

SAMPLE FORMS - CONTRACTS
Distributed Energy Resources Services (DERS)
Feasibility Analysis Agreement (Form 7401)

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(TO BE INSERTED BY UTILITY)
ADVICE LETTER NO. 4918
DECISION NO. 15-10-049

ISSUED BY
Dan Skopec
Vice President
Regulatory Affairs

(TO BE INSERTED BY CAL. PUC)
DATE FILED Jan 19, 2016
EFFECTIVE May 25, 2017
RESOLUTION NO. _____

Instructions: This Feasibility Agreement is subject to negotiation and, upon the mutual agreement of the Parties, may be modified as necessary or appropriate based on the requirements of the contemplated transaction, the unique circumstances of Applicant, or in order to maximize the value of the transaction.

FEASIBILITY ANALYSIS AGREEMENT

This Feasibility Analysis Agreement (this “*Feasibility Agreement*”) is made, entered into and effective as of _____, 20__ (the “*Effective Date*”) by and between Southern California Gas Company, a California corporation (“*Utility*”), and _____, a _____ (“*Company*”), for certain preconstruction feasibility assessments relating to Utility’s potential development of a _____ facility (the “*Proposed Project*”) adjacent to and as a functional part of _____ located at _____, California (the “*Facility*”). Utility and Company may be referred to herein individually each as a “*Party*” and collectively as the “*Parties*.”

ARTICLE 1 DESCRIPTION AND STANDARD OF SERVICES

1.1 Utility shall conduct feasibility analyses described in **Exhibit A** (the “*Services*”), attached hereto and incorporated herein, with the intent of (a) determining the technical and economic feasibility of the design, equipment procurement, construction, operation and maintenance of the Proposed Project, (b) providing sufficient information to prepare the scope of work and pricing (“*Scope of Work*”) for the Distributed Energy Resources Services Agreement (“*DERS Agreement*”), and (c) providing an estimate of potential greenhouse gas emissions reductions that will be achieved as a result of the development of the Proposed Project.

1.2 If the Scope of Work is acceptable to Company, and the feasibility analysis determines that the Proposed Project is, for each Party, feasible from an economic and technical perspective, Utility shall prepare the DERS Agreement in accordance with Schedule GO-DERS.

1.3 Utility and Company acknowledge and agree that: (a) all Services shall be performed by Utility for the mutual benefit of the Parties; (b) Utility shall exercise its independent, professional and trade judgment in performing the Services; and (c) in its preparation of the Scope of Work, Utility will be relying on information provided by Company, which Company represents is complete and accurate except as noted in writing by Company to Utility prior to Utility’s preparation of the Scope of Work.

ARTICLE 2 SERVICES FEE

2.1 As consideration for performance of the Services, Company shall pay Utility _____ Dollars (\$_____) (the “*Feasibility Services Fee*”).

ARTICLE 3 TERM

The term of this Feasibility Agreement shall be _____ (“*Term*”).

ARTICLE 4 RECORDS/OWNERSHIP AND USE OF DOCUMENTS

4.1 Utility shall own such studies, plans, designs, know-how, specifications, and other intellectual property and work product of Utility that are incorporated in the Scope of Work (“*Work Product*”), and such Work Product shall at all times be the exclusive property of Utility. If any of the Work Product contains intellectual property of Company or Company’s affiliates, contractors or agents that is or could be protected by federal copyright, patent, or trademark laws, or state trade secret laws (“*Proprietary Work Product*”), it shall be conspicuously marked and identified as such by Company prior to its delivery to Utility. In the event the Parties, subsequent to this Feasibility Agreement, execute a DERS Agreement, Company hereby grants, and Company shall cause its affiliates, contractors and agents to grant to Utility a perpetual, royalty-free, fully paid-up, nonexclusive and irrevocable license to copy, reproduce, perform, dispose of, use, in whole or in part, and to

authorize others to do so for the benefit of Utility, all Proprietary Work Product, including: databases, templates, file formats, scripts, links, procedures, materials, training manuals and other training materials, specially-created key commands, and any other information, designs, plans, or works provided or delivered to Utility or produced by Company or its subcontractors or its agents. If the Parties fail to execute a DERS Agreement or terminate negotiations, Utility shall have no license to use Proprietary Work Product and shall return all Proprietary Work Product to Company.

