

1 BY AUTHORITY

2 ORDINANCE NO. _____
3 SERIES OF 2013

COUNCIL BILL NO. CB13-0198
COMMITTEE OF REFERENCE:
4 BUSINESS, WORKFORCE, & SUSTAINABILITY

5 A BILL

6 **For an ordinance approving a proposed Power Purchase Agreement between**
7 **the City and County of Denver and DENVER SOLAR IV LLC, related to an**
8 **energy procurement agreement at Denver International Airport.**

9
10 **BE IT ENACTED BY THE COUNCIL OF THE CITY AND COUNTY OF DENVER:**

11 **Section 1.** The proposed Power Purchase Agreement, contract control number
12 201310258, in the words and figures contained and set forth in that form of Power Purchase
13 Agreement in the office and on the web page of City Council, and to be filed in the office of the
14 Clerk and Recorder, Ex-Officio Clerk of the City and County of Denver, under City Clerk's Filing
15 No. 2013-0288 is hereby approved.

16
17 COMMITTEE APPROVAL DATE: March 28, 2013.

18 MAYOR-COUNCIL DATE: April 2, 2013.

19 PASSED BY THE COUNCIL _____ 2013
20 _____ - PRESIDENT

21 APPROVED: _____ - MAYOR _____ 2013

22 ATTEST: _____ - CLERK AND RECORDER,
23 EX-OFFICIO CLERK OF THE
24 CITY AND COUNTY OF DENVER

25 NOTICE PUBLISHED IN THE DAILY JOURNAL _____ 2013; _____ 2013

26
27 PREPARED BY: Debra Overn;  DATE: April 4, 2013

28 Pursuant to Section 13-12, D.R.M.C., this proposed ordinance has been reviewed by the office of the
29 City Attorney. We find no irregularity as to form, and have no legal objection to the proposed
30 ordinance. The proposed ordinance is submitted to the City Council for approval pursuant to § 3.2.6
31 of the Charter.

32 Douglas J. Friednash, City Attorney for the City and County of Denver

33 BY: _____, Assistant City Attorney DATE: April 4, 2013

POWER PURCHASE AGREEMENT

THIS POWER PURCHASE AGREEMENT (as it may be amended from time-to-time, this "Agreement"), is made and entered into as of the date set forth on the signature page below by and between the **CITY AND COUNTY OF DENVER**, a municipal corporation of the State of Colorado ("City" or "Purchaser"), and **DENVER SOLAR IV LLC**, a Colorado limited liability company authorized to do business in the State of Colorado ("Power Provider").

WITNESSETH:

WHEREAS, Power Provider desires to install electricity grid-connected photovoltaic, solar power plants with a total generating capacity rated at approximately 2,000 kWp (the "Generating Facility") located at the City's Denver International Airport ("DIA" or "Airport"), in Denver, Colorado; and

WHEREAS, the City desires to purchase from Power Provider and Power Provider desires to sell to Purchaser energy output from the Generating Facility; and

WHEREAS, the Power Provider and the Purchaser will enter into a Ground Lease Agreement (the "Lease") authorizing the Power Provider to operate the Generating Facility on the Airport grounds; and

WHEREAS, the Purchaser will be providing a subordinated loan to the Power Provider's parent entity as outlined in a "Loan Agreement" and whereas this loan will be guaranteed by the Denver Solar IV LLC parent entity as outlined in the Loan Agreement.

NOW, THEREFORE, in consideration of the promises and the mutual benefits from the covenants hereinafter set forth, Power Provider and the City agree as follows:

1. LINE OF AUTHORITY

The City's Manager of Aviation, her designee or successor in function (the "Manager") authorizes and directs all work performed under this Agreement. Until otherwise notified by the Manager, the City's Deputy Manager of Aviation for Planning and Development ("Deputy Manager") is designated as the authorized representative of the Manager through whom services performed under this Agreement shall be directed and coordinated. Administrative reports, memoranda, correspondence and other submittals required of the Power Provider shall be processed in accordance with the Deputy Manager's directions.

