

**CONFIRMATION  
CAISO ENERGY**

This confirmation (“Confirmation”) confirms the transaction between Direct Energy Business Marketing, LLC, a Delaware limited liability company (“Direct Energy”) and City of San José, a California municipality (“City of San José”), and each individually a “Party” and together the “Parties”, dated as of October 12, 2021 (the “Effective Date”), by which Seller agrees to sell and deliver, and Purchaser agrees to purchase and receive, the Product (the “Transaction”). This Transaction is governed by the WSPP Agreement dated July 28, 2020 (the “WSPP Agreement”). The WSPP Agreement, including this Confirmation, and any applicable appendices, exhibits or amendments hereto, shall be collectively referred to herein as the “Agreement” and will constitute a single agreement between the Parties with respect to the Transaction. Terms capitalized but not defined herein shall have the meaning as set forth in the WSPP Agreement or the CAISO Tariff.

The Parties agree as follows:

|                            |   |
|----------------------------|---|
| <b>Transaction Number:</b> | SJCE: 21-112-23   |
| <b>Purchaser:</b>          | City of San José  |
| <b>Seller:</b>             | Direct Energy Business Marketing, LLC   |
| <b>Product:</b>            | CAISO Energy  |
| <b>Contract Quantity:</b>  | See Exhibit 1 for hourly shape.   |
| <b>Contract Price:</b>     | ██████/MWh  |
| <b>Delivery Period:</b>    | <b>Start Date:</b> January 1, 2022<br><b>End Date:</b> December 31, 2023<br>See Exhibit 1 for hourly shape.   |
| <b>Delivery Point:</b>     | TH_NP15_GEN-APND  |
| <b>SCID Purchaser:</b>     | NSJC  |
| <b>SCID Seller:</b>        | SEL1  |
| <b>Scheduling:</b>         | The Product will be scheduled to Purchaser on a Day-Ahead basis using an Inter-SC Trade (IST). Seller will perform all scheduling requirements applicable to the Transaction(s) contemplated under this Confirmation. All scheduling shall be performed consistent with all applicable CAISO and WECC prevailing protocols. |
| <b>Payment Terms:</b>      | For each month during the Delivery Period, Purchaser shall pay Seller an amount equal to the Contract Quantity of Product that is   |

|                           |  |
|---------------------------|--|
|                           | <p>scheduled and delivered to the Delivery Point in accordance with this Confirmation during such month multiplied by the Contract Price.</p> <p>Payment shall be made in accordance with Section 9 of the WSPP Agreement.</p> |
| <b>Transaction Terms:</b> | N/A  |

**ARTICLE 1  
DEFINITIONS/INTERPRETATIONS**

For purposes of the Confirmation, the following definitions and rules of interpretations shall apply:

- 1.1 “CAISO” means the California Independent System Operator Corporation, or any successor entity.
- 1.2 “CAISO Energy” means a quantity of Energy equal to the hourly quantity without Ancillary Services that is or will be scheduled as an Inter-SC Trade pursuant to the CAISO Tariff for which the only excuse for failure to deliver or receive is an Uncontrollable Force. Terms that are capitalized, but not defined in this definition shall have the meaning ascribed to them in the CAISO Tariff.
- 1.3 “CAISO Tariff” means the California Independent System Operator Corporation Agreement and Tariff, Business Practice Manuals (BPMs), and Operating Procedures, including the rules, protocols, procedures and standards attached thereto, as the same may be amended or modified from time-to-time and, to the extent subject to Federal Energy Regulatory Commission (“FERC”) approval, as approved by FERC.
- 1.4 “City’s Compliance Officer” has the meaning set forth in Section 4.08.020 of the San José Municipal Code.
- 1.5 “Flat” means all hours beginning 0 to HE 24, Monday through Sunday, including NERC holidays.
- 1.6 “HE” means hour ending.
- 1.7 “Inter-SC Trade” or “IST” has the meaning set forth in the CAISO Tariff.
- 1.8 “MW” means megawatt.
- 1.9 “MWh” means megawatt-hour.
- 1.10 “Off-Peak” means HE 01-06, 23-24 PPT Mon-Sat, HE 01-24 Sun and NERC Holidays.
- 1.11 “On-Peak” means HE 07-22 PPT Mon-Sat, exc. NERC Holidays.

