



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Julia H. Cooper
Lori Mitchell

**SUBJECT: COMMUNITY ENERGY
REVOLVING CREDIT
AGREEMENT**

DATE: September 14, 2018

Approved

Date

9/14/18

RECOMMENDATION

Adopt a resolution authorizing the City Manager, the Director of Finance, the Assistant Director of Finance or their authorized designees to negotiate, execute, and deliver a revolving credit agreement with Barclays Bank PLC providing for a commitment to issue revolving loans and standby letters of credit in an aggregate principal amount not to exceed \$50,000,000 outstanding at any one time to finance start-up costs of the City of San José's Community Energy Program, purchase power, and, in the case of standby letters of credit, secure payments under power purchase agreements, and other costs associated and consistent with the Community Energy Implementation Plan, and to take other related actions in connection therewith.

OUTCOME

Approval of this resolution will authorize the City Manager, the Director of Finance, the Assistant Director of Finance or their authorized designees to negotiate, execute, and deliver a Revolving Credit Agreement ("Credit Agreement") by and between the City of San José (the "City") and Barclays Bank PLC (the "Bank"), and a promissory note (the "Note") evidencing the City's obligations thereunder. The Credit Agreement will provide for a credit facility (the "Credit Facility") consisting of a revolving line of credit facility (the "Revolving Line of Credit") and a standby letter of credit facility (the "Standby Letter of Credit Facility"). Under the terms of the Credit Agreement, the Bank will commit to (i) make loans on a revolving basis under the Revolving Line of Credit to the City in the aggregate principal amount of not to exceed \$20 million at any time outstanding (the "Revolving Line of Credit Sublimit") for a period of three (3) years from the date of Credit Agreement is executed and delivered by the City (or November 27, 2021, assuming an effective date of November 27, 2018), and (ii) issue standby letters of credit under the Standby Letters of Credit Facility for the account of the City in an aggregate principal amount of not to exceed \$35 million (the "Standby Letter of Credit Sublimit") for a period of five (5) years from the date the Credit Agreement is executed and delivered by the City

(or November 27, 2023, assuming an effective date of November 27, 2018), provided that the aggregate principal amount outstanding under the Revolving Line of Credit and amounts available to be drawn under Standby Letters of Credit issued by the Bank shall not exceed \$50,000,000 at any one time outstanding.

Advances under the Revolving Line of Credit and Standby Letters of Credit issued by the Bank under the Credit Agreement will permit City of San José's Clean Energy program ("SJCE") to enter into power contracts and provide collateral for power purchase agreements during the ramp-up phases of the SJCE. Advances under the Revolving Line of Credit would also be used to fund start-up and long-term costs for working capital associated with the operation of the Program, including the purchase of electrical power.

EXECUTIVE SUMMARY

Section 331.1 of the California Public Utilities Code allows cities and counties to establish a community-wide electricity program known as Community Choice Aggregation, through which local governments may choose to supply electricity to serve the needs of participating customers within their jurisdiction while existing investor-owned utilities continue to provide such service to existing customers, such as billing, transmission and distribution.

In August 2017, the City established a Community Choice Aggregation program for the provision of electrical power within the City's boundaries with the name "San Jose Clean Energy," under Title 26, Community Energy, of the City's Municipal Code. In June 2018, the City adopted Ordinance No. 30121, pursuant to which Chapter 4.40 was added to Title 4 of the City's Municipal Code. Chapter 4.40 of Title 4 of the City's Municipal Code empowers the City to secure credit facilities to support the operations of SJCE.

On May 17, 2018, the Finance Department issued a Request for Proposals ("RFP"), to qualified lenders and/or financial institutions seeking proposals to provide a credit facility in the aggregate principal amount of \$50 million. Responses were due on June 13, 2018. The City received responses from three (3) banks: the Bank; JP Morgan and River City Bank. Only the Bank and JP Morgan provided proposals to the City for credit facilities in the total principal amount of \$50 million and the flexibility to borrow loans and issue letters of credit for the account of the City, as requested in the RFP. Based on the analyses and evaluations of the proposals by City staff and the City's municipal advisor, including financing costs and the City's preferred terms, City staff recommends that the Bank be selected as the provider of the Credit Facility.

