make changes to active schedules by providing such changes to NCPA with a minimum of 4 hours notice before the active hour to be changed. Changes to active schedules are limited to two (2) changes per day, excluding forced outages, unless otherwise agreed to between the parties. One request for a schedule change, of one hour or multiple hours duration, constitutes one schedule change.
  - a. Example: For power that is scheduled for generation or delivery in hour ending 15:00 (for the period from 14:01 to 15:00), changes must be submitted to NCPA no later than 11:00.
5. NCPA is to be notified of all planned or forced generation outages.
6. At Seller's request, NCPA will modify generation and load schedules for unforeseen circumstances in accordance with the above scheduling timeline constraints and NCPA Schedule Coordination Agreement.

7. All notices and schedules are to be submitted to NCPA by phone, fax or email to the following persons: Chief Dispatcher/Scheduler.
8. In the absence of forecasts and schedules as noted above, NCPA will utilize the most current information provided by Seller in the development and submission of schedules.

## EXAMPLE FORM OF DAY-AHEAD SCHEDULE

For: June \_\_\_\_, 2004

Hour Ended:	Expected Capability
1	2
2	2
3	2
4	2
5	2
6	2
7	1
8	1
9	2
10	2
11	2
12	2
13	0
14	0
15	0
16	1
17	2
18	2
19	2
20	2
21	2
22	2
23	2
24	2

### Expected Daily Temperatures, F

\_\_\_\_\_ Low

\_\_\_\_\_ High

### Contact

#### Information:

Scheduling

Coordinator:

Facility:

CITY:

## APPENDIX E

### PERFORMANCE TEST

The Seller shall coordinate and schedule, with Buyer and Palo Alto, a Performance Test after completion of all equipment startup and commissioning activities. This performance test may be performed before completing punch list items. Buyer and Palo Alto shall be permitted to witness the Performance Test, including access to and copies of control room logs, control system display screens, and instrumentation data for a reasonable period of time before, during and after the Performance Test, and may also concurrently conduct a site inspection of the Landfill and Plant and associated facilities, systems and equipment. Seller shall supply a written copy of the Performance Test results to both Buyer and Palo Alto within five (5) business days following the conclusion of the test.

The Performance Test shall continue for one hundred twenty (120) consecutive hours (the "Test Period") to demonstrate the following:

- 1) Net Generator Output: The power output for each generator shall be recorded for the Test Period to verify the net initial capacities. This Performance Test shall be performed for all engine/generators simultaneously and will be considered successful if the average net output for the Test Period is equal to eighty percent (80%) of the net Initial Capacity designated in this Agreement. All power measurements shall be based on a power factor of 0.90.
  
- 2) Compliance: The Performance Test shall also demonstrate the ability of the Plant to comply with all material safety, system reliability, environmental, and other requirements of its permits, this Agreement, any interconnection agreements, and the LFG Agreement.

## APPENDIX F

### SELLER'S SAMPLE QUARTERLY FINANCIAL STATEMENT

Balance Sheets  
December 31, 2003 and 2002

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#### ASSETS

##### Current assets:

- Cash and cash equivalents
- Restricted cash
- Accounts receivable
- Prepaid and other current assets
- Total current assets

##### Other assets:

- Project assets, net
- Due from member
- Debit issuance costs, net
- Total other assets

#### LIABILITY AND MEMBER'S EQUITY

##### Current liabilities:

- Current portion of long-term debt
- Accounts payable
- Accrued expenses
- Total current liabilities

##### Long-term liabilities:

- Long-term debt, less current portion
- Deferred tax liabilities
- Total long-term liabilities

Member's equity

Statements of Operations  
Years Ended December 31, 2003 and 2002

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Revenues:

Electricity Sales

Costs of revenue:

Operation and maintenance

Depreciation of project assets

Gross profit (loss)

Operating expenses:

Selling, general and administrative

Operating income (loss)

Interest and other financing costs

Income (loss) before tax benefit (provision)

Income tax benefit (provision)

Net income (loss)

Statements of Cash Flows  
Years Ended December 31, 2003 and 2002

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Cash flows from operating activities:

Net income (loss)  
Adjustments to reconcile net income (loss) to  
net cash provided by operating activities:  
    Depreciation and amortization  
    Amortization of deferred issuance costs  
    Deferred taxes  
Change in assets and liabilities:  
(Increase) decrease in:  
    Accounts receivable  
    Prepaid expenses  
    Accounts payable  
    Due to (from) member  
    Net cash provided by operating activities

Cash flows from investing activities:

    Accounts payable relating to construction activity  
    Accrued expenses relating to construction activity  
    Purchase of project assets  
    Net cash used in investing activities

Cash flows from financing activities:

    Increase in restricted cash  
    Capital contributions  
    Distributions to member  
    Proceeds from debt issuance  
    Debt issuance costs  
    Net cash provided by financing activities

Net increase in cash and cash equivalents

Cash and cash equivalents, beginning of year

Cash and cash equivalents, end of year

**Supplemental disclosure of cash flow information:**

    Cash paid during the year for:  
    Interest

    Income taxes

**Supplemental disclosure of noncash transactions:**

    Accrued purchases of project assets