

**AGREEMENT  
between  
ABAG POWER  
and**

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**to Wind Up Electric Program**

This Agreement between ABAG Publicly Owned Energy Resources (ABAG POWER), a joint exercise of powers agency created under the California Joint Powers Act (California Government Code §§6500 *et seq.*), and \_\_\_\_\_ (*City/County/Other*), is made effective \_\_\_\_\_.

**RECITALS**

- A. The *City/County/Other/County/Other* became a signatory to the Joint Powers Agreement creating ABAG POWER (JPA) (Attachment A, Exhibit 1) and a Member of ABAG POWER.
- B. ABAG POWER has been, and continues to be, staffed by employees of the Association of Bay Area Governments (ABAG).
- C. The *City/County/Other/County/Other* and ABAG POWER entered into the Direct Access Electric Aggregation Agreement (DA Agreement) (a form of the DA Agreement is at Attachment A, Exhibit 2). Under the DA Agreement, the *City/County/Other/County/Other* was a participant in the direct access electric aggregation program (Electric Program) until the Electric Program was suspended effective June 30, 2001 (the Electric Program is described in more detail in Attachment B).
- D. During the operation of the Electric Program and pursuant to the DA Agreement, each Member was obligated to pay, and did pay, to ABAG POWER a proportionate share of Electric Program costs and Working Capital needs (Electric Program costs and Working Capital needs are described in more detail in Attachment B).
- E. Upon suspension of the Electric Program, ABAG POWER retained funds (previously paid by the Members as described in paragraph D) to pay (1) identified potential Electric Program liabilities, (2) the costs of winding up the Electric Program, and (3) the costs of marshalling assets (amounts owed to ABAG POWER and Members) (liabilities, assets and costs are described in more detail in Attachments B and C).
- F. ABAG POWER has determined that it cannot, within a reasonable timeframe, (1) pay or eliminate certain potential liabilities, (2) marshal certain assets, or (3) eliminate identified potential liabilities associated with a major asset.

Therefore, ABAG POWER and *City/County/Other* agree to wind up the Electric Program under the following terms and conditions:

- 1. Payment. *City/County/Other* accepts as a true and proper accounting of all sums due to it from a wind up of the Electric Program the following specific and contingent sums:

- a) Balancing Account –a sum to be determined pursuant to §4
- b) Working Capital Deposits (\$\_\_\_\_\_)
- c) DA Credit – (\$\_\_\_\_\_)
- d) ISO Escrow Deposit – to be determined pursuant to §5
- e) PX Escrow Deposit – to be determined pursuant to §5
- f) Wind Up Costs Hold Back – to be determined pursuant to §11

2. Payment Terms. ABAG POWER will pay to *City/County/Other* the following sums:

- a) In complete payment of the Balancing Account owed *City/County/Other*, such funds as are available as of July 1, 2004. Both the payment schedule and the amounts to be paid to *City/County/Other* are determined by §4 of this Agreement.
- b) In complete payment of the Working Capital Deposits owed *City/County/Other*, the sum of (\$\_\_\_\_\_ ) within fifteen (15) days after the *City/County/Other's* execution and return of an original of this Wind Up Agreement or after ABAG POWER's receipt of the "Qualifying Agreement" as defined in §10, whichever is later.
- c) In complete payment of the DA Credit owed *City/County/Other*, the sum of (\$\_\_\_\_\_ ) within fifteen (15) days after the latest of the following: i) the *City/County/Other's* execution and return of an original of this Wind Up Agreement, or ii) after ABAG POWER's receipt of the "Qualifying Agreement" as defined in §10, or iii) receipt of the DA Credit from PG&E.
- d) In complete payment of the ISO Escrow Deposits owed the *City/County/Other*, such funds that ABAG POWER may receive from time to time from the Northern California Power Authority (NCPA) until all funds available from the ISO Escrow Deposits are received. Both the payment schedule and the amounts to be paid to the *City/County/Other* are determined by §5 of this Wind Up Agreement.
- e) In complete payment of the PX Escrow Deposit owed the *City/County/Other*, funds that ABAG POWER may receive from time to time from NCPA until all funds available from the PX Escrow Deposit are received. Both the payment schedule and the amounts to be paid to *City/County/Other* are determined by §5 of this Wind Up Agreement.
- f) In complete payment of the Wind Up Costs Hold Back, the amount determined under §11 of this Wind Up Agreement on or before July 1, 2010.