- 1.12 “San José Clean Energy” is the City of San José’s community choice aggregation program. The San José Community Energy Department administers and manages San José Clean Energy.

## ARTICLE 2

### ADDITIONAL WSPP AGREEMENT AMENDMENTS; GENERAL PROVISIONS

- 2.1 **Governing Law:** This Agreement and the rights and duties of the Parties hereunder shall be governed by and construed, enforced and performed in accordance with the laws of the state of California, without regard to principles of conflicts of law.
- 2.2 **Creditworthiness:** Notwithstanding any other provision of the Agreement, Section 27 of the WSPP Agreement is not applicable to and credit support is not required for either Party under this Confirmation.
- 2.3 **Confidentiality:** The Parties acknowledge and agree that the Agreement is subject to the requirements of the California Public Records Act (Government Code Section 6250 et seq.). Each Party (a “Receiving Party”) acknowledges that the other Party (a “Disclosing Party”) may submit information to the Receiving Party that the Disclosing Party considers confidential, proprietary, or trade secret information pursuant to the Uniform Trade Secrets Act (Cal. Civ. Code section 3426 et seq.), or otherwise protected from disclosure pursuant to an exemption to the California Public Records Act (Government Code Sections 6254 and 6255). In order to designate information as confidential, the Disclosing Party must clearly stamp and identify the specific portion of the material designated with the word “Confidential”. The Parties agree not to over-designate material as confidential. Over-designation would include stamping whole agreements, entire pages or series of pages as confidential that clearly contain information that is not confidential. Upon request or demand of any third person or entity not a party to this Agreement (“Requestor”) for production, inspection and/or copying of information designated by a Party as confidential information (such designated information, the “Confidential Information”), the Receiving Party shall notify the Disclosing Party as soon as practical that such request has been made. The Disclosing Party shall be solely responsible for taking whatever legal steps are necessary to protect information deemed by it to be Confidential Information and to prevent release of information to the Requestor by the Receiving Party. If the Disclosing Party takes no such action after receiving the foregoing notice from the Receiving Party, the Receiving Party shall be permitted to comply with the Requestor’s demand and is not required to defend against it.

If required by any law, statute, ordinance, a court, Governmental Authority or agency having jurisdiction over a Party, including the California Public Records Act, that Party may release Confidential Information, or a portion thereof, as required by the Applicable Law, statute, ordinance, decision, order or regulation. A Party may disclose Confidential Information to accountants in connection with audits. In the event a Party is required to release Confidential Information, such Party shall notify the other Party of the required disclosure, such that the other Party may attempt (if such Party so chooses), at its sole cost, to cause the recipient of the Confidential Information to treat such information in a confidential manner, and to prevent such information from being disclosed or otherwise

becoming part of the public domain. Parties acknowledge that Purchaser may be obligated to provide Confidential Information to the CPUC and CEC for regulatory compliance purposes, and Seller waives the prior notice requirement and authorizes such disclosures to the CPUC and CEC.

Except as provided in this *Confidentiality* section and the California Public Records Act, and subject to and without limiting Section R-7, neither Party shall publish, disclose, or otherwise divulge Confidential Information to any person at any time during or after the term of this Agreement, without the other Party's prior express written consent. Each Party shall permit knowledge of and access to Confidential Information only to those of its affiliates and to their respective attorneys, accountants, representatives, agents and employees who have a need to know such Confidential Information related to this Agreement.

