

---

**DRAFT**

**PURCHASE AND SALE AGREEMENT**

**by and between**

**City of Palmdale, California**

**as Seller,**

**And**

**Summit Palmdale Development, LLC**

**as Purchaser**

**dated as of April [\_\_\_], 2013**



## TABLE OF CONTENTS

	<u>Page</u>
<u>ARTICLE I DEFINITIONS AND CONSTRUCTION</u> .....	1
<u>Section 1.01 Definitions</u> .....	1
<u>Section 1.02 Construction</u> .....	6
<u>ARTICLE II PURCHASE AND SALE AND CLOSING</u> .....	7
<u>Section 2.01 Purchase and Sale; Milestone Payments; Payments upon         Financial Closing</u> .....	7
<u>Section 2.02 Closing</u> .....	8
<u>Section 2.03 No Assumption of Certain Liabilities</u> .....	8
<u>ARTICLE III REPRESENTATIONS AND WARRANTIES OF SELLER</u> .....	8
<u>Section 3.01 Organization and Qualification of Seller</u> .....	8
<u>Section 3.02 Authority</u> .....	8
<u>Section 3.03 No Conflicts; Consents and Approvals</u> .....	8
<u>Section 3.04 Litigation</u> .....	9
<u>Section 3.05 Compliance with Laws and Standards</u> .....	9
<u>Section 3.06 Brokers</u> .....	9
<u>Section 3.07 Contracts</u> .....	9
<u>Section 3.08 Land Contracts and Real Property</u> .....	9
<u>Section 3.09 Permits</u> .....	10
<u>Section 3.10 Assets</u> .....	10
<u>Section 3.11 Taxes</u> .....	10
<u>Section 3.12 Environmental Matters</u> .....	11
<u>Section 3.13 Undisclosed Liabilities</u> .....	11
<u>Section 3.14 Disclosure</u> .....	12
<u>ARTICLE IV REPRESENTATIONS AND WARRANTIES OF PURCHASER</u> .....	12
<u>Section 4.01 Organization and Qualification</u> .....	12
<u>Section 4.02 Authority</u> .....	12
<u>Section 4.03 No Conflicts; Consents and Approvals</u> .....	12
<u>Section 4.04 Litigation</u> .....	13
<u>Section 4.05 Compliance with Laws</u> .....	13
<u>Section 4.06 Brokers</u> .....	13
<u>ARTICLE V COVENANTS</u> .....	13
<u>Section 5.01 Conduct of Business Pending the Closing</u> .....	13
<u>Section 5.02 Taxes; Transfer Taxes</u> .....	14
<u>Section 5.03 Expenses and Fees</u> .....	14
<u>Section 5.04 Agreement to Cooperate</u> .....	14
<u>Section 5.05 Expansion Site Option</u> .....	15
<u>Section 5.06 Further Assurances</u> .....	15
<u>Section 5.07 Announcements</u> .....	15

<u>ARTICLE VI CONDITIONS TO THE CLOSING</u> .....	15
<u>Section 6.01 Conditions to the Obligations of Each Party</u> .....	15
<u>Section 6.02 Conditions to the Obligations of Purchaser</u> .....	16
<u>Section 6.03 Conditions to the Obligations of Seller</u> .....	16
 <u>ARTICLE VII TERMINATION</u> .....	17
<u>Section 7.01 Termination</u> .....	17
<u>Section 7.02 Effect of Termination</u> .....	17
 <u>ARTICLE VIII MISCELLANEOUS</u> .....	18
<u>Section 8.01 Notices</u> .....	18
<u>Section 8.02 Headings</u> .....	18
<u>Section 8.03 Assignment</u> .....	18
<u>Section 8.04 Governing Law; Jurisdiction; Attorneys' Fees</u> .....	18
<u>Section 8.05 Counterparts</u> .....	19
<u>Section 8.06 Amendments</u> .....	19
<u>Section 8.07 Entire Agreement</u> .....	19
<u>Section 8.08 Severability</u> .....	19
<u>Section 8.09 Confidentiality</u> .....	19

## EXHIBITS

Exhibit A	Initial Parcel
Exhibit B	Project Site
Exhibit C	Conditional Use Permit
Exhibit D	Form of Expansion Site Option
Exhibit E	Form of Site Option

## SCHEDULES

Schedule 2.01(c)(i)	Seller Development Costs
Schedule 2.01(d)	Milestone Outside Dates
Schedule 3.03(b)	Seller Governmental Approvals
Schedule 3.05	Compliance with Laws and Standards
Schedule 3.07	Contracts
Schedule 3.08	Land Contracts
Schedule 3.09	Permits
Schedule 3.10	Assets
Schedule 3.12	Environmental Matters
Schedule 3.12(d)	Environmental Permits
Schedule 3.13	Undisclosed Liabilities
Schedule 4.03(b)	Purchaser Governmental Approvals
Schedule 6.02(c)	Additional Closing Instruments

## PURCHASE AND SALE AGREEMENT

This Purchase and Sale Agreement (this “Agreement”) dated as of April [\_\_\_], 2013 (the “Execution Date”) is made and entered into by and between the City of Palmdale, California, a California charter city (“Seller”), and Summit Palmdale Development, LLC, a Delaware limited liability company (“Purchaser”).

### RECITALS

WHEREAS, Seller owns certain assets in connection with a natural gas fueled combined cycle power project under development in the City of Palmdale, Los Angeles County, California (the “Project”);

WHEREAS, Seller desires to sell to Purchaser, and Purchaser desires to purchase from Seller, the Assets (as defined herein), upon the terms and subject to the conditions set forth in this Agreement.

NOW, THEREFORE, in consideration of the foregoing and the mutual promises made in this Agreement and of the mutual benefits to be derived from such promises, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties to this Agreement, intending to be legally bound, agree as follows:

### ARTICLE I DEFINITIONS AND CONSTRUCTION

Section 1.01 Definitions. For purposes of this Agreement, the following terms shall have the respective meanings set forth below:

“Agreement” has the meaning set forth in the introductory paragraph to this Agreement.

“Affiliate” means any Person that directly, or indirectly through one or more intermediaries, controls, is controlled by or is under common control with the Person specified. For purposes of this definition, control of a Person means the power, direct or indirect, to direct or cause the direction of the management and policies of such Person whether through ownership of voting securities or ownership interests, by Contract or otherwise, and specifically with respect to a corporation, partnership, trust or limited liability company, means direct or indirect ownership of more than 50% of the voting securities in such corporation or of the voting interest in a partnership or limited liability company or of the beneficial interests in a trust.

