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2 **Resolution Relating to**  
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6 **APPROVAL OF PURCHASE POWER**  
7 **AGREEMENT WITH ENCORE BTV**  
8 **SCHOOLS SOLAR I, LLC**  
9

**RESOLUTION**

Sponsor(s): Councilors Keogh, Wright,  
Paul, Mulvaney-Stanak, Bd. of  
Finance  
Introduced: 9-12-2011 revised  
Referred to: \_\_\_\_\_ version  
\_\_\_\_\_  
Action: \_\_\_\_\_  
Date: \_\_\_\_\_  
Signed by Mayor: \_\_\_\_\_

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12  
13 **CITY OF BURLINGTON**

14 In the year Two Thousand Eleven.....  
15 Resolved by the City Council of the City of Burlington, as follows:  
16

17 That WHEREAS, Burlington Electric Department ("BED"), in compliance with Action 12 of  
18 the Final Actions Prioritization list of the City's Climate Action Plan, desires to facilitate solar  
19 power generation on the roofs of Burlington School District school buildings by a private third-  
20 party development partner who can take advantage of federal and state tax credits, which the  
21 City cannot; and  
22

23 WHEREAS, BED has been working with Encore BTV Schools Solar I, LLC ("Encore")  
24 on an agreement to purchase electricity generated by solar panels to be installed on the roofs of  
25 two (2) Burlington School District Schools: Burlington High School and C.P. Smith Elementary  
26 School; and  
27

28 WHEREAS, BED has evaluated and developed, in cooperation with Encore, a purchase  
29 power agreement ("PPA") that provides for the sale of solar energy to BED over a 20-year  
30 period on mutually agreeable terms and pricing; and  
31

32 WHEREAS, BTV Solar has or shortly will submit an application pursuant to Vermont  
33 Statutes Annotated Title 30, section 248 for a certificate of public good for the installation and  
34 operation of the solar power generating system; and

35  
36 WHEREAS, at its regular meeting in March 2010, the Burlington Board of Electric  
37 Commissioners approved this PPA in a materially similar form to the one attached hereto and  
38 authorized BED to enter into this PPA.  
39

40 NOW, THEREFORE, BE IT RESOLVED that the City Council approves the PPA  
41 attached hereto; and  
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43 BE IT FURTHER RESOLVED that Barbara Grimes, BED General Manager, and/or her  
44 designee(s), be and hereby is authorized to execute the PPA and all associated documents on  
45 behalf of the City of Burlington in a form substantially similar to the attached PPA.  
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## **PURCHASE POWER AGREEMENT**

This Purchase Power Agreement is made between Encore BTV Schools Solar I, LLC ("Producer") and the City of Burlington, Vermont, a Vermont municipal corporation, acting by and through its Burlington Electric Department ("BED"), each, individually referred to as a "Party" or, collectively, as the "Parties."

### **RECITALS**

WHEREAS, Producer desires to produce and sell Electricity and Other Products Related to Electric Generation and

WHEREAS, BED, as a utility serving load in Vermont, desires to purchase said Electricity and Other Products Related to Electric Generation from Producer; and

WHEREAS, Producer and BED desire to enter into this Agreement to provide the terms for the purchase and sale of Electricity and Other Products Related to Electric Generation provided by Producer's electric generating facility described in Attachment A hereto ("the Project").

NOW, THEREFORE, the Parties agree as follows:

### **1. DEFINED TERMS**

Capitalized terms used in this Agreement shall have the meanings set forth above, in Section 29 hereof, or as defined elsewhere in this Agreement or in the Attachments to this Agreement.

### **2. EFFECTIVE DATE**

This Agreement shall become effective upon execution by both Parties and is of no force and effect whatsoever until that time.

### **3. FAILURE TO ACHIEVE MILESTONES**

Producer Failure to Meet Milestones - If, other than as a result of Force Majeure, Producer should fail to meet any of the milestones set forth in Attachment B as "Producer Milestones," BED shall have the option to either:

- i. Declare this Agreement to be null and void and of no further force and effect. In this event, BED shall notify Producer in writing of such failure and of the termination of this Agreement which termination will be effective as of the date of receipt of such notice. At that time the Parties will have no further obligation to each other.
- ii. Grant an extension relative to any milestone(s) shown in Attachment B, by notifying the Producer in writing of the proposed extension. If Producer does not accept the proposed extension, in writing, within ten (10) business days, this Agreement shall be null and void and of no further force and effect. At that time the Parties will have no further obligation to each other (including under Section 14 hereof).

