EBCE-SJCE 2022 Long-Term Resource RFO Attachment E.4

**Energy Storage Agreement Term Sheet – Stand-alone Storage**

This indicative term sheet (“**Term Sheet**”) is entered into as of \_\_\_\_\_, 2022 (the “**Effective Date**”) between [East Bay Community Energy Authority, a California joint powers authority (“**EBCE**”)] [City of San José, a California municipality, doing business as San José Clean Energy (“**SJCE**”)] and [Respondent Name] (“**Respondent**”) in connection with the 2022 Renewable Energy & Storage Request for Offers (“**RFO**”). This Term Sheet is intended to set forth the key commercial terms and conditions to be included in a proposed energy storage agreement (“**ESA**”) between Seller and Buyer for the purchase and sale of the Product (the “**Proposed Transaction**”) from the Facility. Negotiation of the ESA is subject to Buyer selecting the Proposed Transaction for the negotiation shortlist, the terms and conditions of the RFO, timely execution of the Exclusive Negotiating Agreement (as defined below) and posting of the Shortlist Deposit (as defined in the Exclusive Negotiating Agreement) by Seller. Until a definitive Agreement is approved by Respondent’s management, [EBCE/SJCE]’s management and the [EBCE Board of Directors][San José City Council], and signed and delivered, no party shall have any legal obligations, expressed or implied, or arising in any other manner, under this Term Sheet.

1. **ESA Terms and Conditions**.