ARTICLE 5 INDEMNIFICATION

5.1 Each Party shall indemnify, hold harmless, reimburse and defend the other Party and its current and future parent company, subsidiaries, affiliates and their respective shareholders, members, partners, officers, directors, employees, representatives and agents, and the successors in interest of the foregoing from, for and against any and all third party claims, actions, suits, proceedings, demands, damages, losses, expenses, liabilities, fees, fines and penalties, including reasonable attorneys' and expert witnesses' fees (including fees and disbursements of in-house and outside counsel) ("**Third Party Claims**"), for damages to property or injuries to or death of any person arising out of or relating to this Feasibility Agreement, but only to the extent caused by the negligent or other wrongful acts or omissions of the indemnifying Party or any person or entity for whose acts or omissions the indemnifying Party is responsible.

5.2 Each Party shall give prompt written notice to the other Party of any Third Party Claim or notice of a Third Party Claim made against the other Party for acts or omissions related to, or that may impact the completion of, the Services, in no event later than ten (10) business days after becoming aware of such Third Party Claim or receiving such notice of Third Party Claim.

ARTICLE 6 LIMITATION OF LIABILITY

Notwithstanding anything to the contrary contained in this Feasibility Agreement, in no event shall a Party be liable to the other Party for any claims, actions, suits, proceedings, demands, damages, losses, expenses, liabilities, fees, fines and penalties, including to reasonable attorneys' and expert witnesses' fees (including fees and disbursements of in-house and outside counsel) arising out of or relating to the Services provided or to be provided hereunder in excess of _____, regardless of whether such liability arises out of breach of contract, tort, product liability, contribution, strict liability or any other legal theory.

ARTICLE 7 ASSIGNMENT

7.1 Except with respect to Utility's subcontractors, neither Utility nor Company shall assign or transfer any of its interest in this Feasibility Agreement, in whole or in part, without the prior written consent of the other Party, such consent not to be unreasonably withheld.

7.2 The provisions of this Feasibility Agreement shall be binding upon and shall inure to the benefit of the Parties and their respective successors and permitted assigns.

ARTICLE 8 INDEPENDENT CONTRACTOR; TAXES; SAFETY

8.1 Utility shall perform the Services as an independent contractor and employing unit.

8.2 Utility shall be responsible for remittance of all federal, state and local taxes applicable to any compensation or payments paid to Utility under this Feasibility Agreement, which is included in the Feasibility Services Fee.

8.3 Utility shall be responsible for the safety of its employees and those of its subcontractors, and shall take all reasonable precautions to prevent personal injury, death and property damage resulting from the Services and its acts and omissions and those of its subcontractors. At all times during the performance of any

Services at the Facility, Utility shall comply with all Company safety rules, provided such rules are communicated to Utility in writing by Company.

ARTICLE 9 TERMINATION OF CONTRACT

9.1 A Party ("**Non-Defaulting Party**") may terminate this Feasibility Agreement if the other Party ("**Defaulting Party**") violates or fails to perform any material provision of this Feasibility Agreement (including a failure by the Defaulting Party to make payment when due or if any representation or warranty made by the Defaulting Party was materially false or misleading when made) and, if such violation or failure is capable of cure, the Defaulting Party does not cure such violation or failure within ten (10) calendar days after receipt of a written notice from the Non-Defaulting ("**Cure Period**").

