



RECIPIENT <b>DOE – Lawrence Berkeley National Laboratory</b>	AGREEMENT NUMBER <b>EPC-XX-XXX</b>
ADDRESS <b>One Cyclotron Road 90R1121                  Berkeley, CA 94720</b>	AGREEMENT TERM <b>Insert Date Here to Insert Date Here</b> The effective date of this Agreement is either the start date or the approval date by the California Energy Commission, whichever is later. The California Energy Commission shall be the last party to sign. No work is authorized, nor shall any work begin, until on or after the effective date.

PROJECT DESCRIPTION  
 The parties agree to comply with the terms and conditions of the following Exhibits which are by this reference made a part of the agreement.

<b>Exhibit A – Scope of Work</b>	Page(s): _____
Exhibit A – Attachments	Page(s): _____
<b>Exhibit B – Budget Detail and Payment Provisions</b>	Page(s): <u>3</u>
Exhibit B – Attachments	Page(s): _____
<b>Exhibit C – General Terms and Conditions</b>	Page(s): <u>17</u>
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<b>Exhibit D – Rights in Technical Data – Use of Facility</b>	Page(s): <u>4</u>
<b>Exhibit E – Patent Rights – Use of Facilities</b>	Page(s): <u>7</u>
<b>Exhibit F – List of Contacts</b>	Page(s): <u>1</u>
<b>Exhibit G – Rights in Other Intellectual Property</b>	Page(s): <u>2</u>
<b>Exhibit H – Payments of Royalties to Sponsor</b>	Page(s): <u>2</u>

REIMBURSABLE AMOUNT <b>\$ 0.00</b>
MATCH SHARE <b>\$ 0.00</b>
TOTAL <b>\$ 0.00</b>

*The undersigned parties have read the attachments to this agreement and will comply with the standards and requirements contained therein.*

CALIFORNIA ENERGY COMMISSION		RECIPIENT	
AUTHORIZED SIGNATURE	DATE	AUTHORIZED SIGNATURE	DATE
NAME <b>Rachel L. Grant Kiley</b>		NAME	
TITLE <b>Contracts, Grants and Loans Office Manager</b>		TITLE	
CALIFORNIA ENERGY COMMISSION ADDRESS <b>1516 9th Street, MS 1, Sacramento, CA 95814</b>			

**Exhibit B**  
**Budget Detail and Payment Provisions**

**1. Advance Payments**

- a. The Sponsor shall provide sufficient funds in advance to reimburse DOE, through its Facility Operator, for costs to be incurred in performance of the work described in this Agreement, and the Facility Operator shall not perform in the absence of advance funds. For and in consideration for performance of this Agreement, Sponsor agrees to pay DOE, through its Facility Operator, an amount equal to the Facility Operator's cost of performance in accordance with the conditions listed in this Agreement. Nothing contained in this Agreement shall preclude advance payment to the Government pursuant to Title 2, Government Code Section 12425. The total amount of costs to the Sponsor shall not exceed the amount stated in Block 3 of the attached Standard Agreement.
- b. If the estimated period of performance exceeds ninety (90) days and the estimated cost exceeds \$25,000.00, the Sponsor may, with the DOE's approval, advance funds incrementally. In such a case, the Facility Operator will initially invoice the Sponsor in an amount sufficient to permit the work to proceed for one hundred and eighty (180) days and thereafter invoice the Sponsor to maintain approximately a ninety (90)-day period that is funded in advance.
- c. The Facility Operator shall submit ninety (90)-day invoices requesting payment. Each invoice is subject to Sponsor approval and payment by the State Controller's Office. The Sponsor will accept computer-generated or electronically transmitted invoices without backup documentation, provided the Facility Operator sends a hard copy the same day, correctly addressed with postage prepaid to the Sponsor address listed in this article.
- d. The Sponsor's Agreement Manager will approve ninety (90)-day advance payments provided that the Sponsor's Agreement Manager has received and approved the written progress reports, and any other products required in the reporting period. If such information has not been provided to the Sponsor's Agreement Manager, a written dispute notice specifying the reasons for dispute will be sent by the Sponsor's Agreement Manager to DOE through the Facility Operator's Agreement Administrator. Such notice shall be made within fifteen (15) days of receipt of the disputed invoice for payment on a State of California Standard Form 209. If the invoice for payment is not disputed within fifteen (15) days, the invoice is presumed to be valid, but is subject to audit and verification in accordance with the audit provisions of this Agreement.
- e. The Facility Operator shall submit all invoices for payment to:  
  
Accounting Office, MS-2  
California Energy Commission  
1516 9th Street, 1st Floor  
Sacramento, California, 95814

- f. Payment shall be made directly to the Facility Operator within 30 days of receipt of a correct invoice. The State shall make payment to the Facility Operator as promptly as fiscal procedures permit.
- g. Sponsor shall enter this Agreement number on the check and mail payment to the following address:  
  
Lawrence Berkeley National Laboratory  
Dept. # 34240  
P.O. Box 39000  
San Francisco, CA 94139  
*Attn: Cashier's Office Accounts Receivable*
- h. A 90-day reconciliation report for actual costs shall be submitted no later than the 30th day following the end of the previous ninety (90)-day performance period. The reconciliation report shall include but is not limited to:
  - 1. Facility Operator's name, Federal ID number, this Agreement number, and the CEC grant number,
  - 2. Direct labor costs,
  - 3. Subcontractor, consultants & other services costs,
  - 4. Travel costs,
  - 5. Equipment and material costs,
  - 6. Overhead costs.
- i. Upon termination or completion of this Agreement, the DOE shall direct the Facility Operator to refund any excess funds to the Sponsor. The Facility Operator will reconcile total Agreement costs to total payments received in advance and any remaining advance will be refunded to the Sponsor's Accounting Office. In the event the Agreement is terminated, total project costs incurred prior to the effective date of termination (including close-out costs) will be reconciled to total project payments received in advance and any remaining advance will be refunded to the Sponsor. In either event, DOE, through its Facility Operator, shall return any balance due to the California Energy Commission within sixty (60) days.
- j. Evidence of progress, products, and written progress reports as detailed in the Work Statement shall be prepared and provided by DOE through its Facility Operator's Project Manager (Principal Investigator).

## **2. Budget Contingency Clause**

- a. It is mutually agreed that if the Budget Act of the current year and/or any subsequent years covered under this Agreement or the California Public Utilities Commission does not appropriate sufficient funds for the program, this Agreement shall be of no further force and effect. In this event, the Sponsor shall have no liability to pay any funds whatsoever to Facility Operator or to furnish any other considerations under this Agreement and Facility Operator shall not be obligated to perform any provisions of this Agreement.

- b. If funding for any fiscal year is reduced or deleted by the Budget Act or the California Public Utilities Commission for purposes of this program, the Sponsor shall have the option to either cancel this Agreement with no liability occurring to the Sponsor, or offer an agreement amendment to Facility Operator to reflect the reduced amount.

### **3. Other Terms**

- a. The DOE's estimated cost for the work to be performed by the Facility Operator under this Agreement is stated on the signature page for this Agreement. If the Sponsor requires matching funds, the assessed value of the Federal Administrative Charge that is not charged to this project and the assessed value of any identified synergistic project(s) are stated in this Exhibit B. Specific details are found in Exhibit A, Work Statement.
- b. The DOE has no obligation to direct the Facility Operator to continue or complete performance of the work at a cost in excess of its estimated cost, including any modification to this Agreement.
- c. The DOE, through its Facility Operator, agrees to provide at least sixty (60) days written notice to the Sponsor's Agreement Manager if the actual cost to complete performance will exceed the estimated cost.
- d. Budget reallocations shall be made in accordance with Exhibit C, Section 11 "Amendments."
- e. The Sponsor hereby warrants and represents that the funding it brings to this Agreement has been secured through the State of California and the funding is not restricted by other terms and conditions (including intellectual property) that conflict with the terms of this Agreement.
- f. Upon termination or completion of this Agreement, the DOE shall direct the Facility Operator to refund any excess funds, to the Sponsor. The Facility Operator will reconcile total Agreement costs to total payments received in advance and any remaining advance will be refunded to the Sponsor's Accounting Office. In the event the Agreement is terminated, total project costs incurred prior to the effective date of termination (including close-out costs) will be reconciled to total project payments received in advance and any remaining advance will be refunded to the Sponsor. In either event, DOE, through its Facility Operator, shall return any balance due to the Sponsor within sixty (60) days.

### **4. Budget Detail (TBD)**

Budget Detail is contained in the Attachment to this Exhibit.

## **Exhibit C**

### **General Terms and Conditions**

#### **1. Definitions**

The following definitions apply to all Exhibits attached herein.

- a. "Government" or "DOE" or "Department" means the Federal Government or U.S. Department of Energy.
- b. "Sponsor" means the California Energy Commission, also referred to herein as "CEC".
- c. "Facility Operator" means The Regents of the University of California directed by the DOE to perform the work set forth in Exhibit A, Scope of Work under this Agreement
- d. "Background Intellectual Property" means the separately developed intellectual property items identified by the Facility Operator in Exhibit E paragraph 9, which were conceived or in existence prior to or first produced outside of this Agreement.
- e. "Contract Service Provider" or "CSP" means a service provider that is not a Licensee performing services under written contract for an LSE to make the Subject Invention solely for use by the LSE at LSE facilities, including its transmission and distribution systems, in California.
- f. "Copyrighted Project Work" means any copyrightable work as defined under U.S. copyright law that is first created by the Facility Operator, Subcontractors or Match Fund Contributors in the performance of this Agreement, is not a scholarly work, and to which permission to assert copyright has been granted. In the case of Facility Operator, such permission is granted to assert copyright in accordance with its M&O Contract with the DOE.
- g. "Deliverable" data is that which, under the terms of this Agreement, is required to be delivered to the Sponsor.
- h. "Equipment" means any products, objects, machinery, apparatus, implements or tools, in excess of \$5,000.00, purchased or constructed under this Agreement, including those products, objects, machinery, apparatus, implements or tools, in excess of \$15,000.00, from which over thirty percent (30%) of the equipment is composed of materials purchased for the project. For the purposes of determining residual value, the Sponsor will use straight line depreciation over the equipment's useful life as determined by the Sponsor's standard accounting practices. The residual value will be calculated as of the date of the completion or termination of this Agreement.
- i. "Generated Information" means information first produced in the performance of this Agreement.