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| **Seller:** | [Seller Name, e.g., Project Company LLC] (“**Seller**”) |
| **Buyer:** | [East Bay Community Energy Authority, a California joint powers authority] [City of San José, a California municipality, doing business as San José Clean Energy] (“**Buyer**”). As used in the Agreement, Buyer and Seller are each a “**Party**” and collectively the “**Parties**.”  |
| **Description of Facility:** | A [\_\_\_\_] MW / [\_\_] MWh grid-connected [*insert description of storage technology here*] energy storage facility (the “**Facility**”), located in [\_\_\_\_\_\_] County, in the State of California.  |
| **Product:**  | “**Product**” means energy tolling service, along with resource adequacy, other capacity and storage attributes, and ancillary services based upon Seller’s maintenance of the Facility in accordance with the operating parameters set forth on attached Exhibit A (“**Operating Parameters**”). For clarity, during the Delivery Term Seller may not use the Facility to provide services or attributes to any third party.  |
| **Storage Contract Capacity:** | The Facility will have an initial Storage Capacity of [XX] MW for [four (4), five (5), eight (8)] hours (the “**Storage Contract Capacity**”). |
| **RA Capacity:** | The Qualifying Capacity (QC) of the Facility, which is [XX] MW.[*If there is an annual adjustment for degradation, this should be noted with a table.*] |
| **Interconnection:** | The Facility shall interconnect to the [\_\_\_\_\_\_\_\_\_\_\_] Switching Station (the “**Interconnection Point**”). The Facility has, or will have, an interconnection agreement providing for interconnection capacity available or allocable to the Facility that is no less than the Storage Contract Capacity.Seller shall ensure that, during the Delivery Term, Seller shall have sufficient interconnection capacity and rights under or through the interconnection agreement to interconnect the Facility with the CAISO-Controlled Grid and fulfill its obligations under the Agreement. |
| **Storage Rate, Tolling Rate and Monthly Payment:** | All Storage Product shall be paid on a monthly basis at the Storage Rate multiplied by the current Storage Capacity, as adjusted for the Storage Capacity Test (as set forth in the ESA), multiplied by the Round-Trip Efficiency Factor, and multiplied by the monthly Availability Adjustment. Such payment constitutes the entirety of the amount due to Seller from Buyer for the Storage Product.The “**Storage Rate**” shall be [XX] ]/kW-month]. The Storage Rate shall not be subject to an escalator and is based on a maximum number of [XXX] cycles per Contract Year [*not less than 365 cycles per Contract Year*]. *Alternate Storage Rate Option. Please indicate whether Seller is offering this alternative*. The “**Storage Rate**” shall be $[XX]/kW-month based upon 200 cycles per Contract Year. If Buyer dispatches the Facility for more than 200 cycles, Seller shall receive an additional payment of [$[XX]/MWh] “**Tolling Rate**” multiplied by the MWh throughput, and multiplied by the Round Trip Efficiency Factor. The Tolling Rate assumes a maximum number of additional cycles of [XXX] per Contract Year. |
| **Performance Guarantee:** | The occurrence of any of the following shall constitute an Event of Default:if, in any two consecutive Contract Years during the Delivery Term, the average Monthly Storage Availability over the two-year period is less than seventy percent (70%);if, Seller fails to maintain an average Actual Round Trip Efficiency of at least seventy percent (70%) over a rolling 12-month period; orif, Seller fails to maintain a Storage Capacity equal to at least seventy-five percent (75%) of the Storage Contract Capacity for longer than three hundred sixty (360) days. |
| **Monthly Settlement and Invoice:** | Within ten (10) days after the end of each month of the Delivery Term, Seller shall send a detailed invoice to Buyer for the amount due for Product delivered during such month. The invoice shall include all information necessary to confirm the amount due.Payment for undisputed amounts shall be due to the applicable Party thirty (30) days from the invoice date, with disputed payments subject to Buyer’s billing dispute process. |
| **Charging Energy:** | Buyer is solely responsible, at Buyer’s sole cost, for procuring Charging Energy.  |
| **Transmission Charges:** | Buyer is solely responsible, at Buyer’s sole cost, for arranging transmission and wheeling required to deliver Charging Energy to the Interconnection Point and to accept Discharging Energy at the Interconnection Point. |
| **Scheduling Coordinator:** | Buyer or Buyer’s agent shall act as Scheduling Coordinator for the Facility.  |
| **Delivery Term:** | “**Delivery Term**” means [XX] Contract Years.  |
| **Battery Operating Parameters:** | Buyer’s shall schedule the Facility in accordance with the Operating Parameters set forth in Exhibit A of this Term Sheet. |
| **Operations and Maintenance:**  | Seller shall not during the months of June through September inclusive schedule any non-emergency maintenance that reduces the storage capability of the Facility by more than ten percent (10%), unless (i) such outage is required to avoid damage to the Facility, (ii) such maintenance is necessary to maintain equipment warranties and cannot be scheduled outside the months of June through September, (iii) such outage is required in accordance with prudent operating practice, or (iv) the Parties agree otherwise in writing.Seller shall not replace existing batteries unless for critical maintenance purposes or increase the capacity of the Facility without the prior consent of Buyer. |
| **Storage Operations and Maintenance:** | Buyer shall at all times retain operational control of the Facility and be responsible for dispatching and coordinating charging of the Facility. Seller shall at all times retain all other aspects of operation and maintenance of the Facility in accordance with prudent operating practice and applicable law and adhering to all operational data, interconnection and telemetry requirements applicable to the Facility. |
| **Resource Adequacy Failure:** | The Parties acknowledge and agree that if Seller has failed to obtain Full Capacity Deliverability Status for the Facility in the amount equal to the Guaranteed RA Amount by the Guaranteed Commercial Operation Date, or if Seller otherwise fails to provide Resource Adequacy Benefits as required hereunder (or Replacement RA in lieu thereof), then Seller shall pay to Buyer the RA Deficiency Amount for each RA Shortfall Month as liquidated damages due to Buyer, and as Buyer’s sole remedy, for the Capacity Attributes that Seller failed to convey to Buyer.RA Deficiency Amount Calculation. For each RA Shortfall Month, Seller shall pay to Buyer an amount (the “**RA Deficiency Amount**”) equal to the product of the difference, expressed in kW, of (i) Guaranteed RA Amount, minus (ii) the lowest amount of Available Storage Capacity eligible to be qualified as System RA and, if applicable, Local RA by both the CPUC and CAISO for such month, (such difference, the “**RA Shortfall**”), multiplied by the sum of (a) the CPUC System RA Penalty and (b) CPM Soft Offer Cap; *provided* that Seller may, as an alternative to paying RA Deficiency Amounts, provide Replacement RA up to the RA Shortfall, provided that any Replacement RA capacity is (i) communicated by Seller to Buyer with Replacement RA product information in a written notice substantially in the form attached to the ESA least seventy-five (75) days before the compliance deadline for the applicable CPUC operating month. |