#### **4. INTERCONNECTION REVIEW FEE AND DEPOSIT**

At the time of submission of application for interconnection under Board Rule 5.500, BED may request, and Producer shall tender to BED, funds sufficient to provide for the review of the application for interconnection. In the event that funds remain unexpended following completion of the review of the application for interconnection, any unexpended amounts will be refunded to Producer. Interest will not accrue on the funds provided or refunded pursuant to this section.

#### **5. PROJECT LOCATION, DESIGN AND CONSTRUCTION**

Producer shall construct the Project at the locations and in a manner substantially consistent with the specifications set forth in Attachment A. Producer shall utilize Commercially Reasonable Efforts in the design, construction and operation of the Project in accordance with Good Engineering and Operating Practices, the terms and conditions of any certificate of public good and any other Regulatory Approvals issued relative to the Project, and shall be solely responsible for all costs, expenses, liabilities and other obligations associated with the Project.

#### **6. INTERCONNECTION**

Producer shall be solely responsible for the payment of all costs and the execution of all responsibilities arising under the Interconnection Agreement. At such time as the Interconnection Agreement is approved, it shall be deemed part of this Agreement and a copy shall be appended as Attachment D to this Agreement. BED shall be named as a named insured under any policies of insurance required under the Interconnection Agreement.

#### **7. EXCLUSIVITY**

During the Term of this Agreement, Producer shall not enter into any other agreement for the sale or other conveyance of any portion of the Electricity or any Other Product Related to Electric Generation produced by the Project that is the subject of sale under this Agreement. Producer acknowledges that, by entering into this Agreement, Producer is waiving any and all rights to seek an alternative power sales arrangement, including but not limited to an arrangement through Vermont Public Service Board rules 4.100, 4.300 and 5.100, or under the feed in tariffs allowed under Act 45 of the 2009 Vermont Legislature at any time throughout the Term set forth in this Agreement. This waiver shall extend throughout the full Term contemplated under this Agreement, unless this Agreement is terminated early for any reason by default, for cause or otherwise.

#### **8. STATION SERVICE**

Station service, if any shall be provided by BED, and shall be priced only in accordance with any applicable tariff, special contract, order or other means approved by the Board.

#### **9. DELIVERY OF ELECTRICITY AND TRANSFER OF OTHER PRODUCTS RELATED TO ELECTRIC GENERATION**

- a. During the Term and subject to the terms and conditions of this Agreement, Producer shall sell, transfer and assign to BED all of its right, title and interest in the Electricity and Other Products Related to Electric Generation from the Project. Producer will Deliver Electricity from the Project to BED. Upon request of BED, Producer shall use Commercially Reasonable Efforts to obtain, register, certify or deliver the Other Products Related to Electric Generation or any evidence of the BED's right, title and interest thereto to BED, to the ISO-NE Administered Markets or other markets, or as BED reasonably may otherwise direct. BED shall retain all right, title, and interest in all Other Products Related to Electric Generation. BED shall be entitled, unilaterally and without the consent of Producer, to deal with Other Products Related to Electric Generation in any manner it determines regardless of whether any consideration is separately stated as being received or paid for by BED.
- b. Producer will coordinate Project outages (for maintenance or other reasons) with BED to the greatest extent practicable and will use Commercially Reasonable Efforts to avoid scheduling planned Project outages related to non-emergency maintenance during peak daylight hours (between 9:00 a.m. and 5:00 p.m.) during the months of December, January, February, and May through September (inclusive).

## **10. METERING AND REPORTING REQUIREMENTS**

Producer shall be responsible for meeting such metering requirements as may be established by BED or by regulatory requirement, all at Producer's expense. The testing of metering equipment shall be at the discretion of BED; provided, however, that BED shall cause such testing to be performed not less than once every five years during the Term of this Agreement if the Project exceeds 100 kW in size.

## **11. RATES AND TERM**

Beginning with Commissioning, BED shall pay Producer for all Electricity generated by the Project during the twenty year period commencing with Commissioning in accordance with the rate schedule set forth in Attachment C hereto and shall receive from Producer all Electricity and Other Products Related to Electric Generation during the Term. The final date in the rate schedule set forth in Attachment C corresponds with the end of such twenty year period.

Prior to January 1<sup>st</sup> of each calendar year commencing with the first January after one full year of commercial operation, the rates contained in Attachment C shall be adjusted in accordance with the following formula:

If the value of the Northeast Urban non-seasonally adjusted all items less food and energy Consumer Price Index series for October of such calendar year has increased by 3% or more from the October value in the preceding calendar year, then the price shall be increased by the percentage greater than 3%. For example, if the increase equals 3.5% then the price in Attachment C for all future years shall increase by 0.5%.