9.2 The Parties agree that Utility will incur substantial liabilities to third parties upon the commencement of the Services and that the extent and amount of loss or damage to Utility as a result of Company's breach of this Feasibility Agreement is impractical and difficult to determine with certainty. Therefore, if Company breaches this Feasibility Agreement and fails to cure such breach within the Cure Period, Company shall pay Utility liquidated damages equal to the Service Fee. The Parties agree that such liquidated damages are a genuine pre-estimate of the damages suffered by Utility by reason of Company's failure to perform under this Feasibility Agreement, and are not intended as a penalty. The amounts payable by Utility under this Section shall be Company's sole and exclusive liability to Utility, and Utility's sole and exclusive remedy, with respect to Company's breach. Nothing in this Section shall be construed as relieving Company of its duty to fulfill its obligations under this Feasibility Agreement.

9.3 Subject to Article 6 and Section 9.2, the rights and remedies of the Non-Defaulting Party provided in this Article are not exclusive and are in addition to any other rights and remedies provided by law or under this Feasibility Agreement. All rights and remedies of the Non-Defaulting Party shall be cumulative and may be exercised successively or concurrently.

ARTICLE 10 FORCE MAJEURE

10.1 Neither Company nor Utility shall be held responsible for delay in the performance of the Services or default under this Feasibility Agreement to the extent caused by fire, riot, an act of God, war, terrorist attack or other cause beyond, respectively, Company's or Utility's reasonable control ("**Force Majeure Events**"). So long as the conditions set forth in this Article are satisfied, other than a Party's ability to pay debts as they become due, neither Party shall be responsible or liable for or deemed in breach of this Feasibility Agreement because of any failure or delay in complying with its obligations under or pursuant to this Feasibility Agreement to the extent that such failure has been caused, or contributed to, by one or more Force Majeure Events or its effects or by any combination thereof; provided that in such event:

10.1.1 any liability of either Party that arose before the occurrence of the Force Majeure Event causing the suspension of performance shall not be excused as a result of such Force Majeure Event;

10.1.2 the affected Party shall continually exercise all commercially reasonable efforts to alleviate and mitigate the cause and effect of such Force Majeure Event, remedy its inability to perform, and limit damages to the other Party;

10.1.3 the affected Party shall use all reasonable efforts to continue to perform its obligations hereunder and to correct or cure the event or condition excusing performance; and

10.1.4 when the affected Party is able to resume performance of the affected obligations under this Feasibility Agreement, that Party shall give the other Party written notice to that effect, and the affected Party promptly shall resume performance under this Feasibility Agreement.

ARTICLE 11 FACILITY ACCESS

Within five (5) calendar days after the Effective Date, Company shall designate by written notice an individual as Company's representative for all matters relating to this Feasibility Agreement ("Company Representative"). The Company Representative or designee shall be reasonably available during all business hours and shall provide or facilitate all access by Utility and its subcontractors to the Facility and to the Company's operational records in order to support Utility's performance of the Services. The actions taken by the Company Representative shall be deemed acts of Company. Company may at any time, upon written notice to Utility, change the Company Representative.

ARTICLE 12 CONFIDENTIALITY; PUBLICITY

12.1 Each Party shall hold in confidence: (a) any information provided or supplied by the other Party or its Representatives (as defined below) that is marked confidential, including such information as may have been provided or supplied prior to the Effective Date; (b) the Scope of Work and all exhibits thereto; and (c) the contents of this Feasibility Agreement (collectively, "**Confidential Information**"). Notwithstanding the foregoing, the following categories of information will not constitute Confidential Information:

12.1.1 information that was in the public domain prior to receipt thereof by such Party or that subsequently becomes part of the public domain by publication or otherwise except by a wrongful act of such Party or its Representatives;

12.1.2 information that such Party can show was lawfully in its possession prior to receipt thereof from the other Party through no breach of any confidentiality obligation;

12.1.3 information received by such Party from a third party having no obligation of confidentiality with respect thereto; and

12.1.4 information at any time developed independently by such Party provided that it is not developed from otherwise Confidential Information.