| **Ancillary Services Capability:** | The Facility shall be able to provide the full suite of ancillary services in CAISO markets and Seller will dispatch the Facility in response to signals from the Buyer/scheduler, subject to the Operating Parameters. These services include Frequency Regulation, Spinning Reserve, Ramp Support, Frequency Response, Voltage Control, VAR Dispatch, and Power Factor Correction. |
| **Expected Construction Start Date:**  | Seller reasonably expects to achieve Construction Start by the following date [\_\_\_\_\_\_\_] (the “**Expected Construction Start Date**”).“**Construction Start**” will occur following Seller’s execution of an engineering, procurement and construction (EPC) contract related to the Facility and issuance of a full notice to proceed with the construction of the Facility under the EPC contract, mobilization to site by Seller and/or its designees, and includes the physical movement of soil at the site.  |
| **Guaranteed Construction Start Date:** | The “**Guaranteed Construction Start Date**” means the Expected Construction Start Date, subject to extensions on a day-for-day basis due to Force Majeure Event for a period of up to one-hundred twenty (120) days on a cumulative basis (the “**Development Cure Period**”). For clarity, the permitted extensions under the Development Cure Period extend both the Guaranteed Construction Start Date and the Guaranteed COD simultaneously.Notwithstanding anything to the contrary, no extension shall be given under the Development Cure Period if, and to the extent that (i) the delay was due to Seller’s failure to take commercially reasonable actions to meet its requirements and deadlines or does not otherwise satisfy the requirements of a Force Majeure Event, (ii) Seller failed to provide requested documentation as provided below, or (iii) Seller failed to provide written notice of such Force Majeure Event to Buyer as required under the ESA. Upon written request from Buyer, Seller shall provide documentation demonstrating to Buyer’s reasonable satisfaction that the delay was the result of a Force Majeure Event and did not result from Seller’s actions or failure to take commercially reasonable actions.In the event that Seller fails to achieve the Guaranteed Construction Start Date, Seller shall pay delay damages to Buyer for each day of delay in the amount of the Development Security divided by 120 (“**Construction Delay Damages**”). The Construction Delay Damages shall be refundable to Seller if, and only if, Seller achieves COD on or before the Guaranteed COD.Failure to achieve Construction Start for any reason within 120 days of the Guaranteed Construction Start Date, shall constitute an Event of Default, and Buyer shall have the right, in its sole discretion, to terminate the ESA and receive a damage payment in the amount of the Development Security (the “**Damage Payment**”).  |
| **Facility Development Milestones:** | * [*mm/dd/yyyy*] – Execute Interconnection Agreement
* [*mm/dd/yyyy*] – Procure major equipment
* [*mm/dd/yyyy*] – Obtain federal and state discretionary permits
* [*mm/dd/yyyy*] – Expected Construction Start Date
* [*mm/dd/yyyy*] – Obtain Full Capacity Deliverability Status
* [*mm/dd/yyyy*] – Expected Commercial Operation Date
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| **Progress Reporting:** | After execution of the ESA, Seller shall provide a monthly report to Buyer that (a) describes the progress towards meeting the Facility Development Milestones; (b) identifies any missed Facility Development Milestones, including the cause of the delay; and (c) provides a detailed description of Seller’s corrective actions to achieve the missed Facility Development Milestones and all subsequent Facility Development Milestones by the Guaranteed Commercial Operation Date. In the event Seller misses any Facility Development Milestones and cannot reasonably demonstrate a plan for completing the Facility by the Guaranteed COD, Buyer shall have the right to terminate the ESA and retain the Development Security as damages, in addition to any other remedies it may have at law or equity. |
| **Expected Commercial Operation Date:** | Seller reasonably expects to achieve Commercial Operation by the following date [\_\_\_\_\_\_\_] (the “**Expected Commercial Operation Date**”). |
| **Guaranteed Commercial Operation Date:** | The “**Guaranteed Commercial Operation Date**” or “**Guaranteed COD**” means the Expected Commercial Operation Date, subject to extensions on a day-for-day basis for the Development Cure Period. If the Seller does not achieve COD of the Facility by the Guaranteed COD, Seller shall pay COD Delay Damages to the Buyer for each day of delay until Seller achieves COD (such period of days, the “Development Cure Period”).“**COD Delay Damages**” are equal to the Development Security divided by 60. COD Delay Damages shall be paid for each day of delay and shall be paid to Buyer in advance on a monthly basis. A prorated amount will be returned to Seller if COD is achieved during the month for which COD Delay Damages were paid in advance.Failure to achieve COD for any reason within 60 days of the Guaranteed COD, shall constitute an Event of Default, and Buyer shall have the right, in its sole discretion, to terminate the ESA and receive the Damage Payment. For the avoidance of doubt, Seller’s liability for an Event of Default comprising the failure to timely achieve COD shall equal the sum of any Construction Delay Damages and COD Delay Damages that are due and owing, plus the Damage Payment.  |
| **Conditions Precedent to Commercial Operation Date (“COD”):** | The COD shall be the later of (a) the Expected Commercial Operation Date or (b) the date when all of the following requirements have been met to Buyer’s reasonable satisfaction including Seller providing a certificate from an independent engineer to Buyer certifying to the following: 1. The Facility is fully operational, reliable and interconnected, fully integrated and synchronized with the Transmission System;
2. Seller has installed equipment for the Facility with a nameplate capacity of no less than ninety-five percent (95%) of the Storage Contract Capacity;
3. Seller has commissioned all equipment in accordance with its respective manufacturer’s specifications;
4. Seller has demonstrated functionality of the Facility’s communication systems and automatic generation control (AGC) interface to operate the Facility as necessary to respond and follow instructions, including an electronic signal conveying real time and intra-day instructions, directed by the Buyer in accordance with the ESA and/or the CAISO;
5. The Facility is fully capable of charging, storing and discharging energy up to no less than ninety-five percent (95%) of the Storage Contract Capacity and receiving instructions to charge, store and discharge energy, all within the operational constraints and subject to the applicable Operating Parameters;
6. Authorization to parallel the Facility was obtained from the Participating Transmission Owner;
7. The Transmission Provider has provided documentation supporting full unrestricted release for Commercial Operation;
8. The CAISO has provided notification supporting Commercial Operation, in accordance with the CAISO Tariff; and
9. Seller shall have caused the Facility to be included in the Full Network Model and has the ability to offer Bids into the CAISO Day-Ahead and Real-Time markets.