- j. “Independently Funded Intellectual Property” means inventions, technologies, designs, drawings, data, software, formulas, compositions, processes, techniques, works of authorship, trademarks, service marks, and logos that are created, conceived, discovered, made, developed, altered, or reduced to practice by the Facility Operator, a Subcontractor, a Match Funds Contributor or a third party prior to, during or after the Agreement term without Energy Commission funds or Match Funds; and (b) associated proprietary rights to these items that are obtained without Energy Commission funds or Match Funds, such as patent and copyright.
- k. “Intellectual Property” means: (a) inventions, technologies, designs, drawings, data, software, formulas, compositions, processes, techniques, works of authorship, trademarks, service marks, and logos that are created, conceived, discovered, made, developed, altered, or reduced to practice with Agreement or match funds during or after the Agreement term; (b) any associated proprietary rights to these items, such as patent and copyright; and (c) any upgrades or revisions to these items.

“Works of authorship” does not include written products created for Agreement reporting and management purposes, such as reports, summaries, lists, letters, agendas, schedules, and invoices.

- l. A “Load-Serving Entity(ies)” or “LSE” means a company or other organization that provides electricity to EPIC ratepayers in California.
- m. “Licensee” means any company which has entered into a license for any financial consideration with Facility Operator to purchase, make, sell and offer for sale a Licensed Product arising under this Agreement.
- n. “Licensed Product” means any product commercialized by a Licensee that embodies or utilizes Generated Information, a Subject Invention, or Copyrightable Work, or Other Intellectual Property.
- o. “Match Funds” means cash or in-kind (non-cash) contributions shown in the approved budget in Exhibit B and provided by Facility Operator or other parties that will be used in performance of this Agreement.
- p. “Match Fund Contributor” or “MFC” means the third party identified as providing Match Funds under this Agreement (e.g., identified by the Facility Operator in its proposal that led to this Agreement, in the products of the Scope of Work Subtask 1.7 “Match Funds” in Exhibit A, and/or in the budget documents in Exhibit A) and such third party executes a Match Fund Collaborative Agreement with Facility Operator.
- q. “Match Funded Intellectual Property” means Background Intellectual Property, Generated Information, Technical Data, Copyrighted Project Work, Subject Inventions, Other Intellectual Property, or data generated by a Match Funds Contributor under this Agreement.
- r. “Match Fund Collaborative Agreement” or “MFC Collaborative Agreement” means any agreement between Facility Operator and a party or parties providing Match Funds, *i.e.*, a Match Fund Contributor, for the work under this Agreement.

- s. "Materials" means the substances used in constructing a finished object, commodity, device, article or product.
- t. "Net Revenues" means the total of the gross invoice prices of Licensed Product sold, less the sum of the following actual and customary deductions where applicable: cash; quantity discounts; sales, use, tariff, import/export duties or other excise taxes imposed upon particular sales; transportation charges; and allowance or credits to customers because of rejections or returns.
- u. "Net Royalties" means gross royalties and fees received by the Facility Operator from a Licensee as consideration for commercially licensing any Subject Invention, Copyrighted Project Work or Other Intellectual Property, less the following:
  - i. legal and other direct expenses (that are not otherwise reimbursed under an option or license agreement from a third party) of patenting, protection and preserving patent, copyrighted and related intellectual property rights, maintaining patents and such other costs, taxes, or reimbursements as may be necessary or required by law, except patent infringement expenses, and
  - ii. inventor or author shares in accordance with the Facility Operator's patent or copyright policy.

Direct expenses include operation expenses of the Facility Operator. Net Royalties does not include any payments to joint holders nor research funding accepted in association with an option or licensing agreement. Net Royalties shall be determined annually by the Facility Operator for each licensed Subject Invention, Copyrighted Work, and/or Other Intellectual Property.

- v. "Other Intellectual Property" means Intellectual Property generated under this Agreement, other than a Subject Invention or Copyrighted Project Work, over which legal protection is established by the performing Facility Operator under Federal law in conformance with the Facility Operator's M&O contract or is established by a Subcontractor or Match Fund Contributor, and the foreign counterparts of the intellectual property, such as a trademark/servicemark as provided by Chapter 22 of USC Title 15. Such Other Intellectual Property is subject to certain march-in rights, US Preference, and to a retained United States governmental purpose license.
- w. (Reserved.)
- x. "Patent Counsel" means the DOE Patent Counsel assisting the procuring activity who has the administrative responsibility for the facility where the work under this Agreement is to be performed.
- y. "Project" means the entire effort undertaken and planned by the Facility Operator under Exhibit A, Scope of Work and includes the work funded by the Sponsor.
- z. "Project Task" means the statement of work or description of effort that defines the activities to be performed for a specific task in Exhibit A, Scope of Work.

- aa. "Proprietary Information" means information which is developed outside of this Agreement or solely by a Match Fund Contributor, is marked as Proprietary Information, and embodies (1) trade secrets, or (2) commercial or financial information which is privileged or confidential under the Freedom of Information Act (5 U.S.C. 552 (b)(4)), or (3) is protected under the California Public Records Act (California Government Code section 6250 et seq.)
- i. A trade secret is any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented and which is generally known only to certain individuals with a commercial concern and are using it to fabricate, produce or compound an article of trade or a service having commercial value and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it.
  - ii. Commercial or financial information is information about the operation of a specific business. It includes information concerning the cost and pricing of goods, supply sources, cost analyses, characteristics of customers, books and records of the business, sales information including mailing lists, business opportunities, information regarding the effectiveness and performance of personnel, and information incidental to Agreement administration.
- bb. "Sale" means the sale, license, lease, gift or other transfer of a project-related product or right.
- cc. "Subcontractor" means an entity that is performing research and has received Agreement funds via a subaward arrangement appropriate for that entity from Facility Operator. A Subcontractor may include, but is not limited to, not-for-profit and for-profit organizations, Federal laboratories, or any part of the University of California, such as a campus. This definition does not include Vendors providing goods and services.
- dd. "Subject Invention" means any invention or discovery of Facility Operator that is conceived in the course of or under this Agreement, or, of the Sponsor, Subcontractors, or Match Fund Contributors that is conceived or first actually reduced to practice in the course of or under this Agreement. "Subject Invention" includes any art, method, process, machine, manufacture, design or composition of matter, or any new and useful improvement thereof, or any variety of plant, whether patented under the Patent Laws of the United States of America or any foreign country, or unpatented.

- ee. "Technical Data" as used throughout this Agreement means recorded information regardless of form or characteristic, of a scientific or technical nature. It may, for example, document research; document experimental, developmental, demonstrations, or engineering work; or be usable or used to define a design or process; or to procure, produce, support, maintain, or operate material. The data may be graphic or pictorial delineations in media such as drawings or photographs, test specifications or related performance or design type documents or computer software (including computer programs, computer software data bases, and computer software documentations).
- ff. "Trademark" means a distinctive mark, symbol or emblem used in commerce by a producer or manufacturer to identify and distinguish its goods or services from those of others.
- gg. "Vendor" means dealer, distributor, merchant or other seller providing goods or services that are required for the performance of the Scope of Work. Vendors are not considered Subcontractors and are subject to the normal terms and conditions of the Facility Operator's procurement process.
- hh. "Unlimited Rights" means the right to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose, and to have or permit others to do so.

## **2. Performance**

- a. The DOE has directed The Regents of the University of California, hereinafter referred to as the "Facility Operator" to perform the work set forth in Exhibit A, Scope of Work under this agreement with the California Energy Commission, and hereinafter referred to as "Sponsor."
- b. It is understood by the Parties that the Facility Operator is obligated to comply with the terms and conditions of its Management and Operating (M&O) contract no. DE-AC02-05CH11231 with the United States Government (Government) represented by the DOE when performing this Agreement. The obligations of the Facility Operator shall apply to any successor to the Facility Operator continuing the operation of the DOE facility involved in this Agreement.
- c. No alteration or variation of the terms of this Agreement shall be valid unless made in writing and signed by the Parties, and no oral understanding or agreement not incorporated in this Agreement shall be binding on any of the Parties and the Facility Operator. Other than as specified in this Agreement, no document or communication passing between the Parties and the Facility Operator shall be deemed part of this Agreement. See Section 11 of this Exhibit C, Amendments.
- d. In no event shall any course of dealing, custom or trade usage modify, alter, or supplement any of the terms or provisions contained herein.

- e. Governing Law. This Agreement and the legal relations among the Parties and the Facility Operator shall be governed and construed in accordance with California and Federal law. In the event of any conflict between Federal law applicable to this Agreement and California State law, Federal law shall take precedence.
- f. The DOE and Facility Operator agree to comply with all applicable Federal and State laws.
- g. Changes in the scope of work must be approved in writing by the Sponsor, See Section 11 of this Exhibit, Amendments. .
- h. Facility Operator, its subcontractors and their employees in the performance of work under this Agreement shall be responsible for using their best efforts to exercise the degree of skill and care required by customarily accepted good professional practices and procedures used in scientific and engineering research fields.

### 3. **Term of the Agreement**

The term of this Agreement is shown on the signature page and shall continue for the performance period stated. This Agreement shall be effective as of the later of the start date or the approval date by the California Energy Commission. The Facility Operator will not start work under this Agreement until the date on which the Facility Operator receives advance funding from the Sponsor, if advance funding is provided for in Exhibit B. Time is of the essence in this Agreement.

### 4. **Property**

- a. No Federal funds will be used to purchase property or equipment under this Agreement.
- b. Equipment identified in Exhibit A, Scope of Work, and outlined in Exhibit B, Budget, is approved for purchase.
- c. In the event Sponsor's funds are used to purchase equipment not identified in Exhibit A, Scope of Work, and outlined in Exhibit B, Budget, the purchase of equipment with a purchase price in excess of \$5,000.00 shall be subject to prior written approval from the Sponsor's Agreement Manager.
- d. As between the Sponsor and Facility Operator, title to all equipment, including Equipment as defined above in paragraph 1.H, purchased with Sponsor's funds shall remain with Facility Operator.

e. As between the Facility Operator and MFC, unless specifically stated otherwise in Exhibit A, Statement of Work or in the MFC Collaborative Agreement, any personal property or equipment with a value greater than [5000] produced or acquired with Match Funds under this Agreement, will be owned by the MFC and will be disposed of as directed by the MFC at the MFC's expense or as required by the MFC Collaborative Agreement. Any personal property or equipment, produced or acquired as part of this Agreement will be accounted for and maintained during the term of the Agreement in the same manner as Department property or equipment and unless specifically stated otherwise in Exhibit A Statement of Work or in the MFC Collaborative Agreement, title to such property or equipment not removed by the end of the Agreement and/or which is integrated into the Facility, shall pass to Facility Operator.