If the value of the Northeast Urban non-seasonally adjusted all items less food and energy Consumer Price Index series for October of such calendar year has increased by 1% or less, or has decreased, from the October value in the preceding year, then the price shall be decreased by the percentage less than 1%. For example, if the increase equals 0.5% the price in Attachment C

for all future years shall decrease by 0.5%. As a further example, if the index decreased by 0.5%, then the price in Attachment C for all future years shall decrease by 1.5%.

If the value of the Northeast Urban non-seasonally adjusted all items less food and energy Consumer Price Index series for October of the present year has increased between 1% and 3%, from the October value in the preceding year, then there shall be no adjustment to the prices contained in Attachment C.

Producer shall prepare an updated Attachment C prior to each January 1<sup>st</sup> in accordance with this provision, and shall obtain BED's concurrence prior to the new rates taking effect, which concurrence will not be unreasonably conditioned, withheld or delayed.

## **12. PAYMENT TO PRODUCER**

BED shall pay or cause to be paid to Producer amounts calculated in accordance with Attachment C within 30 days of the end of each billing period during which Electricity and Other Products Related to Electric Generation were provided by Producer. BED shall have no obligation whatsoever to make payments to producer for Electricity or Other Products Related to Electric Generation that are not Delivered. As a matter of administrative convenience, BED may wait to send payments to Producer until the total amount due to Producer, net of any set offs, exceeds \$100.00.

## **13. EVENTS OF DEFAULT**

Any breach of this Agreement by Producer will constitute an event of default by Producer, as will one or more of the following:

- a. Failure to Deliver any Electricity from the Project for a period of twelve consecutive months at any time after Commissioning.
- b. Producer ceases to hold any Regulatory Approval, which failure or cessation results in a lack of legal right on the part of Producer to continue to operate the Project.
- c. Any information provided by Producer relative to this Agreement or any information, representations or warranties set out in this Agreement is not true or correct in any material respect when given, or Producer commits any act of fraud in relation to this Agreement or any regulatory proceeding relating to the Project.
- d. By agreement, decree, judgment or order of a court, Producer agrees to be treated as and/or is adjudicated bankrupt or insolvent, or real or personal property of the Project is sequestered or subject to the appointment of any third party and such agreement, decree, judgment, order of appointment continues in effect unrevoked, undischarged and unstayed for a period of thirty (30) days after the entry or implementation thereof.
- e. Producer fails or ceases to comply in all material respects with Good Engineering and Operating Practices.

- f. Producer fails to construct the Project substantially in accordance with the description included as Attachment A to this Agreement (including use of different fuels ) without obtaining the prior approval of BED; provided, however, that no such consent shall be necessary (and no event of default shall be deemed to occur) as a result of a ten percent (10%) or less change in the aggregate Project kilowatts.

Any breach of this Agreement by BED will constitute an event of default by BED, as will one or more of the following:

- a. Failure to make any undisputed payment under the Agreement if and when due.
- b. BED ceases to hold any Regulatory Approval, which failure or cessation results in a lack of legal right on the part of Producer to continue to operate the Project.
- c. Any information provided by BED relative to this Agreement or any information, representations or warranties set out in this Agreement is not true or correct in any material respect when given, or BED commits any act of fraud in relation to this Agreement or any regulatory proceeding relating to the Project.
- d. By agreement, decree, judgment or order of a court, BED agrees to be treated as and/or is adjudicated bankrupt or insolvent, or real or personal property of BED is sequestered or subject to the appointment of any third party and such agreement, decree, judgment, order of appointment continues in effect unrevoked, undischarged and unstayed for a period of thirty (30) days after the entry or implementation thereof.

#### **14. CURE PERIOD; REMEDIES**

Within five business days of learning of an event of default, the non-defaulting party shall send a written notice to the other party specifying the default and allowing a cure period of 45 days. If the default is not cured within such cure period, the other Party (the "Non-Defaulting Party") shall have the right, but not the obligation, to do any or all of the following: (i) designate by written notice a day, no earlier than ten (10) days after the date such notice is given pursuant to Section 22 and no later than twenty (20) days after such date, as an early termination date ("Early Termination Date") to accelerate all amounts owing between the Parties and to terminate this Agreement; or (ii) extend the cure period for an additional period reasonably necessary to remedy such failure (not to exceed sixty (60) days) subject to the condition that during the additional period, the Defaulting Party shall diligently pursue a remedy for the failure.