Seller shall provide notice of expected COD to Buyer in writing no less than sixty (60) days in advance of such date. If Seller has not installed one hundred percent (100%) of the Storage Contract Capacity within one hundred twenty (120) days after the Commercial Operation Date, Seller shall pay Capacity Damages to Buyer for each MW that the Storage Contract Capacity exceeds the Installed Battery Capacity, and the Storage Contract Capacity and other applicable portions of the ESA shall be adjusted accordingly.**“Capacity Damages**” means an amount equal to Two Hundred FiftyThousand Dollars ($250,000) per MW. |
| **Credit Requirements:** | Seller shall post security as follows:**Development Security** – $125/kW of Storage Contract Capacity **Performance Security** – $105/kW of Storage Contract Capacity To secure its obligations under this ESA, Seller shall deliver the Development Security to Buyer within thirty (30) days of the Effective Date.  Development Security shall be in the form of cash or a Letter of Credit.To secure its obligations under this ESA, Seller shall deliver Performance Security to Buyer on or before the Commercial Operation Date.Within five (5) Business Days following any draw by Buyer on the Development Security or the Performance Security, Seller shall replenish the amount drawn such that the security is restored to the applicable amount. |
| **Metering/Shared Facilities:** | The Facility shall be separately metered from any other generation or storage facility and 100% of the output and services available from the Facility shall be conveyed to Buyer under the ESA.  Seller will provide and maintain at its sole expense separate metering and separate CAISO resource IDs for Facility.Seller may share interconnection facilities with affiliates owning other generation or storage facilities, subject to commercially reasonable and customary shared facilities arrangements to be further described in the ESA; *provided* that such agreements (i) shall permit Seller to perform or satisfy, and shall not purport to limit, its obligations hereunder, including providing interconnection capacity for the Facility in an amount not less than the Storage Contract Capacity, and (ii) continue to provide for separate metering and separate CAISO resource IDs for the Facility. |
| **Purchase Option:** | Seller grants Buyer the exclusive right, but not the obligation, to the purchase Facility at a price equal to the fair market value of the Facility (the “**Purchase Option**”). The Purchase Option may be exercised by Buyer by delivering notice to Seller at least 12 months prior to the end of the Delivery Term, with closing to occur on the day after the last day of the Delivery Term.  |
| **Future Phases; Additional Projects; Increase of Storage Capacity:** | A provision shall be included in the ESA providing Buyer with a right of first offer to evaluate and negotiate an agreement for the output of any additional phases of the Facility, as well as any separate projects that are currently under development by, or will be developed by, affiliates of Seller, and that will use or share infrastructure, land, equipment (including the ability to jointly procure equipment), or other facilities. In addition, should Buyer decline to purchase the output from any such additional project or projects, Seller shall covenant that it will not subsequently offer more favorable monetary terms to another buyer for the same without providing Buyer with a subsequent right to purchase the output for a more favorable price.The ESA will include a provision that gives the Parties the right to increase the capacity of the existing Storage Facility, or add new storage technologies to the Facility.Buyer shall have the right to request Seller to provide a proposal to increase the capacity of the existing Storage Facility, or add new storage technologies to the Facility, at a price not to exceed the lesser of current market prices or Seller’s direct cost to add such capacity, plus ten percent (10%). |
| **Guaranteed Storage Availability:** | Ninety-eight percent (98%)  |
| **Availability Adjustment:** | If the Monthly Storage Availability (as defined in the ESA) during any month is less than the Guaranteed Storage Availability, Buyer’s payment for the Storage Product shall be calculated by the “**Availability Adjustment**” or “**AA**” is calculated as follows:1. If the Monthly Storage Availability is greater than or equal to the Guaranteed Storage Availability, then:

AA = 100%1. If the Monthly Storage Availability is less than the Guaranteed Storage Availability, but greater than or equal to 70%, then:

AA = 100% - [(98% - Monthly Storage Availability) x 2]1. If the Monthly Storage Availability is less than 70%, then:

AA = 0 |
| **Station Use:** | Seller will be responsible for all providing station power and station use power will not be provided by the Facility. |
| **Workforce & Community Investment Obligations:** | Seller must abide by any workforce and community investment obligation proposals included in its bid. Seller to provide commitments related to utilizing union workforce.  |
| **No Recourse to Members of EBCE:** | EBCE is organized as a Joint Powers Authority in accordance with the Joint Exercise of Powers Act of the State of California (Government Code Section 6500, et seq.) and is a public entity separate from its constituent members. EBCE will solely be responsible for all debts, obligations and liabilities accruing and arising out of this Agreement. Seller will have no rights and will not make any claims, take any actions or assert any remedies against any of EBCE's constituent members, or the officers, directors, advisors, contractors, consultants or employees of EBCE or EBCE's constituent members, in connection with this Agreement. |
| **City of San José Designated Fund and Limited Obligations:** | 1. Designated Fund. City of San José is a municipal corporation and is precluded under the California State Constitution and applicable law from entering into obligations that financially bind future governing bodies, and, therefore, nothing in the Agreement shall constitute an obligation of future legislative bodies of the City to appropriate funds for purposes of the Agreement; provided, however, that (i) City of San José has created and set aside a designated fund (the “Designated Fund”) for payment of its obligations under the Agreement and (ii) subject to the requirements and limitations of applicable law and taking into account other available money specifically authorized by the San José City Council and allocated and appropriated to the San José Clean Energy’s obligations, City of San José agrees to establish San José Clean Energy rates and charges that are sufficient to maintain revenues in the Designated Fund necessary to pay its obligations under this Agreement and all of City of San José’s payment obligations under its other contracts for the purchase of energy for San José Clean Energy. City of San José shall provide Seller with reasonable access to account balance information with respect to the San José Clean Energy Designated Fund during the Term.
2. Limited Obligations. City of San José’s payment obligations under the Agreement are special limited obligations of City of San José payable solely from the Designated Fund and are not a charge upon the revenues or general fund of the City of San José or upon any non- San José Clean Energy moneys or other property of the Community Energy Department or the City of San José.
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| **Limitations on Liability:** | EXCEPT TO THE EXTENT PART OF AN EXPRESS REMEDY OR MEASURE OF DAMAGES SET FORTH IN THE AGREEMENT, OR PART OF AN INDEMNITY CLAIM, OR INCLUDED IN A LIQUIDATED DAMAGES CALCULATION, OR ARISING FROM FRAUD OR INTENTIONAL MISREPRESENTATION, NEITHER PARTY SHALL BE LIABLE TO THE OTHER OR ITS INDEMNIFIED PERSONS FOR ANY SPECIAL, PUNITIVE, EXEMPLARY, INDIRECT, OR CONSEQUENTIAL DAMAGES, OR LOSSES OR DAMAGES FOR LOST REVENUE OR LOST PROFITS, WHETHER FORESEEABLE OR NOT, ARISING OUT OF, OR IN CONNECTION WITH THIS AGREEMENT. |
| **Compliance with Laws:** | Seller shall comply with all federal, state and local laws, statutes, ordinances, rules and regulations, and the orders and decrees of any courts or administrative bodies or tribunals, including, without limitation those related to employment discrimination and prevailing wage, non-discrimination and non-preference; and conflict of interest.SJCE only: this also includes environmentally preferable procurement; single serving bottled water; gifts; and disqualification of former employees. |
| **Business Tax (SJCE only):** | The Seller shall obtain a City business tax certificate or exemption, if qualified, and will maintain such certificate or exemption for the Delivery Term. |
| **Standalone Energy Storage Incentive:** | The Parties agree that the Storage Rate is not subject to adjustment or amendment if Seller fails to receive any Federal or State tax credit for standalone energy storage projects (a “Standalone Energy Storage Incentive”), or if any Standalone Energy Storage Incentives expire, are repealed, or otherwise cease to apply to Seller or the Facility in whole or in part, or Seller or its investors are unable to benefit from any Standalone Energy Storage Incentives. Seller shall bear all risks, financial and otherwise, throughout the Delivery Term, associated with Seller’s or the Facility’s eligibility to receive Standalone Energy Storage Incentives or to qualify for accelerated depreciation for Seller’s accounting, reporting or Tax purposes. The obligations of the Parties hereunder shall be effective regardless of whether the sale of Facility Energy is eligible for, or receives Standalone Energy Storage Incentives during the Contract Term. Notwithstanding the foregoing, if after the Effective Date of the Agreement, any Standalone Energy Storage Incentive is enacted and Seller receives the benefit of such Standalone Energy Storage Incentive, Seller shall share with Buyer the value of any credit actually received by Seller, as follows: (i) a one-time payment equal to [50%] of the net present value of the Standalone Energy Storage Incentive; (ii) a price reduction of the Storage Rate of [$XX.XX/kW-mo.] per 1% of the Standalone Energy Storage Incentive, or (iii) such other formula as may be agreed by the Parties. |
| **Assignment:** | Neither Party may assign the Agreement or its rights or obligations under the Agreement, without the prior written consent of the other Party, which consent shall not be unreasonably withheld; provided, that Seller has the right to assign the ESA as collateral for any financing or refinancing of the Facility without the consent of Buyer. Any direct or indirect change of control of Seller or Buyer (whether voluntary or by operation of law) will be deemed an assignment and will require the prior written consent of the other Party, which consent shall not be unreasonably withheld.Seller shall pay Buyer’s reasonable expenses, including attorneys’ fees, incurred to provide consents, estoppels, or other required documentation in connection with Seller’s financing for the Facility. Buyer will have no obligation to provide any consent, or enter into any agreement, that materially and adversely affects any of Buyer’s rights, benefits, risks or obligations under the ESA, or to modify such ESA. |
| **Force Majeure:** | 1. “**Force Majeure Event**” means any act or event that delays or prevents a Party from timely performing all or a portion of its obligations under the ESA or from complying with all or a portion of the conditions under the ESA if such act or event, despite the exercise of reasonable efforts, cannot be avoided by and is beyond the reasonable control (whether direct or indirect) of and without the fault or negligence of the Party relying thereon as justification for such delay, nonperformance, or noncompliance.
2. Without limiting the generality of the foregoing, so long as the following events, despite the exercise of reasonable efforts, cannot be avoided by, and are beyond the reasonable control (whether direct or indirect) of and without the fault or negligence of the Party relying thereon as justification for such delay, nonperformance or noncompliance, a Force Majeure Event may include an act of God or the elements, such as flooding, lightning, hurricanes, tornadoes, or ice storms; explosion; fire; volcanic eruption; flood; epidemic, or pandemic; landslide; mudslide; sabotage; terrorism; earthquake; or other cataclysmic events; an act of public enemy; war; blockade; civil insurrection; riot; civil disturbance; or strikes or other labor difficulties caused or suffered by a Party or any third party except as set forth below. For the avoidance of doubt, so long as the event, despite the use of reasonable efforts, cannot be avoided by, and is beyond the reasonable control of (whether direct or indirect) and without the fault or negligence of the Party relying thereon as justification for such delay, nonperformance, or noncompliance, Force Majeure Event may include an epidemic or pandemic, including in connection with the impacts of and efforts to combat or mitigate the epidemic disease designated COVID-19 and the related virus designated SARS-CoV-2 and any mutations thereof (“**COVID-19**”).
3. Notwithstanding the foregoing, the term “**Force Majeure Event**” does not include (i) economic conditions that render a Party’s performance of the ESA at the Contract Price unprofitable or otherwise uneconomic (including Buyer’s ability to buy Energy at a lower price, or Seller’s ability to sell Energy at a higher price, than the Contract Price); (ii) Seller’s inability to obtain permits or approvals of any type for the construction, operation, or maintenance of the Facility; (iii) the inability of a Party to make payments when due under the ESA, unless the cause of such inability is an event that would otherwise constitute a Force Majeure Event as described above that disables physical or electronic facilities necessary to transfer funds to the payee Party; (iv) a Curtailment Period; (v) Seller’s inability to obtain sufficient labor, equipment, materials, or other resources to build or operate the Facility except to the extent such inability is caused by a Force Majeure Event; (vi) a strike, work stoppage or labor dispute limited only to any one or more of Seller, Seller’s Affiliates, Seller’s contractors, their subcontractors thereof or any other third party employed by Seller to work on the Facility; (vii) any equipment failure except if such equipment failure is caused by a Force Majeure Event; or (viii) Seller’s inability to achieve Construction Start of the Facility following the Guaranteed Construction Start Date or achieve Commercial Operation following the Guaranteed Commercial Operation Date due to a Force Majeure Event; it being understood and agreed, for the avoidance of doubt, that the occurrence of a Force Majeure Event may give rise to a Development Cure Period.