5. **Publication Matters** The DOE, Facility Operator, and the Sponsor shall provide each other not less than a thirty (30) day period in which to review and comment on a proposed publication that either discloses technical developments and/or research findings generated in the course of this Agreement, or identifies Proprietary Information (as defined in Exhibit D). The DOE, Facility Operator, or the Sponsor shall not publish or otherwise disclose Proprietary Information identified by the other, except as provided by law.

6. **Legal Notice** The Parties agree that the following legal notice shall be affixed to each report furnished to the Sponsor under this Agreement and to any report or reprint resulting from this Agreement which may be distributed by the Sponsor, DOE, or the Facility Operator.

"The Lawrence Berkeley National Laboratory is a national laboratory of the DOE managed by The Regents of the University of California for the U.S. Department of Energy under Contract Number DE-AC02-05CH11231. This report was prepared as an account of work sponsored by the Sponsor and pursuant to an M&O Contract with the United States Department of Energy (DOE). The Regents of the University of California, nor the DOE, nor the Sponsor, nor any of their employees, contractors, or subcontractors, makes any warranty, express or implied, or assumes any legal liability or responsibility for the accuracy, completeness, or usefulness of any information, apparatus, product, or process disclosed, or represents that its use would not infringe on privately owned rights. Reference herein to any specific commercial product, process, or service by trade name, trademark, manufacturer, or otherwise, does not necessarily constitute or imply its endorsement, recommendation, or favoring by The Regents of the University of California, or the DOE, or the Sponsor. The views and opinions of authors expressed herein do not necessarily state or reflect those of The Regents of the University of California, the DOE, or the Sponsor, or any of their employees, or the Government, or any agency thereof, or the State of California. This report has not been approved or disapproved by The Regents of the University of California, the DOE, or the Sponsor, nor has The Regents of the University of California, the DOE, or the Sponsor passed upon the accuracy or adequacy of the information in this report."

**7. Disclaimer**

THE GOVERNMENT AND THE FACILITY OPERATOR MAKE NO EXPRESS OR IMPLIED WARRANTY AS TO THE CONDITIONS OF THE RESEARCH OR ANY INTELLECTUAL PROPERTY, GENERATED INFORMATION, OR PRODUCT MADE OR DEVELOPED UNDER THIS AGREEMENT, OR THE OWNERSHIP, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE OF THE RESEARCH OR RESULTING PRODUCT: THAT THE GOODS, SERVICES, MATERIALS, PRODUCTS, PROCESSES, INFORMATION, OR DATA TO BE FURNISHED HEREUNDER WILL ACCOMPLISH INTENDED RESULTS OR ARE SAFE FOR ANY PURPOSE INCLUDING THE INTENDED PURPOSE; OR THAT ANY OF THE ABOVE WILL NOT INTERFERE WITH PRIVATELY OWNED RIGHTS OF OTHERS. NEITHER THE GOVERNMENT NOR THE FACILITY OPERATOR SHALL BE LIABLE FOR SPECIAL, CONSEQUENTIAL, OR INCIDENTAL DAMAGES ATTRIBUTED TO SUCH RESEARCH OR RESULTING PRODUCT, INTELLECTUAL PROPERTY, GENERATED INFORMATION, OR PRODUCT MADE OR DELIVERED UNDER THIS AGREEMENT.

**8. Insurance**

The performing Facility Operator shall be obligated hereunder to obtain and maintain general liability insurance during the life of this Agreement in an amount deemed sufficient by the Sponsor and approved by the Government to indemnify and hold harmless the Government, the Sponsor, and the Facility operator, their officers, agents, employees and persons acting on their behalf from all liability, including costs and expenses incurred, to any person, including the Parties and Facility Operator personnel, for injury to or death of persons or other living things or injury to or destruction of property arising out of the performance of the Agreement by the Government, the Sponsor, or the Facility Operator, or persons acting on their behalf, or arising out of the use of the services performed, materials supplied, or information given hereunder by any person. The Facility Operator's cost associated with obtaining and maintaining such liability insurance policy shall be an expense that is considered by the Parties and the Facility Operator to be allocable to this Agreement. Should the Facility Operator be unwilling or unable to obtain such general liability insurance, the Sponsor may obtain such coverage and, at its discretion, deduct the cost associated with maintaining such policy from the amount of the- successful proposal award. Should neither the performing Facility Operator nor the Sponsor choose to provide adequate insurance protection, this Agreement shall be considered null and void. Nothing herein shall preclude the Facility operator from entering into agreements to indemnify the Sponsor and the Government from the liability, costs, and expenses addressed in this clause provided that any such agreement shall not result in costs allocable or liabilities chargeable to the Government.

Subject to the availability of funds under Facility Operator's Prime Contract, Facility Operator shall defend, indemnify and hold the State of California and its agencies, including the Energy Commission and the California Public Utilities Commission, their respective officers, employees and agents harmless from and against any and all liability, loss, expense, attorneys' fees, or claims for injury or damages arising out of the performance of this Agreement but only in proportion to and to the extent such liability, loss expense, attorneys' fees or claims for injury or damages are caused by or result from the negligent or intentional acts or omissions of Facility Operator, its officers, agents or employees.

The Energy Commission shall defend, indemnify and hold Facility Operator, its officers, employees and agents harmless from and against any and all liability, loss expense, attorneys' fees or claims for injury or damages arising out of the performance of this Agreement but only in proportion to and to the extent such liability, loss, expense, attorneys' fees or claims for injury or damages are caused by or result from the negligent or intentional acts or omissions of the State of California, its officers, agents or employees.

**9. Notice and Assistance Regarding Patent and Copyright Infringement**

The Sponsor shall report to the DOE and the Facility Operator, promptly and in reasonable written detail, each claim of patent or copyright infringement based on the performance of this Agreement of which the Sponsor has knowledge. The Sponsor shall furnish to the DOE and the Facility Operator, when requested by the DOE or the Facility Operator, all evidence and information in the possession of the Sponsor pertaining to such claim.

**10. Assignment**

Except as noted, neither this Agreement nor any interest therein or claim there under shall be assigned or transferred by either Party, except as authorized in writing by the other Party to this Agreement. Such authorization shall not be unreasonably withheld. The Parties recognize that the DOE may transfer the original Facility Operator's obligations under this Agreement to a successor Facility Operator, with notice of such transfer to the Sponsor, and the original Facility Operator shall have no further responsibilities except for the confidentiality, use, and/or nondisclosure obligations of this Agreement. The obligations of the original Facility Operator shall apply to any successor to the original Facility Operator continuing the operation of the DOE facility involved in this Agreement.

**11. Amendment**

No amendment or variation of the terms of this Agreement shall be valid unless made in writing, signed by the Parties, and approved as required. No oral understanding or agreement not incorporated into this Agreement is binding on any of the Parties.

a. Procedure for Requesting Changes

The Facility Operator must submit a written request to the Commission Agreement Manager for any change to the Agreement. The request must include:

- A brief summary of the proposed change;

- A brief summary of the reason(s) for the change; and
- The revised section(s) of the Agreement, with changes made in underline/strikeout format.

b. Approval of Changes

Certain changes to the Agreement (e.g., changes that increase the Agreement amount or substitute one Facility Operator for another) must be approved at a Commission business meeting or by the Executive Director (or his/her designee). Generally, changes that are not significant to the Agreement may be documented in a Letter of Agreement signed by both parties (electronic signatures are acceptable).

The Contract Agreement Manager or Contract Agreement Officer will provide the Facility Operator with guidance regarding the level of Commission approval required for a proposed change.

**12. Similar or Identical Services**

The DOE, its Facility Operator, and the Sponsor shall have the right to perform similar or identical services described in the Exhibit A, Scope of Work for other sponsors as long as the Parties' and Facility Operator's Proprietary Information is not utilized.

**13. Export Control**

Each Party is responsible for its own compliance with laws and regulations governing export control.

**14. Termination**

- Performance of work under this Agreement may be terminated at any time by the Sponsor or the DOE, without liability, upon giving a forty-five (45) day written notice to the other. Such notice shall specify the termination date of the Agreement or the Parties shall negotiate a mutually satisfactory termination date.
- The Sponsor shall be responsible for the allowable costs under this Agreement (including closeout costs) to the extent they could not reasonably be avoided through the termination date of the Agreement, but in no event shall the Sponsor's cost responsibility exceed the total cost to the Sponsor, as described in Exhibit B. DOE agrees to use all reasonable efforts to mitigate its expenses and obligations. It is agreed that any obligations of the Parties and the Facility Operator regarding Proprietary Information or other intellectual property and payment of royalties will remain in effect, despite early termination of the Agreement.

**15. Dispute Resolution**

- The Parties are encouraged to use Alternative Dispute Resolution (ADR) processes to settle any differences that may arise during the performance of this Agreement, although it is not mandatory that they do so.

b. Negotiation.

- i. The Parties and the Facility Operator shall attempt in good faith to resolve any dispute arising out of or relating to this Agreement by negotiating between officials who have authority to settle the controversy and who are at a higher level of management than the persons with direct responsibility for administration of this Agreement. The Sponsor may contact the DOE representative listed below to request immediate attention to the issue raised by the Sponsor.

Spencer R. Peterson  
Contracting Officer  
Berkeley Site Office  
U.S. Department of Energy  
One Cyclotron Road Berkeley, CA 94720

- ii. Either Party may give the other Party written notice of any dispute not resolved in the normal course of business. Within fifteen(15) days after receipt of the notice, the Party receiving notice of the dispute shall submit to the other a written response. The notice and the response shall include (a) the issues in the dispute, (b) the legal authority or other basis for the Party's position, (c) the remedy sought, and (d) the name and title of the executive or official who will represent the Party and of any other person(s) who will accompany the executive or official.

Within thirty (30) days after receipt of the disputing Party's notice, the representatives of the Parties and the Facility Operator shall meet at a mutually acceptable time and place, and thereafter as often as they reasonably deem necessary, to attempt to resolve the dispute. All reasonable requests for information made by one Party to the other will be honored. If the matter has not been resolved within sixty (60) days of the disputing Party's notice, or if the Parties fail to meet within thirty (30) days, either Party may initiate mediation of the controversy or claim provided hereafter.

- iii. All negotiations pursuant to this Agreement are confidential and shall be treated as compromise and settlement negotiations for purposes of the Federal Rules of Evidence and State of California rules of evidence.

c. Mediation.

- i. In the event the dispute has not been resolved by negotiation as provided herein, the Parties' may agree to participate in non-binding mediation, using a mutually agreed upon mediator. The mediator will not render a decision, but will assist the Parties and the Facility Operator in reaching a mutually satisfactory agreement. The Parties agree to equally split the costs of the mediation.