“Alternative Transmission Route” means any CEC-approved transmission route for the interconnection of the Project that is an alternative to the route commonly referred to as the applicant’s proposed transmission route in that certain Commission Adoption Order No. 11-0810-09, Docket No. 08-AFC-9 regarding the Application for Certification for the Palmdale Hybrid Power Project.

“Assets” means all assets, properties, development rights, options, leases or other real property interests, studies, official correspondence, records of official proceedings or claims,

financial models, rights and interest of every kind, nature, character and description (whether real, personal or mixed, whether tangible or intangible, and wherever situated), including the goodwill related thereto, owned, leased or otherwise held by Seller or any of its Affiliates, in each case for or in connection with the Project, including without limitation, the Contracts, Land Contracts, Permits, Permit Applications, interconnection rights and applications and all documents, other instruments and proceeds relating to the foregoing.

“Business Day” means a day other than Saturday, Sunday or any day on which banks located in the City of Palmdale, California are authorized or obligated to close.

“CAISO” means the California Independent System Operator Corporation and any successor agency thereto.

“CEC Adoption Order” means that certain Commission Adoption Order of the Energy Resources Conservation and Development Commission of the State of California, Docket No. 08-AFC-9, Order No. 11-0810-09.

“Claim” means any demand, claim, action, legal proceeding (whether at law or in equity) or arbitration.

“Closing” has the meaning set forth in Section 2.02.

“Closing Date” means the date on which the Closing occurs as provided pursuant to Section 2.02.

“Confidential Information” has the meaning set forth in Section 8.09.

“Contract” means any legally binding oral or written contract, lease, evidence of indebtedness, mortgage, indenture, purchase order, commitment, undertaking or other agreement, exclusive of Land Contracts and Permits.

“CPUC” means the California Public Utilities Commission, and any successor agency thereto.

“Development Premium” has the meaning set forth in Section 2.01(c)(ii).

“Economic Impact” means (i) any increase in the costs or expenses of developing, constructing, owning, operating or maintaining the Project and/or (ii) any deterioration in the economic value of the Project, in the case of each of clauses (i) and (ii), due or attributable to any action, inaction, exercise of authority or other event caused by Seller from and after the Closing Date, including without limitation pursuant to any issuance or enacting of any ordinance, regulation, change or law, taxation or similar event.

“Environmental Law” means any applicable Law relating to the regulation or protection of natural resources, conservation, human health, safety, or the environment including, without limitation, any Applicable Law relating to emissions, discharges, Releases or threatened Releases of Hazardous Substances into the environment (including ambient air, soil, surface water, ground water, wetlands, land or subsurface strata), or otherwise relating to the generation,

manufacture, processing, distribution, use, treatment, storage, disposal, transport or handling of Hazardous Substances. [“Environmental Laws” include, without limitation, the Endangered Species Act, 16 U.S.C. § 1531 et seq., the National Environmental Policy Act, 42 U.S.C. § 4321 et seq., the Federal Water Pollution Control Act, 33 U.S.C. § 1251 et seq., the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 et seq., and the Toxic Substances Control Act of 1976, 15 U.S.C. § 2601 et seq., and any similar or implementing federal, state or local law.]<sup>1</sup>

“Environmental Permit” means any permit, registration, certificate, license, authorization, consent or approval required in connection with the ownership, operation or maintenance of the Assets or the Project pursuant to Environmental Law.

“Execution Date” has the meaning set forth in the introductory paragraph to this Agreement.

“Expansion Site Option” means an option agreement, substantially in the form of Exhibit D, for the purchase and conveyance of up to a maximum of 50 acres within the Project Site and adjacent to the Initial Parcel.

“FERC” means the Federal Energy Regulatory Commission, or any successor agency.

“Financial Closing” means the definitive closing and initial funding of non-recourse or limited recourse construction financing for the construction of the Project, the terms of such financing to be satisfactory to Purchaser in its sole discretion.

“Financial Closing Date” means the date on which the Financial Closing occurs.

“Governmental Authority” means any court, tribunal, arbitrator, authority, agency, commission, official, tribal council or authority or other instrumentality of the United States or any state, county, city, Native American tribe or other political subdivision or similar governing entity, and including any governmental, quasi-governmental or non-governmental body administering, regulating or having oversight over gas, electricity, power or other markets or the Project, the Assets, or the ownership and operation thereof.

“Hazardous Substances” means any hazardous or toxic substance or waste, pollutant, contaminant, material or chemical, or constituent thereof, as defined or regulated under applicable Environmental Laws, including petroleum products and its constituents, asbestos, polychlorinated biphenyls and radioactive materials.

“Initial Parcel” means that certain 50-acre site within the Project Site, as described on Exhibit A hereto, including all necessary easements and right-of-way instruments related thereto on or through the real property adjacent to the Initial Parcel in connection with the Project.

---

<sup>1</sup> NTD: subject to Purchaser due diligence.

“Initial Purchase Price” has the meaning set forth in Section 2.01(a).

“Interim Period” means the period of time from the Execution Date until the Closing Date or termination of this Agreement.

“Knowledge” means, (i) with respect to Seller, the knowledge of [\_\_\_\_], following a reasonable inquiry as of the Execution Date or the Closing Date, as the case may be and (ii) with respect to Purchaser, the knowledge of [\_\_\_\_], following a reasonable inquiry as of the Execution Date or the Closing Date, as the case may be.

“Land Contracts” means all of the leases, easements, rights of way, licenses, options or similar agreements with respect to the real property in connection with the Project.

“Large Generator Interconnection Agreement” means the Standard Large Generation Interconnection Agreement (LGIA) to be entered into among Purchaser, Southern California Edison Company, and the CAISO with respect to the Project..

“Laws” means all laws, statutes, rules, regulations, ordinances and other pronouncements having the effect of law of any Governmental Authority.

“Lien” means any mortgage, pledge, assessment, security interest, lien or other similar encumbrance and any option or right to purchase, use or possess.

“Losses” means any and all judgments, losses, liabilities, Claims, causes of action, amounts paid in settlement, damages, fines, penalties, deficiencies, diminution in value, losses and expenses (including reasonable attorneys’ fees).