Within two (2) Business Days of commencement of a Force Majeure Event, the non-performing Party shall provide the other Party with oral notice of the event of Force Majeure, and within two (2) weeks of the commencement of the Force Majeure Event the non-performing Party shall provide the other Party with Notice in the form of a letter describing in detail the particulars of the occurrence giving rise to the Force Majeure claim. Failure to provide timely Notice as described in the preceding sentence constitutes a waiver of a Force Majeure claim. The suspension of performance due to a claim of Force Majeure must be of no greater scope and of no longer duration than is required by the Force Majeure.  |
| **Site Control:** | Seller shall maintain site control throughout the Delivery Term. |
| **Permits and Approvals:** | Seller shall obtain any and all permits and approvals, including without limitation, environmental clearance under the California Environmental Quality Act (“**CEQA**”) or other environmental law, from the local jurisdiction where the Project is or will be constructed. Buyer is simply purchasing power and does not intend to be the lead agency for the Project.  |
| **Scheduling Requirements and CAISO Settlements:** | Seller shall comply with all applicable CAISO Tariff procedures, protocol, rules and testing as necessary for Buyer to submit Bids for the electric energy charged by and discharged from the Facility. Seller shall provide Buyer with outage and curtailment notifications.As Scheduling Coordinator, during the Delivery Term, Buyer shall be responsible for payment of all CAISO costs and have the right to retain all CAISO revenues, except that Seller shall assume all liability and reimburse Buyer for any and all costs, charges or sanctions (i) incurred by Buyer because of Seller’s failure to perform in accordance with the ESA, (ii) incurred by Buyer as a result of Seller’s failure to adhere to its obligations under the CAISO Tariff or any CAISO directive, including due to outages for which notice has not been provided as required, or (iii) associated with Resource Adequacy Capacity (as defined by the CAISO) from the Facility (including Non-Availability Charges (as defined by the CAISO)).  |
| **Changes in Law:** | If a change in CAISO or CPUC requirements renders the Agreement incapable of being performed, then either Party may request that Buyer and Seller enter into negotiations to make the minimum changes to the Agreement necessary to make the Agreement capable of being performed, while attempting to preserve to the maximum extent possible the benefits, burdens, and obligations set forth in the Agreement as of its execution. Upon delivery of such a request, Buyer and Seller shall engage in such negotiations in good faith. If Buyer and Seller are unable, within sixty (60) days after delivery of such request, to agree upon changes to the Agreement or to resolve issues relating to changes to the Agreement, then either Party may resort to the formal dispute resolution process under the Agreement. Notwithstanding the foregoing, (i) a change in cost shall not in and of itself be deemed to render the Agreement incapable of being performed or administered and (ii) all unaffected provisions of the Agreement shall remain in full force and effect during any period of such negotiation or dispute resolution. |
| **Information Sharing and Shared Learning:** | Seller understands that Buyer is entering into the Agreement in part to gain operational and market information regarding the performance, efficiency, operations, maintenance, and multiple uses of energy storage and storage assets as an integral part of Buyer’s portfolio of assets to meet its customers’ needs as well as to gain an understanding of the impact of energy storage on load forecasting as a load serving entity. Throughout the Term upon Buyer’s request, and annually in a written report, Seller agrees to share such information with Buyer, including meter data and hourly charging and discharging data but excluding cost or similar proprietary information, with such information to be treated by Buyer as Confidential Information. Seller shall provide such applicable meter data to Buyer in a format and to a platform specified by Buyer that is reasonably acceptable to Seller. |
| **Dispute Resolution:** | EBCE: In the event of any dispute arising under the PPA, within ten (10) days following the receipt of a written notice from either Party identifying such dispute, the authorized members of the Parties’ senior management shall meet, negotiate and attempt, in good faith, to resolve the dispute quickly, informally and inexpensively. If the Parties are unable to resolve a dispute arising hereunder within thirty (30) days of initiating such discussions, the parties shall submit the dispute to mediation prior to seeking any and all remedies available to it at law in or equity.SJCE: In the event of any dispute arising under this Agreement, within ten (10) days following the receipt of a written Notice from either Party identifying such dispute, the Parties shall meet, negotiate and attempt, in good faith, to resolve the dispute quickly, informally and inexpensively. |
| **Other Standard Contract Terms to be included in the ESA:** | Event of Default: Events of Default shall include, but not be limited to, failure to pay any amounts when due, breach of representations and warranties, failure to perform covenants and material obligations in the ESA, bankruptcy, assignment not permitted by the ESA, Seller failure to achieve Construction Start within one hundred twenty (120) days of the Guaranteed Construction Start Date, Seller failure to achieve Commercial Operation within sixty (60) days after the Guaranteed Commercial Operation Date, and other Events of Default expressly provided for in this Term Sheet. Indemnification (EBCE): Seller agrees to defend, indemnify and hold harmless Buyer, its directors, officers, agents, attorneys, consultants, employees and representatives from and against all third party claims, demands, losses, liabilities, penalties, and expenses, including reasonable attorneys’ and expert witness fees collectively (“**Indemnifiable Event**”) arising from negligence, willful misconduct, or breach of the PPA.Indemnification (SJCE): Seller agrees to defend, indemnify and hold harmless Buyer, its directors, officers, agents, attorneys, consultants, employees and representatives from and against all claims, demands, losses, liabilities, penalties, and expenses, including reasonable attorneys’ and expert witness fees collectively (“Indemnifiable Event”), to the extent such Indemnifiable Event arises out of, pertains to, or relates to any of the following:(a) the negligent act or omission, recklessness or willful misconduct of the Indemnifying Party, its Affiliates, its directors, officers, employees, agents, subcontractors, and anyone directly or indirectly employed by either the Seller or any of its subcontractors or anyone that they control; (b) any infringement of the patent rights, copyright, trade secret, trade name, trademark, service mark or any other proprietary right of any person(s) caused by the Buyer’s use of the Product, deliverables or other items provided by the of the Seller pursuant to the requirements of this Proposed Transaction, or (c) any breach of the Proposed Transaction.The Seller’s indemnity obligations apply to the maximum extent allowed by law and includes defending the City, its officers, employees and agents as set forth in Section 2778 and 2782.8 of the California Civil Code, if applicable. Upon the Buyer’s written request, the Seller, at its own expense, must defend any suit or action that is subject to the Seller’s indemnity obligations. The Seller’s indemnity obligations survive the expiration or earlier termination of the Proposed Transaction.Governing Law: State of CaliforniaVenue: [Alameda County] [Santa Clara County] |
| **Definitions:** | The following terms, when used herein with initial capitalization, shall have the meanings set forth below:“**Available Storage Capacity**” means the capacity of the Facility, expressed in whole MWs, that is mechanically available to store electrical energy.**“Battery Energy Storage System”** meansthe Energy Management Software and related storage equipment including but not limited to transformers, batteries, fire suppression, thermal management, enclosures, and inverters.“**Bid**” has the meaning as set forth in the CAISO Tariff. “**CAISO**” means the California Independent System Operator.“**CAISO-Controlled Grid**” has the meaning set forth in the CAISO Tariff.“**CAISO Tariff**” means the California Independent System Operator Corporation Agreement and Tariff, Business Practice Manuals (BPMs), and Operating Procedures, including the rules, protocols, procedures and standards attached thereto, as the same may be amended or modified from time-to-time and approved by FERC.“**Contract Year**” means a period of twelve (12) consecutive months beginning on January 1st and continuing through December 31st of each calendar year, except that the first Contract Year shall commence on the Commercial Operation Date and the last Contract Year shall end at midnight at the end of the day prior to the anniversary of the Commercial Operation“**Full Capacity Deliverability Status**” has the meaning set forth in the CAISO Tariff.“**Letter(s) of Credit**” means one or more irrevocable, standby letters of credit issued by a U.S. commercial bank or a foreign bank with a U.S. branch with such bank (a) having a credit rating of at least A- with an outlook designation of “stable” from S&P or A3 with an outlook designation of “stable” from Moody’s or (b) being reasonably acceptable to Buyer. “**MW**” means megawatts in alternating current, unless expressly stated in terms of direct current.“**MWh**” means megawatt-hour measured in alternating current, unless expressly stated in terms of direct current. “**Round-Trip Efficiency Factor**” means (a) if the Actual Round-Trip Efficiency is greater than or equal to the Guaranteed Round-Trip Efficiency, one hundred percent (100%), (b) if the Actual Round-Trip Efficiency is less than the Guaranteed Round-Trip Efficiency but greater than or equal to the Minimum Round-Trip Efficiency, the Actual Round-Trip Efficiency, or (c) if the Actual Round-Trip Efficiency is less than the Minimum Round-Trip Efficiency, zero percent (0%).“**San José Clean Energy**” is the City of San José’s community choice aggregation program. The San José Community Energy Department administers and manages San José Clean Energy.“**Scheduling Coordinator**” has the meaning set forth in the CAISO Tariff. |

