



BESS SERVICES AGREEMENT (USA)

This **Battery Energy Storage System (“BESS”) Services Agreement** (this “Agreement”) is entered into as of August 1, 2021 (the “Effective Date”) between Tesla and Buyer (each as defined below, together the “Parties”). This Agreement comprises (i) the Key Terms set out below (the “Key Terms”), and (ii) all exhibits and schedules referenced in the “Attachments” sections of the Key Terms.

<u>Key Terms</u>				
These Key Terms set out the scope of this Agreement and certain key terms. If the Parties select “none” in the row titled “System Guarantee”, the remainder of the applicable section can be deleted or left blank without affecting the validity of this Agreement.				
<u>Parties:</u>				
Tesla:	Tesla, Inc., a corporation organized under the laws of Delaware, whose registered office is at 3500 Deer Creek Road, Palo Alto, CA 94304.			
Buyer:	City of Santa Clara, dba Silicon Valley Power (“SVP”). The City of Santa Clara is a chartered California municipal corporation, and is the Local Regulatory Authority for its municipal electric utility, SVP. SVP is a municipal electric utility organized under the laws of the State of California whose registered office is at 1500 Warburton Avenue Santa Clara, CA 95050.			
<u>System:</u>				
System:	Energy storage system with the below nameplate minimum power and energy capacities, purchased by Buyer from Tesla (or its Affiliate) under the System Purchase Agreement.			
	Standard (Energy) Mode:			
	<table border="1" style="width: 100%;"> <tr> <td style="width: 50%;">Nameplate Minimum Power Capacity:</td> <td>2,560 kW</td> </tr> <tr> <td>Nameplate Minimum Energy Capacity:</td> <td>5,120 kWh</td> </tr> </table>	Nameplate Minimum Power Capacity:	2,560 kW	Nameplate Minimum Energy Capacity:
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Nameplate Minimum Energy Capacity:	5,120 kWh			
System Purchase Agreement:	200610 SVP SCU _ Megapack Project Sales and Purchase Agreement dated [•] between Tesla or its Affiliate and Buyer.			
Manufacturer’s Limited Warranty:	The Manufacturer’s Limited Warranty provided by Tesla or its Affiliate to Buyer under or in connection with the System Purchase Agreement. [Include this language if (1) Buyer is buying power and energy availability and (2) Manufacturer’s Limited Warranty attached to System Purchase Agreement covers energy capacity degradation: “, except that any warranties relating to the energy capacity retention of the System that are included in the Manufacturer’s Limited Warranty shall cease to apply on the Effective Date of this Agreement.”]			
System Location:	500 El Camino Real, Santa Clara, CA 95053 (Santa Clara University).			

Microgrid:	The System shall be integrated by Buyer into a microgrid being installed by Buyer at the System Location. For clarity, the System Purchase Agreement sets out the agreed configuration and specifications of the microgrid, and the Parties' respective responsibilities relating to the design, delivery of equipment for, and installation and commissioning of the Microgrid	
System Commissioning Date:	The date when Tesla has completed its commissioning activities in accordance with the System Purchase Agreement, as memorialized between the Parties in writing.	
<u>Agreement Term; Operating Year:</u>		
Agreement Term:	The period starting on the Effective Date and ending on the date that both the Preventative Maintenance Term and the System Guarantee Term, as applicable, have expired or been terminated early in accordance with this Agreement.	
Operating Year:	Each annual period starting on the System Commissioning Date (or an anniversary thereof) and ending on the day before the next anniversary of the System Commissioning Date.	
<u>Scope of Services:</u>		
<u>Preventative Maintenance Services:</u>		
Preventative Maintenance Services:	<u>Description:</u>	<u>Check one:</u>
	The preventative maintenance services described in <u>Exhibit A</u> .	X
Preventative Maintenance Term:	The Period starting on the System Commissioning Date and ending on the date falling 20 years after the System Commissioning Date, as extended by written agreement of the Parties.	
Preventative Maintenance Services Fee:	US\$181,480 paid upfront by Tesla as part of in-kind contribution.	
Invoice Timing:	Not Applicable	
<u>Services Change Order:</u>		
Services Change Order:	Any services (including corrective maintenance services) set out in a written services order signed by both Parties and referencing this Agreement.	
Services Change Order Fee and Invoice Timing:	The amount agreed in the applicable services order, to be invoiced by Tesla at the time agreed in the applicable services order (or if no time is agreed, following performance by Tesla of the relevant services).	
<u>System Guarantee:</u>		
System Guarantee Type:	None	
System Guarantee Term:	20 calendar years, starting from the System Commissioning Date	

System Guarantee Fee and Invoice Timing:	Invoice Timing:	Check one:	Amount:
	Lump Sum in Advance, invoiced at any time following the Effective Date:		N/A
	Annual Fee that is [included in][in addition to] Preventative Maintenance Services Fee. No separate invoice required:		N/A
Tesla Manuals:			
Tesla Manuals:	The versions of the following Tesla manuals for the applicable Tesla BESS that were published in the Tesla Partner Portal (https://partners.teslamotors.com) as of the Effective Date: (a) BESS Site Design Manual; (b) BESS Transportation and Storage Guidelines; (c) BESS Installation Manual; (d) BESS Operation and Maintenance Manual; (e) BESS Internal Commissioning Checklist; and (f) BESS Commissioning Protocol. Buyer has been provided with login details for the Tesla Partner Portal prior to execution of this Agreement.		
Payment Details:			
Buyer Invoice Address:	SVP_AP@santaclaraca.gov		
Payment Terms:	Net 30 days from the date of invoice.		
Notices:			
Tesla Notice Address:	3500 Deer Creek Road, Palo Alto, CA 94304, USA. Attn: General Counsel / Legal. Phone: +1.650.681.5000. Email: legal@tesla.com.		
Buyer Notice Address:	<p>All notices: City of Santa Clara/Silicon Valley Power Attn: Erica van Dyck & Eric Shum Phone: 408-615-6648 Email: manager@santaclaraca.gov & svpcontracts@santaclaraca.gov</p> <p>Notices regarding delivery of Megapack to delivery point and for SCU on-site preventative maintenance: Attn Santa Clara University Logistics Contact: John Veargason Phone: (408) 554-4747 Email: jveargason@scu.edu</p>		
NDA:			
NDA:	The Tesla Mutual Non-Disclosure Agreement dated July 17 th , 2018 between Tesla (or its Affiliate) and Buyer (or its Affiliate).		

Attachments:		
The attachments checked below are incorporated by reference into this Agreement. Attachments that are not checked below may be omitted from this Agreement without affecting its validity. In the event of any conflict between these Key Terms and any Exhibit or Schedule, the order of precedence shall be (i) these Key Terms, (ii) the Exhibits, in order of appearance and (iii) the Schedules, in order of appearance.		
Exhibit:	Description:	Check if included:
Exhibit A:	Preventative Maintenance Services	X
Exhibit B:	Labor Compliance Addendum	X
Schedule 1:	Standard Terms & Conditions	X
Schedule 2:	System Guarantee	
Special Terms:		
NONE		

EXECUTED by the Parties on the Effective Date.

<p>CITY OF SANTA CLARA</p> <p>_____</p> <p>(SIGNATURE)</p> <p>_____</p> <p>(PRINT NAME)</p> <p>_____</p> <p>(PRINT TITLE)</p>	<p>TESLA, INC.</p> <p>_____</p> <p>(SIGNATURE)</p> <p>_____</p> <p>(PRINT NAME)</p> <p>_____</p> <p>(PRINT TITLE)</p>
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Exhibit A
Preventative Maintenance Services

Tesla shall provide the following Preventative Maintenance Services, with the following frequency, during the Preventative Maintenance Term, in accordance with this Agreement and the applicable Tesla BESS Operation and Maintenance Manual. These Preventative Maintenance Services cover the System only, and not the remainder of any microgrid or power generating or conditioning facility of which the System forms part.