The \$50 million Credit Facility, if approved would be available to meet the cash flow and financing needs of SJCE. Under the terms of the Credit Agreement, the City's obligations under the Credit Agreement would be secured solely from any and all revenues of SJCE ("SJCE Revenues") and not the City's General Fund or any revenues or moneys of the City deposited or to be deposited therein. As additional customers enroll in SJCE and SJCE Revenues increase, City staff anticipates that the City will have the ability to repay advances under the Revolving

Line of Credit. Such advances and any other amounts due under the Credit Agreement would be repaid solely from SJCE Revenues and not from any revenues or moneys of the City deposited in the General Fund. City staff anticipates that the Credit Agreement will become effective on or about November 27, 2018. It is necessary for the Credit Facility to be in place by the end of November 2018 to permit the City to enter into power purchase agreements in order to serve residential and commercial customers in the City by March 2019 for Phase 2 of SJCE.

Phase 1 began September 2018 and all expenditures related to start-up costs of SJCE will be funded with proceeds from commercial paper (the "Commercial Paper") issued previously by the City of San José Financing Authority ("Authority").

BACKGROUND

San José Clean Energy – A Community Choice Aggregation Program

Timeline:

- May 2017 - City Council, after numerous discussions at City Council meetings and Council Study Sessions, approved proceeding with the establishment of SJCE, a San José Community Choice Aggregation ("CCA") program, for the provision of electrical power in the City.
- August 2017 - City Council approved an ordinance establishing SJCE and amending the Municipal Code to add a new City department, the Community Energy Department. Such ordinance approved the San José Clean Energy Implementation Plan and Statement of Intent, which describes the funding strategy to obtain power supply contracts, establish the SJCE Operating Fund, and the establishment of various revenue estimates and expenditure appropriations for City Departments, including the Community Energy Department, to facilitate the initial operations of SJCE.

Also, in August 2017, City Council authorized the issuance of City of San Jose Financing Authority Commercial Paper in an amount not to exceed \$10 million to finance start-up costs and power purchase relating to SJCE. Additionally, the Finance Department coordinated the RFP process for municipal advisors to advise on its various financings, selecting Public Financial Management, Inc. ("PFM") to provide municipal advisory services on community energy projects generally and SJCE specifically.

- January 2018 - City Council approved a September 1, 2018 launch date of electric generation service to Phase 1 customers, which includes City Accounts.
- February 2018 - City Council approved the Professional Services Agreement for Data Management and Customer Call Center Services with Calpine Energy Solutions, LLC for SJCE for a period of two years from the date of execution.
- March 2018 - City Council approved the Scheduling Coordinator, Portfolio Management, and Optimization Service Agreement with Northern California Power Authority.

- May 2018 - City Council approved the Risk Management Policy and a Launch date for Phase 2.

Also, in May 2018, the Finance Department coordinated the RFP process for a bank credit facility to provide a line of credit (for working capital) and/or letter of credit (for power purchase collateral) in an aggregate principal amount of not to exceed \$50 million. After evaluation and analysis, the Bank was selected.

- June 2018 - City Council approved the rates and initial energy supply contracts to enable SJCE to launch and provide the electric generation service to the Phase 1 City accounts in September 2018.

The City Council approved the criteria for an Integrated Resource Plan for SJCE, which details procurement plans to ensure SJCE meets the program goals and has a reliable and cost-effective electricity supply and authorized the City Manager to file a plan that is consistent with the approved criteria and all CPUC requirements that will allow SJCE to meet its regulatory requirements. It will also inform SJCE's procurement process in preparation for commencing service to its customers.

