

**THIRD PHASE AGREEMENT  
FOR  
ENERGY STORAGE SERVICE AGREEMENT  
WITH  
TROLLEY PASS PROJECT LLC**

## TABLE OF CONTENTS

Section 1. Definitions .....	3
Section 2. Purpose .....	10
Section 3. Sale and Purchase of Product .....	10
Section 4. Billing and Payments .....	11
Section 5. Security Deposit Administration.....	14
Section 6. Cooperation and Further Assurances.....	19
Section 7. Participant Covenants and Defaults .....	19
Section 8. Administration of Agreement .....	23
Section 9. Transfer of Rights by Participants.....	25
Section 10. Term and Termination.....	26
Section 11. Withdrawal of Participants .....	26
Section 12. Settlement of Disputes and Arbitration .....	27
Section 13. Miscellaneous .....	27
EXHIBIT A. Project Participation Percentages .....	40
EXHIBIT B. Eenergy Storage Services Agreement .....	40

This THIRD PHASE AGREEMENT (“this Agreement”) is dated as of \_\_\_\_\_, 20\_\_ by and among the Northern California Power Agency, a joint powers agency of the State of California (“NCPA”), and the signatories to this Agreement other than NCPA (“Participants”). NCPA and the Participants are referred to herein individually as a “Party” and collectively as the “Parties”.

## **RECITALS**

A. NCPA has heretofore been duly established as a public agency pursuant to the Joint Exercise of Powers Act of the Government Code of the State of California and, among other things, is authorized to acquire, construct, finance, and operate buildings, works, facilities, and improvements for the generation and transmission of electric capacity and energy for resale.

B. Each of the Participants is a signatory to the Joint Powers Agreement which created NCPA and therefore is a Member.

C. Each of the Participants to this Agreement have executed the Amended and Restated Facilities Agreement, dated October 1, 2014, which establishes the framework under which Project Agreements are created for the development, design, financing, construction, and operation of specific NCPA Projects.

D. The Participants desire NCPA to enter into an Energy Storage Service Agreement (“ESSA”) with Trolley Pass Project LLC (“Seller”), to purchase the Product for the benefit of the Participants’ customers.

E. Each Participant is authorized by its Constitutive Documents to obtain the Product for its present or future requirements, through contracts with NCPA or otherwise.

F. To enable NCPA to enter into the ESSA on behalf of the Participants, pursuant to the terms and conditions of the Amended and Restated Facilities Agreement, NCPA and the Participants wish to enter into this Agreement to provide all means necessary for NCPA to fulfill obligations incurred on behalf of NCPA and the Participants pursuant to the ESSA, and to enable and obligate the Participants to take delivery of and pay for the Product and to pay NCPA for all costs it incurs for undertaking the foregoing activities.

G. Upon full execution of this Agreement, NCPA will enter into the ESSA on behalf of the Participants, and such ESSA shall be deemed a NCPA Project by the Commission.

H. Each of the Parties intends to observe the provisions of this Agreement in good faith and shall cooperate with all other Parties in order to achieve the full benefits of joint action.

I. The Parties desire to equitably allocate costs of NCPA’s provision of services under this Agreement among the Participants.

J. The Participants further desire, insofar as possible, to insulate other Members who are not Participants, from risks inherent in the services and transactions undertaken on behalf of the Participants pursuant to this Agreement.

NOW, THEREFORE, the Parties agree as follows:

**Section 1. Definitions.**

1.1 Definitions. Whenever used in this Agreement (including the Recitals hereto), the following terms shall have the following respective meanings, provided, capitalized terms used in this Agreement (including the Recitals hereto) that are not defined in Section 1 of this Agreement shall have the meaning indicated in Section 1 of the Power Management and Administrative Services Agreement, dated October 1, 2014:

1.1.1 "Actual Contract Price Increase" has the meaning set forth in Section 1.1 of the ESSA.

1.1.2 "Administrative Services Costs" means that portion of the NCPA administrative, general and occupancy costs and expenses, including those costs and expenses associated with the operations, direction and supervision of the general affairs and activities of NCPA, general management, treasury operations, accounting, budgeting, payroll, human resources, information technology, facilities management, salaries and wages (including retirement benefits) of employees, facility operation and maintenance costs, taxes and payments in lieu of taxes (if any), insurance premiums, fees for legal, engineering, financial and other services, power management services,

general settlement and billing services and general risk management costs, that are charged directly or apportioned to the provision of services under this Agreement.

Administrative Services Costs as separately defined herein and used in the context of this Agreement is different and distinct from the term Administrative Services Costs as defined in Section 1 of the Power Management and Administrative Services Agreement.

1.1.3 "Agreement" means this Third Phase Agreement, including all Exhibits attached hereto.

1.1.4 "All Resources Bill" has the meaning set forth in the Power Management and Administrative Services Agreement.

1.1.5 "CAISO" means the California Independent System Operator Corporation, or its functional successor.

1.1.6 "CAISO Tariff" means the duly authorized tariff, rules, protocols and other requirements of the CAISO, as amended from time to time.

1.1.7 "Capacity Damages" has the meaning set forth in Section 1.1 of the ESSA.

1.1.8 "Change in Tax Law" has the meaning set forth in Section 1.1 of the ESSA.

1.1.9 "Commercial Operation" has the meaning set forth in Section 1.1 of the ESSA.

1.1.10 "Commercial Operation Date" has the meaning set forth in Section 1.1 of the ESSA.

1.1.11 "Commission" has the meaning set forth in the Power Management and Administrative Services Agreement.

1.1.12 "Constitutive Documents" means, with respect to NCPA, the Joint Powers Agreement and any resolutions or bylaws adopted thereunder with respect to the governance of NCPA, and with respect to each Participant, the California Government Code and other statutory provisions applicable to such Participant, any applicable agreements, charters, contracts, or other documents concerning the formation, operation or decision making of such Participant, including, if applicable, its city charter, and any codes, ordinances, bylaws, and resolutions adopted by such Participant's governing body.