#### **2.4 Designated Fund and Limited Obligations:**

- (a) Designated Fund. Purchaser is a municipal corporation and is precluded under the California State Constitution and applicable law from entering into obligations that financially bind future governing bodies, and, therefore, nothing in the Agreement shall constitute an obligation of future legislative bodies of the City to appropriate funds for purposes of the Agreement; provided, however, that (i) Purchaser has created and set aside a designated fund (the "Designated Fund") for payment of its obligations under the Agreement and (ii) subject to the requirements and limitations of applicable law and taking into account other available money specifically authorized by the San José City Council and allocated and appropriated to the San José Clean Energy's obligations, Purchaser agrees to establish San José Clean Energy rates and charges that are sufficient to maintain revenues in the Designated Fund necessary to pay its obligations under this Agreement and all of Purchaser's payment obligations under its other contracts for the purchase of energy for San José Clean Energy. Purchaser shall provide Seller with reasonable access to account balance information with respect to the San José Clean Energy Designated Fund during the Term.
- (b) Limited Obligations. Purchaser's payment obligations under the Agreement are special limited obligations of the Purchaser payable solely from the Designated Fund and are not a charge upon the revenues or general fund of the City of San José or upon any non- San José Clean Energy moneys or other property of the Community Energy Department or the City of San José.

#### **2.5 City of San José Standard Provisions:**

- (a) Nondiscrimination/Non-Preference. Seller shall not, and shall not cause or allow its subcontractors to, discriminate against or grant preferential treatment to any person on the basis of race, sex, color, age, religion, sexual orientation, actual or perceived gender identity, disability, ethnicity or national origin. This prohibition applies to recruiting, hiring, demotion, layoff, termination, compensation, fringe benefits, advancement, training, apprenticeship and other terms, conditions, or

privileges of employment, subcontracting and purchasing. Seller will inform all subcontractors of these obligations. This prohibition is subject to the following conditions: (i) the prohibition is not intended to preclude Seller from providing a reasonable accommodation to a person with a disability; (ii) the City's Compliance Officer may require Seller to file, and cause any Seller's subcontractor to file, reports demonstrating compliance with this section. Any such reports shall be filed in the form and at such times as the City's Compliance Officer designates. They shall contain such information, data and/or records as the City's Compliance Officer determines is needed to show compliance with this provision.

- (b) Conflict of Interest. Seller represents that it is familiar with the local and state conflict of interest laws, and agrees to comply with those laws in performing this Agreement. Seller certifies that, as of the Effective Date, it was unaware of any facts constituting a conflict of interest or creating an appearance of a conflict of interest. Seller shall avoid all conflicts of interest or appearances of conflicts of interest in performing this Agreement. Seller has the obligation of determining if the manner in which it performs any part of this Agreement results in a conflict of interest or an appearance of a conflict of interest, and shall immediately notify the Buyer in writing if it becomes aware of any facts giving rise to a conflict of interest or the appearance of a conflict of interest. Seller's violation of this subsection (b) is a material breach.
- (c) Environmentally Preferable Procurement Policy. Seller shall perform its obligations under this Agreement in conformance with San José City Council Policy 1-19, entitled "Prohibition of City Funding for Purchase of Single serving Bottled Water," and San José City Council Policy 4-6, entitled "Environmentally Preferable Procurement Policy," as those policies may be amended from time to time. The Parties acknowledge and agree that in no event shall a breach of this subsection (c) be a material breach of this Agreement or otherwise give rise to an Event of Default or entitle Buyer to terminate this Agreement.
- (d) Gifts Prohibited. Seller represents that it is familiar with Chapter 12.08 of the San José Municipal Code, which generally prohibits a City of San José officer or designated employee from accepting any gift. Seller shall not offer any City of San José officer or designated employee any gift prohibited by Chapter 12.08. Seller's violation of this subsection (d) is a material breach.
- (e) Disqualification of Former Employees. Seller represents that it is familiar with Chapter 12.10 of the San José Municipal Code, which generally prohibits a former City of San José officer and former designated employee from providing services to the City of San José connected with his/her former duties or official responsibilities. Seller shall not use either directly or indirectly any officer, employee or agent to perform any services if doing so would violate Chapter 12.10.