Overview

Once operational, the City will be the largest single jurisdiction and authority in California to operate a CCA program. SJCE will provide residents and businesses in the City with the ability to continue to receive electric service with higher renewable energy content at comparable rates to the current provider, PG&E. To permit SJCE to provide electric service to residents and businesses, SJCE has partnered with PG&E. Under the agreement with PG&E, SJCE will purchase power from renewable energy sources, set rates, and retain revenue. PG&E will continue to deliver energy over existing utility lines, perform maintenance of the grid, billing, and customer service. SJCE will roll out its service to residents and businesses in the City in two phases:

Phase 1 – Phase 1 includes the City's municipal accounts and officially launched on September 1, 2018. During Phase 1, SJCE anticipates serving approximately 1,800 accounts, comprised of all municipal accounts, totaling nearly 130 GWh of annual energy sales. Phase 1 is approximately 3 percent of SJCE's total customer load.

Phase 2 – Phase 2 will include all remaining accounts made up of residential, commercial, and industrial and is targeted to commence in March 2019. It is anticipated that approximately 347,100 additional customers will be included in Phase 2 with annual energy consumption approximating 4,700 GWh, or 97 percent of SJCE's total prospective customer load.

ANALYSIS

RFP Process

On May 17, 2018, the Finance Department issued an RFP to qualified lenders and/or financial institutions seeking proposals provide a credit facility in the aggregate principal amount of \$50 million supported solely by the SJCE Revenues to secure initial power contracts and to support longer-term operations (i.e., working capital). The City received responses from three (3) banks: the Bank; JP Morgan and River City Bank. Only the Bank and JP Morgan provided proposals to the City for credit facilities in the total principal amount of \$50 million and the flexibility to provide loans and issue letters of credit simultaneously for the account of the City, as requested in the RFP. The proposals received by the City in response to the RFP are summarized in the table below:

Summary of Bank Proposals – Revolving Line of Credit

Bank	3 Year Term –			Estimated Costs
	Commitment Amount	Undrawn Fee	Drawn Fee	
<i>Barclays Bank PLC</i>	<i>\$50 million</i>	<i>0.65%</i>	<i>1 month LIBOR + 2.10%</i>	<i>\$1,432,500</i>
J.P. Morgan	\$50 million	0.45%	1 month LIBOR + 3.25%	\$1,695,000
River City Bank ¹	\$30 million	N/A (Only 2yr Term Available)	For a 2yr Term Only – 1 month LIBOR + 1.75%	N/A%

Summary of Bank Proposals – Letter of Credit

Bank	5 Year Term
<i>Barclays Bank PLC</i>	<i>1.75%²</i>
J.P. Morgan	2.00%

Based on the analyses and evaluations of the proposals by Finance staff and the City’s municipal advisor, including financing costs and the City’s preferred terms, City staff recommends that Barclays Bank be selected to provide the Credit Facility as the most responsive and cost-effective credit facility provider.

¹ River City Bank provided a proposal for \$30,000,000 commitment and for a 2-year term only

² As described in Appendix A, Summary of Business Terms with Barclays, the Letter of Credit Commitment Fee Rate is 1.05%, the Letter of Credit Fee Rate is 1.75%, and the Letter of Credit Unreimbursed Draw Fee Rate is LIBOR + 2.10%.

Financing Documents

This section contains a general description of the documents that require the City Council's approval. Staff recommends that the City Manager, the Director of Finance, Assistant Director of Finance or their designees (the "Designated Officers") each be authorized to negotiate, execute, and deliver the Credit Agreement and the Note described below. As modifications may be required prior to the execution and delivery of the Credit Agreement and the Note by the City to the Bank, staff also recommends that the Designated Officers each be authorized to execute the final version of these agreements as may be modified upon consultation with the City Attorney's Office and the Community Energy Department.