1.1.13 "Contract Price" has the meaning set forth in Section 1.1 of the ESSA.

1.1.14 "Defaulting Participant" has the meaning set forth in Section 7.2.

1.1.15 "Electric System" has the meaning set forth in the Power Management and Administrative Services Agreement.

1.1.16 "Event of Default" has the meaning set forth in Section 7.2.

1.1.17 "Facility" has the meaning set forth in Section 1.1 of the ESSA.

1.1.18 “Final Independent Report” has the meaning set forth in Section 1.1 of the ESSA.

1.1.19 “General Operating Reserve” means the NCPA General Operating Reserve created through resolution of the Commission, as the same may be amended from time to time.

1.1.20 “Initial Independent Report” has the meaning set forth in Section 1.1 of the ESSA.

1.1.21 “Installed Battery Capacity” has the meaning set forth in Section 1.1 of the ESSA.

1.1.22 “MW” means megawatt.

1.1.23 “MWh” means megawatt hour.

1.1.24 “NCPA” has the meaning set forth in the Recitals hereto.

1.1.25 “Participant” has the meaning set forth in the recitals of this Agreement.

1.1.26 “Party” or “Parties” has the meaning set forth in the preamble hereto; provided that “Third Parties” are entities that are not Party to this Agreement.

1.1.27 “Power Management and Administrative Services Agreement” means the NCPA Power Management and Administrative Services Agreement, dated as of October 1, 2014, between NCPA and the Members who are signatories to that agreement by which NCPA provides Power Management and Administrative Services.

1.1.28 "Product" has the meaning set forth in Section 1.1 of the ESSA.

1.1.29 "Project" or "ESSA" means the Energy Storage Service Agreement, dated as of \_\_\_\_\_, 20\_\_ between NCPA and Seller, under which NCPA, on behalf of the Participants, purchases Product from the Facility located in San Bernardino County, California, consisting of a separately metered section of a larger battery energy storage facility commonly known as the Trolley Battery Energy Storage Project. Upon final execution of the ESSA, the Project shall be deemed a NCPA Project in accordance with the Amended and Restated Facilities Agreement. The ESSA has been attached to this Agreement as Exhibit B.

1.1.30 "Project Costs" means all costs charged to and paid by NCPA pursuant to the ESSA.

1.1.31 "Project Participation Percentage" has the meaning set forth in the Power Management and Administrative Services Agreement, and are set forth in Exhibit A of this Agreement.

1.1.32 "Proposed Contract Price Increase" has the meaning set forth in Section 1.1 of the ESSA.

1.1.33 "Proposed Contract Price Increase Cap" has the meaning set forth in Section 1.1 of the ESSA.

1.1.34 "Revenue" means , with respect to each Participant, all income, rents, rates, fees, charges, and other moneys derived by the Participant from the

ownership or operation of its Electric System, including, without limiting the generality of the foregoing: (a) all income, rents, rates, fees, charges or other moneys derived from the sale, furnishing and supplying of electric capacity and energy and other services, facilities, and commodities sold, furnished, or supplied through the facilities of its Electric System; (b) the earnings on and income derived from the investment of such income, rents, rates, fees, charges or other moneys to the extent that the use of such earnings and income is limited by or pursuant to law to its Electric System; (c) the proceeds derived by the Participant directly or indirectly from the sale, lease or other disposition of all or a part of the Electric System; and (d) the proceeds derived by Participant directly or indirectly from the consignment and sale of freely allocated greenhouse gas compliance instruments into periodic auctions administered by the State of California under the California Cap-and-Trade Program, provided that such proceeds are a permitted use of auction proceeds, but the term Revenues shall not include (i) customers' deposits or any other deposits subject to refund until such deposits have become the property of the Participant or (ii) contributions from customers for the payment of costs of construction of facilities to serve them.

1.1.35 "Scheduling Protocols" means the applicable provisions of the Amended and Restated Scheduling Coordination Program Agreement, and any other contractual or other arrangements between NCPA and the Participants concerning the scheduling, delivery and metering of the ESSA.

1.1.36 "Security Deposit" means the account established by NCPA and funded by the Participants in accordance with Section 5, the funds of which are available for use by NCPA in accordance with the terms and conditions hereof.

1.1.37 "Seller" means Trolley Pass Project LLC, as set forth in Recital D of this Agreement, or as otherwise set forth in the ESSA.

1.1.38 "Storage Contract Capacity" has the meaning set forth in Section 1.1 of the ESSA.

1.1.39 "Supply Chain Event" has the meaning set forth in Section 1.1 of in the ESSA.

1.1.40 "Term" has the meaning set forth in Section 10.

1.1.41 "Third Party" means an entity (including a Member) that is not Party to this Agreement.

1.2 Rules of Interpretation. As used in this Agreement (including the Recitals hereto), unless in any such case the context requires otherwise: The terms "herein," "hereto," "herewith" and "hereof" are references to this Agreement taken as a whole and not to any particular provision; the term "include," "includes" or "including" shall mean "including, for example and without limitation;" and references to a "Section," "subsection," "clause," "Appendix", "Schedule", or "Exhibit" shall mean a Section, subsection, clause, Appendix, Schedule or Exhibit of this Agreement, as the case may be. All references to a given agreement, instrument, tariff or other document, or law,

regulation or ordinance shall be a reference to that agreement, instrument, tariff or other document, or law, regulation or ordinance as such now exists and as may be amended from time to time, or its successor. A reference to a “person” includes any individual, partnership, firm, company, corporation, joint venture, trust, association, organization or other entity, in each case whether or not having a separate legal personality and includes its successors and permitted assigns. A reference to a “day” shall mean a Calendar Day unless otherwise specified. The singular shall include the plural and the masculine shall include the feminine, and *vice versa*.