3. Funds Available for Disbursement and Allocation Ratios. Based on ABAG POWER's representation and warranties in §6 and such other documents as it deemed necessary, the *City/County/Other* acknowledges that:

- a) funds available for disbursement were determined by ABAG POWER as described in greater detail in Attachment C. Further, *City/County/Other* approves such determination.
- b) the payments described in §§1(a), (d), (e) and (f) of this Wind Up Agreement are the result of allocating all the Balancing Accounts, ISO Escrow Deposits, PX Escrow Deposits and Wind Up Costs Hold Backs available for disbursement among the Members in a ratio equal to each Member's electrical usage during the period of time such Member participated in the Electric Program to the total electrical usage by all Members who were participating in the Electric Program at the time of suspension ("Usage Ratio"). Further, *City/County/Other* approves such allocation.
- c) Working Capital Deposits were made by the Members in accordance with ABAG POWER's financial records (see Attachment C). *City/County/Other*

acknowledges that the payment described in §1(b) of this Wind Up Agreement is the result of allocating the Working Capital Deposits available for disbursement among the Members in a ratio equal to the *City/County/Other's* deposits to Working Capital to all Working Capital Deposits made by all Members who were participants in the Electric Program at the time of suspension ("Working Capital Ratio"). Further, *City/County/Other* approves such allocation.

- d) the payment described in §1(c) is the result of allocating the DA Credit available for disbursement among the Members in a ratio equal to the CTC Reversals paid by *City/County/Other* to all CTC Reversals paid by all Members ("CTC Reversal Ratio"). The method for determining said ratio is described in greater detail in Attachment C. Further, *City/County/Other* approves such allocation.
4. Balancing Account Payment Amount and Schedule. The amount of the Balancing Account Payment to *City/County/Other* is based on the total funds available for disbursement after payment of Working Capital Deposit and DA Credits and allocated to each Member by the Usage Ratio. ABAG POWER will have an independent financial audit conducted for fiscal year 2003-04 which will identify the total amount available for distribution. This amount will be allocated by the Usage Ratio and sent to *City/County/Other* no later than March 31, 2005.
  5. ISO Escrow Deposit and PX Escrow Deposit Amounts and Payment Schedule(s).
    - a) ISO Escrow Deposit. The amount in the ISO Escrow Deposit available for disbursement to Members will be affected by regulatory and adjudicatory actions of the California Independent System Operator (ISO), California Public Utilities Commission (CPUC) or Federal Energy Regulatory Commission (FERC) (see Attachments B and D). As of December 31, 2003, the total amount in the ISO Escrow Deposit is Five Hundred Eight Thousand Two Hundred Fourteen Dollars (\$508,214). For a period of no less than two (2) years after the effective date of the Qualifying Agreement or December 31, 2006, whichever is later, ABAG POWER will monitor activities affecting fund balances in the ISO Escrow Deposit and will challenge or accept such recalculations at its sole reasonable discretion taking into account, among other factors, the amount of the recalculation, the probity of the underlying cause of the recalculation and the cost and probative value of challenging the recalculation.
    - b) PX Escrow Deposit. The California Power Exchange (PX) is in bankruptcy. As of December 31, 2003, the total amount in the PX Escrow Deposit is One Million Fifty-Six Thousand Five Hundred Six Dollars (\$1,056,506). For a period of no less than two (2) years after the effective date of the Qualifying Agreement or December 31, 2006, whichever is later, ABAG POWER will monitor activities affecting fund balances in the PX Escrow Deposit and will challenge or accept such recalculations at its sole reasonable discretion taking into account, among other factors, the amount of the recalculation, the probity of the underlying cause of the recalculation and the cost and probative value of challenging the recalculation. Upon its discharge from bankruptcy, the amount in the PX Escrow Deposit available for disbursement to Members will be determined.
    - c) Payments. NCPA may release portions of the ISO and/or PX Escrow Deposits to ABAG POWER from time to time. ABAG POWER will place such amounts in an interest bearing account until all funds have been released or December 31, 2006, whichever is earlier. The *City/County/Other's* share will be determined

using the Usage Ratio. ABAG will pay *City/County/Other* its share of the amount in such accounts at that time. Any payments received by ABAG POWER after such disbursement will be paid to Electric Program Members if, in ABAG POWER's sole discretion, it is cost effective to do so.