- ii. The first mediation session shall commence within thirty (30) days from the agreement to mediate. The Parties may contact the DOE Office of Dispute Resolution with questions or for assistance with selection of neutrals or samples of "Agreements to Mediate." All mediations are confidential and shall be treated as compromise and settlement negotiations for purposes of the Federal Rules of Evidence and State of California rules of evidence.
- d. The Parties' performing work under this Agreement shall continue with the responsibilities under this Agreement during any dispute.
- e. In the event that the Sponsor believes the Facility Operator/subcontractor has failed or is failing to perform in accordance with the stated standard of performance in paragraph 2(g), the Sponsor and the Facility Operator shall negotiate in good faith an equitable resolution satisfactory to both parties. If such resolution cannot be reached, the Parties may work through the Alternate Dispute Resolution process described above. In the event negotiation and the Alternate Dispute Resolution process do not provide a satisfactory resolution, Sponsor's sole remedy in the event of the Facility Operator's failure to perform in accordance with the standard of performance in paragraph 2(g) is termination of the Agreement. Nothing herein shall preclude the Facility Operator from entering into agreements of other or additional remediation with the Sponsor provided that any such agreement shall not result in costs allocable or liabilities chargeable to the Department of Energy.
- f. Nothing contained in this section 16 is intended to limit any of the rights or remedies that the Parties may have under law, or to limit exercise of any other provision of this agreement.

## **16. Subcontractors and Vendors Agreements**

- a. DOE oversight of Facility Operator's agreements with Subcontractors and Vendors. The Facility Operator shall be responsible to the DOE for establishing and maintaining contractual agreements with and reimbursement of each of the Subcontractors and Vendors for work performed in accordance with the terms of this Agreement. Upon request, the Facility Operator shall provide the Sponsor with copies of all Subcontractor and Vendor agreements resulting from this Agreement promptly upon final execution thereof.
- b. Replacement of key Subcontractors. The key Subcontractors can be replaced or substituted with prior written concurrence of the Sponsor's Agreement Manager. Such concurrence shall be timely and not unreasonably withheld.
- c. Replacement or substitution of all other subcontractors. The Facility Operator shall notify the Sponsor in writing of any replacement or substitution of subcontractors not listed as key Subcontractors in the Exhibit A, Scope of Work.
- d. Termination of subcontracts. Upon the termination of any subcontract, the Sponsor's Agreement Manager shall be immediately notified in writing.

- e. DOE oversight of Facility Operator's procurement processes. The Facility Operator shall use DOE approved and regulated procurement policies, processes, and procedures to achieve the subcontract and vendor obligations under this Agreement. Federally-approved policies, processes, and procedures regarding competitive selection, sole-source justification, intellectual property rights, assignment, and flow-down shall be maintained for all subcontracts under this Agreement.

**17. Match Funds Contributors Collaborative Agreements**

- a. Before any Match Fund contribution, e.g., funds, personnel and/or equipment, Facility Operator shall require each MFC to enter into a MFC Collaborative Agreement, which is a sub-agreement under this Agreement with Facility Contractor in which MFCs agree to be comply with applicable terms, conditions, and obligations of this Agreement pursuant to the Project Task in which the MFC will participate and provide Match Funds.
- b. Any MFC Collaborative Agreement must ensure that the MFC agrees to grant a license to the Sponsor and the Government to fulfill the obligations provided in this Agreement.

**18. Public Hearings**

If public hearings on the subject matter dealt with in this Agreement are held during the period of the Agreement, the DOE shall ensure that the Facility Operator makes available to testify the Facility Operator personnel assigned to this Agreement if requested by the Sponsor. The Sponsor will reimburse, by advance payment, the labor and travel costs of testifying personnel assigned to this Agreement at the Facility Operator's rates for such work. Any terms and conditions will be contained in the Scope of Work. If the need for witness(es) arises during the grant performance, the parties shall negotiate the details of any necessary appearances.

**19. Site Access for Project Review**

The Parties acknowledge that the DOE enforces strict requirements regarding security, safety, and access to the DOE National Laboratories' sites and facilities. To the extent permitted by DOE and Facility Operator security, safety, and access requirements, the Sponsor and the California Public Utilities Commission and their respective staff and representatives shall have reasonable access to the construction site or Research & Development laboratory and receive presentations and information related to performance under this Agreement.

**20. Notice to Parties and Facility Operator**

Notice to the Parties to this Agreement may be given by certified mail properly addressed, postage fully prepaid, to this address:

**Sponsor:**

Rachel Grant Kiley, Manager  
CA Energy Commission Contracts, Grants and Loans Office  
1516 Ninth Street MS-18  
Sacramento, CA 95814

**DOE:**

Contracting Officer  
Berkeley Site Office  
U.S. Department of Energy  
One Cyclotron Road Berkeley, CA 94720

**Facility Operator:**

Contracts Officer  
Innovation & Partnerships Office  
Lawrence Berkeley National Laboratory  
One Cyclotron Road, M/S 56A-120  
Berkeley, CA 94720

Notice may be given to such other address as either Party or the Facility Operator shall provide to the other in accordance with this section. Such notice shall be effective when received, as indicated by post office records, or if deemed undeliverable by post office, such notice shall be effective nevertheless fifteen (15) days after mailing.

Alternatively, notice may be given by personal delivery at the address designated or to such other address as either Party or the Facility Operator shall notify the other in accordance with this section. Such notice shall be deemed effective when delivered unless a legal holiday for State or Federal offices commences during the 24-hour period, in which case the effective time of the notice shall be postponed 24 hours for each such intervening day.

**21. Business Activity Reporting**

- a. The DOE shall give Sponsor prior written notice of any change of address or name change.
- b. Facility Operator shall not change or reorganize the type of business entity under which it does business except upon prior written notification to the Sponsor, except that the Department of Energy can change the successor to the Facility Operator to continue the operation of the DOE facility without prior written notification to the Sponsor. Once notified of this change and in the event the Sponsor is not satisfied that the new entity can perform as the original Facility Operator would have, the Sponsor may terminate this Agreement as provided in the Termination paragraph.

- c. Facility Operator shall promptly notify Sponsor of the occurrence of each of the following:
  - i. The existence of any litigation or other legal proceeding affecting the Project;
  - ii. The occurrence of any casualty or other loss to project personnel, equipment, with a purchase price in excess of \$5,000.00, or third parties of a type commonly covered by insurance; and
  - iii. Facility Operator's receipt of notice of any claim or potential claim against Facility Operator for patent, copyright, trademark service mark and/or trade secret infringement that could affect the Sponsor's rights. The Facility Operator shall report to the Sponsor in reasonable written detail, each claim of patent or copyright infringement based on the performance of this Agreement of which the Facility Operator has knowledge. The Facility Operator shall furnish to the Sponsor, when requested by the Sponsor, all evidence and information in the possession of the Sponsor pertaining to such claim.

**22. Travel and Per Diem**

- a. Travel will be in accordance with the Federal Travel Regulations as modified by the Facility operator's DOE-approved rates.
- b. Travel identified as pre-approved in the budget documents does not require prior authorization.
- c. Travel that is not included in Facility Operator's Scope of Work shall require prior written authorization from the Sponsor Grant Manager.
- d. Origination and destination points for calculating travel expenses shall be the Facility Operator's office location where the employees performing on the Agreement are permanently assigned. The Facility Operator shall be reimbursed for travel and per diem on the same basis as the Facility Operator's DOE-approved rates in effect during this Agreement.
- e. The Facility Operator will document travel expenses as follows:
  - i. expenses must be detailed using the Facility Operator's DOE-approved rates.
  - ii. expenses must be documented by trip including dates and times of departure and return. Employee's travel expense report may be used instead.
  - iii. The Facility Operator will retain travel expense documentation and receipts for audit and verification to the extent audits are permitted by DOE policy.

**23. Accounting, Cost Allowability, and Audit Provisions**

- a. Accounting Procedures. The Facility Operator's costs shall be determined on the basis of the Facility Operator's accounting system procedures and practices employed as of the effective date of this Agreement, and as may be revised from time to time, provided that generally accepted accounting principles and cost reimbursement practices are used. The Facility Operator's cost accounting practices used in accumulating and reporting costs during the performance of this Agreement shall be consistent with the practices used in estimating costs for any proposal to which this Agreement relates; provided that such practices are consistent with the other terms of this Agreement and provided, further, that such costs may be accumulated and reported in greater detail during performance of this Agreement. The Facility Operator's accounting system shall distinguish between direct costs and indirect costs. All costs incurred for the same purpose, in like circumstances, are either direct costs only or indirect costs only with respect to costs incurred under this Agreement.
- b. Allowability and Unallowability of Costs. To the extent permitted by California law and any applicable funding mechanism limitations, the costs that shall be reimbursed by Sponsor include all costs, direct and indirect, incurred in the performance of work under this Agreement, as specified in Exhibit B. Allowability or unallowability of costs shall be determined in accordance with the Allowable Costs provision of the Department of Energy Acquisition Regulation (DEAR) incorporated in the Facility Operator's M&O Contract with the DOE as of the effective date of this Agreement and shall be determinative of the costs allowed under this Agreement. A copy of this provision shall be provided to Sponsor upon request.
- c. Audit. Sponsor or any other California state agency shall not audit the records of DOE. Upon the Sponsor's or the California State Auditor's (State Auditor) request and at the Sponsor's or State Auditor's expense, any cognizant federal audit agency, including the Defense Contract Audit Agency, the Government Accountability Office, the DOE Office of Inspector General, and the NASA Office of Inspector General, shall audit the Facility Operator's records related to this Agreement. The Facility Operator shall furnish detailed itemization of, and retain all records relating to, direct expenses reimbursed to Facility Operator, and to hours of employment on this Agreement by any employee of Facility Operator for which Sponsor is billed. Such records shall be maintained for a period of three years after final payment under this Agreement, or until audited by the DOE or its designee pursuant to the Sponsor's or the State Auditor's request, whichever occurs first. Once notified of a request for audit, the Facility Operator shall maintain such records until the audit is completed. Said shall be conducted in accordance with Government Auditing Standards, and shall be performed in a time frame and shall contain a scope of work mutually agreed to by the DOE and the State Auditor. The State Auditor shall be provided a copy of the audit report.

**24. Stop Work**

Sponsor's Grants Officer may, at any time, by five days written notice to the DOE, require the Facility Operator to stop all or any part of the Agreement's work tasks.

- a. Compliance. Upon receipt of such stop work order, the DOE shall ensure that the Facility Operator immediately take all necessary steps to comply and to minimize the incurrence of costs allocable to work stopped.
- b. Equitable Adjustment. An equitable adjustment shall be made by the Sponsor based upon a written request for an equitable adjustment by the DOE. Such adjustment request must be made within thirty (30) days from the date of receipt of the stop work notice.
- c. Revoking a Stop Work Order. The DOE shall order the Facility Operator to resume the stopped work only upon receipt of written instructions from the Sponsor's Grants Officer canceling the stop work order.