Credit Agreement and Note

Under the terms of the Credit Agreement, the Bank will make the Credit Facility available to the City, under which the Bank will commit to (i) make advances to the City under a Revolving Line of Credit in an aggregate principal amount of not to exceed \$20,000,000, for a period of three (3) years from the date of the Credit Agreement is executed and delivered by the City (or November 27, 2021, assuming an effective date of November 27, 2018), and (ii) issue standby letters of credit under the Standby Letters of Credit Facility for the account of the City not to exceed \$35,000,000 for a period of five (5) years from the date the Credit Agreement is executed and delivered by the City (or November 27, 2021, assuming an effective date of November 27, 2018), provided that the aggregate principal amount outstanding under the Revolving Line of Credit and amounts available to be drawn under Standby Letters of Credit issued by the Bank shall not exceed \$50,000,000 at any one time outstanding. Advances under the Line of Credit and Standby Letters of Credit will permit SJCE to enter into power agreements and provide collateral for power purchase agreements during the ramp-up phases of the SJCE. Advances under the Revolving Line of Credit would also be used to fund start-up and long-term costs for working capital associated with the operation of the SJCE. Amounts borrowed by the City under the Revolving Line of Credit may be repaid at the City's option and borrowed again during the 3-year commitment period.

Under the terms of the Credit Agreement, the City's obligations under the Credit Agreement would be secured solely from any SJCE Revenues and not the City's General Fund or any revenues or moneys of the City deposited or to be deposited therein.

In consideration for the Bank's commitment to make advances under the Revolving Line of Credit and issue Standby Letters of Credit, the City will be obligated to pay commitment fees of 0.65% and 1.05%, respectively on the undrawn commitment of the Bank to make advances under the Revolving Line of Credit and issue Standby Letters of Credit. Drawn amounts under the Revolving Line of Credit made by the Bank will not be subject to a commitment fee in the period in which such drawn amounts remain unpaid but will be subject to a drawn fee rate based on the 1-month LIBOR + 2.10% per annum. Similarly, issued Standby Letters of Credit will not be subject to a commitment fee but will be subject to a fee rate equal to 1.75% per annum times the daily amount available to be drawn under such Standby Letter of Credit. In the event of a

draw, the drawn amounts under the Letter of Credit that remain unpaid will be subject to an unreimbursed draw fee rate of LIBOR + 2.10%. The remaining unissued Line of Credit and/or Standby Letter of Credit will continue to be subject to the commitment fees.

The Note evidences the City's obligations under the Credit Agreement and shall be in a principal amount of not to exceed \$50,000,000. The proposed form of the Note is included in the Credit Agreement as Exhibit A thereto.

A summary of key business terms in the Credit Agreement is set forth in Appendix A.

Delegation of Authority for the Credit Agreement

Staff recommends that the Designated Officers each be authorized to enter into one or more future extensions of the Credit Agreement. The Bank will charge \$5,000 each time there is an amendment to the Credit Agreement plus Bank counsel fees and expenses.

Staff further recommends that the Designated Officers each be authorized to execute and deliver one or more extensions or other future amendments to the Credit Agreement, for any duration of time that they deem necessary, advisable or prudent, provided that as a result of any such extensions or other amendments shall not cause, without the approval of the City Council: (i) the commitment fee payable by the City to the Bank under the Credit Agreement for the Revolving Line of Credit Facility to exceed 0.715% per annum; (ii) the commitment fee payable by the City to the Bank under the Credit Agreement for the Standby Letter of Credit Facility to exceed 1.15% per annum; (iii) the letter of credit fees payable by the City to the Bank on the daily amount available to be drawn under any issued Standby Letters of Credit to exceed 1.925% per annum; and (iv) the spread above the benchmark rate of interest charged on the principal amount of unreimbursed advances to the City under the Revolving Line of Credit and unreimbursed draws under Standby Letters of Credit to exceed 2.30% per annum, without the approval of the City Council.

Security; Source of Repayment

Under the terms of the Credit Agreement, the City's obligations under the Agreement would be secured solely from any SJCE Revenues and not the City's General Fund or any revenues or moneys of the City deposited or to be deposited therein.