Frequency:	Preventative Maintenance Services:
<u>Annual Maintenance</u> : Once during each Operating Year in the Preventative Maintenance Term	Torque checks within the System, calibration checks, visual inspection (rodents, etc.)
	Harness inspection or replacement in kind if damaged (protective sleeve failure, rodents, etc.)
	Enclosure integrity – touch up paint and gasket inspection or replacement in kind if damaged
	Cabinet cleaning
	Cabinet ventilation system inspection – radiator area cleaning
	Coolant level check
	Battery and meter communications check
<u>10-Yearly Maintenance</u> : Once every ten (10) Operating Years in the Preventative Maintenance Term	BESS coolant refill
	BESS fan replacement
	BESS pump replacement
	BESS door gasket replacement

EXHIBIT B

LABOR COMPLIANCE ADDENDUM

This Agreement is subject to the requirements of California Labor Code section 1720 et seq. requiring the payment of prevailing wages, the training of apprentices, and compliance with other applicable requirements.

A. Prevailing Wage Requirements

1. Contractor shall be obligated to pay not less than the General Prevailing Wage Rate, which can be found at www.dir.ca.gov, which shall be available to any interested party upon request. Contractor is also required to have a copy of the applicable wage determination posted and/or available at each job site.
2. Specifically, contractors are reminded of the need for compliance with Labor Code Section 1774-1775 (the payment of prevailing wages and documentation of such), Section 1776 (the keeping and submission of accurate certified payrolls) and 1777.5 in the employment of apprentices on public works projects. Further, overtime must be paid for work in excess of 8 hours per day or 40 hours per week pursuant to Labor Code Section 1811-1813.
3. Special prevailing wage rates generally apply to work performed on weekends, holidays and for certain shift work. Depending on the location of the project and the amount of travel incurred by workers on the project, certain travel and subsistence payments may also be required. Contractors and subcontractors are on notice that information about such special rates, holidays, premium pay, shift work and travel and subsistence requirements can be found at www.dir.ca.gov.
4. Only bona fide apprentices actively enrolled in a California Division of Apprenticeship Standards approved program may be employed on the project as an apprentice and receive the applicable apprenticeship prevailing wage rates. Apprentices who are not properly supervised and employed in the appropriate ratio shall be paid the full journeyman wages for the classification of work performed.
5. As a condition to receiving progress payments, final payment and payment of retention on any and all projects on which the payment of prevailing wages is required, Contractor agrees to present to City, along with its request for payment, all applicable and necessary certified payrolls (for itself and all applicable subcontractors) for the time period covering such payment request. The term "certified payroll" shall include all required documentation to comply with the mandates set forth in Labor Code Section 1720 et seq, as well as any additional documentation requested by the City or its designee including, but not limited to: certified payroll, fringe benefit statements and backup documentation such as monthly benefit statements, employee timecards, copies of wage statements and cancelled checks, proof of training contributions (CAC2 if applicable), and apprenticeship forms such as DAS-140 and DAS-142.
6. In addition to submitting the certified payrolls and related documentation to City, Contractor and all subcontractors shall be required to submit certified payroll records and related documents electronically to the California Department of Industrial Relations. Failure to submit payrolls to the DIR when mandated by the project parameters shall also result in the withholding of progress, retention and/or final payment.
7. No contractor or subcontractor may be listed on a bid proposal for a public works project unless registered with the Department of Industrial Relations pursuant to Labor Code section 1725.5 [with limited exceptions from this requirement for bid purposes only under Labor Code section 1771.1(a)].
8. No contractor or subcontractor may be awarded a contract for public work on a public works project, unless registered with the Department of Industrial Relations pursuant to Labor Code section 1725.5. Contractors

MUST be a registered "public works contractor" with the DIR AT THE TIME OF BID. Where the prime contract is less than \$15,000 for maintenance work or less than \$25,000 for construction alternation, demolition or repair work, registration is not required.

9. All contractors/subcontractors and related construction services subject to prevailing wage, including but not limited to: trucking, surveying and inspection work must be registered with the Department of Industrial Relations as a "public works contractor". Those who fail to register and maintain their status as a public works contractor shall not be permitted to perform work on the project.
10. Should any contractor or subcontractors not be a registered public works contractor and perform work on the project, Contractor agrees to fully indemnify the City for any fines assessed by the California Department of Industrial Relations against the City for such violation, including all staff costs and attorney's fee relating to such fine.
11. This project is subject to compliance monitoring and enforcement by the Department of Industrial Relations.

B. Audit Rights

All records or documents required to be kept pursuant to this Agreement to verify compliance with this Addendum shall be made available for audit at no cost to City, at any time during regular business hours, upon written request by the City Attorney, City Auditor, City Manager, or a designated representative of any of these officers. Copies of such records or documents shall be provided to City for audit at City Hall when it is practical to do so. Otherwise, unless an alternative is mutually agreed upon, the records or documents shall be made available at Contractor's address indicated for receipt of notices in this Agreement.

C. Enforcement

1. City shall withhold any portion of a payment; including the entire payment amount, until certified payroll forms and related documentation are properly submitted, reviewed and found to be in full compliance. In the event that certified payroll forms do not comply with the requirements of Labor Code Section 1720 et seq., City may continue to hold sufficient funds to cover estimated wages and penalties under the Agreement.
2. Based on State funding sources, this project may be subject to special labor compliance requirements of Proposition 84.
3. The City is not obligated to make any payment due to Contractor until Contractor has performed all of its obligations under these provisions. This provision means that City can withhold all or part of a payment to Contractor until all required documentation is submitted. Any payment by the City despite Contractor's failure to fully perform its obligations under these provisions shall not be deemed to be a waiver of any other term or condition contained in this Agreement or a waiver of the right to withhold payment for any subsequent breach of this Addendum.
4. City or the California Department of Industrial Relations may impose penalties upon contractors and subcontractors for failure to comply with prevailing wage requirements. These penalties are up to \$200 per day per worker for each wage violation identified; \$100 per day per worker for failure to provide the required paperwork and documentation requested within a 10-day window; and \$25 per day per worker for any overtime violation.

Schedule 1
BESS Services Agreement - Standard Terms & Conditions

These standard terms conditions govern all services performed by Tesla under this Agreement. Depending on the elections made by Buyer and Tesla in the Key Terms, some sections do not apply, or only apply to a limited extent.

1. Services.
 - (a) Tesla shall perform the Preventative Maintenance Services and any Services Change Orders in accordance with this Schedule 1, the applicable Exhibit(s) and the Key Terms.
 - (b) The Preventative Maintenance Services, any Services Change Orders and (if applicable) any System Guarantee related services that Tesla elects to perform under Section 2 are collectively referred to in this Agreement as the "Services".
2. System Guarantee. If the Key Terms indicate that Tesla provides a System Guarantee, Tesla shall provide that System Guarantee in accordance with Schedule 2 and the Key Terms and may perform (at Tesla's own cost) any services that Tesla determines are required in order to ensure compliance with the System Guarantee. For clarity, Tesla is not responsible under the System Guarantee, Manufacturer's Limited Warranty or otherwise for any System underperformance resulting from improper installation or maintenance of the System by a person other than Tesla or its Affiliate or subcontractor, including in circumstances where such person received installation or maintenance training from Tesla.
3. Title. Title and risk of loss to all parts, materials or equipment installed by Tesla at the System during the performance of any Services shall transfer to Buyer when such parts, materials or equipment have been installed and the System (or the affected part of the System) has been commissioned (or re-commissioned). For clarity, Tesla shall have title and risk of loss to all parts that it removes from the System.
4. Subcontracting. Tesla may perform any (but not all) Services through subcontractors, but shall remain fully responsible for their performance and compliance with this Agreement. Any subcontractors performing Services shall have any licenses or other accreditations required by applicable law and shall either be covered by Tesla's insurance or maintain their own insurance coverage at least equal to the insurance coverage required of Tesla under Section 27. Tesla will be solely responsible for paying subcontractors and for managing and coordinating their work.
5. Price; Invoicing; Payment.
 - (a) As compensation for Tesla's performance of its obligations under this Agreement, Buyer shall pay to Tesla the applicable fee(s) referenced in the Key Terms. Tesla shall invoice Buyer for such amounts at the times set out in the Key Terms. Tesla shall send all invoices by electronic mail to the address of Buyer shown in the Key Terms.
 - (b) Buyer shall notify Tesla of any invoice dispute and provide substantiating documentation within twenty (20) days of Buyer's receipt of the disputed invoice. Notwithstanding any dispute, Buyer shall pay all undisputed amounts in accordance with the Payment Terms.
 - (c) Buyer shall pay interest on late payments at the lesser of the rate of 1.5% per month or the highest rate permissible under applicable law, calculated daily and compounded monthly. Buyer shall reimburse Tesla for all costs incurred in collecting any late payments, including attorneys' fees.
6. Taxes.
 - (a) All fees are exclusive of, and Buyer is solely responsible for, all taxes of any kind imposed by any governmental authority on any amounts payable by Buyer. For clarity, Tesla is responsible for any import