2. DEFINITIONS

A. "**Commercial Operation**" means the condition existing when the Generating Facility is (i) mechanically complete and has been tested and is operating as specified in the design documents, and (ii) energy is delivered through the Generating Facility's meter and to the Site's electrical system under an approved and executed Utility interconnection agreement.

B. "Commercial Operation Date" means the date on which Power Provider notifies Purchaser in accordance with Section 3(C) that the Generating Facility has achieved Commercial Operation.

C. "Contract Price" has the meaning set forth in Section 10.A.

D. "Early Termination Date" has the meaning set forth in Section 4.E.

E. "Energy Delivery Point" means the energy delivery point within the Site's electrical system on Purchaser's side of the Site's Utility meter, as designated in the Utility interconnection agreement described in Section 2(A).

D. "Energy Output" means the total quantity of all actual net energy generated by the Generating Facility (measured in kWhac) and delivered in accordance with Section 10 to the Energy Delivery Point, in any given period of time. Energy Output does not include the Environmental Incentives.

E. "Environmental Attributes" means the characteristics of electric power generation at the Generating Facility that have intrinsic value, separate and apart from the Energy Output, arising from the perceived environmental benefits of the Generating Facility of the Energy Output, including but not limited to renewable energy certificates, green tags, renewable energy credits, tradable renewable certificates, portfolio energy credits (collectively, "Solar Renewable Energy Credits" or "SRECs"), carbon trading credits, emissions reduction or offset credits, emission allowances, and other tradable renewable credits or related emissions reduction credits, and all environmental and other attributes that differentiate the Generating Facility or the Energy Output from energy generated by fossil-fuel based generation units, fuels or resources, characteristics of the Generating Facility that may result in the avoidance of environmental impacts on air, soil or water, such as the absence of emission of any oxides of nitrogen, sulfur or carbon or of mercury, or other gas or chemical, soot, particulate matter or other substances attributable to the Generating Facility or the compliance of the Generating Facility or the Energy Output with the law, rules and standards of the United Nations Framework Convention on Climate Change (the "UNFCCC") or the Kyoto Protocol to the UNFCCC or crediting "early action" with a view thereto, or laws or regulations involving or administered by the Clean Air Markets Division of the Environmental Protection Agency or successor administrator or any state or federal entity given jurisdiction over a program involving transferability of rights arising from Environmental Attributes and Reporting Rights. In addition to, and without limiting the foregoing, "Environmental Attributes" also means any current or future attributes, credits, or offsets accruing to or related to the system or solar power by virtue of the system or the solar power meeting the project-specific additionality standards which have been outlined by the United Nations Framework Convention on Climate Change (the "UNFCCC") or the Kyoto Protocol to the UNFCCC.

F. "Environmental Incentives" means, except as otherwise provided for in the definition of "Environmental Attributes," any and all grants, incentive payments, rights, credits (including tax credits), payments related to credits, rebates, benefits, reductions, offsets, and allowances and entitlements of any kind, howsoever entitled or named, available currently and from time to time

from the applicable utility company, the Federal or State Government, local or municipal authority, or any other entity as a result of the design, construction and operation of the System. Without limiting the foregoing, "Environmental Incentives" includes the right to apply for (and entitlement to receive) incentives under the Xcel Energy Solar*Rewards program or other incentive programs offered by the applicable utility or the State of Colorado, and the right to claim federal income tax credits under Sections 45 and/or 48 of the Internal Revenue Code, or payments for specified energy property in lieu of tax credits under Section 1603 of the American Recovery and Reinvestment Tax Act of 2009.

G. "Expiration Date" has the meaning set forth in Section 4.D.

H. "Force Majeure" has the meaning given to it in Section 29.

I. "Generating Facility" means the electric power generation equipment, controls, meters, switches, connections, conduit, wires and other equipment connected to the Energy Delivery Point installed on the Site by Power Provider for the purposes of providing electric power to Purchaser under this Agreement, and which is the tangible personal property of the Power Provider and shall be owned solely by Power Provider throughout the Term of the Lease.