Advances under the Revolving Line of Credit and other amounts due to the Bank under the Credit Agreement, including commitment fees, will be payable from revenues collected during such period less all amounts required to be paid by SJCE pursuant to the terms of the Power Sales Agreements during such period. As additional customers enroll in SJCE and SJCE Revenues increase, City staff anticipates the City will have the ability to repay advances under the Revolving Line of Credit within two years. Such advances and any other amounts due under the Credit Agreement will be payable solely from net revenues generated from SJCE and not from any revenues or moneys of the City deposited in the General Fund.

The Commercial Paper is projected to be repaid in FY19-20 from net revenues when the operating reserve account is above \$20 million dollars, the debt service coverage ratio is not less than 2 to 1 as of the last day of the fiscal quarter most recently ended, and no event of default has occurred.

Financing Team

The financing team participants consist of:

- City's Municipal Advisor: PFM Financial Advisors LLC
- Power Procurement Counsel: Troutman Sanders
- Borrower's Counsel: Jones Hall, A Professional Law Corporation
- Revolving Credit Facility Bank: Barclays Bank PLC.
- Bank Counsel: Chapman and Cutler LLP

Financing Schedule

The current proposed schedule for the execution of the Credit Agreement is as follows:

- City Council: September 25, 2018
- Document closing: On or about November 27, 2018

EVALUATION AND FOLLOW-UP

This memorandum recommends the City Council's approval of the Credit Agreement and the Note related to SJCE and requires no follow-up to the City Council.

PUBLIC OUTREACH

The proposed Agreement, in substantially final form, will be posted to the City's agenda webpage on or about September 14, 2018.

COORDINATION

This report has been prepared by the Finance Department and Community Energy Department in coordination with the City Attorney's Office, the Budget Office, and financing team participants.

COMMISSION RECOMMENDATION/INPUT

There is no commission recommendation or input associated with this action.

FISCAL/POLICY ALIGNMENT

The proposed financing plan is also consistent with the City’s Debt Management Policy which establishes objectives in order to obtain cost-effective access to the capital markets, which includes minimizing debt service and issuance costs; maintaining access to cost-effective borrowing; and ensuring compliance with applicable State and Federal laws.

COST IMPLICATIONS

Professional services (bank expenses, bank counsel fees, municipal advisor fees, borrower counsel fees, power procurement counsel fees) and other related costs are not to exceed \$225,000, are included in SJCE’s 2018-2019 non-personal budget, and will be paid from the Commercial Paper previously issued by the Authority.

Using the most conservative assumptions, the Credit Facility will have an annual cost ranging from \$465,000 to \$1,371,000. The lower amount assumes no amounts of the Credit Facility have been drawn or utilized and the higher amount assumes \$30 million of Standby Letters of Credit have been utilized and \$20 million has been drawn on the Revolving Line of Credit.

BUDGET REFERENCE

Debt service costs from the revolving credit financing and Commercial Paper issued by the Authority have been included in the 2018-2019 Adopted Operating Budget, and the table below identifies the fund and appropriation proposed to fund the agreement recommended as part of this memorandum:

Fund #	Appn #	Appn. Name	Current Year Appn.	2018-2019 Proposed Operating Budget Page	Last Budget Action (Date, Ord. No.)
501	204D	Debt Service – Interest/Fees – Revolver/LOC	\$1,095,000	X-77	6/19/2018 Ord. No. 30124
501	204F	Debt Service – Principal - Revolver	\$35,000,000 ³	X-77	6/19/2018 Ord. No. 30124

³ The 2017-2018 Annual Report will include a recommendation to reduce this amount to \$20 million.

HONORABLE MAYOR AND CITY COUNCIL

September 14, 2018

Subject: Community Energy Revolving Credit Agreement

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CEQA

Not a Project, File No. PP17-003, Agreements/Contracts (New or Amended) resulting in no physical changes to the environment.