duties on equipment imported to the System Location by Tesla in connection with performance of the Services.

- (b) Where required by law, unless Buyer furnishes to Tesla lawful evidence of exemption, Tesla will invoice Buyer for the amount of any such tax and remit such amount to the applicable taxing authority.
- (c) If Buyer is required by law to deduct or withhold any amount of tax from a payment to Tesla, Buyer shall (i) promptly remit such amount to the applicable taxing authority and provide Tesla with a receipt for such remittance and (ii) increase the amount of its payment to Tesla by the amount necessary to ensure Tesla receives the full amount which it would have received if no deduction or withholding had been made.

7. Relationship to Manufacturer's Limited Warranty. If Buyer pays a fee to Tesla for Services Change Orders in connection with a System issue that is subsequently determined to be covered by the Manufacturer's Limited Warranty, Buyer shall be entitled to claim a refund of the fee from Tesla. Additionally, if Buyer is purchasing a System Guarantee, Tesla's obligations to repair or replace the System as set forth in (and subject to) the Manufacturer's Limited Warranty shall be extended for the System Guarantee Term, as more particularly described in this Agreement.
8. No Set-off Right. Any claim for money due or to become due from a Party under this Agreement shall not be subject to deduction or set-off by such Party against any amount due or to become due to such Party from the other Party or its Affiliates, whether relating to a claim under this Agreement or relating to any other transaction.
9. Access; Remote Monitoring. Buyer hereby grants the following rights to Tesla and its agents, employees and subcontractors, and agrees to ensure that such rights are not interfered with by any third party (including, without limitation, the owner or lessee of the System Location, if different from Buyer):
 - (a) Reasonable and timely access to the System for the performance of Services, provided that (i) Tesla complies with Buyer's reasonable onsite policies and procedures at the System Location; and (ii) Tesla gives Buyer prior notice in accordance with the next sentence. Tesla shall give Buyer at least 10 days prior notice (including by telephone) of its intention to access the System Location in connection with the performance of this Agreement, unless (1) liquidated damages are accruing, or reasonably expected by Tesla to start accruing, under any System Guarantee during such ten (10) day period, in which case Tesla shall only be required to give Buyer twenty-four (24) hours' prior notice (including by telephone) or (2) Tesla determines that it is urgently required to perform Services Change Orders, in which case Tesla shall only be required to make commercially reasonable efforts to give Buyer advance notice (including by telephone).
 - (b) The ability to (i) remotely monitor performance of the System, and (ii) provide remote firmware and software upgrades to the System. Buyer hereby consents to Tesla performing such remote monitoring and providing such firmware and software upgrades as Tesla reasonably deems appropriate, at any time and without further notice to or consent from Buyer. Buyer grants to Tesla an irrevocable, perpetual worldwide, royalty-free license to use of all data obtained via the remote monitoring of the System.
10. Standard of Performance. Tesla shall perform all Services in accordance with Prudent Industry Practices, the BESS Operation & Maintenance Manual published by Tesla or its Affiliate, this Agreement and the Manufacturer's Warranty. Tesla shall also perform any Services Change Orders in accordance with the applicable services order. "Prudent Industry Practices" means the methods approved by a significant portion of the electrical services industry operating in the System Location that, in the exercise of reasonable judgment in light of the facts known at the time a decision was made, would have been expected to accomplish the desired result in a manner consistent with applicable law, reliability, safety, environmental protection, economy and expedition. Prudent Industry Practices are not limited to optimum methods, but rather include a spectrum of reasonable and prudent methods that take the conditions specific to the System into account.

11. Services Warranty.

- (a) Tesla warrants that (i) it shall perform all Services in accordance with Prudent Industry Practices, the applicable Tesla Manuals, this Agreement and the Manufacturer's Limited Warranty and (ii) any labor performed, and any materials installed, in the performance of the Services shall be free from defects in design and workmanship for twelve (12) months after such labor was performed or such materials were installed (collectively, the "Services Warranty").
- (b) Tesla shall remedy any defect or otherwise cure a breach of the Services Warranty, at its own cost and expense, as promptly as reasonably practicable after Buyer notifies Tesla in writing of such breach, in a manner and at such times that reasonably minimizes interruption of the operation of the System and revenue loss to Buyer. This shall be Tesla's sole and exclusive liability, and Buyer's sole and exclusive remedy, in connection with a breach of the Services Warranty.
- (c) EXCEPT AS PROVIDED FOR IN THIS AGREEMENT, TESLA MAKES NO WARRANTIES OR GUARANTEES WITH RESPECT TO THE SERVICES AND DISCLAIMS ANY WARRANTY OR GUARANTEE IMPLIED BY APPLICABLE LAWS, INCLUDING IMPLIED WARRANTIES OF PERFORMANCE, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE AND IMPLIED WARRANTIES OF CUSTOM OR USAGE.

12. Buyer Termination.

- (a) Buyer may terminate this Agreement (or the Preventative Maintenance Term or System Guarantee Term) for convenience by providing at least thirty (30) days' prior written notice to Tesla.
- (b) Buyer may terminate this Agreement by written notice to Tesla if (a) Tesla has breached any material provision of this Agreement and the breach is not cured within thirty (30) days after Tesla's receipt of written notice thereof from Buyer; or (b) Tesla becomes insolvent, files a petition for bankruptcy or commences or has commenced against it proceedings relating to bankruptcy, receivership, reorganization or assignment for the benefit of creditors (each, an "Insolvency Event").

13. Tesla Termination. Tesla may terminate this Agreement by written notice to Buyer if (a) Buyer fails to pay any undisputed amount when due under this Agreement and the failure is not cured within ten (10) days after Buyer's receipt of written notice thereof from Tesla; (b) Buyer has breached any material provision of this Agreement and the breach is not cured within thirty (30) days after Buyer's receipt of written notice thereof from Tesla; or (c) an Insolvency Event occurs with respect to Buyer. Tesla may also terminate the System Guarantee in the circumstances described in Schedule 2.

14. Effect of Termination.

- (a) If Buyer terminates this Agreement in accordance with Section 12(a), Buyer shall pay for any Services performed by Tesla in accordance with this Agreement prior to termination. Additionally, if the Key Terms indicate that Tesla is providing a System Guarantee, Buyer shall also pay any termination fees described in Schedule 2.
- (b) Upon any termination pursuant to Section 12(b) or Section 13, the terminating Party shall have the right to pursue any and all remedies available to it at law or in equity. Buyer shall pay for any Services performed by Tesla in accordance with this Agreement prior to termination. Each Party shall use reasonable efforts to mitigate its damages in connection with any such termination.
- (c) For purposes of the Manufacturer's Limited Warranty, if Buyer terminates the System Guarantee, Tesla's obligations with respect to energy capacity shall revert back to the original Manufacturer's Limited Warranty provided in the System Purchase Agreement to the extent such original warranty is then still in effect.

