

PARTICIPATION AGREEMENT

This PARTICIPATION AGREEMENT ("Agreement"), made and entered into as of August 8, 2017, by and among the CALIFORNIA MUNICIPAL FINANCE AUTHORITY, a joint powers agency organized and existing under the laws of the State of California (the "AUTHORITY"), and OnPACE Energy Solutions, LLC, (the "Administrator") and the City of Chula Vista, a municipal corporation organized and existing under the laws of the State of California (the "PARTICIPATING MEMBER");

WITNESSETH:

- (a) The AUTHORITY is a joint powers agency organized and existing pursuant to the Joint Powers Act, comprising Articles 1, 2, 3 and 4 of Chapter 5 of Division 7 of Title 1 (commencing with Section 6500) of the Government Code of the State of California; and
- (b) The AUTHORITY has adopted the CMFA PACE Program (the "Program"), for the financing of certain renewable energy and energy and water efficiency and other improvements ("Improvements") authorized by Chapter 29 of the Streets & Highways Code ("Chapter 29") within the Participating Member's jurisdiction; and
- (c) The AUTHORITY has conducted, or will conduct, proceedings required by Chapter 29 with respect to the territory within the boundaries of the PARTICIPATING MEMBER; and
- (d) The PARTICIPATING MEMBER has consented to inclusion of properties within the PARTICIPATING MEMBER'S jurisdiction in the Program for Program financing of Improvements on certain properties owned by property owners who voluntarily agree to participate in the Program ("Program Participant"); and
- (e) The AUTHORITY intends to issue bonds, notes or other forms of indebtedness (the "Bonds") to finance Improvements within the District; and
- (f) The AUTHORITY is solely responsible for the formation, operation, and administration of the Program, as well as the sale and issuance of any bonds in connection therewith, including the conduct of assessment proceedings, the levy and collection of assessments and any remedial action in the case of such assessment payments, and the offer, sale and administration of any bonds issued by the AUTHORITY on behalf of the Program; and
- (g) The PARTICIPATING MEMBER desires to authorize the AUTHORITY to (i) record the assessment against the Program Participants' parcels, (ii) administer the Program in accordance with Chapter 29 and the Improvement Act of 1915

(commencing with Section 8500 et seq.) and (iii) prepare program guidelines for the operations of the Program; and

- (h) The PARTICIPATING MEMBER will permit the ADMINISTRATOR to perform certain management, administrative, operational and implementation functions for the AUTHORITY with respect to the Program.

NOW, THEREFORE, FOR AND IN CONSIDERATION OF THE MUTUAL PROMISES, COVENANTS AND CONDITIONS HEREIN CONTAINED, THE PARTIES HERETO AGREE AS FOLLOWS:

Section 1. Recitals. The Recitals contained herein are true and correct and are hereby incorporated herein by reference.

Section 2. Appointment of the AUTHORITY. PARTICIPATING MEMBER is not and will not be deemed to be an agent of the AUTHORITY or any ADMINISTRATOR as a result of this Agreement. PARTICIPATING MEMBER consents to the AUTHORITY's assumption of rights, responsibilities, obligations and liabilities related to the Agreement within its jurisdiction upon satisfaction of the conditions imposed pursuant to this Agreement and the resolution authorizing this Agreement, to take each and every step required for financing the Improvements, including the levying, collecting and enforcement of the contractual assessments. PARTICIPATING MEMBER consents to the AUTHORITY's delegation of duties hereunder or with respect to the Program, or ADMINISTRATOR. AUTHORITY and ADMINISTRATOR agree to comply with the PARTICIPATING MEMBER'S "PACE Program Guidelines," as may be amended from time to time, in administering the Program within the PARTICIPATING MEMBER'S jurisdiction.

Section 3. Indemnification and Insurance. The AUTHORITY and ADMINISTRATOR jointly and severally agree to defend, indemnify, and hold harmless the PARTICIPATING MEMBER, its officers, agents, employees, elected or appointed officials, volunteers, and attorneys from and against any and all liabilities, claims, damages, losses, expenses, fines, penalties, judgments, defense costs, and demands arising or alleged to arise out of, or in connection with, this Agreement, or the Program, or as a result of the AUTHORITY's or the ADMINISTRATOR's performance or failure to perform under this Agreement or the Program, except that arising from the sole negligence or willful misconduct of PARTICIPATING MEMBER. The AUTHORITY and ADMINISTRATOR will conduct all defenses at their sole cost and expense, and the PARTICIPATING MEMBER shall reasonably approve the defense counsel selected by the AUTHORITY and ADMINISTRATOR. This indemnity shall apply to all claims and liabilities regardless of whether any insurance policies of the AUTHORITY or ADMINISTRATOR, or their affiliates or other parties, are applicable. The policy limits of any insurance of the AUTHORITY or ADMINISTRATOR, or their affiliates or other parties, do not limit the obligations of the AUTHORITY or the ADMINISTRATOR, including without limitation, the amount of indemnification to be provided by the AUTHORITY or the ADMINISTRATOR.