/s/

JULIA H. COOPER

Director of Finance

/s/

LORI MITCHELL

Director of Community Energy

For questions, please contact Lisa C. Taitano, Assistant Director of Finance, at (408) 535-7041.

APPENDIX A

SUMMARY OF BUSINESS TERMS WITH BARCLAYS

Barclays Bank PLC has offered a Credit Facility in the outstanding principal amount of not to exceed \$50,000,000 to support SJCE. The Commitment Fee is charged on the undrawn amount of the line of credit and full amount of the letter of credit at the "Commitment Fee Rate" corresponding with the table below. The "Letter of Credit Fee Rate" is charged on the amount the purchase power provider is requiring the City to issue as collateral on the letter of credit. The "Drawn Fee Rate" at any given time, as set forth in the following table, is determined based on the current LIBOR rate plus the "Applicable Spread" for the line of credit and the letter of credit.

Revolving Line of Credit			
Term	Commitment Fee Rate		Drawn Fee Rate
3 Year	0.65%		1-month LIBOR + 2.10%
Standby Letter of Credit			
	Commitment Fee Rate	Letter of Credit Fee Rate	Unreimbursed Draw Fee Rate
5 Year	1.05%	1.75%	LIBOR + 2.10%

Each issuance of a Standby Letter of Credit is subject to a \$600 application fee.

The Bank's commitment to make advances under the Revolving Line of Credit is scheduled to terminate 3 years after effective date of the agreement (or November 27, 2021, assuming an effective date of November 27, 2018).

The Bank's commitment to issue Standby Letters of Credit for the account of the City is scheduled to terminate is 5 years after effective date of the agreement (or November 27, 2023, assuming an effective date of November 27, 2018).

Letter of Credit Fee 1.75%

Default Rate: Prime Rate + 4.00%. This is the interest rate charged to the City upon the occurrence of certain enumerated events (defined in the Credit Agreement as "Events of Default") and during the period such events continue.

Prime Rate: For any day, the rate of interest in effect for such day as publicly announced from time to time by the Bank as its "prime rate." The "prime rate" is a rate set by the Bank based upon various factors including the Bank's costs and desired return, general economic conditions and other factors, and is used as a reference point for pricing some loans, which may be priced at, above, or below such announced rate. Any change in such rate announced by the Bank shall take effect at the opening of business on the day specified in the public announcement of such change.

APPENDIX A (Continued)

Additional terms and covenants:

Application of Loan
Proceeds:

The City shall use Credit Extensions (i) in the case of Letters of Credit, to secure payments due under Power Purchase Agreements, (ii) in the case of Loans, to purchase energy for the Community Energy Program and to secure payments due under Power Purchase Agreements, (iii) also in the case of Loans, for payment of Start-Up Costs related to the Community Energy Program in an amount not to exceed \$5,000,000, and (iv) to pay Costs of Issuance; provided, that in no event shall any portion of any Credit Extension be used to pay, or in the case of Letters of Credit, to support, the principal of or interest on Commercial Paper or any other Debt payable from the Community Energy Program to the City.

Fee for Early
Termination of LOC:

(i) The City may, upon notice to the Bank, terminate the Commitment, the Loan Sublimit, or the Letter of Credit Sublimit or from time to time permanently reduce the Commitment or the Loan Sublimit or the Letter of Credit Sublimit; provided that (i) any such notice shall be received by the Bank not later than 4:00 p.m. (New York City time) five (5) Business Days prior to the date of termination or reduction, (ii) any such partial reduction shall be in an aggregate amount of \$5,000,000 or any whole multiple of \$1,000,000 in excess thereof and (iii) City shall not terminate or reduce the (A) Commitment if, after giving effect thereto and to any concurrent prepayments hereunder, the Total Outstandings would exceed the Commitment or (B) Letter of Credit Sublimit if, after giving effect thereto and to any concurrent prepayments or Cash Collateralizations thereunder, the Outstanding Amount of L/C Obligations not fully Cash Collateralized hereunder would exceed the Letter of Credit Sublimit or (C) Loan Sublimit if, after giving effect thereto and to any concurrent prepayments hereunder, the Outstanding Amount of Loans not repaid thereunder would exceed the Loan Sublimit. Failure by the City to designate in the notice required under this Section 2.05(a)(i) whether the Commitment, Loan Sublimit or L/C Sublimit is to be permanently reduced shall be deemed to be a permanent reduction in the Commitment.