15. Confidentiality; Publicity.

- (a) The NDA is incorporated by reference into this Agreement and sets out the Parties' confidentiality obligations under this Agreement. The terms and conditions of the NDA will continue in force throughout the Agreement Term and for three (3) years following its expiration or early termination. The terms and conditions of this Agreement shall be both Parties' Confidential Information for purposes of the NDA.
- (b) Neither Party shall advertise or issue any public announcement regarding the execution of this Agreement or its contents, or use the other Party's mark, name or logo in any marketing literature, web sites, articles, press releases (including interviews with representatives of media organizations of any form), or any other document or electronic communication, without the prior written consent of the other Party. The foregoing shall not prohibit a Party from making any public disclosure or filing that it determines in good faith is required by law or the rules of the stock exchange on which its shares, or the shares of its parent company, are listed.

16. Proprietary Rights. As between the Parties, Tesla shall remain the sole and exclusive owner of any and all patents, trademarks, copyrights, mask work rights, trade secrets and any other intellectual or proprietary rights ("Proprietary Rights") associated with the Services or any components or software installed in the System during performance of the Services, or any parts or derivations thereof. Tesla hereby grants to Buyer a limited, non-exclusive, non-sublicensable, non-transferable (other than where Tesla sells the System in accordance with the System Purchase Agreement) license to use (a) any embedded software (ie. firmware) and (b) the Tesla Manuals referenced in the Key Terms of this Agreement, each solely in the operation of the System. Except for the foregoing, no license or other right to Tesla's Proprietary Rights is granted or implied hereby. The licenses granted under this Section 16 only relate to the software and Tesla Manuals as final forms of same are provided by Tesla to Buyer or are accessed by Buyer, as applicable.

17. Limitations of Liability.

- (a) NEITHER PARTY SHALL BE LIABLE FOR ANY CONSEQUENTIAL, INDIRECT, INCIDENTAL, SPECIAL, EXEMPLARY OR PUNITIVE DAMAGES ARISING OUT OF OR RELATING TO ANY BREACH OF THIS AGREEMENT, WHETHER OR NOT THE POSSIBILITY OF SUCH DAMAGES HAS BEEN DISCLOSED IN ADVANCE OR COULD HAVE BEEN REASONABLY FORESEEN AND REGARDLESS OF THE LEGAL OR EQUITABLE THEORY (CONTRACT, TORT OR OTHERWISE) UPON WHICH THE CLAIM IS BASED.
- (b) NEITHER PARTY'S AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT, WHETHER IN CONTRACT, TORT (INCLUDING NEGLIGENCE) OR OTHERWISE, SHALL EXCEED THE HIGHER OF (1) THE AGGREGATE AMOUNT PAID OR PAYABLE BY BUYER FOR SERVICES PERFORMED DURING THE CALENDAR YEAR PRIOR TO THE DATE THAT THE CLAIM AROSE (WHICH IN THE CASE THAT BUYER IS PURCHASING A SYSTEM GUARANTEE AND ELECTING A LUMP SUM PAYMENT, SHALL INCLUDE THE PRO RATA PORTION OF THE LUMP SUM PAYMENT APPLICABLE TO THE OPERATING YEAR); OR (2) USD 50,000.
- (c) THE LIMITATIONS OF LIABILITY SET OUT IN THIS SECTION 17 SHALL NOT APPLY TO: (1) BUYER'S OBLIGATION TO MAKE PAYMENTS FOR SERVICES PERFORMED OR GUARANTEES PROVIDED UNDER THIS AGREEMENT; (2) EITHER PARTY'S OBLIGATION TO PAY ANY LIQUIDATED DAMAGES UNDER THIS AGREEMENT; (3) DAMAGES ATTRIBUTABLE TO EITHER PARTY'S BREACH OF ITS CONFIDENTIALITY OBLIGATIONS; (4) ANY VIOLATION OF A PARTY'S INTELLECTUAL PROPERTY RIGHTS; (5) CLAIMS THAT ARE THE SUBJECT OF INDEMNIFICATION UNDER THIS AGREEMENT; (6) DAMAGES ATTRIBUTABLE TO A PARTY'S INTENTIONAL TORTS OR UNLAWFUL CONDUCT OR WILFUL MISCONDUCT; OR (7) ACTS OR OMISSIONS FOR WHICH LIABILITY CANNOT BE DISCLAIMED OR LIMITED UNDER APPLICABLE LAW.

18. General Indemnity. Each Party shall defend, indemnify and hold harmless the other Party, its Affiliates, and their respective directors, officers, partners, members, shareholders, agents, employees, subcontractors, successors and assigns (collectively, "Representatives") from and against any losses, damages, liabilities, deficiencies, actions,

judgments, interest, awards, penalties, fines, costs or expenses of whatever kind, including reasonable legal fees (collectively, "Losses") arising from (a) any claim, action, suit, proceedings, demand, investigation or assessment made or brought by any third party (excluding any of the foregoing brought by shareholders or employees of the indemnified Party) (collectively, "Claims") alleging injury or death of persons, or damage to or loss of property, to the extent caused by or arising from the negligent acts or omissions or acts of willful misconduct of the indemnifying Party or its Representatives in connection with the performance of this Agreement; or (b) any failure by the indemnifying Party or its Representatives to comply with applicable laws.

19. Environmental Indemnity.

- (a) Tesla shall defend, indemnify, and hold harmless Buyer and Buyer's Representatives from and against all Claims arising out of or relating to any violations of any environmental laws by Tesla, including the release at, on, above, below or near the Installation Location in connection with the performance of this Agreement, of any hazardous materials to the extent such violation or release relates to (i) pre-existing hazardous materials or hazardous materials brought to the Installation Location by Buyer or anyone for whom Buyer is legally responsible (other than Tesla or its subcontractors), in either case whose presence and location were previously made known to Tesla by Buyer and that were negligently released on the Installation Location by Tesla or its subcontractor, or (ii) hazardous materials brought to the Installation Location by Tesla or its subcontractor that are released by Tesla or its subcontractors.
- (b) Buyer shall defend, indemnify, and hold harmless Tesla and its Representatives from and against any and all Claims made against any Tesla and its Representatives in connection with or arising from (i) pre-existing environmental conditions, including pre-existing hazardous materials, on the Installation Location, (ii) any releases of hazardous materials other than those for which Tesla is responsible under this Agreement, and (iii) any violations of any permits or environmental laws by Buyer or end user.

20. IP Indemnity.

- (a) Tesla shall indemnify, defend and hold harmless Buyer and its Representatives from any Losses arising out of any Claim alleging that any Services performed under this Agreement, or any component or software incorporated in the System by Tesla during performance of the Services, infringes the intellectual property rights of any third party. However, Tesla shall have no obligation to indemnify Buyer or any Representative to the extent such Claim arises out of: (i) use of the System in combination with products, materials or equipment not expressly authorized by Tesla in circumstances where the infringement would have been avoided by the use of the System not so combined; or (ii) any modifications or changes made to the System other than by Tesla in circumstances where the infringement would have been avoided without such modifications or changes. If any Claim for infringement or alleged infringement of any intellectual property rights is made, Tesla may, at its own expense, (x) modify any or all of the intellectual property rights so as to avoid the infringement or the alleged infringement; or (y) take such other action as Tesla deems reasonable to avoid or settle such Claim in accordance with Section 21, and this shall be the sole and exclusive remedy available to Buyer in respect of such Claim.
- (b) Buyer shall indemnify, defend and hold harmless Tesla and its Representatives from any Losses arising out of any Claim alleging (i) any Buyer modification (directly or indirectly), use or reuse of the licensed materials other than as permitted under Section 16, (ii) use of the System in combination with any other products, materials or equipment not expressly authorized in writing by Tesla in circumstances where the infringement would have been avoided by the use of the System not so combined; or (iii) any modifications or changes made to the System other than by Tesla in circumstances where the infringement would have been avoided without such modifications or changes.