The ADMINISTRATOR shall, at no cost or expense to the PARTICIPATING MEMBER, at all times during the administration of the Program, maintain the insurance coverage set forth in Exhibit "A" to this Agreement, which is attached and incorporated into this Agreement by this reference.

This Section shall survive termination of this Agreement.

Section 4. PARTICIPATING MEMBER has no liability. Except as expressly set forth in this Agreement or Resolution [INSERT NUMBER], PARTICIPATING MEMBER shall not have any liabilities or obligations or incur any costs or expenses for the Program, including, but not limited to, the repayment of any bonds issued for the Program. PARTICIPATING MEMBER will not have any responsibilities or obligations with respect to the Program, including, but not limited to, the conduct of any assessment proceedings, the levy of assessments, any required remedial action in the case of delinquencies, the issuance, sale or administration of the bonds or other indebtedness issued in connection with the Program.

Section 5. Information to be Provided. Within thirty (30) days of each request from PARTICIPATING MEMBER, the AUTHORITY agrees to provide PARTICIPATING MEMBER with a list of property owners within the jurisdiction of PARTICIPATING MEMBER participating in the Program as well as their address, detailed description of Improvement(s) installed, and date(s) of Improvement(s) completion.

Section 6. Confidentiality.

(a) "Confidential Information" means, with respect to a Party hereto, all information or material which either (1) is marked or identified as "Confidential," "Restricted," or "Proprietary Information" or other similar marking or identification, or (2) the other Party knew, as recipient, or under the circumstances, should have known, was considered confidential or proprietary by the Disclosing Party (as defined below). Confidential Information shall consist of all information, whether in written, oral, electronic, or other form, furnished in connection with this Agreement by one Party or its Representatives ("Representative" is defined as any elected and appointed officials, affiliate, director, officer, employee, agent, advisor or consultant of a Party or any of its subsidiaries or affiliates) to one or more of the other Parties or to its or their Representatives, and specifically includes but is not limited to (1) PARTICIPATING MEMBER's individually identifiable customer information, (2) PARTICIPATING MEMBER's customer data and financial data, (3) the AUTHORITY's property owner information disclosing to PARTICIPATING MEMBER pursuant to Section 5, and (4) ADMINISTRATOR's customer data and financial data.

(b) The AUTHORITY, ADMINISTRATOR and PARTICIPATING MEMBER shall each hold each other's Confidential Information in confidence. No Party shall make the others' Confidential Information available in any form to any third party or use any other's Confidential Information for any purpose other than as specified in this Agreement. The Party providing Confidential Information ("Disclosing Party") to any other Party ("Receiving Party") shall remain the sole owner of such information. Except as provided elsewhere within this Agreement, nothing contained in this Agreement shall be construed as granting or conferring any

right or license in any Confidential Information or in any patents, copyrights, software or other technology, either expressly or by implication to any other Party, or to its Representatives or to others. The term Confidential Information shall not include any of the following: (1) information already in possession of, or already known to, the Receiving Party as of the Effective Date without an obligation of confidentiality; (2) information in the public domain at the time of the disclosure, or which, after such disclosure, enters into the public domain through no breach of this Agreement by the Receiving Party or its Representative(s); (3) information lawfully furnished or disclosed to the Receiving Party by a non-party to this Agreement without any obligation of confidentiality and through no breach of this Agreement by the Receiving Party or its Representative(s); (4) information independently developed by the Receiving Party without use of any Confidential Information of the Disclosing Party; or (5) information authorized in writing by the Disclosing Party to be released from the confidentiality obligations herein.

(c) By virtue of this Agreement, each Party hereto may disclose to any other Party information that is Confidential Information. This Agreement does not diminish, revoke or supersede any existing confidentiality, non-disclosure or similar agreement between or among any Parties that does not pertain to the subject matter of this Agreement. However, any Confidential Information, whether or not previously disclosed, that pertains to the subject matter of this Agreement shall be governed by the terms of this Section 6 which shall supersede any such previous agreement with respect to such Confidential Information and any Confidential Information relating to the subject matter of this Agreement that was exchanged under such previous agreement shall be treated as though it was exchanged under this Agreement as of the date of such exchange.