**25. Captions**

The headings that appear in this Agreement have been inserted for the purpose of convenience and ready reference. They do not purport, and shall not be deemed, to define, limit, or extend the scope or intent of the clauses to which they relate.

**26. Independent Contractors**

Under the terms of this Agreement, the DOE and its Facility Operator and their agents and employees and the Sponsor and its agents and employees shall act in an independent capacity and not as officers or employees or agents of the other. The Parties and the Facility Operator specifically acknowledge that they do not have authority to incur any obligations or responsibilities on behalf of the others.

**27. Severability**

If any provision of this Agreement or the application thereof is held invalid, that invalidity shall not affect other provisions of the Agreement.

**28. Entire Agreement**

It is expressly understood and agreed that this Agreement with its appendices contains the entire agreement between the Parties with respect to the work to be performed under this Agreement.

# ATTACHMENT 1

## Confidential Products and Background and Independently Funded Intellectual Property

### 1. Instructions

#### Identification of Confidential Information

- **Prior to the effective date of the Agreement**, the Facility Operator (“Recipient”) must identify in Section 2 of this attachment any products (or information contained within products) that it considers to be confidential. If the Energy Commission agrees, then the Energy Commission will only disclose confidential information under the circumstances specified in Title 20 CCR Sections 2506, 2507, and 2508 and per the terms and conditions (see Exhibits D (Rights in Technical Data – Use of Facility) and E.10 (Independently Funded Intellectual Property)).
- **During the Agreement**, if the Recipient develops additional information not originally anticipated as confidential, it must follow the procedures for a request for designation of confidential information specified in Title 20 California Code of Regulations (CCR) Section 2505.

The Energy Commission’s Executive Director will make the confidentiality determination. Following this determination, the confidential information may be added to this attachment through a Letter of Agreement (see Exhibit C Section 11 (Amendments) and Attachment 2 (Sample Letter of Agreement)).

- **When submitting products containing confidential information**, the Recipient must mark each page of any document containing confidential information as “confidential” and present it in a sealed package to the Contracts, Grants, and Loans Office.

The Commission Agreement Manager may require the Recipient to submit a non-confidential version of the product, if it is feasible to separate the confidential information from the non-confidential information.

#### Identification of Background and Independently Funded Intellectual Property

- The Recipient must identify all Background Intellectual Property and Independently Funded Intellectual Property (defined Exhibit C, Section 1) in Section 3 of this attachment prior to the effective date of the Agreement, or within sixty (60) days of becoming aware that the property has been or will be used to support a premise, postulate, or conclusion referred to or expressed in any product under the Agreement. This attachment may be amended by a Letter of Agreement (see Exhibit C, Section 11 (Amendments) and Attachment 2 (Sample Letter of Agreement)).

## 2. Confidential Products and/or Confidential Information Contained within Products

The Energy Commission designates the following products (or information contained within products) as confidential, in accordance with Title 20 California Code of Regulations Section 2505(c)(2)(B) and per the terms and conditions (see Exhibits D (Rights in Technical Data – Use of Facility) and E.10 (Independently Funded Intellectual Property)).

<b>Product name</b>	
<b>Task/subtask number</b>	
<b>Information to be kept confidential</b>	<input type="checkbox"/> Entire product <input type="checkbox"/> Selected information within product ( <i>describe below; be as specific as possible</i> ):
<b>Legal basis for confidentiality designation</b>	<input type="checkbox"/> California Public Records Act, located in California Government Code Sections 6250 et seq. ( <i>identify the relevant section(s) and subsections(s) below</i> ):  <input type="checkbox"/> Other law ( <i>identify below, including the relevant section(s) and subsections(s)</i> ):
<b>Term of confidentiality</b>	MM-DD-YY to MM-DD-YY
<p><b>Trade secrets only</b></p> <p>Answer the following questions if the product/information described above is considered a trade secret (i.e., confidential business information that provides the business with a competitive advantage):</p> <ol style="list-style-type: none"> <li>1. What is the nature of the competitive advantage provided by the product/information?</li> <li>2. How would the competitive advantage be lost by disclosure? (generally describe the value of the product/information and the ease or difficulty with which it may be legitimately acquired or duplicated by others).</li> </ol>	

**Cut and paste this chart as necessary to add products.**

### 3. Background Intellectual Property and Independently Funded Intellectual Property

The Recipient has identified the following items as Background Intellectual Property and Independently Funded Intellectual Property, as defined in Exhibit C, Section 1.

<b>Name/Title of Intellectual Property</b>	
<b>Type of Intellectual Property</b>	<input type="checkbox"/> Background intellectual property <input type="checkbox"/> Independently funded intellectual property
	<input type="checkbox"/> Invention <input type="checkbox"/> Process <input type="checkbox"/> Technology <input type="checkbox"/> Technique <input type="checkbox"/> Design <input type="checkbox"/> Work of Authorship <input type="checkbox"/> Drawing <input type="checkbox"/> Trademark/ Service mark <input type="checkbox"/> Data <input type="checkbox"/> Logo <input type="checkbox"/> Software <input type="checkbox"/> Formula
<b>Registered or Pending Intellectual Property (i.e., copyrights, patents, or trademarks that are registered or pending with the U.S. Copyright Office or the U.S. Patent and Trademark Office)</b>	<input type="checkbox"/> Copyright <input type="checkbox"/> Patent <input type="checkbox"/> Trademark/ Service mark Name of owner: Number and date:
	<i>For pending applications</i> Name of applicant: Application number and date:
<b>Unregistered Intellectual Property</b>	<input type="checkbox"/> Copyright <input type="checkbox"/> Trademark/ Service mark <input type="checkbox"/> Trade Secret Name of owner:
<b>Description of how the property will be or has been used to support a premise, postulate, or conclusion referred to or expressed in any product under the Agreement</b>	

**Cut and paste this chart as necessary to add intellectual property.**

**ATTACHMENT 2:  
Sample Letter of Agreement**

Generally, changes that are not significant to the Agreement may be documented in a Letter of Agreement signed by both parties. Recipients must request changes to the Agreement using the procedure described in Exhibit C, Section 11 (Amendments). If the changes are approved, the Commission Agreement Officer will prepare a Letter of Agreement using the format below.

Electronic signatures in the form of scanned signatures are acceptable if the Letter of Agreement is sent via email.

**LETTER OF AGREEMENT**

**California Energy Commission and [Recipient], Agreement Number [#]**

[Letter of Agreement date]

The California Energy Commission (Energy Commission) and [Recipient] (Facility Operator) entered into Agreement Number [#] (Agreement) on [agreement's effective date]. The purpose of the Agreement is to [brief purpose statement].

The purpose of this Letter of Agreement (Letter) is to add the changes listed in Attachment 1 of this Letter to the Agreement. The changes in Attachment 1 include: [brief description of changes (e.g., formatting revisions)].

Please sign this Letter below and return it to me via e-mail or U.S. mail (if returning via email, an electronic signature in the form of a scanned signature is acceptable). The Energy Commission's Agreement Officer will then sign the Letter, and a copy containing both signatures will be sent to you via email or U.S. mail. If you have any questions you may call me at (916) 654-5186 or e-mail me at [Agreement Officer's email address].

Sincerely,  
[NAME OF AGREEMENT OFFICER]  
Energy Commission Agreement Officer

Approved by:

**RECIPIENT**

BY (Authorized Signature) -	DATE SIGNED
PRINTED NAME AND TITLE OF PERSON SIGNING	
<b>STATE OF CALIFORNIA</b>	
<b>California Energy Commission (Energy Commission)</b>	
BY (Authorized Signature) -	DATE SIGNED
PRINTED NAME AND TITLE OF PERSON SIGNING	

**LETTER OF AGREEMENT**  
**Attachment 1**  
**Changes to Agreement Number [#]**

**Use the format below to list changes to Agreement exhibits.**

**Scope of Work (Exhibit A)**

1. **Page [#], Task [#] (name), Subtask [#] (name)**  
Insert a brief description of the change.

**Budget (Exhibit B)**

1. **Exhibit [#], Page [#]**  
Insert a brief description of the change.

**Terms and Conditions (Exhibit C)**

1. **Page [#], Section [#] (name)**  
Insert a brief description of the change.

**Special Terms and Conditions (Exhibit D, E, G and H)**

1. **Page [#], Section [#] (name)**  
Insert a brief description of the change.

**Contacts List (Exhibit F)**

1. **Recipient's Contact Information or Energy Commission's Contact Information**  
Insert a brief description of the change.

**Exhibit D**  
**Rights in Technical Data-Use of Facility**

1. The Sponsor and MFCs agree to furnish to the DOE and Facility Operator or leave at the facility that information, if any, which is (1) essential to the performance of work by the Facility Operator personnel or (2) necessary for the health and safety of such personnel in the performance of the work. Any information furnished to the DOE and Facility Operator shall be deemed to have been delivered with Unlimited Rights unless marked as Proprietary Information. The Sponsor and MFCs agree that it has the sole responsibility for appropriately identifying and marking all documents containing its Proprietary Information, whether such documents are furnished by the Sponsor or MFC or are incorporated within report(s) generated under this Agreement and made available to the Sponsor and each MFC for review. If Proprietary Information is disclosed orally, electronically, visually, or in any other intangible form, it shall be identified as such, at the time of disclosure and confirmed in writing within ten (10) days as being Proprietary Information.
2. The Sponsor, Facility Operator, the Government, and the California Public Utilities Commission shall have Unlimited Rights in all Generated Information, except for information which is disclosed in a Subject Invention disclosure being considered for patent protection or information which is marked as either Proprietary Information or copyrighted in accordance with the provisions set forth herein below. Subject Invention information which may be disclosed to the Sponsor prior to issuance of a patent shall be treated as confidential in accordance with 35 U.S.C. 205 and shall not be further disclosed by the Sponsor during pendency of the patent application.
3. Each MFC may designate as Proprietary Information (as defined in Exhibit C(1)) any of its Generated Information. However, MFC shall grant a license to such designated Proprietary Data to Sponsor and the California Public Utilities Commission, and further designate to LSE's and CSPs, and the Government similar to the copyright license below in section (7) for MFC's Generated Information. Also, each MFC shall consider granting licenses to other MFCs as requested.
4. The Government and Facility Operator agree not to disclose properly marked Proprietary Information of the Sponsor without written approval, except to Government employees who are subject to the statutory provisions against disclosure of confidential information set forth in the Trade Secrets Act (18 U.S.C. 1905).
5. The Sponsor and each MFC is solely responsible for the removal of all of its Proprietary Information from the facility by or before termination of this Agreement. The Government and Facility Operator shall agree to cooperate in the return of any of the Sponsor's or MFC's Proprietary Information. The Government and Facility Operator shall have Unlimited Rights in any Proprietary Information which is incorporated into the facility or equipment under this Agreement to such an extent that the facility or equipment is not restored to the condition existing prior to such incorporation. The Government and Facility Operator shall have Unlimited Rights in any information which is not removed from the facility by termination of this Agreement.