J. "kWp" means kilowatt rated power.

K. "kWac" means kilowatt alternating current.

L. "kWhac" means kilowatt-hour alternating current.

M. "Lease" means the Ground Lease Agreement between the Purchaser and the Power Provider of even date herewith.

N. "Party" means Power Provider or Purchaser.

O. "Parties" means Power Provider and Purchaser.

P. "PUC" means the Public Utilities Commission of Colorado.

Q. "Quarterly Invoice Date" means the first Business Day of each of January, April, July, and October.

R. "Quarterly Period" means the period between the current and next Quarterly Invoice Date.

S. "Reporting Rights" means the right of Power Provider to report to any federal, state, or local agency, authority or other party, including without limitation under Section 1605(b) of the Energy Policy Act of 1992 and provisions of the Energy Policy Act of 2005, or under any present or future domestic, international or foreign emissions trading program, that Power Provider owns the Environmental Attributes and the Environmental Incentives associated with the Energy Output.

T. "Site" means Purchaser's facility at Denver International Airport in Denver, Colorado or at such other location agreed to by Power Provider and Purchaser.

U. "Solar Power Payment" has the meaning set forth in Section 10.A.

V. "Utility" means Public Service Company of Colorado, the electric distribution company responsible for electric energy transmission and distribution service at the Site.

3. INSTALLATION AND OPERATION OF THE GENERATING FACILITY

A. Power Provider shall install the Generating Facility in accordance with the terms and conditions of the Lease. Power Provider shall provide Purchaser reasonable notice of the progress of the installation of the Generating Facility and shall provide reasonable notice to Purchaser of the Commercial Operation Date.

B. Power Provider shall be solely responsible for all costs and the performance of all tasks required for installation of the Generating Facility. Promptly following the execution of this Agreement, Power Provider shall commence pre-installation activities relating to the Generating Facility, which shall include, without limitation, the following:

- (i) obtain financing for installation of the Generating Facility, and Solar Renewable Energy Credits for operation of the Generating Facility;
- (ii) obtain all permits, contracts and agreements required for installation of the Generating Facility;
- (iii) obtain all necessary authority from the PUC or other regulatory entities for the operation of Generating Facility and sale and delivery of Energy Output to Purchaser;
- (iv) effect the execution of all agreements required for Utility interconnection of the Generating Facility; and
- (v) enter into contract(s) for installation of the Generating Facility (e.g., contracts with equipment suppliers and related service providers for the Generating Facility), subject to the terms of the Lease and any proposed financing; and
- (vi) perform title, lien and related real property searches; and
- (vii) negotiating and entering into an acceptable SO-REC Purchase Contract and any related agreements between Power Provider and Public Service Co. of Colorado d.b.a. Xcel Energy.

C. Power Provider shall (i) use commercially reasonable efforts to cause installation of the Generating Facility to be completed and to cause the Generating Facility to begin Commercial Operation on or before December 31, 2013; or (ii) on such date, notify Purchaser of the actual or estimated Commercial Operation Date. Successful completion of parts (i) - (vii) of

Section 3.B shall be conditions precedent to Power Provider's obligations to install and operate Generating Facility and otherwise perform its obligations under this Agreement. If the activities contemplated in parts (i) - (vii) of Section 3.B are not completed by December 31, 2013, Power Provider shall have the option to terminate the Agreement without triggering the default provisions of this Agreement or any liability under this Agreement. Alternatively, in the event that such conditions precedent are not satisfied by such date, the Parties may mutually agree to amend this Agreement to revise the Commercial Operation Date and the Term of this Agreement.

D. Power Provider shall prevent activities associated with installation, operation and maintenance of the Generating Facility from disrupting or interfering with Purchaser's operation of the Airport.

E. Power Provider shall be solely responsible for operation and maintenance of the Generating Facility and shall, at all times during the Term of this Agreement, maintain the Generating Facility in good operating condition. Power Provider's insurance shall address all risk of loss with respect to the Generating Facility, and Power Provider shall have full responsibility for its operation and maintenance in compliance with all laws, regulations and governmental permits. In accordance with the Lease, Purchaser shall provide adequate and secure storage space at the Site to store the spare parts inventory for the Generating Facility for the Term of this Agreement.