(d) Each Receiving Party will treat all Confidential Information of the Disclosing Party, no matter written, electronic, or oral, as confidential and proprietary, and such Receiving Party shall only use such information in furtherance of this Agreement. As such, such Receiving Party shall hold in confidence the Confidential Information of the Disclosing Party, and ensure that such Confidential Information is not disclosed to any other person or entity, except as expressly permitted by this Agreement or as authorized by the Disclosing Party. No Receiving Party shall disclose Confidential Information of a Disclosing Party received under this Agreement to any person other than its Representatives who require knowledge of such Confidential Information in furtherance of this Agreement. Each Receiving Party shall inform its Representatives of the confidential nature of the Confidential Information of any Disclosing Party and advise such Representatives of the limitations on the use and disclosure and prohibition on making copies or summaries of such Confidential Information. Each Receiving Party shall be responsible for any breach of this Agreement by its Representatives. No Party shall use the Confidential Information of any other Party for any commercial purpose.

(e) If a Receiving Party becomes legally compelled (by Public Records Act request, oral questions, interrogatories, request for information or documents, subpoena, civil investigative demand, or similar process) to disclose any Confidential Information of a Disclosing Party, the Receiving Party will provide the Disclosing Party with written notice of such an occurrence (if so permitted) as soon as possible. Thereafter, at its sole costs and expense, the Disclosing Party may seek a protective order or other appropriate remedy, or waive compliance with the provisions of this Agreement. So long as it is consistent with applicable

law, the Receiving Party will not oppose action by, and the Receiving Party will cooperate with, the Disclosing Party, at the Disclosing Party's sole cost and expense, to obtain an appropriate protective order or other reliable assurance that confidential treatment will be accorded the Confidential Information. If, prior to the legal deadline for disclosure, the Disclosing Party fails to obtain such protective order or other remedy, or if the Disclosing Party waives compliance with the requirements of the preceding sentence, the Receiving Party will disclose only that Confidential Information that it is legally required to disclose, and will exercise commercially reasonable efforts, at Disclosing Party's expense, to obtain reliable assurance that confidential treatment will be accorded the Confidential Information so disclosed.

(f) In the event a Receiving Party discloses, disseminates or releases any Confidential Information, except as expressly permitted by this Agreement, such disclosure, dissemination or release will be deemed a material breach of this Agreement and the Disclosing Party may demand prompt return of all Confidential Information previously provided to the Receiving Party. As soon as the Receiving Party becomes aware that it has made an unauthorized disclosure of Confidential Information, the Receiving Party shall take any and all necessary actions to recover the improperly disclosed Confidential Information and immediately notify the Disclosing Party regarding the nature of the unauthorized disclosure and the corrective measures being taken. Each Party agrees that any breach of their confidentiality obligations could cause irreparable harm to the Disclosing Party, the amount of which would be extremely difficult to estimate. Accordingly, it is understood and agreed that monetary damages would not be a sufficient remedy for any material breach of this Agreement and that specific performance and injunctive relief in addition to monetary damages shall be appropriate remedies for any breach or any threat of such breach. The provisions of this Paragraph are in addition to any other legal rights or remedies a Disclosing Party may have.

(g) Notwithstanding any other provision of this Agreement, the provisions of this Section 6 shall not apply to the disclosure of information that must be shared in order to record, levy or collect contractual assessments under the Program or to sell or securitize Bonds.

(h) Notwithstanding the termination of this Agreement, this Confidentiality Section shall survive the expiration or earlier termination of this Agreement.

Section 7. Integration. This Agreement contains the entire agreement of PARTICIPATING MEMBER, ADMINISTRATOR and the AUTHORITY with respect to the matters covered hereby, and no agreement, statement or promise made by PARTICIPATING MEMBER, any ADMINISTRATOR and the AUTHORITY which is not contained herein, shall be valid or binding. No prior agreement, understanding or representation pertaining to any such matter shall be effective for any purpose.

Section 8. This Agreement may be terminated by either the AUTHORITY or PARTICIPATING MEMBER with thirty (30) days written notice. In the event of such termination, the AUTHORITY and ADMINISTRATOR shall no longer have the rights and authorizations granted in this Agreement and Resolution [INSERT], including but not limited to, conducting of additional contractual assessment proceedings and levying new contractual assessments.


Section 9. Effective Date. This Agreement shall be effective on the date on which this Agreement is executed by the PARTICIPATING MEMBER (“Effective Date”).

IN WITNESS WHEREOF, the parties hereto have executed this Participation Agreement by their officers duly authorized as of the day and year first written above.