**Section 2. Purpose.** The purpose of this Agreement is to: (i) set forth the terms and conditions under which NCPA shall enter into the ESSA on behalf of the Participants, (ii) authorize NCPA, acting on behalf of the Participants, to engage in all activities related to that basic purpose, and (iii) specify the rights and obligations of NCPA and the Participants with respect to the ESSA.

**Section 3. Sale and Purchase of Product.** By executing this Agreement, each Participant acknowledges and agrees to be bound by the terms and conditions of the Agreement, and that the Agreement is written as a “take-or-pay” agreement. Any Product delivered to NCPA under the ESSA shall be delivered to each Participant in proportion to such Participant’s Project Participation Percentage as set forth in Exhibit A, and each Participant shall accept and pay for its respective percentage of such Product. To the extent a Participant is unable to accept such deliveries in full, NCPA shall dispose of such

surplus in its sole discretion, in such a manner to attempt to maximize Participant value and that Participant shall reimburse to NCPA any costs incurred by NCPA in doing so. Notwithstanding the above, NCPA may allocate Product procured through the ESSA among the Participants in such percentages as NCPA may, in its reasonable discretion, determine are necessary, desirable, or appropriate, in order to accommodate Participant transfer rights pursuant to Section 9.

3.1 Scheduling. Product delivered from Seller shall be scheduled for and to the Participants in accordance with Scheduling Protocols, and the terms and conditions of the ESSA.

#### **Section 4. Billing and Payments**

4.1 Participant Payment Obligations. Each Participant agrees to pay to NCPA each month its respective portion of the Project Costs, Administrative Services Costs, scheduling coordination costs, and all other costs for services provided in accordance with this Agreement and the Amended and Restated Facilities Agreement. In addition to the aforementioned monthly payment obligations, each Participant is obligated to fund: (i) any and all required Security Deposits calculated in accordance with Section 5, and (ii) any working capital requirements for the Project maintained by NCPA as determined, collected and set forth in the Annual Budget.

4.2 Invoices. NCPA will issue an invoice to each Participant for its share of Project Costs, Administrative Services Costs, scheduling coordination costs, and all other

costs for services provided in accordance with this Agreement and the Amended and Restated Facilities Agreement. Such invoice may be either the All Resources Bill or separate special invoice, as determined by NCPA. At NCPA's discretion, invoices may be issued to Participants using electronic media or physical distribution.

4.3 Payment of Invoices. All invoices delivered by NCPA (including the All Resources Bill) are due and payable thirty (30) Calendar Days after the date thereof; provided, however, that any amount due on a day other than a Business Day may be paid on the following Business Day.

4.4 Late Payments. Any amount due and not paid by a Participant in accordance with Section 4.3 shall be considered late and bear interest computed on a daily basis until paid at the lesser of (i) the per annum prime rate (or reference rate) of the Bank of America NT&SA then in effect, plus two percent (2%) or (ii) the maximum rate permitted by law.

4.5 Billing Disputes. A Participant may dispute the accuracy of any invoice issued by NCPA under this Agreement by submitting a written dispute to NCPA, within thirty (30) Calendar Days after the date of such invoice; nonetheless the Participant shall pay the full amount billed when due. If a Participant does not timely question or dispute the accuracy of any invoice in writing, then the invoice shall be deemed to be correct. Upon review of a submitted dispute, if an invoice is determined by NCPA to be incorrect, then NCPA shall issue a corrected invoice and refund any amounts that may be due to the Participant. If NCPA and the Participant fail to agree on the accuracy of an invoice within

thirty (30) Calendar Days after the Participant has disputed it, then the General Manager shall promptly submit the dispute to the Commission for resolution. If the Commission and the Participant fail to agree on the accuracy of a disputed invoice within sixty (60) Calendar Days after its submission to the Commission, then the dispute may then be resolved under the mediation and arbitration procedures set forth in Section 12 of this Agreement; provided, however, that prior to resorting to either mediation or arbitration proceedings, the full amount of the disputed invoice must be paid by the Participant.

#### 4.6 Billing/Settlement Data and Examination of Books and Records.

4.6.1 Settlement Data. NCPA shall make billing and settlement data available to the Participants in the All Resources Bill, or other invoice, or upon request. NCPA may also, at its sole discretion, make billing and settlement support information available to Participants using electronic media (e.g. electronic data portal).

Procedures and formats for the provision of such electronic data submission may be established by the Commission from time to time. Without limiting the generality of the foregoing, NCPA may, in its reasonable discretion, require the Participants to execute a non-disclosure agreement prior to providing access to the NCPA electronic data portal.

4.6.2 Examination of Books and Records. Any Participant to this Agreement shall have the right to examine the books and records created and

maintained by NCPA pursuant to this Agreement at any reasonable, mutually agreed upon time.

**Section 5. Security Deposit Administration**

5.1 Security Deposit Requirements. Each Participant agrees that any funds deposited at NCPA to satisfy Participant's Security Deposit requirements pursuant to this Agreement shall be irrevocably committed and held by NCPA in the General Operating Reserve, and that such funds may be used by NCPA in accordance with Section 5.1.3. Each Participant's Security Deposit will be accounted separately from and in addition to any other security accounts or deposits maintained pursuant to any other agreement between NCPA and the Participant, or any other such security account or deposits required of Members. In connection with fulfilling the Security Deposit requirements of this Agreement, Participant may elect to use its uncommitted funds held in the General Operating Reserve to satisfy in whole or in part its Security Deposit required under Section 5. If Participant chooses to satisfy in whole or in part its security requirements using its uncommitted funds held in the General Operating Reserve, then Participant is required to execute and deliver to NCPA an Irrevocable Letter of Direction, directing NCPA to utilize Participant's uncommitted General Operating Reserve funds for such purposes, and the designated funds will thereafter be irrevocably committed and held by NCPA to satisfy the requirements of this Agreement.