6. The Sponsor and the California Public Utilities Commission have the right to obtain from the DOE through its Facility Operator as a product, a copy of all Technical Data, including properly marked Proprietary Information first produced in performance of this Agreement which the Sponsor has not excluded as being unusable. The Sponsor agrees that the Facility Operator will also provide the DOE with a nonproprietary description of the work performed under this Agreement.
7. Copyrights. The Sponsor may assert copyright in any of its Generated Information. Each MFC may assert copyright in any of its Generated Information. The Facility Operator is given permission to assert copyright in accordance with its M&O Contract with the DOE. Subcontractors are given permission to assert copyright in accordance with the subcontract agreement with the Facility Operator. The Facility Operator, Subcontractors, and/or MFCs hereby grant to the Sponsor and the California Public Utilities Commission a royalty-free, non-exclusive, irrevocable, non-transferable, worldwide license to produce, translate, publish, distribute, duplicate, exhibit, prepare derivative works, perform, use and dispose of, and to authorize others to produce, translate, publish, use, distribute, duplicate, exhibit, prepare derivative works, perform and dispose of all Generated Information copyrighted by the Facility Operator, Subcontractors, or MFCs for State governmental purposes subject to the other provisions of this article and Paragraphs 7c and 7d of this Exhibit, and to the extent that copyright is asserted, the Government reserves for itself a royalty-free, world-wide, irrevocable, non-exclusive license for Governmental purposes to publish, distribute, translate, duplicate, exhibit, prepare derivative works, and perform any such Generated Information copyrighted by the Facility Operator, Subcontractors, MFCs or the Sponsor.
  - a. In the event software is first produced in performance of this Agreement, Facility Operator shall have the right to copyright and/or patent such software in accordance with its M&O Contract with the DOE. The Facility Operator is given permission to assert copyright in accordance with its M&O Contract with the DOE and hereby grants the Sponsor and the California Public Utilities Commission a royalty-free, no-cost, non-exclusive, irrevocable, non-transferable except for sublicenses to a Load-Serving Entity or CSP granted according to Paragraph 7c and 7d of this Exhibit D, worldwide, license to produce and use the software, and to prepare derivative works for State governmental purposes.

In the event software is first produced in performance of this Agreement by a Subcontractor of Facility Operator, Subcontractor may be granted the right to copyright and/or patent such software by Facility Operator in its subcontract. Subcontractors may assert copyright in the software as provided in its subcontract with Facility Operator and each Subcontractor hereby grants the Sponsor and the California Public Utilities Commission a royalty-free, no-cost, non-exclusive, irrevocable, non-transferable except for sublicenses to a Load-Serving Entity or CSP granted according to Paragraph 7c and 7d of this Exhibit D, worldwide, license to produce and use the software, and to prepare derivative works for State governmental purpose.

In the event software is first produced in performance of this Agreement, MFC shall have the right to copyright and/or patent such software. The MFC may assert copyright in the software and hereby grants the Sponsor and the California Public Utilities Commission a royalty-free, no-cost, non-exclusive, irrevocable, non-transferable except for sublicenses to a Load-Serving Entity or CSP granted according to Paragraph 7c and 7d of this Exhibit D, worldwide, license to produce and use the software, and to prepare derivative works for State governmental purposes.

The license in this Paragraph 7 to the Sponsor and the California Public Utilities Commission extends and applies only to Copyrighted Project Work, including software, or copyrighted Generated Information first produced by the Facility Operator, Subcontractors or with Match Funds under this Agreement.

This license does not extend to such copyrighted work developed outside of this Agreement that is Independently Funded Intellectual Property as defined in Exhibit C, section (1). For all Facility Operator Generated Information which becomes a Copyrighted Project Work, the Facility Operator will apply a notice in accordance with 17 U.S.C. 401 et seq.

- b. Both the Energy Commission and the California Public Utilities Commission may grant, or direct Facility Operator or MFC to grant, to LSEs and/or CSPs a no-cost, non-exclusive, non-commercial, non-transferable, irrevocable, royalty-free, perpetual, limited for non-commercial purposes for use in California, license, subject to Paragraph (d) below of this section, to use, publish, translate, modify, and reproduce copyrighted Generated Information, including Copyrighted Project Work and software, to enhance the entities' service to EPIC ratepayers in California for use by the LSE at LSE facilities, including its transmission and distribution systems, in California.
- c. Any such license to a Load-Serving Entity or CSP must contain the following required terms: (i) Load-Serving Entity shall indemnify, defend and hold harmless the Sponsor, California Public Utilities Commission, the creators of the Copyrighted Project Work and their employers, Facility Operator, the DOE and U.S. Government, their officers, employees and agents, against all claims, suits, losses, damages, costs, fees, and expenses, including attorney's fees; (ii) a disclaimer of all warranties of merchantability or fitness for a particular purpose which is substantively equivalent to the disclaimer in Exhibit C paragraph 7 Disclaimer; and (iii) Notice that any license to a Load-Serving Entity or CSP under this Agreement is subject to the right of the United States federal government to a non-exclusive, nontransferable, irrevocable, paid-up license to practice or have practiced for or on behalf of the United States the Copyrighted Project Work throughout the world, and certain U.S. Government march-in rights in accordance with 48 CFR 27.304-1(g).

- d. The licenses to LSEs are sublicenseable to CSPs only for non-commercial purposes of copying, using and implementing the copyrighted Generated Information or the Copyrighted Project Work including software at the LSE's facilities, including its transmission and distribution systems, in California for the purpose of facilitating the LSE's enhancement of service to EPIC ratepayers in California. LSEs may request the Sponsor to direct Facility Operator, Subcontractor or MFC to grant such license to a CSP. In the event that an LSE must issue such a sublicense to a CSP, the LSE must obtain prior written approval from the Energy Commission or California Public Utilities Commission (whichever agency granted the LSE the sublicense) in order to sublicense to such Contract Service Provider. LSEs shall strictly prohibit such CSP from transferring the Generated Information and Copyrighted Project Work to others and shall contractually bind such CSP in a manner no less strict than as set forth in this Agreement and such prohibition shall survive termination of any agreement between the LSE and CSP. Upon termination, LSEs shall direct the CSP to return or delete any Generated Information or Copyrighted Project Work to LSEs.
  - e. Sponsor shall provide Facility Operator notification of any license granted to a Load-Serving Entity or CSP under Paragraph 7c or 7d of this Exhibit. Facility Operator, Subcontractor and MFCs shall provide Sponsor notification of any license to Copyrighted Project Work granted to a LSE or CSP.
8. The terms and conditions of this Exhibit shall survive the Agreement, in the event that the Agreement is terminated in whole or in part before completion of the Exhibit A, Scope of Work.

## **Exhibit E**

### **Patent Rights-Use of Facilities**

- 1. Rights of the Sponsor -Election to Retain Rights**
  - a. Subject to the provisions of paragraph 6, with respect to any Subject Invention reported and elected in accordance with paragraph 7(a) of this Exhibit, the Sponsor may elect to obtain the entire right, title and interest throughout the world to each Subject Invention made by the Sponsor's employees and any patent application filed in any country on that Subject Invention and in any resulting patent secured by the Sponsor. Where appropriate, the filing of patent applications by the Sponsor is subject to DOE and other United States Government (Government) security regulations and requirements.
  - b. With respect to any Subject Invention in which the Facility Operator or the Government obtains title, the Facility Operator or the Government grants to the Sponsor and the California Public Utilities Commission a nonexclusive, non-transferable, non-sublicenseable, irrevocable, paid-up, license to practice or have practiced by or on behalf of the State of California, for State governmental purposes, the Subject Invention throughout the world. The Facility Operator and/or Government will obtain agreements to effectuate this clause with all Subcontractors, Match Fund Contributors, persons or entities obtaining ownership interest in patented Subject Inventions.
  - c. The license to Sponsor under this Section 1 applies and extends to a Subject Invention under this Agreement. This license does not extend to any Independently Funded Intellectual Property, as defined in Exhibit C, section (1). Both the Sponsor and the California Public Utilities Commission may direct Facility Operator or Subcontractor or MFCs to grant LSEs or CSPs a no-cost, non-exclusive, non-transferable, irrevocable, royalty-free, perpetual limited to California license for non-commercial purposes, subject to Paragraph (d) of this section to use, make, and have made by a CSP without the right to further sublicense Subject Inventions to enhance the LSE's service to EPIC ratepayers in California for use by the LSE at LSE facilities in California, including LSE transmission and distribution systems.

- d. Any such license to a Load-Serving Entity or CSP must contain the following required terms: (i) the Load-Serving Entity or CSP shall indemnify, defend and hold harmless the Sponsor, California Public Utilities Commission, the inventors of the Subject Inventions and their employers, Facility Operator, the DOE and U.S. Government, their officers, employees and agents, against all claims, suits, losses, damages, costs, fees, and expenses, including attorneys fees; (ii) a disclaimer of all warranties of merchantability or fitness for a particular purpose which is substantively equivalent to the disclaimer in Exhibit C paragraph 7 Disclaimer; and (iii) Notice that any license to a Load-Serving Entity or CSP under this Agreement is subject to the right of the United States federal government to a non-exclusive, nontransferable, irrevocable, paid-up license to practice or have practiced for or on behalf of the United States the Subject Invention throughout the world, and certain U.S. Government march-in rights in accordance with 48 CFR 27.304-1(g).
- e. The licenses to LSEs are sublicenseable to CSPs only for non-commercial purposes for the purpose of making, using and implementing the Subject Invention at the LSE's facilities for the purpose of facilitating the LSE's enhancement of service to EPIC ratepayers in California. LSEs may direct the Facility Operator or Subcontractor or MFC to grant such license to a CSP. In the event that an LSE must issue a sublicense to a CSP, LSEs must obtain prior written approval from the Energy Commission or California Public Utilities Commission (whichever agency granted the LSE the sublicense) in order to sublicense to such CSP. LSEs shall strictly prohibit a CSP from making, using, offering for sale, selling, or otherwise transferring the Subject Invention to others and shall contractually bind such CSP in a manner no less strict than as set forth in this Agreement and such prohibition survives the termination of any agreement between the LSE and CSP.
- f. Sponsor shall provide Facility Operator notification of any license granted to a Load-Serving Entity or CSP under Paragraph 2c or 2d of this Exhibit. Facility Operator, Subcontractors and MFCs shall provide Sponsor notification of any license granted to a LSE or CSP.