- a. Early Termination Payment.

- i. In the event that Producer exercises its right to terminate this Agreement as set forth under (i) in the first paragraph in this Section 14, Producer shall calculate its damages hereunder, in a commercially reasonable manner, by taking (1) the net present value of the amount obtained by multiplying (A) the number of years (including fractions thereof) that would be remaining in the Term if the Agreement had not been terminated (the "Remaining Years"), by (B) the product of (x) the Estimated Yearly Output of the Project, multiplied by (y) the rate in effect under Section 11 hereof on the date of termination, and deducting (2) the net present value of the amount

obtained by multiplying (A) the Remaining Years, by (B) the product of (x) the Estimated Yearly Output of the Project, multiplied by (y) the rate at which Producer will or would reasonably be expected to sell Electricity and Other Products Related to Electric Generation in connection with a Replacement Transaction (such amount, the "Producer Early Termination Payment").

ii. In the event that BED exercises its right to terminate this Agreement as set forth under (i) in the first paragraph in this Section 14, BED shall calculate its damages hereunder, in a commercially reasonable manner, by taking (1) the net present value of the amount obtained by multiplying (A) the Remaining Years, by (B) the product of (x) the Estimated Yearly Output of the Project, multiplied by (y) the rate at which BED will or would reasonably be expected to purchase Electricity and Other Products Related to Electric Generation in connection with a Replacement Transaction, and deducting (2) the net present value of the amount obtained by multiplying (A) the Remaining Years by (B) the product of (x) the Estimated Yearly Output of the Project, multiplied by (y) the rate in effect under Section 11 hereof on the date of termination (such amount, the "BED Early Termination Payment") (the Producer Early Termination Payment or BED Early Termination Payment, as applicable, the "Early Termination Payment").

iii. In the event that the calculation of the Early Termination Payment results in a net amount owed to the Non-Defaulting Party, the Non-Defaulting Party shall submit an invoice to the Defaulting Party in accordance with subsection b. below. In the event that the net amount owed to the Non-Defaulting Party is less than or equal to zero, no amount shall be owed to the Non-Defaulting Party as a result of the termination of the Agreement.

b. As soon as practicable after the establishment of an Early Termination Date, the Non-Defaulting Party shall provide an invoice to the Defaulting Party for the Early Termination Payment. The invoice for the Early Termination Payment shall include all reasonable detail required for the Defaulting Party to verify the calculation of such amount. The Defaulting Party shall pay the Early Termination Payment within ten (10) Business Days of receipt of the Non-Defaulting Party's invoice therefor.

c. Within ten (10) Business Days of the Defaulting Party's receipt of the invoice for the Early Termination Payment, the Defaulting party shall: (i) pay the Early Termination Payment, or (ii) if the Defaulting Party disputes the amount of the Early Termination Payment, in whole or in part, the Defaulting Party shall provide to the Non-Defaulting Party a detailed written explanation of the basis for such dispute (the "Counter Notice"). If the Parties are unable to settle such dispute within 45 days of such Counter Notice, the parties shall select a mutually agreed upon independent certified public accountant to audit the calculation of and determine the proper amount of the Early Termination Payment according to the methodology set forth in Section 14(a) hereof. If the parties are unable to agree on an independent certified public accountant to perform the audit and make such determination, the Parties shall each select an independent certified public accountant and the selected accountants shall then mutually agree on a third independent certified public accountant who shall then perform the audit and determine the amount of the Early Termination Payment. The expenses associated with such audit and determination shall be borne equally by the Parties. The Parties shall use all reasonable efforts to ensure that the arbitration is completed as promptly as reasonably possible. The remaining balance of the Early Termination Payment, if any, shall be paid within ten (10) Business Days of such independent certified public accountant making a determination pursuant to this Subsection c.

d. Each Party shall have an obligation to make good faith efforts to enter into a Replacement Transaction to be entitled to the liquidated damages provided for in this Section 14 but acknowledges that absent success of good faith efforts to enter into such a Replacement Transaction, damages shall be calculated in accordance with Section 14(a) hereof.

e. TO THE EXTENT ANY DAMAGES REQUIRED TO BE PAID HEREUNDER ARE LIQUIDATED, THE PARTIES ACKNOWLEDGE THAT ACTUAL DAMAGES ARE DIFFICULT OR IMPOSSIBLE TO DETERMINE, OTHERWISE OBTAINING AN ADEQUATE REMEDY IS INCONVENIENT AND THE LIQUIDATED DAMAGES CONSTITUTE A REASONABLE APPROXIMATION OF THE HARM OR LOSS AND EACH PARTY HEREBY WAIVES THE RIGHT TO CONTEST SUCH PAYMENTS AS UNENFORCEABLE, AN UNREASONABLE PENALTY OR OTHERWISE.