## **2.6 Other WSPP Agreement Changes:**

For this Transaction, the WSPP Agreement shall be amended as follows:

- (a) Section 22.1 is modified by inserting the following new text at the end thereof:
- “(f) the failure of the Defaulting Party to pay its debts generally as they become due or the Defaulting Party’s admission in a writing that is unable to generally pay its debts as they become due;
- (g) the institution, by the Defaulting Party, of a general assignment for the benefit of its creditors; or
- (h) the application for, consent to, or acquiescence to, by the Defaulting Party, the appointment of a receiver, custodian, trustee, liquidator, or similar official for all or a substantial portion of its assets.”
- (b) Section 22.2(b) is amended by inserting “and is continuing” after “Event of Default occurs” in the first line thereof and deleting the second sentence therein.
- (c) Section 22.3(c) is amended by deleting the third sentence thereof and replacing it with the following: “If the Non-Defaulting Party’s aggregate Gains exceed its aggregate Losses and Costs, if any, resulting from the termination of this Agreement or a Confirmation, the Termination Payment for all such Terminated Transactions shall be zero, notwithstanding any provision in this Section or Agreement to the contrary.”
- (d) In Section 22.3(e), delete the entire provision (including subsections) and replace it with the following: “[Intentionally omitted]”
- (e) In Section 22.3(f), delete the entire provision and replace it with the following:
- “If the Defaulting Party disagrees with the calculation of the Termination Payment and the Parties cannot otherwise resolve their differences, and provided that the Defaulting Party has paid the undisputed part of the Termination Payment to the Non-Defaulting Party as provided under Section 22.3(c), and that any amounts disputed by the Defaulting Party are disputed in good faith, then the Defaulting Party may submit the calculation issue to Dispute Resolution pursuant to Section 34.”
- (f) Section 28.1 is applicable and the Parties shall net monthly payments in accordance with Exhibit A of the WSPP. Both Parties intend for the netting provisions of Exhibit A to the WSPP Agreement to be effective on the Confirmation Effective Date.
- (g) Section 30.1 is amended by inserting “or requested” after the word “required” in Section 30.1(4) and by adding the following at the end of the first sentence: “; or (8) to the Party’s and such Party’s affiliates’ lenders, counsel, accountants, advisors and agents who have a need to know such information and have agreed to keep such terms confidential”.

- (h) Subsections 34.1 and 34.2 are deleted and replaced with the following:

“34.1 INFORMAL DISPUTE RESOLUTION

IN THE EVENT OF ANY DISPUTE ARISING UNDER THIS TRANSACTION, WITHIN TEN (10) DAYS FOLLOWING THE RECEIPT OF A WRITTEN NOTICE FROM EITHER PARTY IDENTIFYING SUCH DISPUTE, THE PARTIES SHALL MEET, NEGOTIATE AND ATTEMPT, IN GOOD FAITH, TO RESOLVE THE DISPUTE QUICKLY, INFORMALLY AND INEXPENSIVELY. IF THE PARTIES ARE UNABLE TO RESOLVE A DISPUTE ARISING HEREUNDER WITHIN THIRTY (30) DAYS AFTER RECEIPT OF SUCH NOTICE, THEN EITHER PARTY MAY SEEK ANY AND ALL REMEDIES AVAILABLE TO IT AT LAW OR IN EQUITY, SUBJECT TO THE LIMITATIONS SET FORTH IN THIS TRANSACTION.”

“34.2 EXCLUSIVE JURISDICTION

EACH PARTY SUBMITS TO THE EXCLUSIVE JURISDICTION OF THE STATE OR FEDERAL COURTS LOCATED IN THE COUNTY OF SANTA CLARA, CALIFORNIA FOR ANY ACTION OR PROCEEDING RELATING TO THIS AGREEMENT OR ANY TRANSACTION, AND EXPRESSLY WAIVES ANY OBJECTION IT MAY HAVE TO SUCH JURISDICTION OR THE CONVENIENCE OF SUCH FORUM.”