1. **Additional Term Sheet Provisions.**
2. **No Obligation to Enter Into Proposed Transaction**. This Term Sheet is intended to provide an overview of the Proposed Transaction and is not intended to constitute a binding contract or an offer to enter into an ESA with respect to the Proposed Transaction and does not obligate [EBCE/SJCE], Respondent or any party to enter into the Proposed Transaction or execute any agreement, including the ESA, in connection with the Proposed Transaction. Neither Buyer nor Seller will be deemed to have agreed to the ESA or will be bound by any term thereof, unless and until authorized representatives of Buyer and Seller have executed final definitive documents, enforceable in accordance with their terms.
3. **Other Agreements**. In connection with this Term Sheet, Respondent shall execute that certain Exclusive Negotiating Agreement (“**Exclusive Negotiating Agreement**”) with [EBCE/SJCE] and provide a Shortlist Deposit (as defined in such agreement) in accordance with the Exclusive Negotiating Agreement. The Shortlist Deposit will be returned in accordance with, and subject to, the terms of the Exclusive Negotiating Agreement.
4. **Expenses**. Each of [EBCE/SJCE] and Respondent will pay its own costs and expenses (whether internal or out-of-pocket, and whether for legal, financial, technical or other consultants, or other purposes) in connection with the Term Sheet and any definitive agreements.
5. **Termination**. This Term Sheet will terminate upon the earlier of (a) execution of the ESA or (b) expiration of the Exclusivity Deadline (as defined in the Exclusive Negotiating Agreement), as such Exclusivity Deadline may be extended in accordance with the Exclusive Negotiating Agreement.
6. **Governing Law**. This Term Sheet is governed by, and construed in accordance with, the laws of the State of California.
7. **Prior Agreements**. This Term Sheet supersedes all prior communications and agreements, oral or written, between and among [EBCE/SJCE] and Respondent regarding the subject matter herein contemplated.
8. **Assignment**. This Term Sheet will be binding upon and inure to the benefit of [EBCE/SJCE] and Respondent and their respective successors and permitted assigns. Neither [EBCE/SJCE] nor Respondent will assign, pledge or otherwise transfer this Term Sheet or any right or obligation under this Term Sheet without first obtaining the other Party’s prior written consent (which consent will not be unreasonably withheld, delayed, or encumbered).
9. **No Consequential Damages**. IN NO EVENT SHALL [EBCE/SJCE] OR RESPONDENT OR ANY OF THEIR AFFILIATES AND/OR REPRESENTATIVES BE LIABLE FOR ANY LOST OR PROSPECTIVE PROFITS OR ANY OTHER CONSEQUENTIAL, INCIDENTAL, SPECIAL, PUNITIVE, INDIRECT OR EXEMPLARY DAMAGES UNDER OR IN RESPECT TO THIS TERM SHEET.