“Milestones” has the meaning set forth in Section 2.01(b).

“Milestone Outside Date” has the meaning set forth in Section 2.01(d).

“Milestone Payments” has the meaning set forth in Section 2.01(b).

“Party” or “Parties” means Purchaser, on the one hand, and Seller, on the other hand.

“Permit Applications” means any applications made or filed with any Governmental Authority in connection with any Permit related to the development, construction, ownership, operation or maintenance of the Project.

“Permits” means all licenses, consents, certificates, approvals, orders, registrations, permits and any authorizations of any sort whatsoever by or from any Governmental Authority associated with the development, construction, operation, maintenance or ownership of the Project or Assets.

“Permitted Liens” means (i) any Liens, liabilities or encumbrances which are expressly assumed by Purchaser or to which Purchaser consents in its sole and absolute judgment and discretion; (ii) all Liens disclosed by Seller and imposed by the Permits, as set forth in

Schedule 3.09; and (vi) Liens, liabilities or encumbrances that are discharged and satisfied in full by Seller at or prior to Closing.

“Person” means any natural person, corporation, general partnership, limited partnership, limited liability company, proprietorship, other business organization, trust, union, association or Governmental Authority.

“Phase I Environmental Site Assessment” means a Phase I Environmental Site Assessment performed for the Project Site in connection with the Project, which assessment shall be satisfactory to Purchaser.

“Project” has the meaning set forth in the Recitals of this Agreement.

“Project Engineer” means the third party engineer hired by Purchaser to provide technical engineering and design services to the Project.

“Project Site” means the real property upon which the Project is contemplated to be located, as more particularly described on Exhibit B hereto.

“Purchaser” has the meaning set forth in the introductory paragraph of this Agreement.

“Purchaser Development Costs” means the out-of-pocket costs and expenses for the development of the Project, including without limitation, all costs in obtaining any Permit or in preparing and submitting any Permit Application, any fees or expenses required to be paid to any Governmental Authority, any amounts required to be paid under any Contract for the development of the Project, the costs and expenses of any studies, reports or filings required in connection with the foregoing and legal fees incurred in connection with development of the Project; *provided* that “Purchaser Development Costs” shall exclude Purchaser’s internal overhead and legal or other fees that Benefit Purchaser exclusively and do not advance development, construction or financing of the Project.

“Purchaser Indemnitees” means Purchaser and its constituent members and the respective employees, Representatives, agents, Affiliates, managers, officers, directors and assigns of each.

“Purchaser Governmental Approvals” has the meaning set forth in Section 4.03(b).

“Release” means any release, spill, emission, leaking, pumping, injection, deposit, disposal, discharge, dispersal, leaching or migration into the indoor or outdoor environment, including the movement of Hazardous Substances through ambient air, soil, surface water, ground water, wetlands, land or subsurface strata.

“Representatives” means the officers, directors, members, managers, general partners, employees, counsel, accountants, financial advisers or consultants of a Person.

“Seller” has the meaning set forth in the introductory paragraph of this Agreement.

“Seller Development Costs” means the documented and reasonable out-of-pocket costs incurred by Seller prior to the Execution Date for the development of the Project, as such costs are disclosed to Purchaser and set forth on Schedule 2.01(c)(i).

“Seller Governmental Approvals” has the meaning set forth in Section 3.03(b).

“Site Option” means an option agreement, substantially in the form of Exhibit E, for the purchase and conveyance of the Initial Parcel.

“Tax” or “Taxes” means any income, profits, franchise, withholding, ad valorem, personal property (tangible and intangible), real property, employment, payroll, sales and use, social security, disability, occupation, property, severance, excise and other taxes imposed by a Taxing Authority, including any interest, penalty or addition thereto.

“Tax Returns” means any return, report or similar statement required to be filed with respect to any Taxes, including any information return, claim for refund, amended return and declaration of estimated Tax.

“Taxing Authority” means, with respect to any Tax, the governmental entity or political subdivision thereof that imposes such Tax, and the agency (if any) charged with the collection of such Tax for such entity or subdivision.

“Transfer Taxes” means all transfer, real property transfer, sales, use, goods and services, value added, documentary, stamp duty, gross receipts, excise, and conveyance Taxes and other similar Taxes, duties, fees or charges.

“Water Contract Term Sheet” means that certain term sheet agreement between Seller and Purchaser regarding the transportation and sale of reclaimed water for Project cooling.

#### Section 1.02 Construction.

(a) All Article, Section, Subsection, Schedule and Exhibit references used in this Agreement are to Articles, Sections, Subsections, Schedules and Exhibits to this Agreement unless otherwise specified. The Exhibits and Schedules attached to this Agreement constitute a part of this Agreement and are incorporated herein for all purposes.

(b) The words “includes” or “including” shall mean “includes without limitation” or “including without limitation,” the words “hereof,” “hereby,” “herein,” “hereunder” and similar terms in this Agreement shall refer to this Agreement as a whole and not any particular Section or Article in which such words appear and any reference to a Law shall include any amendment thereof or any successor thereto and any rules and regulations promulgated thereunder. Unless otherwise specified herein, currency amounts referenced herein are in U.S. Dollars.

(c) Whenever this Agreement refers to a number of days, such number shall refer to calendar days unless Business Days are specified. Whenever any action must be taken hereunder

on or by a day that is not a Business Day, then such action may be validly taken on or by the next day that is a Business Day.

## **ARTICLE II PURCHASE AND SALE AND CLOSING**

### Section 2.01 Purchase and Sale; Milestone Payments; Payments upon Financial Closing.

(a) Subject to the terms and conditions set forth herein, including satisfaction of the conditions precedent set forth in Sections 6.01, 6.02 and 6.03, at the Closing Purchaser shall purchase from Seller, and Seller shall sell to Purchaser, the Assets for the payment of \$500,000 payable by Purchaser to Seller (the “Initial Purchase Price”).

(b) In the event the Closing occurs, Purchaser and Seller will use commercially reasonable efforts to negotiate four “Milestones,” “Milestone Payments” and “Milestone Outside Dates” that would result in advance payments a portion of the Development Premium.