5.1.1 Initial Amounts. No later than ninety (90) day prior to the Commercial Operation Date, each Participant shall ensure that sufficient Security Deposit funds have been deposited with and are held by NCPA in an amount not greater than the highest three (3) months of estimated Project Costs, as estimated by NCPA. Such Security Deposit requirement may be satisfied by Participant in whole or part either in cash, through irrevocable commitment of its uncommitted funds held in the General Operating Reserve in accordance with Section 5.1, or through a clean, irrevocable letter of credit satisfactory to NCPA's General Manager.

5.1.2 Subsequent Deposits. Periodically, and at least quarterly, NCPA shall review and revise its estimate of Project Costs for which Participant shall be obligated to pay under this Agreement. Following such review, NCPA shall determine whether each Participant has a sufficient Security Deposit balance at NCPA. To the extent that any Participant's Security Deposit balance is greater than one hundred and ten percent (110%) of the amount required herein, NCPA shall credit such amount as soon as practicable to the Participant's next following All Resources Bill, or by separate special invoice. To the extent that any Participant's Security Deposit balance is less than ninety percent (90%) of the amount required herein, NCPA shall add such amount as soon as practicable to such Participant's next All Resources Bill, or as necessary, to a special invoice to be paid by Participant upon receipt. Credits or additions shall not be made to Participants who satisfy these Security Deposit requirements in whole through

the use of a letter of credit; provided, that the amount of the letter of credit shall be adjusted, as required from time to time, in a like manner to assure an amount not to exceed the highest three (3) months of estimated Project Costs is available to NCPA, as determined by NCPA.

5.1.3 Use of Security Deposit Funds. NCPA may use any and all Security Deposit funds held by NCPA (or utilize a letter of credit provided in lieu thereof) to pay any costs it incurs hereunder, including making payments to Seller, without regard to any individual Participant's Security Deposit balance or proportionate share of Project Costs, and irrespective of whether NCPA has issued an All Resources Bill or special invoice for such costs to the Participants or whether a Participant has made timely payments of All Resources Bills or special invoices. Should Participant have satisfied its Security Deposit requirements in whole or part through a letter of credit, NCPA may draw on such letter of credit to satisfy Participant's obligations hereunder at NCPA's sole discretion. Notwithstanding the foregoing, if any Participant fails to pay any costs incurred by NCPA pursuant to this Agreement, NCPA shall first use that non-paying Participant's Security Deposit and shall not use any other Participants' Security Deposit until such non-paying Participant's Security Deposit has been exhausted.

5.1.4 Accounting. If Security Deposit funds or a letter of credit are used by NCPA to pay any costs it incurs hereunder as described in Section 5.1.3, then NCPA

will maintain a detailed accounting of each Participant's shares of funds withdrawn, and upon the collection of all or a part of such withdrawn funds, NCPA will credit back to each non-defaulting Participant the funds collected in proportion to such non-defaulting Participant's share of funds initially withdrawn.

5.1.5 Emergency Additions. In the event that funds are withdrawn pursuant to Section 5.1.3, or if the Security Deposit held by NCPA is otherwise insufficient to allow for NCPA to pay any invoice, demand, request for further assurances by Seller, or claims, NCPA shall notify all Participants of the deficiency. In conjunction with such notice, NCPA shall send a special or emergency assessment invoice to the Participant or Participants that caused or are otherwise responsible for the deficiency. Each Participant of such an invoice shall pay to NCPA such assessment when and if assessed by NCPA within two (2) Business Days of the invoice date of the assessment, or shall consent to and direct NCPA to draw on any existing letter of credit Participant has established for such purposes. In the event that the Participant or Participants that caused or are otherwise responsible for the deficiency cannot, does not or will not pay to NCPA the special or emergency assessment within two (2) Business Days after the invoice date, NCPA shall immediately submit a special or emergency invoice to all remaining Participants, and such remaining Participants shall pay to NCPA such assessment within two (2) Business Days after the invoice date of

the assessment, or shall consent to and direct NCPA to draw on any existing letter of credit that Participant has established for such purposes.

5.1.6 Security Deposit Interest. NCPA shall maintain a detailed accounting of each Participant's Security Deposits, and withdrawals of such funds, held by NCPA. Security Deposits held by NCPA shall be invested by NCPA in accordance with the General Operating Reserve policies and investment policies adopted by the NCPA Commission. Interest earned on the Security Deposit funds shall be proportionately credited to the Participants in accordance with their weighted average balances held therein. Any Security Deposit losses caused by early termination of investments shall be allocated among the Participants in accordance with the General Operating Reserve provisions and guidelines approved by the Commission, as the same may be amended from time to time; provided, however, to the extent that either the General Operating Reserve provisions and guidelines do not apply or the Security Deposit is not adequate to cover the losses, then such losses shall be allocated among the Participants in accordance with their proportionate Security Deposit balances.

5.1.7 Return of Funds. Upon termination or a permitted withdrawal of a Participant in accordance with this Agreement, the affected Participant may apply to NCPA for the return of their share of Security Deposit funds ninety (90) days after the effective date of such termination or withdrawal. However, NCPA shall, in its sole but

reasonable discretion, as determined by the NCPA General Manager, estimate the then outstanding liabilities of the Participant, including any estimated contingent liabilities and shall retain all such funds, if any, until all such liabilities have been fully paid or otherwise satisfied in full. After all such liabilities have been satisfied in full, as determined by NCPA's General Manager, any remaining balance of the Participant's share of the Security Deposit will be refunded to the Participant within sixty (60) days thereafter.

**Section 6. Cooperation and Further Assurances.** Each of the Parties agree to provide such information, execute and deliver any instruments and documents and to take such other actions as may be necessary or reasonably requested by any other Party which are consistent with the provisions of this Agreement and which do not involve the assumption of obligations other than those provided for in this Agreement, in order to give full effect to this Agreement and to carry out the intent of this Agreement. The Parties agree to cooperate and act in good faith in connection with obtaining any credit support required in order to satisfy the requirements of this Agreement.