6. ABAG POWER's Representations and Warranties.

- a) ABAG POWER represents and warrants that the descriptions provided in Attachments A, B and C are, to the best of ABAG POWER's knowledge, true and accurate for the purposes of (i) ABAG POWER performing as required under the Wind Up Agreement, and (ii) the Electric Program Members determining the accuracy, fairness and appropriateness of the distribution of funds contemplated by this Agreement.
- b) In some instances, the operation of the Electric Program may have deviated from the description contained in Attachment B or Attachment C or may omit some factors. ABAG POWER represents and warrants that any such deviations or omissions would not have had a material effect on the amounts to be disbursed or the allocation of those amounts to any individual Member.
- c) ABAG POWER represents that the analysis provided in Attachment D is, as of April 15, 2004, a fair statement of the risk that the contingent liabilities described in Attachment D will become actual liabilities. However, ABAG POWER neither guaranties the outcome nor represents that such analysis is the only conclusion that can be reached.
- d) Only Electric Program Members who execute this Agreement are entitled to rely on the information, representations and warranties set forth in this section and Attachments A through D, inclusive and any exhibits thereto.

7. *City/County/Other* Due Diligence and Acceptance of Representations and Warranties.

The *City/County/Other* has reviewed this Wind Up Agreement, each of the Attachments and Exhibits and such other documents as it has examined and has determined that there is no additional information which it requires in order to make an informed decision on whether to accept or reject the terms of this Agreement or in order to determine the amounts to which it is entitled under the JPA or the DA. Therefore, the *City/County/Other* hereby:

- a) Releases ABAG POWER and ABAG from any and all liabilities or claims which the *City/County/Other*, or anyone claiming through it, may have against ABAG POWER or ABAG for damages, injury or additional proceeds from the wind up of the Electric Program.
- b) Releases ABAG POWER and ABAG from any and all liabilities or claims which the *City/County/Other*, or anyone claiming through it, may have against ABAG POWER or ABAG for any damages or injury arising out of the *City/County/Other's* participation in the Electric Program.
- c) Accepts the Contingent Risks described in Attachment D.
- d) Agrees to defend and indemnify ABAG POWER and ABAG against any claims made by any person claiming any rights through the *City/County/Other* for damages resulting from the *City/County/Other's* participation in the Electric Program, its execution of this Wind Up Agreement or the performance of any of its obligations hereunder unless such is caused by fraud, gross negligence or intentional misconduct of ABAG POWER or ABAG, or their respective members, directors, agents or employees.

8. Other Electric Program Members. The *City/County/Other* acknowledges that each Member executing a Wind Up Agreement substantially identical to this Wind Up Agreement, excepting only the amounts set forth in §1 is a third party beneficiary of this Wind Up Agreement (hereinafter, a Member who executes a Wind Up Agreement is a "Third Party Beneficiary"). The *City/County/Other* agrees that it will not make any claim against a Third Party Beneficiary for monies owed, or damages incurred by the *City/County/Other*, as a result of the *City/County/Other's* or such Member's participation in the Electric Program.
  
9. Covenants.
  - a) The *City/County/Other* hereby covenants that it will do the following:
    - 1) Notify ABAG POWER of any information, written notices, bills or any other communication regarding a Contingent Risk, described in Attachment D,
    - 2) Cooperate with ABAG POWER and all Third Party Beneficiaries to eliminate, mitigate or resolve the possibility that a Contingent Risk will be triggered,
    - 3) Cooperate with ABAG POWER and all Third Party Beneficiaries to fairly and reasonably allocate costs associated with any Contingent Risk that is actually incurred by the *City/County/Other*, any Third Party Beneficiary or ABAG POWER, and
    - 4) Pay to ABAG POWER its share of any Contingent Risk incurred by ABAG POWER, said share to be determined by the process described in subsection 9(c) of this section.
  
  - b) ABAG POWER covenants that it will:
    - 1) Notify the *City/County/Other* and all Third Party Beneficiaries of any information, written notices, bills or any other communication regarding a Contingent Risk, described in Attachment D,
    - 2) Upon the occurrence of an event described in 9(a)(1) or 9(b)(1):
      - (i) the Board of Directors of ABAG POWER (Board) or the Executive Committee of the Board (Executive Committee), shall designate no fewer than five (5) and no more than eleven (11) Third Party Beneficiaries to form a Liability Allocation Committee (LAC).
      - (ii) The Board or the Executive Committee shall delegate to the LAC, the exercise of ABAG POWER's rights under Section 9.
  