## **2. Rights of the Matching Fund Contributors -Election to Retain Rights**

- a. As stated in Exhibit C Paragraph 17, before any Match Fund contribution of funds, personnel and/or equipment, Facility Operator shall require each MFC to enter into a MFC Collaborative Agreement with Facility Contractor in which MFCs agree to comply with the applicable terms, conditions, and obligations of this Agreement pursuant to the Project Task in which the MFC will participate and provide Match Funds.

- b. Subject to the provisions of paragraph 6 of this Exhibit, with respect to any Subject Invention reported and elected in accordance with paragraph 7(a) of this Exhibit, an MFC may elect to obtain the entire right, title and interest throughout the world to each Subject Invention made by the MFC's employees and any patent application filed in any country on that Subject Invention and in any resulting patent secured by the MFC. Where appropriate, the filing of patent applications by the MFC is subject to DOE and other United States Government (Government) security regulations and requirements.
- c. Any MFC Collaborative Agreement must ensure that the MFC agrees to grant a license to the Sponsor and the Government to fulfill the obligations in section (1) above.
- d. For paragraphs 4 through 8 below, the term "MFC" replaces the term "Sponsor" when determining the rights, obligations and responsibilities of an MFC.

**3. Rights of the Facility Operator or its Subcontractors-Election to Retain Rights**

- a. With respect to any Subject Invention reported in accordance with paragraph 7(b) of this Exhibit, the Facility Operator may elect to obtain title to each Subject Invention made by the Facility Operator's employees subject to the terms of its M&O Contract with the DOE. Once title has been elected by the Facility Operator, a Facility Operator's Subject Invention may subsequently be assigned to the Sponsor, the California Public Utilities Commission, or Load-Serving Entities, subject to the provisions of paragraphs 1, 2, 4 and 6 hereunder, for continuation of patent prosecution, the payment of maintenance fees, or other good cause as mutually agreed to by the DOE, Facility Operator and the Sponsor. In the case of a nonprofit management and operations Facility Operator, the above arrangement has been approved by the DOE under 35 USC 202 (c) (7).
- b. The Subcontractor shall report Subject Inventions it makes in accordance with the terms and conditions set forth in its subcontract with the Facility Operator. In addition, the Subcontractor shall disclose to the Facility Operator and Sponsor at the same time as disclosure to the DOE any Subject Inventions made by the Subcontractor under this Agreement. With respect to any Subject Invention reported in accordance with paragraph, the Subcontractor may elect to obtain title to each Subject Invention made by the Subcontractor's employees subject to the terms of its subcontract with Facility Operator. Any such subcontract must ensure that the Subcontractor agrees to grant, or Facility Operator obtains from Subcontractor, a license to the Sponsor and the Government to fulfill the obligations in section (1) above.
- c. Subcontractor Assignment to the Facility Operator or the Government.  
The Subcontractor agrees to assign to either the Facility Operator or the Government, as requested by the DOE, the entire right, title, and interest in any country to each Subject Invention of the Subcontractor, where the Subcontractor:
  - i. does not elect pursuant to this Exhibit to retain such rights;

- ii. elects or is assigned title to a Subject Invention pursuant to this paragraph but fails to have a patent application filed in that country on the Subject Invention or decides not to continue prosecution or decides not to pay any maintenance fees covering such Subject Invention; or
- iii. elects to retain title but, at any time, no longer desires to retain title.

#### **4. Rights of Facility Operator and Government**

Assignment to the Facility Operator or the Government.

The Sponsor agrees to assign to either the Facility Operator or the Government, as requested by the DOE, the entire right, title, and interest in any country to each Subject Invention of the Sponsor, where the Sponsor:

- i. does not elect pursuant to this Exhibit to retain such rights;
- ii. elects or is assigned title to a Subject Invention pursuant to paragraph 2, 3, or 4, but fails to have a patent application filed in that country on the Subject Invention or decides not to continue prosecution or decides not to pay any maintenance fees covering such Subject Invention; or
- iii. elects to retain title but, at any time, no longer desires to retain title.

#### **5. Unelected Interests**

Placement in the Public Domain

The Parties and the Facility Operator each agree that either may place any Subject Invention in the public domain (by inclusion in the final report of this project):

- i. that is not elected by either Party pursuant to this Exhibit;
- ii. for which each Party fails to have a patent application filed in that country on a Subject Invention or decides not to pay any maintenance fees covering such Subject Invention; and
- iii. for which neither Party nor the Government desires to retain title at any time.

#### **6. Terms and Conditions of Waived Rights**

- a. To preserve the Facility Operator's and the Government's residual rights to Sponsor's Subject Inventions, and in patent applications and patents on Sponsor's Subject Inventions, the Sponsor will take all actions in reporting, electing, filing on, prosecuting, and maintaining invention rights promptly, but in any event, in sufficient time to satisfy domestic and foreign statutory and regulatory time requirements; or, if the Sponsor decides not to take appropriate steps to protect the invention rights, it will notify the Facility Operator or DOE Patent Counsel in sufficient time to permit either the Facility Operator or the Government to file, prosecute, and maintain patent applications and any resulting patents prior to the end of such domestic or foreign statutory or regulatory time requirements.

- b. The Sponsor will convey or ensure the conveyance of any executed instruments necessary to vest in either the Facility Operator or the Government the rights set forth in this Exhibit.
- c. With respect to any Subject Invention in which the Sponsor obtains title, the Sponsor hereby grants to the Government a non-exclusive, nontransferable, irrevocable, paid-up license to practice or have practiced by or on behalf of the Government the Subject Invention throughout the world.
- d. The Sponsor will provide the Government a copy of any patent application which it files on a Subject Invention within six (6) months after such application is filed, including its serial number and filing date.
- e. The Sponsor agrees to include, within the specification of any U.S. patent application and any patent issuing thereon covering a Subject Invention in which the Sponsor obtains title, the following statement: "The Government has rights in this invention pursuant to [specify this underlying Agreement]."
- f. Preference for U.S. Industry. Notwithstanding any other provision of this Exhibit, the Sponsor agrees that neither it nor any assignee, will grant to any person the exclusive right to use or sell any Subject Invention in the U.S. unless such person agrees that any products embodying the Subject Invention or produced through the use of the Subject Invention will be manufactured substantially in the U.S. However, in individual cases, the requirement for such an agreement may be waived by DOE upon a showing by the Sponsor or its assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the U.S. or that under the circumstances domestic manufacture is not commercially feasible.
- g. March-In-Rights. The Sponsor agrees that with respect to any Subject Invention in which it has acquired title, the DOE will retain the right to require the Sponsor to grant a responsible applicant a non-exclusive, partially exclusive, or exclusive license to use the Subject Invention in any field of use, on terms that are reasonable under the circumstances, or if the Sponsor fails to grant such a license, to grant the license itself. DOE may exercise this right only in exceptional circumstances and only if DOE determines that:
  - i. the action is necessary to meet health or safety needs that are not reasonably satisfied by the Sponsor; or
  - ii. the action is necessary to meet the requirements for public use specified by Federal regulations and such requirements are not reasonably satisfied by the Sponsor; or
  - iii. such action is necessary because a licensee of the exclusive right to use or sell any Subject Invention in the United States is in breach of the agreement required by paragraph 6(f).
- h. The Sponsor agrees to refund any amounts received as royalty charges on any Subject Invention to which the Sponsor obtains title in procurement by or on behalf of the Government and to provide for that refund in any instrument transferring rights to any party in the Subject Invention.

## **7. Invention Identification. Disclosures. and Reports**

- a. The Sponsor will furnish the DOE Patent Counsel a written report containing full and complete technical information concerning each Subject Invention it makes within six (6) months after conception or first actual reduction to practice, whichever occurs first, in the course of or under this Agreement, but in any event prior to any on sale, public use, or public disclosure of such invention known to the Sponsor. The report will identify the grant and inventor(s) and will be sufficiently complete in technical detail and appropriately illustrated by sketch or diagram to convey to one skilled in the art to which the invention pertains a clear understanding to the extent known at the time of disclosure, of the nature, purpose, operation, and to the extent known, the physical, chemical, biological, or electrical characteristics of the invention. The report should also include any election of invention rights under this Exhibit. When a Subject Invention is reported under this paragraph 7(a), it will be presumed to have been made in the manner specified in Section (a)(1) and (2) of 42 U.S.C. 5908.
- b. The Facility Operator shall report Subject Inventions it makes in accordance with the terms and conditions set forth in its M&O Contract with the DOE. In addition, the Facility Operator shall disclose to the Sponsor at the same time as disclosure to the Department any Subject Inventions made by the Facility Operator under this Agreement.
- c. The Facility Operator agrees to include, within the specification of any U.S. patent application and any patent issuing thereon covering a Subject Invention in which the Facility Operator obtains title, the following statement: "This invention was made with support from the US Dept of Energy under Contract No. [contract number] and the State of California under Grant No. [grant number.] Both the Government and the California Energy Commission have certain rights in this invention."
- d. Requests for extension of time for election under paragraphs (a) and (b) above may be granted by DOE Patent Counsel for good cause shown in writing.

## **8. Facilities License**

In addition to the rights of the Parties and the Facility Operator with respect to Subject Inventions, the Sponsor hereby grants to the Government an irrevocable, non-exclusive, paid-up license to (1) practice or to have practiced by or for the Government at the facility, and (2) transfer such license with the transfer of the facility any inventions or discoveries regardless of when conceived or first actually reduced to practice or acquired by the Sponsor, which at any time, through completion of this Agreement, are owned or controlled by the Sponsor and are incorporated in the facility as a result of this Agreement to such an extent that the facility is not restored to the condition existing prior to the Agreement. The acceptance or exercise by the Government of the aforesaid rights and license will not prevent the Government at any time from contesting the enforceability, validity, scope of, or title to, any rights or patents herein licensed.

**9. Background Intellectual Property**

The Facility Operator will not knowingly use Background Intellectual Property in performing work under this Agreement unless such Background Intellectual Property, if any, is identified herein below. The Sponsor is not granted any license rights, either express or implied, to this Background Intellectual Property under this Agreement. Facility Operator provides this information to comply with its M&O Contract and to notify the Sponsor that licenses to Background Intellectual Property may be necessary to practice Subject Inventions made under this Agreement. Neither the Government nor the Facility Operator shall be liable for failing to bring Background Intellectual Property to the Sponsor's attention or for infringement of others' rights or damages incurred through the use of such intellectual property.