**Section 7. Participant Covenants and Defaults**

7.1 Each Participant covenants and agrees: (i) to make payments to NCPA, from its Electric System Revenues, of its obligations under this Agreement as an operating expense of its Electric System; (ii) to fix the rates and charges for services provided by its Electric System, so that it will at all times have sufficient Revenues to meet the obligations

of this Agreement, including the payment obligations; (iii) to make all such payments due NCPA under this Agreement whether or not there is an interruption in, interference with, or reduction or suspension of services provided under this Agreement, such payments not being subject to any reduction, whether by offset or otherwise, and regardless of whether any reasonable dispute exists; and (iv) to operate its Electric System, and the business in connection therewith, in accordance with Good Utility Practices.

7.2 Events of Default. An Event of Default under this Agreement shall exist upon the occurrence of any one or more of the following by a Participant (the “Defaulting Participant”):

(i) the failure of any Participant to make any payment in full to NCPA when due;

(ii) the failure of a Participant to perform any covenant or obligation of this Agreement where such failure is not cured within thirty (30) Calendar Days following receipt of a notice from NCPA demanding cure; provided, that this subsection shall not apply to any failure to make payments specified by subsection 7.2 (i);

(iii) if any representation or warranty of a Participant material to the services provided hereunder shall prove to have been incorrect in any material respect when made and the Participant does not cure the facts underlying such incorrect representation or warranty so that the representation or warranty becomes true and correct within thirty (30) Calendar Days after the date of receipt of notice from NCPA demanding cure; or

(iv) if a Participant is in default or in breach of any of its covenants or obligations under any other agreement with NCPA and such default or breach is not cured within the time periods specified in such agreement.

7.3 Uncontrollable Forces. A Party shall not be considered to be in default in respect of any obligation hereunder if prevented from fulfilling such obligation by reason of Uncontrollable Forces; provided, that in order to be relieved of an Event of Default due to Uncontrollable Forces, a Party affected by an Uncontrollable Force shall:

(i) first provide oral notice to the General Manager using telephone communication within two (2) Business Days after the onset of the Uncontrollable Force, and provide subsequent written notice to the General Manager and all other Parties within ten (10) Business Days after the onset of the Uncontrollable Force, describing its nature and extent, the obligations which the Party is unable to fulfill, the anticipated duration of the Uncontrollable Force, and the actions which the Party will undertake so as to remove such disability and be able to fulfill its obligations hereunder; and

(ii) use due diligence to place itself in a position to fulfill its obligations hereunder and if unable to fulfill any obligation by reason of an Uncontrollable Force such Party shall exercise due diligence to remove such disability with reasonable dispatch; provided, that nothing in this subsection shall require a Party to settle or compromise a labor dispute.

7.4 Cure of an Event of Default. An Event of Default shall be deemed cured only if such default shall be remedied or cured within the time periods specified in Section 7.2 above, as may be applicable, provided, however, upon request of the Defaulting Participant the Commission may waive the default at its sole discretion, where such waiver shall not be unreasonably withheld.

7.5 Remedies in the Event of Uncured Default. Upon the occurrence of an Event of Default which is not cured within the time limits specified in Section 7.2, without limiting other rights or remedies available under this Agreement, at law or in equity, and without constituting or resulting in a waiver, release or estoppel of any right, action or cause of action NCPA may have against the Defaulting Participant, NCPA may take any or all of the following actions:

(i) suspend the provision of services under this Agreement to such Defaulting Participant; or

(ii) demand that the Defaulting Participant provide further assurances to guarantee the correction of the default, including the collection of a surcharge or increase in electric rates, or such other actions as may be necessary to produce necessary Revenues to correct the default.

7.6 Effect of Suspension.

7.6.1 Generally. The suspension of this Agreement will not terminate, waive, or otherwise discharge any ongoing or undischarged liabilities, credits or

obligations arising from this Agreement until such liabilities, credits or obligations are satisfied in full.

7.6.2 Suspension. If performance of all or any portion of this Agreement is suspended by NCPA with respect to a Participant in accordance with subsection 7.5(i), then such Participant shall pay any and all costs incurred by NCPA as a result of such suspension including reasonable attorney's fees, the fees and expenses of other experts, including auditors and accountants, or other reasonable and necessary costs associated with such suspension and any portion of the Project Costs, scheduling and dispatch costs, and Administrative Services Costs that were not recovered from such Participant as a result of such suspension.

## **Section 8. Administration of Agreement**

8.1 Commission. The Commission is responsible for the administration of this Agreement. Each Participant shall be represented by its Commissioner or their designated alternate Commissioner ("Alternate") pursuant to the Joint Powers Agreement. Each Commissioner shall have authority to act for the Participant represented with respect to matters pertaining to this Agreement.

8.2 Forum. Whenever any action anticipated by this Agreement is required to be jointly taken by the Participants, such action shall be taken at regular or special meetings of the NCPA Commission.

8.3 Quorum. For purposes of acting upon matters that relate to administration of this Agreement, a quorum of the Participants shall consist of those Commissioners, or their designated Alternate, representing a numerical majority of the Participants.

8.4 Voting. Each Participant shall have the right to cast one vote with respect to matters pertaining to this Agreement. A unanimous vote of all Participants shall be required for action regarding: (i) any transfer of rights to a Third Party as described in Section 9 of this Agreement; and (ii) for matters related to any of the following actions as provided for in the ESSA: (a) exercising any early termination provisions as set forth in the ESSA, and (b) exercising any assignment rights as set forth in the ESSA. For all other matters pertaining to this Agreement, a majority vote of the Participants shall be required for action.