## **15. EFFECT OF TERMINATION OR EXPIRATION**

Termination of this Agreement, whether by expiration or otherwise, shall not affect or prejudice any rights, obligations or remedies of either Party.

## **16. FORCE MAJEURE**

In the event of Force Majeure, BED may suspend the obligations of Producer under this Agreement for a period of up to sixty days. In no case will an event of Force Majeure excuse Producer's failure to perform for a period of more than twelve consecutive months.

## **17. SECURED LENDER RIGHTS**

- a. Producer shall have the right from time to time, at its cost, to enter into one or more Security Agreements upon such terms as it desires, provided that:
  - (i) in the case of a deed of trust, syndication agreement or similar instrument by which the trustee or syndication agent holds security on behalf of, or for the benefit of, other lenders, only the trustee or agent shall be entitled to exercise the rights and remedies under the Security Agreement as the Secured Lender on behalf of the lenders;
  - (ii) BED have no liability whatsoever under any Security Agreement for the payment of the principal sum secured or any interest accrued thereon or any other sum secured thereby or accruing thereunder, and the Secured Lender shall not be entitled to seek any damages against the BED for any or all of the same; and
  - (iii) all rights acquired by a Secured Lender under any Security Agreement shall be subject to all of the provisions of this Agreement, including the restrictions on assignment contained herein.
  - (iv) Producer shall provide any entity with whom it intends to enter a Security Agreement with a copy of this Agreement and the Attachments to this Agreement.



- b. While a Security Agreement remains outstanding, and provided that BED has received from Producer prior written notice of the name and address of the Secured Lender, BED shall provide a copy of any written notice of default or termination to the Secured Lender at such time that such notice is sent to Producer. Subject to the provisions of this Agreement, a Secured Lender may enforce any Security Agreement and acquire Producer's interest in the Project in any lawful way, subject to (1) receipt of any required Regulatory Approvals, (2) the honoring of all obligations of Producer under this Agreement, and (3) payment of all of BED's costs and expenses (including attorney fees) incurred with respect to the acquisition and any related events.
- c. BED, upon request of Producer, may enter into an acknowledgement and agreement, in such standard form as BED may determine from time to time and subject to any Regulatory Approvals that may be required, with Producer and any Secured Lender for the purpose of implementing the Security Agreement protection provisions contained in this Agreement.

## **18. INDEMNIFICATION OF BED**

Producer shall indemnify, defend and hold BED and its respective city officials, officers, employees, commissioners, advisors, and agents (including contractors and their employees) (collectively, the "Indemnitees") harmless from and against any and all claims, demands, suits, losses, damages, liabilities, penalties, obligations, payments, costs and expenses, interest accrued thereon (including the costs and expense of, and interest accrued on, any and all actions, suits, proceedings for personal injury (including death) or property damage, assessments, judgments, settlements and compromises relating thereto and reasonable attorney fees and reasonable disbursements in connection therewith), asserted against or suffered by the Indemnitees relating to, in connection with, resulting from, or arising out of the design, construction or operation of the Project or the generation and delivery of Electricity and Other Products Related to Electric Generation therefrom or any occurrence or event relating thereto, or any occurrence or event on Producer's side of the Interconnection Point, or a breach by Producer of any of its representations, warranties, obligations or covenants contained in this Agreement.

## **19. LIABILITY**

- 1. If Producer is not a single legal entity, then all such entities comprising Producer shall be jointly and severally liable to BED for all representations, warranties, obligations, covenants, and liabilities of Producer under this Agreement.
- 2. BED's liability under this Agreement shall be limited to BED's actual payments to Producer pursuant to Sections 11 & 12 and to those remedies outlined in Section 14. Producer's liability under this Agreement shall be limited to BED's actual payments to Producer pursuant to Sections 11 & 12 and to those remedies outlined in Section 14.
- 3. Neither party shall be liable to the other party under this Agreement or under any cause of action relating to the subject matter of this Agreement for any special, indirect, incidental, punitive, exemplary or consequential damages.