(c) In the event the Closing occurs and following Financial Closing, Purchaser shall make the following payments to Seller, such payments to be made within thirty (30) days following the Financial Closing Date:

(i) *Reimbursement of Seller’s Development Costs.* Purchaser shall make a payment to Seller in an amount equal to Seller’s Development Costs; *provided* that Purchaser shall only be obligated to pay Seller Development Costs up to a maximum amount of \$10,000,000.

(ii) *Development Premium.* Purchaser shall make a payment to Seller in an amount equal to (x) \$10,000,000 *less* (y)(i) the aggregate amount of all Milestone Payments paid to Seller, (ii) any costs or expenses paid by Purchaser to Seller or its Affiliates pursuant to Section 5.04(a) in connection with any rights of way related to the Project and (iii) the aggregate value of all Economic Impacts (the amount of clause (x) *minus* clause (y), the “Development Premium”).

(iii) *Alternative Transmission Route.* In the event that Purchaser elects, which election shall be made by Purchaser in its sole discretion, to utilize the Alternative Transmission Route for interconnection of the Project, Purchaser shall pay 10% of the reasonably documented reduction in construction costs for completion of the Project solely as a result of the utilization of the Alternative Transmission Route; *provided* that Purchaser’s payment obligations under this Section 2.01(c)(iii) shall in no event exceed \$2,000,000. In the event that the Parties cannot reasonably and in good faith agree on the amount of cost savings for construction of the Project that is attributable to the utilization of the Alternative Transmission Route within thirty (30) days, such determination shall be made by the Project Engineer on an open-book basis; *provided* that Seller may, at its option, engage its own construction engineer to reasonably review such determination by the Project Engineer.

(d) In the event that (a) any Milestone is not completed by the outside date indicated for such Milestone as agreed by the Parties pursuant to Section 2.01(b) (each such date, a

“Milestone Outside Date”) and (b) the sole reason for the failure to achieve such Milestone on or prior to the applicable Milestone Outside Date is due to Purchaser’s election to delay an action required of Purchaser pursuant to the terms of this Agreement in order to meet such Milestone and (c) Seller is not in breach of any of its obligations under this Agreement, then Purchaser shall make a payment to Seller within thirty (30) days of such Milestone Outside Date in an amount equal to fifty percent (50%) of the Milestone Payment associated with such Milestone; *provided, however,* that nothing in this Section 2.01(d) shall affect or otherwise impair Purchaser’s right to make a determination in its sole discretion as set forth in Section 2.01(b).

Section 2.02 Closing. The closing of the transactions contemplated by this Agreement (the “Closing”) shall take place on the third (3rd) Business Day following satisfaction or waiver of the conditions precedent set forth in Sections 6.01, 6.02 and 6.03, or on such other date as the Parties mutually agree in writing.

Section 2.03 No Assumption of Certain Liabilities. Purchaser does not assume and shall not be liable or responsible for any of Seller’s liabilities or obligations except as expressly set forth in this Agreement with respect to Purchaser’s acquisition of the Assets.

### **ARTICLE III REPRESENTATIONS AND WARRANTIES OF SELLER**

Seller hereby represents and warrants to Purchaser as of the Execution Date and the Closing Date that:

Section 3.01 Organization and Qualification of Seller. Seller is a Charter City, validly existing under the Laws of the State of California.

Section 3.02 Authority. Seller has all requisite entity power and authority to execute and deliver this Agreement, to perform its obligations hereunder and to consummate the transactions contemplated hereby. The execution and delivery by Seller of this Agreement, and the performance by Seller of its obligations hereunder, have been duly and validly authorized by all necessary entity action. This Agreement has been duly and validly executed and delivered by Seller and constitutes the legal, valid and binding obligation of Seller enforceable against Seller in accordance with its terms, except as the same may be limited by general equitable principles.

Section 3.03 No Conflicts; Consents and Approvals. The execution and delivery by Seller of this Agreement does not, and the performance by Seller of its obligations under this Agreement and the consummation by Seller of the transactions contemplated hereby:

(a) will not conflict with or result in a violation or breach of any of the terms, conditions or provisions of the charter or ordinances of Seller;

(b) does not require filings, approvals, consents, authorizations and notices with or of any Governmental Authority, except as have been made, obtained or given, will not (i) violate or breach any Law or writ, judgment, order or decree applicable to Seller or Purchaser or (ii) require the consent or approval of any Governmental Authority under any applicable Law, except as set forth on Schedule 3.03(b) ( the “Seller Governmental Approvals”).

Section 3.04 Litigation. There are no Claims pending or, to Seller's Knowledge, threatened, or, to Seller's Knowledge, any investigations ongoing or threatened against the Project or the Assets before any Governmental Authority or any arbitrator. Neither the Project nor the Assets are subject to any judgment, decree, injunction, rule or order of any Governmental Authority or any arbitrator that prohibits the consummation of the transactions contemplated by this Agreement or would, in the aggregate, reasonably be expected to have a material adverse effect on the Project.

Section 3.05 Compliance with Laws and Standards. Neither Seller nor the Project is in violation of any Law applicable to the Project or the Assets; and all reports, statements and other documents required to be filed with any Governmental Authority have been filed in a timely manner and were true, correct and complete in all material respects when filed (and any related fees required to be paid have been paid in full).

Section 3.06 Brokers. Seller has no liability or obligation to pay fees or commissions to any broker, finder or agent with respect to the transactions contemplated by this Agreement for which Purchaser or its Affiliates could become liable or obligated.

Section 3.07 Contracts. Schedule 3.07 contains a true and complete list of all Contracts now existing with respect to the Project and the Assets. Seller has delivered to Purchaser a correct and complete copy of each Contract listed on Schedule 3.07. With respect to each Contract identified on Schedule 3.07: (i) the Contract is legal, valid and binding obligation of Seller and enforceable against Seller in accordance with its terms, except as enforceability thereof may be limited by any applicable bankruptcy, reorganization, insolvency or other Laws affecting creditors' rights generally or by general principles of equity, and in full force and effect; (ii) the consummation of the transactions contemplated by this Agreement will not affect the legality, validity, binding nature or enforceability or force and effect of such Contract; (iii) neither Seller nor any of its Affiliate that is a party to any such Contract is in breach or default and no event has occurred that with notice or lapse of time would constitute a breach or default by Seller or any of its Affiliate, or permit termination, modification, or acceleration under the Contract; (iv) to Seller's Knowledge, no other party to such Contract is in breach or default, and no event has occurred that with notice or lapse of time would constitute a breach or default, or permit termination, modification, or acceleration, under such Contract; and (v) Seller has not repudiated or threatened to repudiate any provision of any Contract and no other party has repudiated any provision of any Contract.