- (i) The phrase “arbitration or” is deleted from the first line of Section 34.4.
- (j) The following shall be inserted as a new Section 34.5:

“34.5 LIMITATION OF DAMAGES. EXCEPT AS OTHERWISE SPECIFIED IN ANY CONFIRMATION, FOR BREACH OF ANY PROVISION OF THIS CONFIRMATION AGREEMENT FOR WHICH AN EXPRESS REMEDY OR MEASURE OF DAMAGES IS PROVIDED, THE EXPRESS REMEDY OR MEASURE OF DAMAGES PROVIDED IS THE SOLE AND EXCLUSIVE REMEDY UNDER THIS AGREEMENT AND THE AGREEMENT FOR THE BREACH, LIABILITY FOR THE BREACH IS LIMITED AS SET FORTH IN THE PROVISION AND ALL OTHER REMEDIES FOR DAMAGES AT LAW OR IN EQUITY ARE WAIVED. EXCEPT AS OTHERWISE SPECIFIED IN ANY CONFIRMATION, IF NO EXPRESS REMEDY OR MEASURE OF DAMAGES IS PROVIDED IN THIS AGREEMENT FOR A PARTICULAR BREACH, LIABILITY FOR THE BREACH IS LIMITED TO DIRECT DAMAGES ONLY, THE DIRECT DAMAGES ARE THE SOLE AND EXCLUSIVE REMEDY UNDER THIS AGREEMENT FOR THE BREACH, AND ALL OTHER REMEDIES FOR DAMAGES AT LAW OR IN EQUITY ARE WAIVED. EXCEPT AS OTHERWISE SPECIFIED IN ANY CONFIRMATION, NEITHER PARTY IS LIABLE FOR ANY OTHER TYPE OF DAMAGE, INCLUDING INCIDENTAL, PUNITIVE, EXEMPLARY,

CONSEQUENTIAL, SPECIAL OR INDIRECT DAMAGES OF ANY NATURE (INCLUDING DAMAGES ASSOCIATED WITH LOST PROFITS, BUSINESS INTERRUPTION AND LOSS OF GOODWILL) ARISING AT ANY TIME, WHETHER IN TORT (INCLUDING THE SOLE OR CONTRIBUTORY NEGLIGENCE OF EITHER PARTY OR ANY RELATED PERSON), WARRANTY, STRICT LIABILITY, CONTRACT OR STATUTE, UNDER ANY INDEMNITY PROVISION, OR OTHERWISE.”

- (k) Section 37 is amended by inserting the following in the beginning of the section: “On the date of entering into this Confirmation,”.
- (l) Section 41 “Witness” shall become Section 42 and the following “Standard of Review” Section shall be substituted in its place:

“The Parties agree as follows:

From the date of entering into a Transaction under this Agreement and throughout the term of such Transaction, the Parties each warrant and covenant as follows:

- (i) Absent the agreement of all Parties to the proposed change, the standard of review for changes to any section of this Agreement (including all Transactions and/or Confirmations) specifying the rate(s) or other material economic terms and conditions agreed to by the Parties herein, whether proposed by a Party, a non-party or FERC acting sua sponte, shall be the “public interest” standard of review set forth in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (the “Mobile-Sierra” doctrine) and clarified in *Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1 of Snohomish* 554 U.S. 527 (2008) and *NRG Power Marketing LLC v. Maine Pub. Util. Comm’n*, 558 U.S. 165 (2010).
- (ii) The Parties, for themselves and their successors and assigns, (i) agree that this “public interest” standard shall apply to any proposed changes in any other documents, instruments or other agreements executed or entered into by the Parties in connection with this Agreement and (ii) hereby expressly and irrevocably waive any rights they can or may have to the application of any other standard of review, including the “just and reasonable” standard.”

**2.7 Counterparts:** This Confirmation may be signed in any number of counterparts with the same effect as if the signatures to the counterparts were upon a single instrument. Delivery of an executed signature page of this Confirmation by electronic mail transmission (including PDF) shall be the same as delivery of a manually executed signature page.