## **20. RECORD RETENTION**

Producer and BED each shall keep complete and accurate records and all other data required by either of them for the purpose of proper administration of this Agreement. Without limiting the generality of the foregoing, Producer shall keep all records and other documentary evidence that may be necessary to establish, substantiate or maintain any claim or title of BED to any Other Products Related to Electric Generation. All such records shall be maintained as required by law, but for no less than seven (7) years after the creation of the record or data. Producer shall provide or cause to be provided reasonable access to the relevant and appropriate financial and operating records and data kept by it or on its behalf relating to this Agreement reasonably required for BED to comply with its obligations, or to verify billings or to verify information provided in accordance with this Agreement or relating to compliance by Producer with this Agreement.

## **21. PROJECT INSPECTION**

BED shall have the right to inspect the Project prior to Commissioning and shall have the right to inspect the Project during normal business hours during the term of this Agreement, upon at least five business days' notice to Producer.

## **22. NOTICES**

a. Unless otherwise stated, all notices pertaining to this Agreement shall be in writing and shall be transmitted, by the Party giving notice, via electronic mail, or if such method is unavailable, via facsimile, courier or hand delivery, and addressed to the other Party as follows:

If to Producer:

Chad Farrell  
BTV Schools Solar I, LLC  
c/o Encore Redevelopment, LLC  
110 Main Street Suite 2E  
Burlington, VT 05401  
Facsimile: (802) 861 3023

If to BED:

General Manager  
Burlington Electric Department  
585 Pine Street  
Burlington, VT 05401  
Facsimile: (802)865-7400

b. Notice transmitted or delivered as provided above shall be deemed to have been given and received on the day it is transmitted (if by electronic mail or facsimile) or delivered (if by courier or hand delivery), provided such notice is transmitted or delivered on a business day prior to 5:00 p.m. local time in the place of delivery or receipt. If a notice is transmitted or delivered after 5:00 p.m. local time or such day is not a business day, then such notice shall be deemed to have been given and received on the next business day. Either Party, by written notice to the other, may change its contact person, electronic mail address, facsimile number or postal address to which notices are to be sent.

## **23. PUBLIC RECORD ISSUES**

Producer acknowledges its understanding that BED is subject to Vermont's Access to Public Records law, 1 V.S.A. § 315 et seq. (Public Records Law). To the extent that BED may receive requests under the Public Records Law for information provided by Producer to BED, BED shall notify Producer of the request not later than the next business day after the request is received. Information related to the development of the Project shall be considered, to the fullest extent permissible, to be trade secrets under 1 V.S.A. § 317(9) for purposes of application of that statute. Notwithstanding this requirement, it shall be the responsibility of the Party seeking to maintain confidentiality of specific information to seek an appropriate protective order, or other remedy, or to undertake such court action as may be necessary, at such Party's sole expense.

## **24. BUSINESS RELATIONSHIP**

The relationship between the BED and Producer is that between independent contractors, and nothing in this Agreement shall create or be deemed to create a relationship of partnership, joint venture, fiduciary, principal and agent or any other relationship between the Parties.

## **25. NON-PARTY RIGHTS**

Except as set out otherwise in this Agreement, this Agreement shall not confer upon any person or entity, except the Parties and permitted assigns, any rights, interests, obligations or remedies under this Agreement.

## **26. ASSIGNMENT**

Producer may not assign its rights and duties under this Agreement without the prior written approval of BED, which approval shall not be unreasonably withheld, and any assignee of Producer shall be required to make a statement in writing assuming all of Producer's obligations under this Agreement. Notwithstanding the foregoing, either Party may assign this Agreement without the other Party's consent as part of a financing transaction. Nothing in this provision shall be deemed to alter Producer's responsibility or obligations to obtain any and all Regulatory Approvals that may be required in conjunction with a transfer of all or part of any legal interest in the Project.

## **27. BED SETOFF RIGHTS**

In addition to its other rights of setoff under this Agreement or otherwise arising in law or equity, BED may set off any amounts owed to it by Producer against any monies owed by BED to Producer.

## **28. FURTHER ASSURANCES**

- a. Each Party, from time to time on written request of the other Party, shall perform further acts, including execution of documents, as may be reasonably required in order to fully perform and to more effectively implement and carry out the terms of this Agreement, provided that such acts shall not be inconsistent with this Agreement or any law or Regulatory Approvals pertaining to the Project.

- b. Producer shall provide assurance, to BED of its ability to perform its obligations under this Agreement for the entire term of the Agreement (“Performance Assurance”). This Performance Assurance must be in a form acceptable to BED.