ONPACE ENERGY SOLUTIONS, LLC

By: 
Arthur Cormier, CEO

CALIFORNIA MUNICIPAL FINANCE
AUTHORITY

By: 
Edward Becker, Executive Director

corporation THE CITY OF CHULA VISTA, a municipal

By: _____
[Title]
MARY CASILLAS SALAS
MAYOR

ATTEST

By: _____
[Title]
Kerry K. Bigelow, MMC
Acting City Clerk

APPROVED AS TO FORM:
[TITLE]

By: _____
[Title]
Glen R. Googins
City Attorney

EXHIBIT A TO PARTICIPATION AGREEMENT



INSURANCE COVERAGE REQUIREMENTS

Administrator shall procure and maintain for the duration of the Agreement insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the work hereunder and the results of that work by the Administrator, its agents, representatives, employees or subcontractors.

Section 1. **MINIMUM SCOPE AND LIMIT OF INSURANCE**

Section 2. Coverage shall be at least as broad as:

1. **Commercial General Liability (CGL):** Insurance Services Office (ISO) Form CG 00 01 12 07 covering CGL on an "occurrence" basis, including products-completed operations, personal & advertising injury, with limits no less than **\$1,000,000** per occurrence. If a general aggregate limit applies, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit.
2. **Automobile Liability:** ISO Form Number CA 00 01 covering any auto (Code 1), or if Administrator has no owned autos, hired, (Code 8) and non-owned autos (Code 9), with limit no less than **\$1,000,000** per accident for bodily injury and property damage.
3. **Workers' Compensation:** as required by the State of California, with Statutory Limits, and Employer's Liability Insurance with limit of no less than **\$1,000,000** per accident for bodily injury or disease.
4. **Professional Liability (Errors and Omissions):** Insurance appropriate to the Administrator's profession, with limit no less than \$1,000,000 per occurrence or claim, \$2,000,000 aggregate. *(If applicable – see footnote next page)*

If the Administrator maintains higher limits than the minimums shown above, City Administrator.

Other Insurance Provisions

The insurance policies are to contain, or be endorsed to contain, the following provisions:

Additional Insured Status

The City, its officers, officials, employees, and volunteers are to be covered as additional insureds on the CGL policy with respect to liability arising out of work or operations performed by or on behalf of the Administrator including materials, parts, or equipment furnished in connection with such work or operations. General liability coverage can be provided in the form of an endorsement to the Administrator's insurance at least as broad as ISO Form CG 20 10 11 85 or if not available, through the addition of both CG 20 10 and CG 20 37 if a later edition is used). Specifically, endorsement must not exclude Products / Completed Operations.

Primary Coverage

For any claims related to the Agreement, the Administrator’s insurance coverage shall be primary insurance as respects the City, its officers, officials, employees, and volunteers. Any insurance or self-insurance maintained by the City, its officers, officials, employees, or volunteers shall be excess of the Administrator’s insurance and shall not contribute with it.

Notice of Cancellation

Each insurance policy required above shall provide that coverage shall not be canceled, except with prior notice to the City.

Waiver of Subrogation

Administrator hereby grants to City a waiver of any right to subrogation which any insurer of Administrator may acquire against the City by virtue of the payment of any loss under such insurance. Administrator agrees to obtain any endorsement that may be necessary to effect this waiver of subrogation, but this provision applies regardless of whether or not the City has received a waiver of subrogation endorsement from the insurer.

Deductibles and Self-Insured Retentions

Any deductibles or self-insured retentions must be declared to and approved by the City. The City may require the Administrator to purchase coverage with a lower deductible or retention or provide proof of ability to pay losses and related investigations, claim administration, and defense expenses within the retention.

Acceptability of Insurers

Insurance is to be placed with insurers with a current A.M. Best’s rating of no less than A:VII, unless otherwise acceptable to the City.

Claims Made Policies

If any of the required policies provide claims-made coverage:

1. The Retroactive Date must be shown, and must be before the date of the Agreement or the beginning of work under the Agreement.
2. Insurance must be maintained and evidence of insurance must be provided ***for at least five (5) years after completion of the work under the Agreement.***
3. If coverage is canceled or non-renewed, and not replaced ***with another claims-made policy form with a Retroactive Date prior to*** the Agreement effective date, the Administrator must purchase “extended reporting” coverage for a minimum of ***five (5)*** years after completion of work.

Verification of Coverage

Administrator shall furnish the City with original certificates and amendatory endorsements or copies of the applicable policy language effecting coverage required by this clause. All certificates and endorsements are to be received and approved by the City before work commences. However, failure to obtain the required documents prior to the work beginning shall not waive the Administrator’s obligation to provide them. The City reserves the right to

require complete, certified copies of all required insurance policies, including endorsements required by these specifications, at any time.

Special Risks or Circumstances

City reserves the right to modify these requirements, including limits, based on the nature of the risk, prior experience, insurer, coverage, or other special circumstances.

(May 2011 version 7.4.1)