Section 3.08 Land Contracts and Real Property.

(a) Schedule 3.08 contains a true and complete list of all Land Contracts. Such Land Contracts and the Permits set forth on Schedule 3.09 comprise all of the rights of Seller to use real property (including ingress and egress) necessary in connection with the development, construction, permitting, operation, maintenance or ownership of the Project and/or the Assets in accordance with all applicable Laws and Permits.

(b) Seller has delivered to Purchaser correct and complete copies of the Land Contracts and with respect thereto:

(i) each Land Contract is legal, valid and binding against Seller and, to Seller's Knowledge, against the other Party or Parties thereto in accordance with its terms and in full force and effect;

(ii) the consummation of the transactions contemplated by this Agreement will not affect the legality, validity, binding nature or enforceability or force and effect of any Land Contract;

(iii) Seller has paid all amounts due to date under all such Land Contracts prior to Closing and is not in breach or default under any Land Contract, and to Seller's Knowledge, no other party to any Land contract is in breach or default, and to Seller's Knowledge, no event has occurred that, with notice or lapse of time, would constitute a breach or default or permit termination, or modification thereof, or acceleration thereunder;

(iv) to Seller's knowledge, no party to any Land Contract has repudiated any provision thereof; and

(v) there are no disputes, oral agreements, or forbearance programs in effect as to any Land Contract.

(c) Except as disclosed in Schedule 3.08 and as provided in the Permits listed in Schedule 3.09, there are no leases, subleases, easements, licenses, concessions or any other Contracts, options or rights of first refusal or agreements granting to any Person other than Seller any right to the possession, use, occupancy or enjoyment of the Project Site or any portion thereof. The Project Site is not subject to any pending or, to Seller's Knowledge, threatened condemnation proceedings by any Governmental Authority.

Section 3.09 Permits. Schedule 3.09 sets forth a true and complete list of all Permits. Seller has delivered to Purchaser a correct and complete copy of each Permit listed on Schedule 3.09 of this Agreement. With respect to each Permit identified on Schedule 3.09 and except as set forth in that schedule: (i), such Permit is in full force and effect; (ii) the consummation of the transactions contemplated by this Agreement will not limit or affect the validity or scope, or cause the termination of such Permit; (iii) no party to such Permit is in non-compliance with the terms and conditions of such Permit, and no event has occurred that with notice or lapse of time would constitute non-compliance with such terms and conditions; and (iv) no action, suit, proceeding, hearing, charge, Claim, demand or, to Seller's Knowledge, complaint or investigation is threatened or pending that challenges the legality, validity, or enforceability of such Permit.

Section 3.10 Assets. Schedule 3.10 sets forth a true and complete list of all Assets related to or in connection with the Project. Seller has good and valid title to the Assets, free and clear of all Liens, other than Permitted Liens. Other than as set forth in Schedule 3.10, Seller owns or otherwise holds an interest in no other Assets or any other interests or properties in connection with the Project.

Section 3.11 Taxes.

(a) There are no Liens for Taxes on the Assets or the Project, other than Permitted Liens. There are no proceedings pending against the Project or the Assets with respect to Taxes; and Seller has not received a written notice that any such proceedings are threatened. There are no matters under discussion between Seller or its Affiliates and any Governmental Authority with respect to the Project's liability for Taxes, and no extensions of the statute of limitations have either been requested or granted with respect to the Project's liability for Taxes.

(b) No power of attorney is currently in effect, and no Tax ruling has been requested of any Governmental Authority, with respect to any Tax matter of the Project.<sup>2</sup>

Section 3.12 Environmental Matters. Except as set forth in Schedule 3.12:

(a) There has not been a Release of Hazardous Substances on or otherwise affecting the Project Site that: (i) has imposed any Release reporting obligations on Seller or its Affiliates under any applicable Environmental Law; or (ii) has imposed or, if later discovered and identified to the appropriate authorities, would impose, any obligations on Seller or its Affiliates, on Purchaser or on any other Person under any applicable Environmental Law to investigate, assess, monitor, clean-up, contain, remediate, mitigate, remove, store, transport, dispose or treat any contamination, prepare or implement any work plans related thereto, or respond to or prepare for, any inquiry, order, hearing or other proceeding by or before any Governmental Authority with respect thereto.

(b) Neither Seller nor its Affiliates have received any written notice of any proceedings, action, or other Claim or liability arising under any Environmental Law (including notice of potentially responsible party status under The Comprehensive Environmental Response, Compensation and Liability Act, as amended, or any other state counterpart) from any Person or Governmental Authority regarding any interest in the Project Site.

(c) The Project Site does not contain, and has not contained, any underground storage tank, surface impoundment or similar device used for the management of wastewater, or other waste management unit dedicated to the disposal, treatment, or long-term storage (greater than thirty (30) days) of Hazardous Substances.

(d) Seller has obtained all Environmental Permits, kept all records and made all filings required by applicable Environmental Law with respect to the Assets or the Project. Schedule 3.12(d) contains an accurate and complete listing of all such required Environmental Permits. Except as disclosed in Schedule 3.12(d), each of the Environmental Permits is in full force and effect. Except as disclosed in Schedule 3.12(d), no Claim is pending or, to Seller's Knowledge, threatened to revoke, suspend, modify, or limit any Environmental Permit. Except as disclosed in Schedule 3.12(d), no conditions exist which could reasonably provide the basis for any Claim to revoke, suspend, modify or limit any Environmental Permit.

Section 3.13 Undisclosed Liabilities. Except as set forth on Schedule 3.13, neither Seller nor any of its Affiliates have any liabilities or obligations with respect to the Assets or the Project, whether absolute or contingent, accrued or unaccrued, matured or unmatured, other than

---

<sup>2</sup> NTD: Tax provisions in this agreement, including Section 3.11, subject to tax review.

liabilities under a Contract, Land Contract or Permit (none of which is a liability or obligation arising due to breach of contract or default or any accrued indemnity claim).