12.2 Notwithstanding anything herein to the contrary, a Party may disclose Confidential Information as follows:

12.2.1 Confidential Information may be disclosed pursuant to and in conformity with applicable laws or in connection with any legal proceedings, provided that the Party required to disclose such information shall give prior notice to the other Party of such required disclosure and, if so requested by the other Party, shall use all reasonable efforts to oppose the requested disclosure as appropriate under the circumstances or to seek, through a protective order or other appropriate mechanism, to maintain the confidentiality of the Confidential Information;

12.2.2 Confidential Information may be disclosed as required to be disclosed under securities laws applicable to publicly traded companies and their subsidiaries;

12.2.3 In the case of Utility, Confidential Information may, without providing notice thereof to Applicant, be disclosed to regulatory agencies with jurisdiction over Utility and their staffs, including the California Public Utilities Commission ("CPUC") and the Federal Energy Regulatory Commission;

12.2.4 Confidential Information may be disclosed to affiliates, subcontractors, employees, directors, officers, agents, advisors or representatives (collectively, "**Representatives**") of such Party solely as necessary in connection with the Services; provided that (a) each such Representative is informed of the confidential nature of the Confidential Information, (b) such Party shall require each such Representative to adhere to the provisions of this Article, and (c) such Party shall be liable to the other Party for any disclosure by any Representative in violation of the terms of this Article; and

12.2.5 either Party may disclose Confidential Information with the express written consent of the other Party, which consent shall not be unreasonably conditioned, withheld, or delayed.

12.3 It is agreed that each Party shall be entitled to relief both at law and in equity, including injunctive relief and specific performance, in the event of any breach or anticipated breach of this Article, without proof of any actual or special damages.

12.4 All right and title to, and interest in, a Party's Confidential Information shall remain with such Party. All Confidential Information obtained, developed or created by or for Utility exclusively for the Services, including copies thereof, is the exclusive property of Utility whether delivered to Company or not. No right or license is granted to Company or any third party respecting the use of Confidential Information by virtue of this Feasibility Agreement, except to the extent required for Utility's performance of its obligations hereunder. Company shall deliver the Confidential Information, including all copies thereof, to Utility upon request.

ARTICLE 13 DISPUTE RESOLUTION

All claims, disputes and other matters in question between the Parties arising out of or relating to this Feasibility Agreement or the breach thereof, including contract, tort, property, statutory, or common law claims ("*Dispute*") shall be addressed and resolved as follows:

13.1 Negotiation. The resolution of the Dispute shall first be negotiated in good faith by the Parties.

13.2 Mediation. If the Parties are unable to resolve a Dispute through negotiation, the Parties agree first to try in good faith to settle the Dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures, or through private mediation upon agreement of the Parties. The mediator's fees and costs shall be paid equally by the Parties. Any and all mediations arising out of or relating to this Feasibility Agreement shall include, by consolidation or joinder, any other person or entity not a party to this Feasibility Agreement that is substantially involved in a common issue of law or fact and whose involvement in the consolidated mediation is necessary to achieve a final resolution of a matter in controversy therein. The Parties' obligation to mediate shall be specifically enforceable by any court with jurisdiction thereof.

13.3 Litigation. If the Parties do not settle the Dispute through mediation within ninety (90) calendar days of the written notice to the other Party requesting mediation, then either Party shall have the right to pursue litigation as provided for herein. In the event of any litigation to enforce or interpret any terms of this Feasibility Agreement, unless the parties agree in writing otherwise, such action shall be brought in a Superior Court of the State of California located in the County of _____ (or, if the federal courts have exclusive jurisdiction over the subject matter of the dispute, in either the U.S. District Court for the _____ District of California), and the Parties hereby submit to the exclusive jurisdiction of said courts. In any action in litigation to enforce or interpret any of the terms of this Feasibility Agreement, the prevailing Party shall be entitled to recover from the unsuccessful Party all costs, expenses (including expert testimony) and reasonable attorney's fees (including fees and disbursements of in-house and outside counsel) incurred therein by the prevailing Party.

ARTICLE 14 WAIVER

The failure of either Party to enforce any provision of this Feasibility Agreement shall not constitute a waiver by that party of that or any other provision of this Feasibility Agreement.