8.5 Storage Rate Adjustment Event. Section 2.5 of the ESSA permits the Seller to request a Contract Price adjustment from NCPA to address cost increases that Seller incurs as a result of a Change in Tax Law or Supply Chain Event. If the Proposed Contract Price Increase or Actual Contract Price Increase is equal to or less than the Proposed Contract Price Increase Cap, then as further set forth in Section 2.5 of the ESSA, such Proposed Contract Price Increase or Actual Contract Price Increase shall be deemed accepted by the Participants and NCPA, and the parties to the ESSA shall amend the Contract Price in the ESSA.

If the Proposed Contract Price Increase and/or Actual Contract Price Increase is greater than the Proposed Contract Price Increase Cap by an amount that is less than or equal to fifteen percent (15.00%) of the original Contract Price, in aggregate, then the NCPA General Manager is hereby delegated authority by the Participants to approve the price increase based on their determination that (1) the Initial Independent Report or Final Independent Report supports the Proposed Contract Price Increase and/or Actual Contract Price Increase, and (2) the ESSA with the Proposed Contract Price Increase and/or Actual Contract Price Increase is still favorable when compared to current market conditions for similar products. The NCPA General Manager shall notify the Commission of the acceptable Proposed Contract Price Increase and/or Actual Contract Price Increase and associated modifications to the ESSA with the foregoing findings, if any, at the next available Commission meeting. If the Proposed Contract Price Increase and/or Actual Contract Price Increase is greater than fifteen percent (15.00%) of the original Contract Price, in aggregate, then the proposed modifications to the ESSA will be brought to the Commission for discussion and further action.

**Section 9. Transfer of Rights by Participants**

9.1 A Participant has the right to make transfers, sales, assignments and exchanges (collectively “transfers(s)”) of any portion of its Project Participation Percentage and rights thereto, subject to the approval provisions in Section 8.4 of this Agreement, provided that the transferee satisfies all applicable criterion in the ESSA. If a Participant

desires to transfer a portion or its entire share of the Project for a specific time interval, or permanently, then NCPA will, if requested by such Participant, use its best efforts to transfer that portion of the Participant's share of the Project.

9.2 Unless otherwise set forth in this Agreement, before a Participant may transfer an excess Project share pursuant to Section 9.1 to any person or entity other than a Participant, it shall give all other Participants the right to purchase the share on the same terms and conditions. Before a Participant may transfer an excess Project share pursuant to Section 9.1 to any person or entity other than a Member, it shall give all Members the right to purchase the share on the same terms and conditions. Such right shall be exercised within thirty (30) days of receipt of notice of said right.

No transfer shall relieve a Participant of any of its obligations under this Agreement except to the extent that NCPA receives payment of these obligations from a transferee.

**Section 10. Term and Termination.** This Agreement shall become effective when it has been duly executed by all Participants, and delivered to and executed by NCPA (the "Effective Date"). NCPA shall notify all Participants in writing of the Effective Date. The Term of this Agreement shall be coterminous with the ESSA, and shall commence on the Effective Date, and shall continue through the term of the ESSA.

**Section 11. Withdrawal of Participants.** No Participant may withdraw from this Agreement except as otherwise provided for herein.

**Section 12. Settlement of Disputes and Arbitration.** The Parties agree to make best efforts to settle all disputes among themselves connected with this Agreement as a matter of normal business under this Agreement. The procedures set forth in Section 10 of the Power Management and Administrative Services Agreement shall apply to all disputes that cannot be settled by the Participants themselves; provided, that the provisions of Section 4.5 shall first apply to all disputes involving invoices prepared by NCPA.

**Section 13. Miscellaneous**

13.1 Confidentiality. The Parties will keep confidential all confidential or trade secret information made available to them in connection with this Agreement, to the extent possible, consistent with applicable laws, including the California Public Records Act. Confidential or trade secret information shall be marked or expressly identified as such.

If a Party (“Receiving Party”) receives a request from a Third Party for access to, or inspection, disclosure or copying of, any other Party’s (the “Supplying Party”) confidential data or information, which the Receiving Party has possession of (“Disclosure Request”), then the Receiving Party shall provide notice and a copy of the Disclosure Request to the Supplying Party within three (3) Business Days after receipt of the Disclosure Request. Within three (3) Business Days after receipt of such notice, the Supplying Party shall provide notice to the Receiving Party either:

(i) that the Supplying Party believes there are reasonable legal grounds for denying or objecting to the Disclosure Request, and the Supplying Party requests the

Receiving Party to deny or object to the Disclosure Request with respect to identified confidential information. In such case, the Receiving Party shall deny the Disclosure Request and the Supplying Party shall defend the denial of the Disclosure Request at its sole cost, and it shall indemnify the Receiving Party for all costs associated with denying or objecting to the Disclosure Request. Such indemnification by the Supplying Party of the Receiving Party shall include all of the Receiving Party's costs reasonably incurred with respect to denial of or objection to the Disclosure Request, including but not limited to costs, penalties, and the Receiving Party's attorney's fees; or

(ii) that the Receiving Party may grant the Disclosure Request without any liability by the Receiving Party to the Supplying Party.

13.2 Indemnification and Hold Harmless. Subject to the provisions of Section 13.4, each Participant agrees to indemnify, defend and hold harmless NCPA and its Members, including their respective governing boards, officials, officers, agents, and employees, from and against any and all claims, suits, losses, costs, damages, expenses and liability of any kind or nature, including reasonable attorneys' fees and the costs of litigation, including experts, to the extent caused by any acts, omissions, breach of contract, negligence (active or passive), gross negligence, recklessness, or willful misconduct of that Participant, its governing officials, officers, employees, subcontractors or agents, to the maximum extent permitted by law.

13.3 Several Liabilities. No Participant shall, in the first instance, be liable under this Agreement for the obligations of any other Participant or for the obligations of NCPA incurred on behalf of other Participants. Each Participant shall be solely responsible and liable for performance of its obligations under this Agreement, except as otherwise provided for herein. The obligation of each Participant under this Agreement is, in the first instance, a several obligation and not a joint obligation with those of the other Participants.