F. The Power Provider and the Purchaser hereby agree and acknowledge that notwithstanding the Generating Facility's presence on the Site, Purchaser shall have no ownership interest in the Generating Facility and no responsibility for its operation or maintenance. Neither Purchaser nor any party related thereto shall have the right or be deemed to operate the Generating Facility for purposes of Section 7701(e)(4)(A)(i) of the Internal Revenue Code.

G. All personal property taxes related to the Generating Facility shall be the responsibility of Power Provider.

H. Power Provider shall provide general and umbrella liability insurance coverage as set forth in the Lease between the Parties.

I. Notwithstanding any other provision of this Agreement, the effectiveness of this Agreement, including the obligations and responsibilities of the Parties, is contingent upon the arrangement and entering into of a Lease for the length of this Agreement between Purchaser and Power Provider. Notwithstanding the Generating Facility's presence on the Site, except as required by the Federal Aviation Administration or as required for air navigation purposes, Purchaser shall not cause or permit any interference with the Generating Facility's insolation and access to sunlight, as such access exists as of the effective date of this Agreement.

J. Purchaser represents to Power Provider that there are no circumstances known to Purchaser and no commitments to third parties that may damage, impair, or otherwise adversely affect the Generating Facility or its function by blocking sunlight to the Generating Facility.

K. The Parties share a common desire to generate favorable publicity regarding the Generating Facility and their association with it. The Parties agree that they will, from time-to-time, issue press releases regarding the Generating Facility and that they shall cooperate with each other in connection with the issuance of such releases. Each Party agrees that it shall not issue any press release regarding the Generating Facility without the prior written consent of the other Party, which consent shall not be unreasonably withheld or delayed. Power Provider shall use commercially reasonable efforts to maintain the area in the immediate vicinity (i.e., within the fence) of the Generating Facility in a reasonably neat and clean condition.

4. PURCHASE AND SALE OF POWER; TERM

A. Purchase and Sale. Beginning on the Commercial Operation Date and continuing through the Term of this Agreement, Purchaser shall purchase and accept delivery from Power Provider at the purchase price set forth in Section 4.B below, and Power Provider shall sell and deliver to Purchaser, the entire Energy Output (in such amount of output as the Generating Facility produces from time to time). Purchaser shall not resell any of the Energy Output except for any net-metering.

B. Purchase Price. Purchaser shall pay Power Provider an amount equal to the Energy Output multiplied by the Purchase Price per kWhac (pursuant to Exhibit A). Such amount shall be paid in accordance with the terms of Section 11.

C. Taxes. In the event that any taxes are assessed against the generation, sale, delivery or consumption of Energy Output, Purchaser shall pay for all such amounts due.

D. Term. The purchase and sale obligation under Section 4.A, with respect to Energy Output from the Generating Facility shall commence on **October 1, 2013**, or the Commercial Operation Date, whichever is later, and continue until **November 14, 2033**, unless and until terminated earlier pursuant to the provisions of this Agreement (collectively, "Term"). The date this Agreement terminates by reason of the expiration of the Term is hereinafter referred to as the "Expiration Date."

E. Early Termination by Power Provider. Power Provider shall have the right, but not the obligation, to terminate this Agreement prior to expiration of its Term only upon the occurrence of:

- (i) an unstayed order of a court or administrative agency having the effect of subjecting the sales of Energy Output to federal or state regulation of prices;
- (ii) elimination or alteration of one or more Environmental Incentives or other change in law that results in a material adverse economic impact on Power Provider;
- (iii) an annual level of direct beam solar resource availability that is less than or equal to 90% of historical averages as measured by long-term weather data (minimum of five (5) years) collected at the Site and/or other reliable calibrated and appropriate weather station representative of the Site; or

- (iv) the termination of the Lease prior to the Expiration Date for any reason other than Power Provider's breach of the Site Lease; or
- (v) failure of any activity in Section 3.B; or
- (vi) an Event of Default of either party under Section 17.A.