## 29. DEFINITIONS

The following terms shall have the respective meanings set forth below for purposes of this Agreement:

- a. Commercially Reasonable Efforts means efforts that are designed to enable a Party, directly or indirectly, to satisfy a condition to, or otherwise assist in the consummation of, a transaction, activity or undertaking contemplated by this Agreement and that do not require the performing Party to expend any funds or assume liabilities other than expenditures and liabilities that are commercially reasonable in nature and amount in the context of the transaction contemplated by this Agreement.
- b. Commissioning shall mean the date on which the Project has received all Required Approvals and begins Delivering Electricity to the Distribution System of BED.
- c. Interconnection Agreement means the agreement or agreements entered into between BED and Producer with respect to the connection of the Project to the Distribution System.
- d. Interconnection Costs mean all costs which are payable by Producer with respect to the interconnection of the Project to the Distribution System.
- e. Interconnecting Utility means BED.
- f. Delivered, in the context of Electricity, means delivered to the interconnection point specified in the Interconnection Agreement and successfully injected into the Distribution System, and Deliver has the corresponding meaning.
- g. Distribution System means the system which is owned and operated by the BED, and includes any structures, equipment or other things used for the purpose of transmitting, distributing, or providing service to end-use customers.
- h. Electricity means electric energy, measured at the interconnection point, in kWh.
- i. Estimated Yearly Output of the Project means, (i) if more than 25 months have elapsed since Commissioning, the 12 month average of the actual Electricity production of the Project during the 24-month period immediately prior to the occurrence of the event of default resulting in termination of this Agreement; or (ii) if 25 months or less have elapsed since Commissioning, 355,700 kWh per year.
- j. Force Majeure means any act, event, cause or condition that (i) prevents a Party from performing its obligations, and (ii) is beyond the affected Party’s reasonable control, except that no act, event, cause or condition shall be considered to be an event of Force Majeure:

- (1) if and to the extent the Party seeking to invoke Force Majeure has caused or contributed to the applicable act, event, cause or condition by its act, fault or negligence or has failed to use Commercially Reasonable Efforts to prevent or remedy such act, event, cause, or condition and, so far as possible and within a reasonable time period, remove it (except in the case of strikes, lockouts and other labor disturbances, the settlement of which shall be wholly within the discretion of the party involved);
  - (2) if the act, event, cause or condition is the result of a violation of law or the terms of any regulatory approval by the Party seeking to invoke Force Majeure;
  - (3) if the act, event, cause or condition was caused by a lack of funds or other financial cause; or
  - (4) to the extent that the duration of such act, event, cause or condition prevents a Party from performing its obligations for a period exceeding twelve consecutive months.
- k. Good Engineering and Operating Practices means any of the practices, methods and activities adopted by a significant portion of the North America electric utility industry as good practices applicable to the design, building, and operation of generating facilities of similar type, size and capacity or any of the practices, methods or activities that, in the exercise of skill, diligence, prudence, foresight and reasonable judgment by a prudent generator of Electricity in light of the facts known at the time the decision was made, reasonably could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety, expedition and Laws and Regulations.
- l. ISO-NE means the Independent System Operator-New England, or its successor.
- m. ISO-NE Administered Markets has the meaning given to it by the ISO-NE Market Rules.
- n. Meter means a meter owned by or under the control of the Interconnecting Utility that measures and records the quantity of Electricity which passes through it.
- o. Other Products Related to Electric Generation means all products, in addition to Electricity, resulting directly or indirectly from the generation of electricity by the Project.
- p. Project shall have the meaning set forth in the Recitals to this Agreement.
- q. "Replacement Transaction" shall mean a transaction intended to replace the deliveries or purchases under this Agreement.
- r. Required Approvals shall mean: (i) a Certificate of Public Good for each of the Project locations set forth in Attachment A from the Vermont Public Service Board (the "PSB") pursuant to 30 V.S.A. § 248; (ii) any and all other necessary and material approvals required to construct and operate the Project; and (iii) approval by BED of the application for interconnection under Vermont Public Service Board Rule 5.500.
- s. Secured Lender means the lender(s) under a Security Agreement.