21. Indemnification Procedures. The indemnified Party will give the indemnifying Party prompt written notice of any claim for which indemnification is sought under Section 18, 19 or 20. Failure to give prompt notice will not diminish the indemnifying Party's obligations under this Section 21 to the extent such failure does not materially prejudice

the indemnifying Party's ability to defend the claim. The indemnifying Party shall control the defense of the claim, and the indemnified Party may participate in the defense at its own expense with counsel of its choice. The indemnified Party shall make available information and assistance as the indemnifying Party may reasonably request, at the indemnifying Party's expense. The indemnifying Party may not, without the prior written consent of the indemnified Party, consent to any judgment or settlement that (a) provides for injunctive or other non-monetary relief affecting the indemnified Party or its Representatives, (b) does not provide for an unconditional and full release of the indemnified Party and its Representatives, (c) diminishes any rights of the indemnified Party under this Agreement, or (d) results in additional fees or charges to the indemnified Party. If the indemnifying Party, within a reasonable time after receipt of a request for indemnification, fails to take reasonable steps to defend indemnified Party or its Representative against a claim, the indemnified Party may undertake the defense of such claim without waiving its rights and remedies under this Agreement.

22. General Compliance with Laws; Approvals. Each Party shall comply with all laws applicable to the performance of this Agreement. Buyer shall obtain all approvals, certifications, licenses and permits required by any applicable law or governmental authority (collectively, "Approvals") in connection with the use of the System. Tesla shall obtain all Approvals with respect to the performance of its obligations under this Agreement.
23. Anti-Bribery Laws. Each Party shall comply with all national or international anti-bribery laws applicable to it, including without limitation the Foreign Corrupt Practices Act of 1977 (the "FCPA") and shall, at all times during the Agreement Term, remain in compliance and maintain appropriate policies and procedures to ensure ongoing compliance with all such laws. As of the Effective Date, (a) neither Party has any employees who are foreign officials as defined under the FCPA, and (b) no foreign official as defined under the FCPA has any legal or beneficial interest in a Party (or, if a Party or its direct or indirect parent company is a publicly listed company, a more than 5% legal or beneficial interest in such Party). Each Party shall promptly notify the other Party in writing in the event any of the foregoing representations would be untrue if made by Buyer at any time during the Agreement Term. Each Party acknowledges that any violation of this Section 23 constitutes just cause for immediate termination of this Agreement by the other Party.
24. Governing Law; Dispute Resolution. This Agreement is governed by the laws of California. Any dispute arising from or relating to this Agreement shall first be promptly referred to the Parties' senior level management for resolution. In the event they are unable to resolve any such dispute within twenty (20) days after referral, either Party may take such dispute to binding arbitration in accordance with the then-current Streamlined Arbitration Rules of the Judicial Arbitration and Mediation Services ("JAMS"). The existence, content and result of the arbitration shall be held in confidence by the Parties, their representatives, any other participants and the arbitrator. The arbitration will be conducted by a single arbitrator selected by agreement of the Parties or, failing such agreement, appointed in accordance with the JAMS rules. The arbitration shall be conducted in English and in Santa Clara, California. Each Party will bear its own expenses in the arbitration and will share equally the costs of the arbitration; provided, however, that the arbitrator may, in its discretion, award reasonable costs and fees to the prevailing Party. Judgment upon the award rendered in the arbitration may be entered in any court of competent jurisdiction. In the event that any dispute in arbitration under this Agreement is substantially the same or involves common issues of law or fact (which may include, but not by way of limitation, matters involving other agreements related to the System), either Party shall be entitled to require that any such dispute be consolidated with the relevant arbitration pursuant hereto, and the other Party shall permit, and reasonably co-operate with the other parties in, such consolidation. Notwithstanding the foregoing, each Party will have the right to apply at any time to a judicial authority for appropriate injunctive relief in connection with a breach by the other Party of its obligations in Section 15 or Section 16, and by doing so will not be deemed to have breached its agreement to arbitrate or to have impaired the powers reserved to the arbitrator.
25. Cumulative Remedies. Unless stated to the contrary, all rights and remedies provided under this Agreement are cumulative and not exclusive, and the exercise by either Party of any right or remedy does not preclude the exercise of any other rights or remedies that may now or subsequently be available at law, in equity, by statute, in any other agreement between the Parties or otherwise.

26. Force Majeure. Neither Party shall be liable to the other Party, nor be deemed to have breached this Agreement, for any failure or delay in performing any non-monetary obligation under this Agreement if and to the extent such failure or delay is caused by or results from acts or circumstances beyond the reasonable control of such Party, including, without limitation, acts of God, flood, fire, earthquake, extreme weather, explosion, pandemics, governmental actions, war, terrorist threats or acts or other civil unrest, lock-outs, strikes or other labor disputes, restraints or delays affecting carriers or the inability or delay in obtaining supplies of adequate or suitable materials (each a "Force Majeure Event").
27. Insurance. Each Party shall maintain, at its sole cost and expense, the following insurance coverage and shall, upon the other Party's request, furnish to the other Party a certificate evidencing such coverage: (a) commercial general liability ("CGL") insurance including all operations by or on behalf of such Party against claims for bodily injury, property damage and personal injury with minimum limits of USD 1,000,000 each occurrence (combined single limit bodily injury and property damage) and USD 2,000,000 general aggregate; and (b) umbrella/excess liability insurance on occurrence form in excess of the CGL insurance requirements with minimum limits of USD 5,000,000 per occurrence and USD 5,000,000 aggregate. Each Party shall include the other Party as an additional insured on the CGL policy with respect to liability arising out of the Agreement. Each of the insurance policies noted above shall be issued by companies with a rating of A-/VII or better in the current Best's Insurance Reports published by A. M. Best Company, Inc. The CGL policy carried by each Party shall (i) include a waiver of subrogation in favor of the other Party; and (ii) be primary and non-contributory over any insurance carried by the other Party.
28. Entire Agreement; Severability. This Agreement will be deemed to have been written by both Parties, constitutes the entire agreement between the Parties regarding its subject matter and supersedes all prior agreements, representations and understandings, oral or written, between the Parties regarding its subject matter. If any provision of this Agreement is held by a court of competent jurisdiction to be illegal or unenforceable, such provision shall be interpreted so as to best accomplish the objectives of the original provision and the remaining provisions of this Agreement shall remain in full force and effect.
29. Amendment; Modification; Waiver. No amendment or modification of this Agreement is effective unless it is in writing and signed by each Party. No waiver by either Party of any provision of this Agreement is effective unless set forth in writing and signed by such Party. No failure to exercise, or delay in exercising, any right or remedy arising from this Agreement operates as a waiver thereof. No single or partial exercise of any right or remedy hereunder precludes any other or further exercise of that right or remedy or the exercise of any other right or remedy.
30. Assignment.
- (a) Subject to Section 30(b), neither Party may assign its rights or obligations under this Agreement without the prior written consent of the other Party. Any purported assignment or delegation in violation of this Section 30(a) is null and void. This Agreement shall be binding upon and inure to the benefit of and be enforceable by the respective successors and permitted assigns of the Parties.
 - (b) Each Party may (i) assign this Agreement to a successor in interest following a merger, acquisition or corporate reorganization (provided, that in the case of Buyer as assignor such assignee shall not be a direct or indirect competitor of Tesla with respect to the provision of battery energy storage equipment or maintenance services), and (ii) without the other Party's consent, collaterally assign this Agreement as security to or as part of any factoring arrangement with any financing party; provided, however, that no assignment of this Agreement pursuant to the foregoing subsection (ii) shall release the assignor from its obligations and liabilities under this Agreement. A permitted assignee under this Section 30(b)(ii) shall be bound by the obligations of this Agreement upon consummation of a foreclosure of its security interest and shall, upon the other Party's request, deliver a written assumption of assignor's rights and obligations under this Agreement to the other Party.