(ii) The City hereby agrees to pay to the Bank a Reduction and Termination Fee in connection with any permanent reduction to, or termination or replacement of, the Commitment by the City prior to the first (1st) anniversary of the Effective Date, in an amount equal to the product of (1) the Commitment Fee Rate in effect on

APPENDIX A (Continued)

the date of such termination or replacement, (2) the Commitment in effect on the Effective Date and (3) a fraction, the numerator of which is equal to the number of days from and including the date of such termination or replacement to and including the first (1st) anniversary of the Effective Date, and the denominator of which is 360, payable on the date of such termination or replacement; provided, that no Reduction and Termination Fee shall be payable by the City if the Commitment is terminated or permanently reduced, as applicable, prior to the first (1st) anniversary of the Effective Date after (i) the Bank requests any amount or amounts necessary to compensate the Bank or its holding company, as the case may be, pursuant to Section 8.01 hereof or (ii) (x) the Bank obtains knowledge of a pending Bail-In Action that the Bank reasonably expects to occur prior to the Scheduled Termination Date or (y) the occurrence of a Bail-In Action.

Debt Service
Coverage Ratio:

(a) Commencing with the fiscal quarter ended March 31, 2020 and as of the last day of each fiscal quarter ended thereafter, the Debt Service Coverage Ratio shall be not less than 2.00 to 1.

(b) For each date of any proposed Credit Extension, the Debt Service Coverage Ratio shall be not less than 2.00 to 1 on each such date.

Operating Reserve
Requirement:

From and including: (a) August 31, 2019, to but excluding November 15, 2019, the City shall at all times during such period maintain not less than \$10,000,000 in the Operating Reserve Account; (b) November 15, 2019, to but excluding the Full Utilization Date, the City shall at all times during such period maintain not less than \$15,000,000 in the Operating Reserve Account; and (c) the Full Utilization Date and thereafter, the City shall at all times maintain \$20,000,000 in the Operating Reserve Account.

Operating Reserve
Account:

The City shall (i) maintain the Operating Reserve Account at all times; (ii) deposit all Net Revenues into the Operating Reserve Account to the extent necessary to meet the obligations under Section 5.15 hereof; and (iii) segregate the Operating Reserve Account and amounts on deposit therein from all other funds and accounts of the City.

Governing Law:

This Agreement shall be construed and enforced in accordance with the laws of the State of New York; provided, that the power

APPENDIX A (Continued)

and authority of the City to execute, deliver and perform its obligations under this Agreement shall be governed by the Laws of the State; provided, however, that the power and authority of the City to enter into any and all Power Purchase Agreements and such agreements themselves are governed by the laws of the State unless otherwise provided therein.

Waiver of Jury Trial:

The City and the Bank each waives its right to jury trial.

Indemnification and
Bank Liability:

The City generally is responsible for indemnifying the Bank for claims arising from these transactions and increased costs that the Banks may incur, however, the City is not obligated to indemnify the Bank for liability arising from the Bank's gross negligence or willful misconduct. The Bank limits its obligation to direct damages as opposed to special, indirect, consequential or punitive damages. Consequential damages are one kind of two types of damages (the other being direct damages) that may be awarded to a plaintiff in a civil action, where plaintiff claims the terms of an agreement were not honored. Consequential damages include loss of profit or revenues and may be recovered if it is determined that such damages were reasonably foreseeable at the time of the making of the contract.