ARTICLE 15 NOTICES

Any notice, request, demand or other communication required or permitted under this Feasibility Agreement shall be deemed to be properly given by the sender and received by the addressee if made in writing and (1) personally delivered; or (2) as of the date of signed return receipt after deposit with the U.S. Postal Service by certified or registered mail, postage prepaid, with a return receipt requested; or (3) if sent by email or facsimile with

confirmation sent as provided in (2) above. All such notices, requests, demands or other communication shall be addressed as follows:

If to Utility:

Fax: _____
Email: _____

If to Company:

Fax: _____
Email: _____

ARTICLE 16 GOVERNING LAW

The laws of the State of California shall govern this Feasibility Agreement.

ARTICLE 17 SEVERABILITY

If any provision of this Feasibility Agreement is determined to be illegal, in conflict with any law, void or otherwise unenforceable, and if the provisions of this Feasibility Agreement that are essential to each Party’s interests otherwise remain valid and enforceable, then the remaining provisions shall continue to be valid and enforceable and the offending provision shall be given the fullest meaning and effect intended by the Parties as allowed by applicable law.

ARTICLE 18 SURVIVAL

The terms, conditions, representations, and warranties contained in this Feasibility Agreement shall survive the termination or expiration of this Feasibility Agreement.

ARTICLE 19 ENTIRE CONTRACT

This Feasibility Agreement constitutes the entire legally-binding contract between the Parties regarding its subject matter. No waiver, consent, modification or change of terms of this Feasibility Agreement shall bind either party unless in writing and signed by both Parties. Such waiver, consent, modification or change, if made, shall be effective only in the specific instance and for the specific purpose given.

ARTICLE 20 SIGNATURES

This Feasibility Agreement may be executed in several counterparts, each of which shall be an original, and all of which shall constitute one and the same instrument. A facsimile signature or an electronically scanned and electronically mailed (e-mail) signature shall be considered an original. The individuals signing this Feasibility Agreement certify that they are authorized to execute this Feasibility Agreement on behalf of Utility and Company, respectively.

ARTICLE 21 CONSTRUCTION

All references herein to any (i) agreement, law, or tariff shall be to such agreement, law, or tariff as amended, supplemented or modified from time to time, and (ii) governmental authority or other organization, shall be to any successor of such Governmental Authority or other organization. The words “herein,” “hereof” and

“hereunder” shall refer to this Agreement as a whole and not to any particular section or subsection of this Agreement. The singular shall include the plural and the masculine shall include the feminine and neuter and vice versa. “Includes” or “including” shall mean “including, without limitation.” The word “or” when used in this Agreement includes the meaning “and” unless the context unambiguously dictates otherwise. THE PARTIES HEREBY AGREE THAT NO TRADE USAGE, PRIOR COURSE OF DEALING OR COURSE OF PERFORMANCE UNDER THIS AGREEMENT SHALL BE A PART OF THIS AGREEMENT OR SHALL BE USED IN THE INTERPRETATION OR CONSTRUCTION OF THIS AGREEMENT.

ARTICLE 22 REGULATORY MATTERS

This Agreement shall at all times be (a) subject to changes or modifications by the CPUC, as the CPUC may, from time to time, direct in the exercise of its jurisdiction, and (b) subject to and incorporate by reference all of Utility’s applicable tariff schedules.

[Signature Page Follows]

UTILITY:

Southern California Gas Company

Signature: _____

Printed Name: _____

Title: _____

Date: _____

COMPANY:

Signature: _____

Printed Name: _____

Title: _____

Date: _____

EXHIBIT A

SCOPE OF SERVICES

Utility shall conduct the Services with the intent of determining the technical and economic feasibility of the design, equipment procurement, construction, operation and maintenance of the Proposed Project. The Scope of Work may include, but is not limited to, the following:

Comprehensive Scope Definition

- Define the project execution processes for technical execution, construction, operations & maintenance, and other business related aspects of the project.
- Prepare the scope of work and pricing for the DERS Agreement.