Section 3.14 Disclosure. None of (a) the information supplied or to be supplied by or on behalf of Seller to Purchaser or its Representatives in connection with the transactions contemplated by this Agreement or the negotiations leading up to this Agreement in the aggregate and taken as a whole, or (b) the representations or warranties of Seller contained in this Agreement or in the disclosure schedules attached hereto contain any statement that is false or misleading with respect to material fact or omits to state a material fact necessary to make the statements contained herein or therein, in light of the circumstances in which they were made, not false or misleading. There is no fact, to Seller's Knowledge, which could be reasonably expected to have a material adverse effect on the Project (including the economic value thereof), which has not been disclosed in this Agreement or in another written statement delivered to Purchaser by Seller.

#### **ARTICLE IV REPRESENTATIONS AND WARRANTIES OF PURCHASER**

Purchaser hereby represents and warrants to Seller as of the Execution Date and the Closing Date that:

Section 4.01 Organization and Qualification. Purchaser is a limited liability company, validly existing under the Laws of Delaware.

Section 4.02 Authority. Purchaser has all requisite limited liability company power and authority to enter into this Agreement, to perform its obligations hereunder and to consummate the transactions contemplated hereby. The execution and delivery by Purchaser of this Agreement and the performance by Purchaser of its obligations hereunder have been duly and validly authorized by all necessary limited liability company action on behalf of Purchaser. This Agreement has been duly and validly executed and delivered by Purchaser and constitutes the legal, valid and binding obligation of Purchaser enforceable against Purchaser in accordance with its terms except as the same may be limited by bankruptcy, insolvency, reorganization, arrangement, moratorium or other similar Laws relating to or affecting the rights of creditors generally or by general equitable principles.

Section 4.03 No Conflicts; Consents and Approvals. The execution and delivery by Purchaser of this Agreement and the performance by Purchaser of its obligations under this Agreement and the consummation by Purchaser of the transactions contemplated hereby:

(a) will not conflict with or result in a violation or breach of any of the terms, conditions or provisions of the organizational documents of Purchaser; and

(b) does not require filings, approvals, consents, authorizations and notices with or of any Governmental Authority, except as have been made, obtained or given, will not (i) violate or breach any Law or writ, judgment, order or decree applicable to Purchaser or (ii) require the consent or approval of any Governmental Authority under any applicable Law, except as set forth on Schedule 4.03(b) (the "Purchaser Governmental Approvals").

Section 4.04 Litigation. There are no Claims pending or, to Purchaser's Knowledge, threatened that would, in the aggregate, have a material adverse effect on the ability of Purchaser to consummate the transactions contemplated by this Agreement. Purchaser is not subject to any judgment, decree, injunction, rule or order of any Governmental Authority or any arbitrator that prohibits the consummation of the transactions contemplated by this Agreement or would, in the aggregate, reasonably be expected to have a material adverse effect on the ability of Purchaser to consummate the transactions contemplated by this Agreement.

Section 4.05 Compliance with Laws. Purchaser is not in violation of any Law, except for violations that would not, in the aggregate, have a material adverse effect on the ability of Purchaser to consummate the transactions contemplated by this Agreement.

Section 4.06 Brokers. Purchaser does not have any liability or obligation to pay fees or commissions to any broker, finder or agent with respect to the transactions contemplated by this Agreement for which Seller or its Affiliates could become liable or obligated.

## **ARTICLE V COVENANTS**

The Parties hereby covenant and agree as follows:

### Section 5.01 Conduct of Business Pending the Closing.

(a) During the Interim Period, Seller shall promptly give Purchaser written notice of the occurrence of any event or existence of any fact that could cause any representation made by Seller in this Agreement to be untrue in any respect. During the Interim Period, Seller will not, without the prior written consent of Purchaser:

- (i) sell, transfer, encumber, convey or otherwise dispose of any of the Assets;
- (ii) enter into, amend, modify, terminate (partially or completely) grant any waiver under or give any consent with respect to any Contract, Land Contract or Permit;
- (iii) authorize or approve any activities of any third-party in connection with the Project for which Purchaser would be responsible for (whether for payment or otherwise); or
- (iv) agree or commit to do any of the foregoing.

(b) Seller shall, within five (5) days after obtaining Knowledge thereof, disclose in writing to Purchaser any matter relating to the Project or the Assets hereafter arising that, (i) if existing or occurring as of the Effective Date, would have been required to be disclosed as an exception or qualification to Seller's representations and warranties under this Agreement or (ii) could adversely affect the Project or the Assets or the economic value thereof.

Section 5.02 Taxes; Transfer Taxes.

(a) Seller shall retain for any unpaid third-party invoices, taxes, fees or similar costs and expenses related to the Assets that are incurred by Seller during the period between the Execution Date and the Closing Date. Purchaser shall be responsible for all such Taxes accruing after the Closing Date.

(b) Seller shall file all Tax Returns required to be filed to report Transfer Taxes imposed on or with respect to the transactions contemplated by this Agreement, shall be solely responsible and liable for and shall pay all such Transfer Taxes, and shall indemnify, defend and hold harmless Purchaser and its Affiliates from and against any and all liability for the payment of such Transfer Taxes and filing of such Tax Returns.

Section 5.03 Expenses and Fees. All costs and expenses incurred in connection with this Agreement and the transactions contemplated hereby shall be paid by the Party incurring such expenses.

Section 5.04 Agreement to Cooperate.

(a) *Rights of Way.* Seller shall use commercially reasonable efforts to assist Purchaser in obtaining any rights of way reasonably required in connection with the development, construction, operation, maintenance or ownership of the Project, such rights of way to include, without limitation, any rights or way in connection with road access, transmission access, water service, natural gas or any other project lateral in connection with the Project. Any payments, costs or expenses of Purchaser made to Seller or its Affiliates in connection with the acquisition of such rights of way shall be deducted from the Development Premium pursuant to Section 2.01(c)(ii).

(b) *Permissible Impacts.* The provisions of Exhibit C are hereby incorporated by reference to this Agreement with respect to the permissible impacts of the Project or the Seller that may result from the development, construction, operation or maintenance of the Project and related conditions and mitigation required by the Seller in connection thereto.<sup>3</sup>

(c) *Development of Project.* From and after Closing until the Financial Closing Date Purchaser shall use commercially reasonable efforts to (i) preserve the viability of the Project, (ii) maintain the validity of the Permits assigned to Purchaser pursuant to this Agreement or issued to Purchaser or the Project after the Closing Date, (iii) preserve Purchaser's organization and relationships with Governmental Authorities, licensors, distributors, customers, suppliers, contractors and others having material relationships with Purchaser, in each case, in connection with the development or construction of the Project and (iv) comply with all applicable Laws in connection with the development of the Project. Notwithstanding the foregoing, Purchaser shall have no obligation to reach Financial Closing or otherwise develop the Project and the election to spend any and all funds, costs or expenses for the development of the Project shall be made by Purchaser in its sole and absolute discretion.