Background Intellectual Property is listed in Exhibit C, Attachment 1.

**10. Independently Funded Intellectual Property**

Each MFC may identify in the MFC Collaborative Agreement any Independently Funded Intellectual Property, as defined in Exhibit C, section (1), used solely in performance of research under its Project Task. The Sponsor and the Government may request such list of Independently Funded Intellectual Property. If such list meets the definition of Proprietary Information, MFC may provide such list marked as Proprietary Information, Sponsor and the Government will treat such list accordingly. This Agreement does not grant to any other MFC any option, grant, or license to commercialize, or otherwise use the MFC's Independently Funded Intellectual Property. Licensing of Independently Funded Intellectual Property, if agreed to by the Parties, shall be the subject of separate licensing agreements between the Parties.

Each MFC shall use reasonable efforts to list all relevant Independently Funded Intellectual Property.

Independently Funded Intellectual Property is listed in Exhibit C, Attachment 1.

**11. Limitation of Rights**

Nothing contained in this patent rights Exhibit shall be deemed to give the Government any rights with respect to any invention other than a Subject Invention except as set forth in Facilities License of paragraph 8.

**12. Survival after Termination of Agreement**

The terms and conditions of this Exhibit will survive the Agreement.

## **Exhibit G**

### **Rights in Other Intellectual Property**

#### **A. Rights of Facility Operator and Match Fund Contributors.**

- (1) The Facility Operator and/or Match Fund Contributor may seek to obtain legal protection of Other Intellectual Property generated under this Agreement in the United States or foreign countries. The Party or Parties that originated or created such Other Intellectual Property shall have the full right, title and interest in such Other Intellectual Property. Such Other Intellectual Property is subject to certain march-in rights, US Preference, and to a retained United States governmental purpose license and the license to the Sponsor in the paragraph below.
- (2) With respect to trademarks or service marks, the Parties acknowledge that the Government shall have the right to indicate on any similar goods or services produced by or for the Government that such goods or services were derived from and are a DOE version of the goods or services protected by such trademark/service mark, with the trademark and the owner thereof being specifically identified. Where the Government indicates on goods that such goods were derived from goods protected by a trademark/service mark, the Government will also indicate that the Trademark owner has had no right to perform a quality review/inspection of the DOE version of the goods. In addition, the Government shall have the right to use such Trademark/Service Mark in print and communications media.
- (3) The Facility Operator and/or Government will obtain agreements to effectuate the rights and licenses required by this Exhibit for the Sponsor and the California Public Utilities Commission with all Subcontractors, Match Fund Contributors, persons or entities obtaining ownership interest in Other Intellectual Property generated under this Agreement.

#### **B. Rights of Sponsor.**

- (1) A California state governmental purpose license will also be retained in such Other Intellectual Property generated under this Agreement which is not identified as Background Intellectual Property or Independently Funded Intellectual Property.
- (2) The Facility Operator or the Government grants to the Sponsor and the California Public Utilities Commission a nonexclusive, non-transferable except for sublicenses to a Load-Serving Entity granted according to Paragraphs B(2)(a), B(2)(b) and B(2)(c) of this Exhibit G, irrevocable, paid-up, non-commercial purposes license to practice or have practiced by or on behalf of the State of California, for State governmental purposes, the Other Intellectual Property throughout the world. The license to Sponsor under this Section B applies and extends to Other Intellectual Property first developed by the Facility Operator or Subcontractor or by an MFC with Match Funds under this Agreement. This license does not extend to any Independently Funded Intellectual Property.

Any MFC Collaborative Agreement (see Exhibit E.2.) must ensure that the MFC agrees to grant a license to the Sponsor and the Government to fulfill the obligations in this Exhibit.

- (a) Both the Energy Commission and the California Public Utilities Commission may direct Facility Operator or a Subcontractor or an MFC to grant Load-Serving Entities or CSPs a no-cost, non-exclusive, non-transferable, irrevocable, royalty-free, perpetual, limited to California license, subject to Paragraph B(2)(b) and B(2)(c) of this section, to make, have made, use, publish, translate, modify, and reproduce Other Intellectual Property to enhance the entities' service to EPIC ratepayers in California.
- (b) Any such license to a Load-Serving Entity or CSP must contain the following required terms: (i) the Load-Serving Entity or CSP shall indemnify, defend and hold harmless the inventors or creators of Other Intellectual Property and their employers, sponsors or funders of research leading to the Other Intellectual Property, the Sponsor, California Public Utilities Commission, Facility Operator, the DOE and U.S. Government, their officers, employees and agents, against all claims, suits, losses, damages, costs, fees, and expenses, including attorneys fees; (ii) a disclaimer of all warranties of merchantability or fitness for a particular purpose which is substantively equivalent to the disclaimer in Exhibit C paragraph 7 Disclaimer; and (iii) Notice that any license to a Load-Serving Entity or CSP under this Agreement is subject to the right of the United States federal government to a non-exclusive, nontransferable, irrevocable, paid-up license to practice or have practiced for or on behalf of the United States the Other Intellectual Property throughout the world, and certain U.S. Government march-in rights in accordance with 48 CFR 27.304-1(g).
- (c) The licenses to LSEs are sublicensable to CSPs only for non-commercial purposes for the purpose of using and implementing the Other Intellectual Property at LSE California facilities, including LSE transmission and distribution systems, for the purpose of facilitating the LSE's enhancement of service to EPIC ratepayers in California. LSEs may direct the Facility Operator or Subcontractor or MFC to grant such license to a CSP. In the event that an LSE must issue a sublicense to a CSP, LSEs must obtain prior written approval from the Energy Commission or California Public Utilities Commission (whichever agency granted the load-serving entity the license) in order to sublicense the license to a CSP. LSEs shall strictly prohibit a CSP from making, using, offering for sale, selling, or otherwise transferring the Other Intellectual Property to others and shall contractually bind such CSP in a manner no less strict than as set forth in this Agreement and such prohibition shall survive the termination of any agreement between the LSE and CSP.
- (d) Sponsor shall provide Facility Operator notification of any license to Other Intellectual Property granted to a LSE. Facility Operator and its Subcontractors and MFCs shall provide Sponsor notification of any license to Other Intellectual Property granted to a LSE.

### C. Survival After Termination

The terms of this Exhibit shall survive any termination of this Agreement.

## **Exhibit H**

### **Payments of Royalties to Sponsor**

**A.** In consideration of the Sponsor providing EPIC funding to Facility Operator, Facility Operator agrees to provide to the Sponsor an amount equal to a portion of Net Revenues or Net Royalties as annual royalty payments under the terms and conditions hereinafter set forth (“Annual Royalty Payments”). For avoidance of doubt, these Annual Royalty Payments, as defined below, are collected on behalf of the Sponsor for the benefit of Sponsor and EPIC ratepayers and therefore does not fall under the requirement of Facility Operator’s prime contract with DOE regarding the disposition of income received from license royalties and royalty income.

**B.** Annual Royalty Payments.

**Net Royalties.** If the Facility Operator licenses to a Licensee, Facility Operator’s obligation to make Annual Royalty Payments to the Sponsor shall commence from the date that the Net Royalties calculation is positive. Annual Royalty Payments are payable in annual installments and are due the first day of March for Net Royalties calculations made and Annual Royalty Payments collected for the Facility Operator’s prior fiscal year. The Facility Operator is responsible for notifying the Sponsor, on an annual basis, of Net Royalties received as a result of its licensing of intellectual property under this Agreement.

**Net Revenues.** If the Facility Operator is the licensee, the Facility Operator’s obligation to make payments to the Commission shall commence upon the first sale of the Licensed Product. Payments are payable in annual installments and are due the first day of March for the prior fiscal year of the Facility Operator and extend until ten (10) years from the Agreement’s end date. Facility Operator agrees to pay an amount equivalent to 10% of the Net Revenues by check made payable to the California Energy Commission, EPIC Fund.

Facility Operator agrees to pay Sponsor Annual Royalty Payments in an amount equivalent to 10% of the total annual Net Royalties calculated for the prior fiscal year from each intellectual property in each license that is subject to Net Royalties in this Agreement. Annual Royalty Payments shall be made by check, made payable to the California Energy Commission, EPIC Fund. Annual Royalty Payments from Net Revenues and Net Royalties received resulting from the sale, license, or assignment of each Subject Invention, Copyrighted Project Work or Other Intellectual Property right shall extend for a period of ten (10) years from the Agreement’s end date that funded the licensed intellectual property or until the underlying patent, copyright, or Other Intellectual Property protection expires, whichever occurs first. Unless an early buyout is made, total royalty payments under this Agreement for all licensed intellectual property will be limited to three (3) times the amount of funds paid by the Energy Commission under the Agreement.

If a Licensed Product, Subject Inventions, Copyrightable Works or Generated Information were developed in part with Match Funds or non-Energy Commission funds (e.g., federal funds) during the Agreement term, the Net Revenues or Net Royalties payment will be reduced in accordance with the percentage of development activities that were funded with Match Funds or non-Energy Commission funds. Example 1, Net Revenues: if 10% of the development activities were funded with Match Funds during the Agreement and Net Revenues totaled \$100,000 in one year, the Recipient would owe the Energy Commission \$1350 for the year ( $1.5\%$  of \$100,000 = \$1500;  $10\%$  of \$1500 = \$150;  $\$1500 - \$150 = \$1350$ ). Example 2, Net Royalties: if 80% of the development activities were funded with Match Funds or non-Energy Commission funds during the Agreement and Net Royalties totaled \$100,000 in one year, the Recipient would owe the Energy Commission \$2,000 for the year ( $10\%$  of \$100,000 = \$10,000;  $80\%$  of \$10,000 = \$8,000;  $\$10,000 - \$8,000 = \$2,000$ ).

Notwithstanding, the Facility Operator is not required to report or make an Annual Royalty Payment for any calendar year in which Net Royalties are less than \$1,000 U.S. Dollars.

- C.** Early Buyout. Facility Operator may satisfy the entire royalty obligation to the Energy Commission without a pre-payment penalty, as an alternative to annual Net Royalties and Net Revenues payments under Paragraph B. If an amount equal to one and a half (1.5) times the amount of funds paid by the Energy Commission under the Agreement is paid to the Energy Commission in a single year within five (5) years of the Agreement's end date, then Facility Operator will have no continuing obligations under Paragraph B of this Exhibit.
- D.** The Facility Operator agrees to use its best business judgment, consistent with the Facility Operator's licensing practices, when making any sale, license, assignment, or other transfer to licensees of any intellectual property rights that arise under this Agreement.