Notwithstanding the foregoing, the Participants acknowledge that any debts or obligations incurred by NCPA under this Agreement on behalf of any of them shall be borne solely by such Participants in proportion to their respective Project Participation Percentages, and not by non-Participant Members of NCPA, pursuant to Article IV, Section 3(b) of the Joint Powers Agreement.

In the event that a Participant should fail to pay its share of the debts or obligations incurred by NCPA as required by this Agreement, the remaining Participants shall, in proportion to their Project Participation Percentages, pay such unpaid amounts and shall be reimbursed by the Participant failing to make such payments.

13.4 No Consequential Damages. FOR ANY BREACH OF ANY PROVISION OF THIS AGREEMENT FOR WHICH AN EXPRESS REMEDY OR MEASURE OF DAMAGES IS PROVIDED IN THIS AGREEMENT, THE LIABILITY OF THE DEFAULTING PARTY SHALL BE LIMITED AS SET FORTH IN SUCH PROVISION, AND ALL OTHER

DAMAGES OR REMEDIES ARE HEREBY WAIVED. IF NO REMEDY OR MEASURE OF DAMAGE IS EXPRESSLY PROVIDED, THE LIABILITY OF THE DEFAULTING PARTY SHALL BE LIMITED TO ACTUAL DAMAGES ONLY AND ALL OTHER DAMAGES AND REMEDIES ARE HEREBY WAIVED. IN NO EVENT SHALL NCPA OR ANY PARTICIPANT OR THEIR RESPECTIVE SUCCESSORS, ASSIGNS, REPRESENTATIVES, DIRECTORS, OFFICERS, AGENTS, OR EMPLOYEES BE LIABLE FOR ANY LOST PROFITS, CONSEQUENTIAL, SPECIAL, EXEMPLARY, INDIRECT, PUNITIVE, OR INCIDENTAL LOSSES OR DAMAGES, INCLUDING LOSS OF USE, LOSS OF GOODWILL, LOST REVENUES, LOSS OF PROFIT OR LOSS OF CONTRACTS EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, AND NCPA AND EACH PARTICIPANT EACH HEREBY WAIVES SUCH CLAIMS AND RELEASES EACH OTHER AND EACH OF SUCH PERSONS FROM ANY SUCH LIABILITY.

The Parties acknowledge that California Civil Code section 1542 provides that: "A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor." The Parties waive the provisions of section 1542, or other similar provisions of law, and intend that the waiver and release provided by this Section of this Agreement shall be fully enforceable despite its reference to future or unknown claims.

13.5 Waiver. No waiver of the performance by a Party of any obligation under this Agreement with respect to any default or any other matter arising in connection with this Agreement shall be effective unless given by the Commission or the governing body of a Participant, as applicable. Any such waiver by the Commission in any particular instance shall not be deemed a waiver with respect to any subsequent performance, default or matter.

13.6 Amendments. Except where this Agreement specifically provides otherwise, this Agreement may be amended only by written instrument executed by the Parties with the same formality as this Agreement.

13.7 Assignment of Agreement.

13.7.1 Binding Upon Successors. This Agreement shall inure to the benefit of and shall be binding upon the respective successors and assignees of the Parties to this Agreement.

13.7.2 No Assignment. Neither this Agreement, nor any interest herein, shall be transferred or assigned by a Party hereto except with the consent in writing of the other Parties hereto, which consent shall not be unreasonably withheld.

13.8 Severability. In the event that any of the terms, covenants or conditions of this Agreement or the application of any such term, covenant or condition, shall be held invalid as to any person or circumstance by any court having jurisdiction, all other terms, covenants or conditions of this Agreement and their application shall not be affected

thereby, but shall remain in force and effect unless the court holds that such provisions are not severable from all other provisions of this Agreement.

13.9 Governing Law. This Agreement shall be interpreted, governed by, and construed under the laws of the State of California.

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

13.11 Notices. Any notice, demand or request required or authorized by this Agreement to be given to any Party shall be in writing, and shall either be personally delivered to a Participant's Commissioner or Alternate, and to the General Manager, or shall be transmitted to the Participant and the General Manager at the addresses shown on the signature pages hereof. The designation of such addresses may be changed at any time by written notice given to the General Manager who shall thereupon give written notice of such change to each Participant. All such notices shall be deemed delivered when personally delivered, two (2) Business Days after deposit in the United States mail first class postage prepaid, or on the first Business Day following delivery through electronic communication.

13.12 Warranty of Authority. Each Party represents and warrants that it has been duly authorized by all requisite approval and action to execute and deliver this Agreement and that this Agreement is a binding, legal, and valid agreement enforceable in accordance

with its terms. Upon execution of this Agreement, each Participant shall deliver to NCPA a resolution of the governing body of such Participant evidencing approval of and authority to enter into this Agreement.

13.13 Counterparts. This Agreement may be executed in any number of counterparts, and each executed counterpart shall have the same force and effect as an original instrument and as if all the signatories to all of the counterparts had signed the same instrument. Any signature page of this Agreement may be detached from any counterpart of this Agreement without impairing the legal effect of any signatures thereon, and may be attached to another counterpart of this Agreement identical in form hereto but having attached to it one or more signature pages.

13.14 Venue. In the event that a Party brings any action under this Agreement, the Parties agree that trial of such action shall be vested exclusively in the state courts of California in the County of Placer or in the United States District Court for the Eastern District of California.

13.15 Attorneys' Fees. If a Party to this Agreement brings any action, including an action for declaratory relief, to enforce or interpret the provisions of this Agreement, then each Party shall bear its own fees and costs, including attorneys' fees, associated with the action.