31. Relationship of the Parties. The Parties are independent contractors. Nothing contained in this Agreement shall be construed as creating any agency, partnership, joint venture or other form of joint enterprise, employment or fiduciary relationship between the Parties. Neither Party shall have authority to contract for or bind the other Party in any manner whatsoever.
32. No Third-Party Beneficiaries. This Agreement is for the sole benefit of the Parties and their respective successors and permitted assigns. Nothing herein is intended to or shall confer upon any other person or entity any legal or equitable right, benefit or remedy of any nature whatsoever under or by reason of this Agreement. Claims by non-parties indemnified pursuant to this Agreement may only be brought by a party to this Agreement.
33. Notices. If a provision of this Agreement expressly contemplates notification by telephone, the relevant notification may be made by telephone (including recorded message) to the telephone number set out in the Key Terms. All other notices under this Agreement shall be in writing and shall be deemed given (a) if sent by courier, on the date when left at the address of the recipient if such date is a Business Day or on the next Business Day if such date is not a Business Day and (b) if sent by email, upon receipt by the sender of an email confirming receipt of the notice by the recipient (in which case the email will be deemed received on the date it was actually received if such date is a Business Day, or on the next Business Day if such date is not a Business Day). An automatic "read receipt" shall not constitute confirmation of receipt for purposes of this Section 33. In each case, notices shall be sent to the Notice Address given for Tesla and Buyer in the Key Terms, or such other address as either Party may notify the other Party in writing from time to time. Nothing in this Section 33 shall be construed to restrict the transmission of routine communications between representatives of Buyer and Tesla.
34. Survival. Provisions of this Agreement which by their nature contemplate or govern performance or observance subsequent to the termination or expiration of this Agreement shall survive such termination or expiration; provided, that all warranties and licenses granted by Tesla to Buyer pursuant to this Agreement shall terminate upon Tesla's termination for Buyer's default based on Buyer's failure to pay Tesla in accordance with this Agreement.
35. Counterparts. This Agreement may be signed in duplicate originals, or in separate counterparts, which are effective as if the Parties signed a single original. A .pdf of an original signature or electronically signed version transmitted to the other Party is effective as if the original was sent to the other Party.
36. Representations.
- (a) Each Party represents and warrants to the other Party that (i) it is a legal entity, duly organized and in good standing under the laws of its jurisdiction of incorporation; (ii) this Agreement constitutes a legal, valid and binding obligation of such Party enforceable in accordance with its terms; (iii) the execution, delivery and performance of this Agreement (A) is within its powers, (B) has been duly authorized by all requisite action and (C) will not violate any agreement, commitment, certificate or other document to which it is a party or by which any of its assets may be bound or affected.
 - (b) Buyer further represents and warrants to Tesla that: (i) all financial information that it has provided to Tesla is true and accurate and fairly represents Buyer's financial position as at the date it was provided and (ii) it has all rights and consents required for Tesla to remotely monitor performance of the System.
37. Certain Defined Terms. For purposes of this Agreement, (a) "Affiliate" means, with respect to a Party, an entity that controls, is controlled by or is under common control with such Party; (b) "control" means possessing, directly or indirectly, the power to direct or cause the direction of the management, policies or operations of an entity, whether through ownership of voting securities, by contract or otherwise; and (c) "Business Day" means any day other than weekends and days when banks are not generally open for business in San Francisco, California and the System Location. Capitalized terms that are used but not defined in this Agreement shall have the meaning given to them in the System Purchase Agreement.

Schedule 2
System Guarantee (Power Availability)

1. System Guarantee. Tesla guarantees to Buyer that the Annual Availability Percentage of the System will equal or exceed the Guaranteed Annual Availability Percentage during each Operating Year in the System Guarantee Term.
2. Key Terms. "System Guarantee Term", "System Guarantee Fee", "Operating Year", and "System Location" are defined in the Key Terms. "Specifications" means the System specifications attached to the System Purchase Agreement. The following terms have the following meanings:

Guaranteed Annual Availability Percentage:	[•]%
Point of Guarantee:	AC terminals of the inverter.
Availability LD Amount:	\$(•) per percentage point shortfall.
Annual Availability LD Cap:	\$(•).
Aggregate Availability LD Cap:	\$(•).

3. Calculation of Effective Availability. The "Annual Availability Percentage" of the System for an Operating Year is calculated using the below formula:

$$\text{Annual Availability Percentage} = \frac{1}{8760} * \sum_{h=1}^{8760} \text{Availability percentage}(h)$$

where the following terms have the following meanings:

Availability Percentage (h) = For any Hour (h), the availability percentage is calculated using the following formula. However, if Available Power is less than Nameplate Power Capacity in any Hour due, in whole or in part, to an Excuse Event, then the Availability Percentage shall be deemed to be 100% for that Hour:

$$\text{Availability percentage}(h) = \frac{\text{Available Power}(h)}{\text{Nameplate Power Capacity}}$$

Hour = The consecutive sixty minute period commencing on the hour, every hour, using local time at the System Location.

Available Power (h) = For any Hour (h), the higher of the actual average charge and discharge power capacities (in kW, in absolute values) of the System during that Hour, as reported by the System's Site Controller.

Nameplate Power Capacity = For any Hour (h), if the System is in *Peak Power Mode* for the entirety of that Hour, *Guaranteed Power* is the Nameplate Minimum Power Capacity of the System (in kW) for *Peak Power Mode*. Otherwise, *Guaranteed Power* is the Nameplate Minimum Power Capacity of the System (in kW) for *Standard (Energy) Mode*.

4. Excuse Event. An “Excuse Event” means any event outside of the reasonable control of Tesla, including without limitation the following: (a) Damage to the System that occurred during shipping or transportation (other than shipping or transportation by or on behalf of Tesla); (b) Operation of the System in violation of the Specifications or the applicable Tesla Manual by anyone other than Tesla or its affiliate or subcontractor, including without limitation (i) use of the System outside the “Operating Temperature” range set out in the Specifications or (ii) operation of the System without pre-heating in accordance with Section 2.3.1 of the Specifications in environmental conditions in which, according to that section, failure to pre-heat will reduce the capabilities of the System; (c) Vandalism, negligence or any attempt to extend or reduce the life of the System or prevent or hinder the recovery of data regarding System usage, in each case by anyone other than Tesla, its affiliates or subcontractors; (d) Any breach by Buyer of this Agreement or any Force Majeure Event (including any Force Majeure Event that prevents Tesla from inspecting, testing, maintaining or repairing the System); (e) underperformance resulting from improper installation or maintenance of the System by a person other than Tesla or its Affiliate or subcontractor, including in circumstances where such person received installation or maintenance training from Tesla (f) any downtime during Tesla’s performance of any Services contemplated by this Agreement or any warranty work; and (g) if the System forms part of or is connected to a larger microgrid or other power generating or conditioning facility, any defect or malfunction of any such other equipment.

5. Availability Liquidated Damages.

(a) If the Annual Availability Percentage is less than the Guaranteed Annual Availability Percentage in any Operating Year, then Tesla shall pay to Buyer liquidated damages calculated in accordance with the below formula.

$$MAX[0, (GAAP - AAP)] * Y$$

where the following terms have the following meanings:

GAAP = Guaranteed Annual Availability Percentage.

AAP = Annual Availability Percentage.

Y = Availability LD Amount.

(b) Tesla’s liability for these liquidated damages shall be capped at (i) the Annual Availability LD Cap, in any Operating Year; and (ii) the Aggregate LD Cap, in aggregate.