**Note: SJCE does not sign/countersign term sheets but does require Respondents to submit fully marked up files.**

**IN WITNESS WHEREOF**, EBCE and Respondent have by their duly authorized representatives executed this Term Sheet as of the Effective Date.

|  |  |
| --- | --- |
| **EAST BAY COMMUNITY ENERGY AUTHORITY,** **a California joint powers authority** | **[RESPONDENT]**  |
| By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Printed Name: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Title: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ | By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Printed Name: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Title: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |
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[*Exhibit A follows this page*]

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**EXHIBIT A**

**Operating Parameters**

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| --- | --- |
| **Maximum Storage Level:** | [XX] MWh [number in MWh representing maximum amount of energy that may be charged] |
| **Minimum Storage Level:** | 0 MWh [number in MWh representing the lowest level to which the Facility may be discharged] |
| **Maximum Charging Capacity:** | [\_\_\_] MW [based on final system configuration, number in MW representing the highest level to which the Facility may be charged] |
| **Minimum Charging Capacity:** | 0.01 MW [number in MW representing the lowest level at which the Facility may be charged] |
| **Maximum Discharging Capacity:** | [\_\_\_] MW [based on final system configuration, number in MW representing the highest level at which the Facility may be discharged] |
| **Minimum Discharging Capacity:** | 0.01 MW [number in MW representing the lowest level at which the Facility may be discharged] |
| **Maximum State of Charge (SOC) during Charging:** | 100% |
| **Minimum State of Charge (SOC) during Discharging:** | 0% |
| **Guaranteed Round-Trip Efficiency:** |

|  |  |
| --- | --- |
| Contract Year | Guaranteed Round-Trip Efficiency  |
| 1 | 88.0% |
| 2 - XX | [*Seller to fill out rest of table*] |

Liquidated Damages for Failure to Achieve Guaranteed Efficiency Rate: If during any month during the Delivery Term, the Actual Round-Trip Efficiency for such month is less than the Guaranteed Round-Trip Efficiency, Seller shall owe liquidated damages to Buyer, which damages shall be calculated by multiplying (i) the total Charging Energy for such month, by (ii) the percentage amount by which the Actual Round-Trip Efficiency is less than the Guaranteed Round-Trip Efficiency, by (iii) the simple average of the Day-Ahead Market locational marginal price for all the hours of the applicable month, as published by the CAISO, for the Delivery Point, provided, that if the foregoing calculation results in a negative value, then Seller shall pay Buyer the absolute value of such result. |
| **Minimum Round-Trip Efficiency:** | [70]%  |
| **Ramp Rate:** | The Facility shall have the ability to discharge at Maximum Discharging Capacity in two seconds. |
| **Response Time:**  | The BESS shall execute the commanded power within one (1) second |
| **Cycles or Throughput:** | [TBD based on final configuration and OEM warranties, likely to be an annual battery energy throughput (BET) limit equal to approximately 1 cycle per day but providing buyer with more daily flexibility]  |
| **Daily Dispatch Limits:** | Charging: 2 times per dayDischarging: 2 times per dayPartial Charging/Discharging: No limits beyond the operational conditions specified. |
| **Maximum Time at Minimum Storage Level:** | [Seller-specified, if applicable] |
| **Energy Management Software:** | Seller must provide remotely operable, 2-4 second timestamps, data historian (at least 5 years of storage), SCADA/AGC communication and operability.Applications/Modes:* Dynamic Voltage Support
* Shifting
* Regulation
* Flexible RampSpinning Reserve
* ITC Compliance if applicable
 |
| **Other Operating Limits:** | [Seller-specified, if applicable] |