  - c) ABAG POWER, on behalf of the LAC, covenants that the LAC shall:
    - 1) Cooperate with the *City/County/Other* and all Third Party Beneficiaries to eliminate, mitigate or resolve the possibility that a Contingent Risk will be triggered,
    - 2) Cooperate with the *City/County/Other* and all Third Party Beneficiaries to fairly and reasonably allocate costs associated with any Contingent Risk that is actually incurred by the *City/County/Other* or any Third Party Beneficiary, and
    - 3) The LAC shall confirm the reasonableness and fairness of the proposed allocation of costs by conducting a poll of Third Party Beneficiaries. If the proposed allocation is agreed to by a majority of Third Party Beneficiaries, then such plan is approved. For the purposes of this section, a majority is:

- (i) More than fifty percent (50%) of the votes cast determined by counting each Third Party Beneficiary as having one vote, and
    - (ii) More than fifty percent (50%) of the votes cast determined by weighing each Third Party Beneficiary's vote by the amount disbursed to it under this Agreement.
  - 4) If the Third Party Beneficiaries do not approve a cost allocation plan under Section 9 (c)(3) then the costs associated with a Contingent Risk will be allocated among all Third Party Beneficiaries in accordance with CTC Reversal Ratio for any costs associated with recovery of DA Credits and in accordance with the Usage Ratio for costs associated with recovery of energy and/or UDC costs (see Attachment D).
  - 5) Receive from the *City/County/Other* the share of any Contingent Risk incurred by the *City/County/Other*, said share to be determined by the process described in subsection 9(3) or 9(4) of this subsection.
  - 6) Pay the liability.
10. Effectiveness of the Wind Up Agreement. This Wind Up Agreement becomes effective only if Members owed a total of Twenty Million Dollars (\$20,000,000) under §§1(a)-(c) execute a Wind Up Agreement substantially identical to this Wind Up Agreement, excepting only the amounts set forth in §1. The executed Wind Up Agreement which triggers this section is the Qualifying Agreement.
  11. Wind Up Cost Hold Back Funds. ABAG POWER will retain the sum of One Hundred Thousand Dollars (\$100,000) for the purposes described in §12. The funds will be separately accounted for by ABAG POWER and will be disbursed to Electric Program Members in accordance with §2(f) and allocated among Electric Program Members in accordance with the Usage Ratio.
  12. Permitted Uses of Wind Up Cost Hold Back Funds. ABAG POWER may use funds in the Wind Up Cost Hold Back to fund staff, consultants, attorneys or others engaged in any of the tasks described in §§5 and 9 of this Wind Up Agreement. ABAG POWER will send to each Electric Program Member an annual report on the use of funds and fund balances.
  13. Termination of DA Agreement. The DA Agreement between ABAG POWER and the *City/County/Other* is hereby terminated.
  14. Assignment. This Agreement shall not be assigned, transferred, hypothecated, or pledged by the *City/County/Other*.
  15. Amendment. §§1 and 2 of this Agreement may be amended at any time, but only by a writing signed by both parties. Any other section of this Agreement may be amended only by a writing signed by both parties and all Third Party Beneficiaries.
  16. Headings. The descriptive headings used in this Agreement are for convenience only and shall not control or affect the meaning or construction of any of its provisions.
  17. Controlling Law. This Agreement and all matters relating to it shall be governed by the laws of the State of California.
  18. Binding on Successors, Etc. This Agreement shall be binding upon the successors, assigns, or transferees of ABAG POWER or the *City/County/Other* as the case may

be. This provision shall not be construed as an authorization to assign or transfer this Agreement other than as provided above.

- 19. Severability. Should any part of this Agreement be declared unconstitutional, invalid, or beyond the authority of either party to enter into or carry out, such decision shall not affect the validity of the remainder of this Agreement, which shall continue in full force and effect; provided that, the remainder of this Agreement can, absent the excised portion, be reasonably interpreted to give effect to the intentions of the parties.
- 20. Arbitration. Any disputes regarding the interpretation, effects, alleged breach or powers and duties arising out of this Agreement will be submitted to binding arbitration. An arbitration panel of three (3) individuals shall be formed as follows:
  - a) Each Third Party Beneficiary and ABAG POWER shall have the right to submit the name and qualifications of an individual nominated for the panel. The individual shall be a member in good standing of the State Bar of California. ABAG POWER will compile a list of all such names, with the names of those submitted more than once, appearing as many times as they were submitted (List).
  - b) Each Third Party Beneficiary which submitted a name and ABAG POWER, if it submitted a name, shall have the right to strike a name from the List. The order in which the Third Party Beneficiaries and ABAG POWER shall strike names shall be determined by lot.
  - c) The striking process shall continue until only the names of three (3) qualified individuals are left. They shall constitute the arbitration panel.

IN WITNESS WHEREOF, the parties have executed this Agreement on the dates set forth below.

Dated: \_\_\_\_\_

MEMBER:

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Title

Dated: \_\_\_\_\_

ABAG PUBLICLY OWNED ENERGY  
RESOURCES (ABAG POWER):

\_\_\_\_\_  
Eugene Y. Leong, President

Approved as to Legal Form and Content:

By: \_\_\_\_\_  
Kenneth K. Moy, Legal Counsel  
ABAG Public Owned Energy Resources (ABAG POWER)