**2.8 Entire Agreement; No Oral Agreements Or Modifications:** This Confirmation sets forth the terms of the Transaction into which the Parties have entered and shall constitute the entire Agreement between the Parties relating to the contemplated purchase and sale of the Product. Notwithstanding any other provision of the Agreement, this Confirmation



may be entered into only by a Documentary Writing executed by both Parties, and no amendment or modification to this Confirmation shall be enforceable except through a Documentary Writing executed by both Parties.

*[Signatures appear on the following page.]*

**ACKNOWLEDGED AND AGREED TO AS OF THE EFFECTIVE DATE.**

**DIRECT ENERGY BUSINESS  
MARKETING, LLC**

**CITY OF SAN JOSÉ, A CALIFORNIA  
MUNICIPALITY**

By: *Darron Giron*  
Darron Giron (Nov 3, 2021 15:47 CDT)

Name: Darron Giron

Title: Senior Director, Product Control

By: *Lori Mitchell*  
Lori Mitchell (Nov 3, 2021 15:47 PDT)

Name: Lori Mitchell

Title: Director of Community Energy

**APPROVED AS TO FORM:**

By: *Luisa Elkins*

Name: Luisa Elkins

Title: Senior Deputy City Attorney

**EXHIBIT 1**

**HOURLY IST SHAPE (MW):**

**Hours Ending 13-22 every day including Sundays  
and holidays**

| Term      | Quantity Requested (MW) | Offer (MW): | Offer Price (\$/MWh) |
|-----------|-------------------------|-------------|----------------------|
| 2022-2023 |                         |             | \$                   |

# City of San José Contract/Agreement Transmittal Form

## Route Order

## Attached / Completed

## Electronically Signed

- TO:  City Attorney  
 City Manager  
 City Clerk **OR** Return to  
 Dept. (circle one)

- Insurance Certificates / Waivers  Electronically Signed: Yes  
 Business Tax Certificate  Audit Trail Attached (if applicable)  
 Contacted Clerk re: Form 700  Scanned Signature Authorization  
 Supplemental Memorandums (if applicable): Select One

Type of Document: New Contract

Type of Contract: Other

### REQUIRED INFORMATION FOR ALL CONTRACTS:

Existing GILES # 667247-000

Contractor: Direct Energy Business Marketing, LLC

Address: \_\_\_\_\_

Phone: \_\_\_\_\_

Email: \_\_\_\_\_

Contract Description: Contract ID: 21-112-23

Term Start Date: 10/12/2021 Term End Date: 12/31/2023 Extension: Select one

Method of Procurement: Select one RFB, RFP or RFQ No.: \_\_\_\_\_ Date Conducted: \_\_\_\_\_

Agenda Date (if applicable): \_\_\_\_\_ Agenda Item No.: \_\_\_\_\_

Resolution No.: \_\_\_\_\_ Ordinance No.: \_\_\_\_\_

Original Contract Amount: \_\_\_\_\_ Amount of Increase/Decrease: \_\_\_\_\_

Option #: \_\_\_ of \_\_\_ Option Amount: \_\_\_\_\_ NTE/Updated Contract Amount: \_\_\_\_\_

Fund/Appropriation: \_\_\_\_\_

Form 700 Required (Selection mandatory for processing): Select one Revenue Agreement: Select one

Tax Certificate No.: \_\_\_\_\_ Expiration Date: \_\_\_\_\_

Department: Community Energy

Department Contact: angela.sato-anderson@sanjoseca.go Customer (Finance Only): \_\_\_\_\_

Notes:

Department Director Signature: \_\_\_\_\_ Date

Office of the City Manager Signature: \_\_\_\_\_ Date

**Pricing information within this Contract is confidential and may not be subject to disclosure under the California Public Records Act, and has been redacted.**

**Unredacted versions of Power Supply Contracts and Energy Confirmations are with the Community Energy Department. For additional information, contact the Community Energy Department at:**

**For additional information, contact the Community Energy Department at:**

- Email: [Invoices@sanjosecleanenergy.org](mailto:Invoices@sanjosecleanenergy.org)
- Phone: (408) 535-4898