- t. Security Agreement means an agreement or instrument, including a deed of trust or similar instrument securing bonds or debentures, or other evidences of indebtedness, containing a charge, mortgage, pledge, security interest, assignment, sublease, deed of trust or similar instrument with respect to all or any part of the Producer's Interest granted by the Producer that is security for any indebtedness, liability or obligation of the Producer, together with any amendment, change, supplement, restatement, extension, renewal or modification thereof.
- u. Station Service means the Electricity used at the Project for excitation, on-site maintenance and operation of auxiliary and other facilities that are essential to operation of the Project.
- v. Regulatory Approval means the receipt of any federal, state or local permit, license or other assent of any governmental body, where such assent is required for lawful construction and/or operation of the Project.
- w. Site Control means proof of dominion over real property to the extent necessary to construct the Project in accordance with the description set forth on attachment A. Site control may be established by (1) fee simple title to the property; (2) a valid written leasehold interest in the property for at least the duration of the contract term, (3) a valid written option, unconditionally exercisable by Producer, to purchase or lease such real property, or (4) a duly executed contract for the purchase or lease of such property.
- x. Term means the period beginning on the date hereof and ending on the earlier to occur of: (i) the twenty (20) year anniversary of the date of Commissioning; or (ii) termination of this Agreement in accordance with the terms and conditions hereof.
- y. Year 1, where used in Attachment C shall represent the twelve month period commencing with production commencing at the Project. Year 2 shall mean the second twelve month period following. References to subsequent years in Attachment C shall have corresponding meanings.

### 30. MISCELLANEOUS

#### a. Headings

The inclusion of headings in this Agreement is for convenience of reference only and shall not affect the construction or interpretation of this Agreement.

#### b. Entire Agreement

This Agreement constitutes the entire agreement between the Parties pertaining to the subject matter of this Agreement.

#### c. Waiver, Amendment

Except as expressly provided in this Agreement, no amendment or waiver of any provision of this Agreement shall be binding unless executed in writing by the Party to be bound thereby. No waiver or any provision of this Agreement shall constitute a waiver of any other provision nor shall it constitute a continuing waiver or operate as a waiver of, or estoppels with respect to, any subsequent failure to comply, unless otherwise expressly provided.

d. Board jurisdiction

The Vermont Public Service Board shall have jurisdiction to resolve disputes arising under or in connection with this Agreement, to the fullest extent allowed by law.

IN WITNESS WHEREOF, Producer and BED have executed this instrument on the respective dates set forth below.

\_\_\_\_\_(PRODUCER)

By: \_\_\_\_\_  
Duly authorized agent  
Dated:

City of Burlington, Vermont Electric Department

By: \_\_\_\_\_  
Barbara L. Grimes, General Manager  
Dated:

## Attachment A

### Project description

Encore Redevelopment, LLC (the "Producer") will develop and own photovoltaic equipment on the rooftops of three school facilities owned by the Burlington School District (BSD). The facilities are collectively expected annually to generate approximately 355,000 kilowatt hours. The facilities will be connected to BED equipment and metered, and the power produced will be sold to BED for 20 years. Racked photovoltaic panels will be assembled per required national electric code and local codes and located on the roofs. Protection, inversion, and control equipment will also be located on the roofs and be able to be monitored remotely. Automatic and manual disconnects will be installed as needed to meet local and national electrical code and electrical utility requirements.

The location of the facilities and there anticipated output is listed below:

Facility Summary					
	Name	Location	Est. Available Roof SF	Proposed Kilowatts	Est. kWh Prod.
1	Burlington HS	52 Institute Road	58,893	149	173,800
2	CP Smith	323 Ethan Allen Parkway	28,040	122	142,300
3	Lawrence Barnes	123 North St.	16,000	34	39,600
Total			102,933	305	355,700



## **Attachment B**

### **Milestones**

#### **PRODUCER MILESTONES**

- a. Within six months of the date of this Agreement, Producer shall file with BED a complete application for interconnection under Vermont Public Service Board Rule 5.500.
- b. Obtain all Regulatory Approvals and any other necessary approvals required to construct and operate the Project not later than December 31, 2011; provided, however, that such date shall be extended to the extent any delay in obtaining such Regulatory Approvals is attributable to any Force Majeure event or any act or failure to act by BED, including any delay by BED in approving the application for interconnection under PSB Rule 5.500.
- c. Not later than December 31, 2011, the Project shall achieve Commissioning; provided, however, that such date shall be extended to the extent any delay in achieving Commissioning is attributable to any Force Majeure event or any act or failure to act by BED, including any delay by BED in approving the application for interconnection under PSB Rule 5.500.

## Attachment C

### Rate Schedule and Term

<u>Year</u>	<u>Rate per kWh</u>
1	\$0.21
2	\$0.21
3	\$0.21
4	\$0.21
5	\$0.21
6	\$0.21
7	\$0.21
8	\$0.21
9	\$0.21
11	\$0.21
12	\$0.21
13	\$0.21
14	\$0.21
15	\$0.21
16	\$0.21
17	\$0.21
18	\$0.21
19	\$0.21
20	\$0.21

**Attachment D**

**Interconnection Agreement**

(Attachment D will be amended to include the Interconnection Agreement for each location upon its execution with BED.)