---

<sup>3</sup> NTD: Exhibit C to set forth intention of the parties related to the Conditional Use Permit and permissive impacts on the City from the Project.

(d) *Access to Due Diligence Materials.* From and after the Execution Date Seller shall cooperate with Purchaser and continue to afford Purchaser and its respective Representatives reasonable access to all of Seller's books and records, properties and other Assets in connection with Purchaser's due diligence of the Project, such access and cooperation to include, without limitation, (i) making management of Seller available to Purchaser on reasonable notice, (ii) arranging meetings with applicable counterparties and other interested parties in connection with the Project on reasonable notice and (iii) providing documentation reasonably requested by Purchaser in connection with the Assets and the Project and making the same available in the data-room for the Project.

(e) Subject to the terms and conditions of this Agreement and applicable Law, each Party shall use commercially reasonable efforts to take, or cause to be taken, all action and do, or cause to be done, all things necessary, proper or advisable to obtain all necessary or appropriate waivers, consents, approvals or authorizations of Governmental Authorities, and to satisfy all other conditions required in order to consummate the transactions contemplated by this Agreement.

Section 5.05 Expansion Site Option. On the Financial Closing Date each of Seller and Purchaser shall execute and deliver to the other Party the Expansion Site Option.

Section 5.06 Further Assurances. Subject to the terms and conditions of this Agreement, at any time or from time to time after the Closing, at any Party's request and without further consideration, the other Party shall execute and deliver to such Party such other instruments of sale, transfer, conveyance, assignment and confirmation, provide such materials and information and take such other actions and execute and deliver such other documents as such Party may reasonably request in order to consummate the transactions contemplated by this Agreement.

Section 5.07 Announcements. Subject to the terms of Section 8.09 and except for disclosures that are reasonably required by a Party by applicable Law, no Party shall issue any press release or otherwise make any public announcement with respect to the transactions contemplated by this Agreement without the prior written consent of the other Party, which consent shall not be unreasonably withheld or delayed.

## **ARTICLE VI CONDITIONS TO THE CLOSING**

Section 6.01 Conditions to the Obligations of Each Party. The obligations of the Parties to proceed with the Closing are subject to the satisfaction on or prior to the Closing Date of all of the following conditions, any one or more of which may be waived in writing, in whole or in part, as to a Party by such Party:

(a) no permanent judgment, injunction, order or decree of a court or other Governmental Authority of competent jurisdiction shall be in effect which has the effect of making the transactions contemplated by this Agreement illegal or otherwise restraining or prohibiting the consummation of the transactions contemplated by this Agreement;

(b) the Parties shall have obtained all consents, approvals, waivers, authorizations and orders necessary or reasonably required in order to permit them to effectuate this Agreement and to consummate the transactions contemplated hereby; and

(c) all Purchaser Governmental Approvals and Seller Governmental Approvals shall have been made, obtained or given.

Section 6.02 Conditions to the Obligations of Purchaser. The obligation of Purchaser to proceed with the Closing is subject to the satisfaction on or prior to the Closing Date of the following conditions, any one or more of which may be waived, in whole or in part, by Purchaser:

(a) Seller shall have performed all of its obligations hereunder required to be performed by it at or prior to the Closing Date;

(b) the representations and warranties of Seller contained in this Agreement shall be true and correct as of the Closing Date, except to the extent such representations and warranties expressly relate only to an earlier date (in which case as of such earlier date);

(c) Each Contract<sup>4</sup> listed on Schedule 3.07 hereto and each other Asset identified on Schedule 6.02(c) shall have been assigned and delivered to Purchaser, together with documentation evidencing all approvals, notices, consents or filings with Governmental Authorities required in connection with such assignment;

(d) The Site Option shall have been duly executed by the parties thereto, delivered to Purchaser and shall be in full force and effect;

(e) The Water Contract Term Sheet shall have been duly executed by the parties thereto, delivered to Purchaser and shall be in full force and effect;

(f) Purchaser shall have received a completed Phase I Environmental Site Assessment;

(g) Purchaser shall have received such resolutions, governmental approvals, incumbency certificates or other evidence reasonably satisfactory to Purchaser evidencing Seller's authorization to enter into the transactions contemplated by this Agreement; and

(h) A binding term sheet for the purchase of emission reduction credits adequate for the Project in form and substance satisfactory to the Purchaser in its sole discretion shall be in full force and effect.

Section 6.03 Conditions to the Obligations of Seller. The obligation of Seller to proceed with the Closing is subject to the satisfaction on or prior to the Closing Date of the following further conditions, any one or more of which may be waived, in whole or in part, by Seller:

---

<sup>4</sup> Scope of required Contracts and deliverables for closing condition TBD.

(a) Purchaser shall have performed all of its obligations hereunder required to be performed by it at or prior to the Closing Date;

(b) the representations and warranties of Purchaser contained in this Agreement shall be true and correct as of the Closing Date, except to the extent such representations and warranties expressly relate to an earlier date (in which case as of such earlier date); and

(c) Seller shall have received such resolutions, incumbency certificates or other evidence reasonably satisfactory to Seller evidencing Purchaser's authorization to enter into the transactions contemplated by this Agreement.

## **ARTICLE VII TERMINATION**

Section 7.01 Termination. This Agreement may be terminated and the consummation of the transactions contemplated hereby may be abandoned at any time prior to the Closing:

(a) by Purchaser at any time prior to the Financial Closing Date upon sixty (60) days' written notice to Seller, the exercise of such termination right to be at the sole and absolute discretion of Seller;

(b) by mutual written consent of Purchaser and Seller;

(c) by either Purchaser or Seller upon written notice to the other Party if any court of competent jurisdiction in the United States or other United States Governmental Authority shall have issued a final order, decree or ruling or taken any other final action restraining, enjoining or otherwise prohibiting the consummation of the transactions contemplated by this Agreement and such order, decree, ruling or other action is or shall have become final and nonappealable; or

(d) by Seller if there has been a material breach by Purchaser of any representation, warranty, covenant or agreement contained in this Agreement which (x) would result in a failure of a condition set forth in Section 6.03(a) or Section 6.03(c) and (y) cannot be cured within fifteen (15) days following delivery by Seller to Purchaser of written notice of such breach.