13.16 Counsel Representation. Pursuant to the provisions of California Civil Code Section 1717 (a), each of the Parties were represented by counsel in the negotiation and

execution of this Agreement and no one Party is the author of this Agreement or any of its subparts. Those terms of this Agreement which dictate the responsibility for bearing any attorney's fees incurred in arbitration, litigation or settlement in a manner inconsistent with the provisions of Section 13.2 were intentionally so drafted by the Parties, and any ambiguities in this Agreement shall not be interpreted for or against a Party by reason of that Party being the author of the provision.

13.17 No Third Party Beneficiaries. Nothing contained in this Agreement is intended by the Parties, nor shall any provision of this Agreement be deemed or construed by the Parties, by any third person or any Third Parties, to be for the benefit of any Third Party, nor shall any Third Party have any right to enforce any provision of this Agreement or be entitled to damages for any breach by the Parties of any of the provisions of this Agreement.

IN WITNESS WHEREOF, NCPA and each Participant have, by the signature of its duly authorized representative shown below, executed and delivered a counterpart of this Agreement.

NORTHERN CALIFORNIA  
POWER AGENCY  
651 Commerce Drive  
Roseville, CA 95678

CITY OF SANTA CLARA  
1500 Warburton Avenue  
Santa Clara, CA 95050

\_\_\_\_\_  
By: Randy S. Howard  
Title: General Manager  
Date: \_\_\_\_\_

\_\_\_\_\_  
By: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

Approved as to form:

Approved as to form:

\_\_\_\_\_  
By: Jane E. Luckhardt  
Its: General Counsel  
Date: \_\_\_\_\_

\_\_\_\_\_  
By: \_\_\_\_\_  
Its: City Attorney  
Date: \_\_\_\_\_

Attestation (if applicable):

Attestation (if applicable):

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

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

CITY OF ALAMEDA  
2000 Grand Street  
P.O. Box H  
Alameda, CA 94501

CITY OF LOMPOC  
100 Civic Center Plaza  
Lompoc, CA 93436

\_\_\_\_\_  
By: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

\_\_\_\_\_  
By: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

Approved as to form:

Approved as to form:

\_\_\_\_\_  
By: \_\_\_\_\_  
Its: City Attorney  
Date: \_\_\_\_\_

\_\_\_\_\_  
By: \_\_\_\_\_  
Its: City Attorney  
Date: \_\_\_\_\_

Attestation (if applicable)

Attestation (if applicable)

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

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

CITY OF PALO ALTO  
250 Hamilton Avenue  
Palo Alto, CA 94301

CITY OF REDDING  
777 Cypress Avenue  
Redding, CA 96001

\_\_\_\_\_  
By: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

\_\_\_\_\_  
By: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

Approved as to form:

Approved as to form:

\_\_\_\_\_  
By: \_\_\_\_\_  
Its: City Attorney  
Date: \_\_\_\_\_

\_\_\_\_\_  
By: \_\_\_\_\_  
Its: City Attorney  
Date: \_\_\_\_\_

Attestation (if applicable)

Attestation (if applicable)

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

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

CITY OF SHASTA LAKE  
4477 Main Street  
Shasta Lake, CA 96019

CITY OF UKIAH  
300 Seminary Avenue  
Ukiah, CA 95482

\_\_\_\_\_  
By: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

\_\_\_\_\_  
By: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

Approved as to form:

Approved as to form:

\_\_\_\_\_  
By: \_\_\_\_\_  
Its: City Attorney  
Date: \_\_\_\_\_

\_\_\_\_\_  
By: \_\_\_\_\_  
Its: City Attorney  
Date: \_\_\_\_\_

Attestation (if applicable)

Attestation (if applicable)

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

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

CITY OF OAKLAND, acting  
by and through its  
Board of Port Commissioners  
530 Water Street  
Oakland, CA 94607

\_\_\_\_\_  
By: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

Approved as to form:

\_\_\_\_\_  
By: \_\_\_\_\_  
Its: City Attorney  
Date: \_\_\_\_\_

Attestation (if applicable)

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

**EXHIBIT A**  
**PROJECT PARTICIPATION PERCENTAGES**

Table 1 of this Exhibit A lists the Members, and their respective initial Project Participation Percentage share of the Project, that are expected to execute this Agreement by signature, and therefore become Participants:

**Table 1**  
**Initial Project Participation Percentages**

<b>Participants</b>	<b>Project Participation Percentage (%)</b>	<b>Project Participation Percentage (MW)</b>
City of Santa Clara	66.6667%	200.00
City of Alameda	3.3333%	10.00
City of Lompoc	1.0000%	3.00
City of Palo Alto	10.0000%	30.00
City of Redding	15.0000%	45.00
City of Shasta Lake	1.6667%	5.00
City of Ukiah	1.0000%	3.00
Port of Oakland	1.3333%	4.00
<b>Total</b>	<b>100.0000%</b>	<b>300.00</b>

On the Effective Date, NCPA shall prepare Table 2 to reflect the Final Project Participation Percentages of each Participant, and such Table 2 will be added to this Exhibit A as an amendment to this Agreement. NCPA shall provide notice to each Participant of Table 2 that is incorporated into this Exhibit A as described herein.

Pursuant to Section 5 of Exhibit B of the ESSA, if, at Commercial Operation, the Installed Battery Capacity is less than one hundred percent (100%) of the Storage Contract Capacity, Seller shall have one hundred twenty (120) days after the Commercial Operation Date to install additional capacity such that the Installed Battery Capacity is equal to (but not greater than) the one hundred percent (100%) of the Storage Contract Capacity. If Seller fails to construct the Storage Contract Capacity by such date, Seller shall pay NCPA

Capacity Damages, and for each MW (or portion thereof) that the Storage Contract Capacity exceeds the Installed Battery Capacity, the Project Participation Share for the Participants shall be automatically adjusted and reduced, on a pro rata basis, to equal to actual amount of Installed Battery Capacity.

**EXHIBIT B**

**Energy Storage Service Agreement**

The Energy Storage Service Agreement between Trolley Pass Project LLC and Northern California Power Agency has been attached to this Agreement as Exhibit B.