(c) These liquidated damages have been agreed to by the Parties because the actual damages arising in these circumstances are difficult to predict. They represent a reasonable pre-estimate of the damages that Buyer would incur, and do not constitute a penalty. Payment of these liquidated damages shall be Tesla’s exclusive liability and Buyer’s exclusive remedy for any losses incurred by Buyer as a result of the System failing to meet the System Guarantee or otherwise failing to perform as expected. However, they are cumulative to any rights of Buyer to require Tesla to repair or replace the System, or pay “Energy Shortfall Damages”, under the Manufacturer’s Limited Warranty.

6. Termination Events. Tesla may terminate this System Guarantee by written notice to Buyer if: (a) the System is installed, commissioned, maintained, modified or repaired by anyone other than Tesla, its affiliate or a Tesla approved technician; (b) the System is removed and reinstalled at a different location without the written consent of Tesla; or (c) anyone other than Tesla or its affiliate or subcontractor (i) designs the System in contravention of the BESS Site Design Manual or installs the System in contravention of the BESS Installation Manual, (ii) stores or transports the System in contravention of the BESS Transportation and Storage Guidelines or in violation of the “Storage Conditions (on the shelf)” set out in the “Environmental Specifications” section of the Specifications; or (iii) attempts to extend or reduce the life of the System or prevent or hinder the recovery of data regarding System usage.

Schedule 2
System Guarantee (Power and Energy Availability)

1. System Guarantee. Tesla guarantees to Buyer that the Annual Availability Percentage of the System will equal or exceed the Guaranteed Annual Availability Percentage during each Operating Year in the System Guarantee Term.
2. Key Terms. “System Guarantee Term”, “System Guarantee Fee”, “Operating Year” and “System Location” are defined in the Key Terms. “Specifications” means the System specifications attached to the System Purchase Agreement. The following terms have the following meanings:

Guaranteed Annual Availability Percentage:	[•] %.	
Point of Measurement:	[•].	
Point of Guarantee:	AC terminals of the inverter.	
Loss Adjustment Factor:	[•].	
Actual Annual Throughput:	For any Operating Year in the System Guarantee Term, the aggregate discharge throughput of the System in that Operating Year, measured at the Point of Guarantee in kWh.	
Paid-up Annual Throughput:	[•] kWh (calculated as number of annual cycles that the System is sized for * kWh capacity of the System).	
Annual Throughput Cap:	[•] kWh (calculated as 365 * kWh capacity of the System).	
Space Reserve:	The area described in <u>Annex A</u> to this <u>Schedule 2</u> .	
Space Reserve Works:	Description:	Check one:
	Design and installation, in accordance with the Tesla Manuals, of concrete pads and conduit that is sufficient for the installation of the Maximum Capacity Maintenance Equipment.	<input type="checkbox"/>
	None.	<input type="checkbox"/>
Maximum Capacity Maintenance Equipment:	[•] [Powerpack/Megapack] units.	
Excess Throughput Fee:	\$[•] per kWh * Excess Throughput (in kWh), where the “ <u>Excess Throughput</u> ” is the Actual Annual Throughput for the applicable Operating Year in the System Guarantee Term <u>minus</u> the Paid-up Annual Throughput.	
Maximum Pre-Energization Period:	[•] days.	
Delayed Energization Payment:	\${•}/day (calculated as \$0.50/kWh * kWh capacity of the System).	

Availability LD Amount:	\$(•) per percentage point shortfall.
Annual Availability LD Cap:	\$(•).
Aggregate Availability LD Cap:	\$(•).
Early Termination Payment:	The amount set out in <u>Annex A</u> to this <u>Schedule 2</u> .

3. Calculation of Annual Availability Percentage. The “Annual Availability Percentage” of the System for an Operating Year is calculated using the below formula:

$$\text{Annual Availability Percentage} = \frac{1}{8760} * \sum_{h=1}^{8760} \text{MIN}[(AEP(h)), (APP(h))]$$

where the following terms have the following meanings:

AEP (h) = For any Hour (h), AEP is calculated in accordance with the following formula. However, if AEP is less than 1 due, in whole or in part, to an Excuse Event, AEP shall be deemed to be 1.

$$AEP = \text{MIN} \left[1, \frac{\text{Available Energy (h)}}{\text{Guaranteed Energy (h)}} \right]$$

APP (h) = For any Hour (h), APP is calculated in accordance with the following formula. However, if APP is less than 1 due, in whole or in part, to an Excuse Event, APP shall be deemed to be 1.

$$APP = \text{MIN} \left[1, \frac{\text{Available Power (h)}}{\text{Guaranteed Power (h)}} \right]$$

Hour = The consecutive sixty minute period commencing on the hour, every hour, using local time at the System Location.

Available Power (h) = For any Hour (h), the higher of the actual average charge and discharge power capacities (in kW, in absolute values) of the System during that Hour, as reported by the System’s Site Controller.

Available Energy (h) = For any Hour (h), the actual available energy capacity of the System demonstrated by the most recent Standard Capacity Test multiplied by the Loss Adjustment Factor; provided that (i) if no Standard Capacity Test has yet been performed *Available Energy* shall be deemed to equal *Guaranteed Energy*; (ii) if Buyer does not permit Tesla to perform a Standard Capacity Test at the time requested by Tesla in accordance with Section 5(b), then *Available Energy* shall be deemed to equal *Guaranteed Energy* during the period between the time Tesla requested to perform the Standard Capacity Test and the time the Standard Capacity Test is actually performed.

Guaranteed Power (h) = For any Hour (h), if the System is in *Peak Power Mode* for the entirety of that Hour, *Guaranteed Power* is the Nameplate Minimum Power Capacity of the System (in kW) for *Peak Power Mode*. Otherwise, *Guaranteed Power* is the Nameplate

Minimum Power Capacity of the System (in kW) for *Standard (Energy) Mode*.

Guaranteed Energy (h) = For any Hour (h), if the System is in *Peak Power Mode* for the entirety of that Hour, *Guaranteed Energy* is the Nameplate Minimum Energy Capacity of the System (in kWh) for *Peak Power Mode*. Otherwise, *Guaranteed Energy* is the Nameplate Minimum Energy Capacity of the System (in kWh) for *Standard (Energy) Mode*.

4. Standard Capacity Tests. A Standard Capacity Test is a test of the energy capacity of the System at Standard Test Conditions. "Standard Test Conditions" means the System should be fully charged and then fully and continuously discharged at the rated power. Ambient temperature should be between 0 and 30°C. If the ambient temperature is below 25°C, the System should have been in pre-heating for 8 hours before the charge (Heat Energy flag activated).
5. Performance of Standard Capacity Test. (a) Buyer may perform a Standard Capacity Test at any time, provided that Buyer provides Tesla at least twenty-four (24) hours' written notice and permits Tesla to monitor performance of the Standard Capacity Test, remotely or in person, in accordance with Section 10 of Schedule 1. (b) Tesla may request to perform a Standard Capacity Test, remotely or in person, at any time when *Available Energy* is less than *Guaranteed Energy*, by providing Buyer with at least twenty-four (24) hours' prior written notice. If Buyer does not permit Tesla to perform a Standard Capacity Test at the requested time, then Tesla shall instead perform the Standard Capacity Test at a time agreed between the Parties (each acting reasonably) as soon as practicable thereafter.
6. Excuse Event. An "Excuse Event" means any event outside of the reasonable control of Tesla, including without limitation the following: (a) Damage to the System that occurred during shipping or transportation (other than shipping or transportation by or on behalf of Tesla); (b) Operation of the System in violation of the Specifications or the applicable Tesla Manual by anyone other than Tesla or its affiliate or subcontractor, including without limitation (i) use of the System outside the "Operating Temperature" range set out in the Specifications or (ii) operation of the System without pre-heating in accordance with Section 2.3.1 of the Specifications in environmental conditions in which, according to that section, failure to pre-heat will reduce the capabilities of the System; (c) Vandalism, negligence or any attempt to extend or reduce the life of the System or prevent or hinder the recovery of data regarding System usage, in each case by anyone other than Tesla, its affiliates or subcontractors; (d) Any breach by Buyer of this Agreement or any Force Majeure Event (including any Force Majeure Event that prevents Tesla from inspecting, testing, maintaining or repairing the System); (e) underperformance resulting from improper installation or maintenance of the System by a person other than Tesla or its Affiliate or subcontractor, including in circumstances where such person received installation or maintenance training from Tesla; (f) any downtime during Tesla's performance of any Services contemplated by this Agreement or any warranty work; and (g) if the System forms part of or is connected to a larger microgrid or other power generating or conditioning facility, any defect or malfunction of any such other equipment.
7. Availability Liquidated Damages.
 - (a) If the Annual Availability Percentage is less than the Guaranteed Annual Availability Percentage in any Operating Year, then Tesla shall pay to Buyer liquidated damages calculated in accordance with the below formula.

$$MAX[0, (GAAP - AAP)] * Y$$

where the following terms have the following meanings:

GAAP = Guaranteed Annual Availability Percentage.