Section 7.02 Effect of Termination.

(a) Subject to Section 7.02(b), in the event of termination of this Agreement by Seller or by Purchaser prior to the Closing pursuant to the provisions of Section 7.01, all of the obligations of the Parties under this Agreement will terminate except for the obligations set forth in Article VIII.

(b) In the event this Agreement is terminated by Purchaser pursuant to Section 7.01(a) during the period between the Closing Date and the Financial Closing Date, (i) Purchaser shall re-convey all of its rights, title and interest in and to the Assets to Seller, which conveyance shall be on an "as-is", "where-is" basis, without representation or warranty by Purchaser other than the absence of Liens created by Purchaser following the Closing Date, (ii) the Site Option shall be terminated and (iii) Seller shall grant to Purchaser a first-priority security interest in the Project and the Assets pursuant to security documentation reasonably satisfactory to the Parties,

which security interest shall be released by Purchaser upon its receipt of payment by Seller of Purchaser's Development Costs incurred for the development of the Project and prior to the date of termination of this Agreement.

## **ARTICLE VIII MISCELLANEOUS**

Section 8.01 Notices. All notices and other communications hereunder shall be in writing and shall be deemed given if delivered personally or by nationally recognized overnight courier service to, or mailed by registered or certified mail (return receipt requested) if and when received by, or sent via facsimile if and when received by, the Parties at the following addresses (or at such other address for a Party as shall be specified by like notice):

(a) If to Seller, to:

City of Palmdale  
38300 Sierra Highway, Suite A  
Palmdale, CA 93550  
Attention: Mike Mischel, DPW  
Facsimile: (661) 267-5122]

(b) If to Purchaser, to:

Summit Palmdale Development, LLC  
c/o Summit Power Project Holdings, LLC  
Attention: Richard W. Burkhardt  
83 S. King Street, Suite 200  
Seattle, Washington 98104

Section 8.02 Headings. The headings contained in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement.

Section 8.03 Assignment. This Agreement may not be assigned by any Party without the prior written consent of the other Party, provided that Purchaser shall be entitled to assign this Agreement (including any collateral assignment) to any entity providing financing to Purchaser or the Project or in connection with a sale or other transfer of the Project by Purchaser.

Section 8.04 Governing Law; Jurisdiction; Attorneys' Fees. This Agreement shall be governed by, interpreted and enforced in accordance with the Laws of the State of California, without regard to the conflict of Laws principles thereof. All litigation arising out of or in connection with this Agreement and the transactions contemplated or documents required hereby shall be brought in a state or federal court in the State of California, County of San Francisco. The Parties irrevocably agree to submit to the exclusive jurisdiction of such courts and waive any defense of forum non-conveniens. Both Parties agree that in any action to enforce the terms of this Agreement, each Party shall be responsible for its own attorneys' fees and costs. In the event of a dispute between the Parties arising out of this Agreement, the Parties will use

reasonable efforts to reach a satisfactory solution by referring the dispute to senior management of each of the Parties.

Section 8.05 Counterparts. This Agreement may be executed in two or more counterparts, and by facsimile, each of which shall be deemed to be an original, but all of which shall constitute one and the same agreement.

Section 8.06 Amendments. This Agreement may not be amended, waived or modified except by an instrument in writing signed on behalf of Purchaser and Seller.

Section 8.07 Entire Agreement. This Agreement constitutes the entire agreement between the Parties with respect to the subject matter hereof and supersedes all prior agreements, understandings and negotiations, both written and oral, between the Parties with respect to the subject matter of this Agreement. No representation, inducement, promise, understanding, condition or warranty not set forth herein has been made or relied upon by any Party. Neither this Agreement nor any provision hereof is intended to confer upon any Person other than the Parties hereto any rights or remedies hereunder.

Section 8.08 Severability. If any term or other provision of this Agreement is invalid, illegal, or incapable of being enforced by any rule of applicable Law, or public policy, then such term or provision shall be severed from the remaining terms and provisions of this Agreement, and such remaining terms and provisions shall nevertheless remain in full force and effect.

Section 8.09 Confidentiality. If either Party provides confidential information, including, without limitation, the terms of this Agreement, business plans, strategies, financial information, proprietary, patented, licensed, copyrighted or trademarked information, and/or technical information regarding the design, operation or maintenance of the Project ("Confidential Information"), such Confidential Information shall be kept confidential and shall not be disclosed to any Person or entity except: (a) where disclosure is required under compulsion of applicable Law; (b) where disclosure must be made to comply with the requirements or duties of applicable Law; (c) where disclosure is required by any taxing authority, Governmental Authority or other regulatory body; (d) where disclosure is deemed appropriate by any Party for the purpose of defending itself against any claim against it or proving any defense asserted by it in any legal or administrative proceeding; and (e) to those Affiliates, employees, attorneys, accountants, other advisors and potential or actual lenders (including any guarantors, collateral agents or related parties to such lenders) to the Purchaser, with a need to know such Confidential Information, provided the disclosing party shall advise all such Persons receiving Confidential Information that such information is confidential and shall require such Persons to observe and be bound by the confidentiality terms of this Section 8.09. Each Party hereto acknowledges that the remedy at law for any breach by any Party of its obligations under this Section 8.09 is inadequate and that the other Parties shall be entitled to equitable remedies, including an injunction, in the event of breach by the other Party. The obligations of the Parties under this Section 8.09 shall survive until the second (2nd) anniversary of the Closing Date or, in the event this Agreement is earlier terminated, until the second (2nd) anniversary of such date of termination.

[Remainder of page intentionally left blank. Signature page to follow.]

DRAFT

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed by their respective authorized officers as of the day and year first above written.

**PURCHASER:**

SUMMIT PALMDALE DEVELOPMENT, LLC  
A Delaware limited liability company

By: \_\_\_\_\_

**SELLER:**

CITY OF PALMDALE,  
a California Charter City

By: \_\_\_\_\_

DRAFT