AAP = Annual Availability Percentage.

Y = Availability LD Amount.

- (b) Tesla's liability for these liquidated damages shall be capped at (i) the Annual Availability LD Cap, in any Operating Year; and (ii) the Aggregate LD Cap, in aggregate.
 - (c) These liquidated damages have been agreed to by the Parties because the actual damages arising in these circumstances are difficult to predict. They represent a reasonable pre-estimate of the damages that Buyer would incur, and do not constitute a penalty. Payment of these liquidated damages shall be Tesla's exclusive liability and Buyer's exclusive remedy for any losses incurred by Buyer as a result of the System failing to meet the System Guarantee or otherwise failing to perform as expected. However, they are cumulative to any rights of Buyer to require Tesla to repair or replace the System under the Manufacturer's Limited Warranty.
8. Excess Throughput Fee. If the Actual Annual Throughput in any Operating Year in the System Guarantee Term exceeds the Paid-up Annual Throughput, Buyer shall pay the Excess Throughput Fee in addition to the System Guarantee Fee. Tesla may invoice for the Excess Throughput Fee at any time after the end of the Operating Year in respect of which such Excess Throughput Fee is payable.
9. Space Reserve.
- (a) If the Key Terms indicate that Buyer shall perform Space Reserve Works, Buyer or its representative shall perform the Space Reserve Works in accordance with the Tesla Manuals and Prudent Industry Practices prior to the System Commissioning Date.
 - (b) For the duration of the System Guarantee Term, Buyer shall (i) ensure the Space Reserve is left vacant (except for any Space Reserve Works) and available to Tesla for the performance of Capacity Maintenance, (ii) grant Tesla access to the System Location (including the Space Reserve) to perform onsite inspections of the System or to perform Capacity Maintenance, provided that Tesla complies with the notice requirements in Section 9(a) of Schedule 1; and (iii) maintain any Space Reserve Works in accordance with Prudent Industry Practices, on the assumption that Capacity Maintenance Equipment will be integrated with the Space Reserve Works at some point during the System Guarantee Term.
10. Capacity Maintenance. At any time during the System Guarantee Term, Tesla may elect to perform an onsite inspection of the System or (b) increase the Actual Energy Capacity by delivering additional or replacement energy storage equipment ("Capacity Maintenance Equipment") to the System Location, and installing, integrating and commissioning such Capacity Maintenance Equipment at the System, all at Tesla's sole cost and expense ("Capacity Maintenance"). Tesla shall determine in its sole discretion the volume and specifications of Capacity Maintenance Equipment required for Capacity Maintenance, and whether the Capacity Maintenance Equipment will be composed of new, remanufactured or refurbished parts. The System Guarantee Fee and any Excess Throughput Fee includes the cost of all Capacity Maintenance Equipment provided by Tesla under this System Guarantee, including all delivery, installation, de-installation, shipping and commissioning costs.
11. Removal of System Components during Capacity Maintenance; Recycling. In connection with Tesla's performance of Capacity Maintenance, Tesla may, in its sole discretion, elect to decommission and remove components from the System. Title to, and care, custody and control and risk of loss of, any such removed components shall transfer from Buyer to Tesla upon such components' disconnection from the System. Tesla shall be responsible for disposing of or recycling such components at its own cost and expense and shall be entitled to any salvage or recycling proceeds therefrom. For clarity, Tesla's obligations under this Section 11 only applies to components that Tesla elects to

remove in connection with its performance of Capacity Maintenance, and does not extend to the end-of-life decommissioning, removal or recycling costs.

12. Delayed Energization Payment. If (a) Tesla is not responsible for installing the System under the System Purchase Agreement, (b) the Key Terms identify a Maximum Pre-Energization Period, and (c) the Actual Pre-Energization Period exceeds the Maximum Pre-Energization Period, Buyer shall pay the Delayed Energization Payment to Tesla for each day by which the Actual Pre-Energization Period exceeds the Maximum Pre-Energization Period. The “Actual Pre-Energization Period” means the period between (i) the date that the System is delivered by Tesla in accordance with the System Purchase Agreement; and (ii) the date that the System is properly and completely installed in accordance with the BESS Installation Manual and all inverters comprising the System have been energized.
13. Manufacturer’s Limited Warranty. The System and any Capacity Maintenance Equipment are covered by the Manufacturer’s Limited Warranty. The warranty period for Capacity Maintenance Equipment shall expire on the same day as warranty period for the equipment that originally comprised the System, as set out in the Manufacturer’s Limited Warranty. This is the case irrespective of when the Capacity Maintenance Equipment is delivered and commissioned.
14. Termination Events. Tesla may terminate this System Guarantee by written notice to Buyer if:
 - (a) the System is installed, commissioned, maintained, modified or repaired by anyone other than Tesla, its affiliate or a Tesla approved technician;
 - (b) the System is removed and reinstalled at a different location without the written consent of Tesla;
 - (c) anyone other than Tesla or its affiliate or subcontractor (i) designs the System in contravention of the BESS Site Design Manual or installs the System in contravention of the BESS Installation Manual, (ii) stores or transports the System in contravention of the BESS Transportation and Storage Guidelines or in violation of the “Storage Conditions (on the shelf)” set out in the “Environmental Specifications” section of the Specifications; or (iii) attempts to extend or reduce the life of the System or prevent or hinder the recovery of data regarding System usage; or
 - (d) the Actual Annual Throughput in any Operating Year during the System Guarantee Term equals or exceeds the Annual Throughput Cap.
15. Early Termination Payment. If (a) Buyer terminates this Agreement or the System Guarantee Term for convenience under Section 12(a) of Schedule 1 prior to the scheduled expiry of the System Guarantee Term; (b) Tesla terminates this Agreement for Buyer breach under Section 13 of Schedule 1 prior to the scheduled expiry of the System Guarantee Term; or (c) Tesla terminates this System Guarantee under Section 14 above prior to the scheduled expiry of the System Guarantee Term, then Buyer shall pay the applicable Early Termination Payment within thirty (30) days after receipt of an invoice from Tesla. This Section 15 shall not apply if Buyer has paid the full System Guarantee Fee in advance.

Appendix A to Schedule 2

Part 1- Space Reserve

Dimensions of Space Reserve:

[Insert]

Plan of System Location designating Space Reserve:

[Insert]

Part 2 – Early Termination Fee

[None.] [Use if System Guarantee Fee is paid lump sum in advance]

[The following amounts in the following Operating Years during the System Guarantee Term:][Use if System Guarantee Fee is paid annually with Preventative Maintenance Fee. Amend table to match duration of System Guarantee Term]

Operating Year	Amount ([Currency])
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	

[Number of Operating Years should match the number of Operating Years in System Guarantee Term]