5. MAXIMUM CONTRACT PAYMENT OBLIGATION

In no event shall the City's payment obligation for the services provided hereunder be any amount in excess of the sum of **Eight Million Dollars (\$8,000,000.00)** over the Term of this Agreement, unless this Agreement is amended to increase such amount.

6. CONTRACT FUNDING

A. All payments under this Agreement shall be paid from the City and County of Denver Airport System Operations and Maintenance Fund and from no other fund or source. The City is under no obligation to make payments from any other source. The City is under no obligation to make any future encumbrances or appropriations for this Agreement.

B. It is expressly understood and agreed that the obligation of the City to make payments to the Power Provider shall only extend to monies appropriated by the Denver City Council, paid into the Treasury of the City and encumbered for the purposes of this Agreement. The Power Provider acknowledges that (i) the City does not by this Agreement irrevocably pledge present cash reserves for payments in future fiscal years, and (ii) this Agreement is not intended to create a multiple-fiscal year direct or indirect debt or financial obligation of the City.

7. THE POWER PROVIDER'S PROJECT MANAGER

A. The Power Provider shall provide a Project Manager who is trained, qualified and acceptable to the Airport's Contract Administrator. The Project Manager shall have full authority to act for the Power Provider at all times to carry out the provisions of this Agreement regarding operational matters.

B. The Project Manager shall make sufficient regular inspections, or otherwise as necessary, either in person or by a designated representative, to ensure the work is performed as specified. The Project Manager shall provide a copy of all inspection reports to the Airport's Contract Administrator.

C. The Power Provider agrees that it shall use reasonable efforts to obtain the approval of the Airport's Contract Administrator of the Power Provider's proposed Project Manager. The Power Provider shall submit a resume of the proposed Project Manager, along with other information reasonably requested by the City, in order to obtain such approval.

8. ENVIRONMENTAL ATTRIBUTES

A. Delegation of Attributes. City's purchase of the Energy Output from the Generating Facility does not include Environmental Incentives, Environmental Attributes, or any other attributes of ownership of the Generating Facility, which shall be owned by Power Provider. City agrees to cooperate in good faith as necessary to enable Power Provider to obtain all available Environmental Incentives, including reassignment of any incentive received by the City as a result of the transaction described in this Agreement. Notwithstanding the Generating Facility's presence on the Site, Power Provider shall own, and may assign or sell in its sole discretion, all right, title and interest associated with or resulting from the development and installation of the Generating Facility or the production, sale, purchase or use of the Energy Output including, without limitation:

- (i) all Environmental Incentives and all Environmental Attributes; and
- (ii) the Reporting Rights and the exclusive rights to claim that: (A) the Energy Output was generated by the Generating Facility; (B) Power Provider is responsible for the delivery of the Energy Output to the Energy Delivery Point; (C) Power Provider is responsible for the reductions in emissions of pollution and greenhouse gases resulting from the generation of the Energy Output and the delivery thereof to the Energy Delivery Point; and (D) Power Provider is entitled to all credits, certificates, registrations, etc., evidencing or representing any of the foregoing.

B. Impairment of Solar Renewable Energy Credits. Following notice by Power Provider of actions or omissions which could impair or jeopardize either the sale of SRECs to the Utility or the production of power hereunder, Purchaser shall not take any such action or suffer any such omission at the Site except as required by the Federal Aviation Administration, for air navigation purposes, or as otherwise permitted under this Purchase Agreement or the Lease. To the fullest extent Purchaser is able to comply, Purchaser shall take such action or suffer such omission as necessary to assist Power Provider in qualifying for receipt of SRECs payment.

9. METERING

A. Power Provider shall install and maintain a standard revenue quality meter with electronic data acquisition system ("DAS") capabilities at the Generating Facility. The meter shall measure the alternating current output of the Generating Facility on a continuous basis. Power Provider shall be responsible for maintaining the metering equipment in good working order and, if Purchaser so requests, for testing at Purchaser's sole expense the same once per calendar year and certifying the results of such testing to Purchaser. In the event of a failure of the electronic meter reading system and until such failure has been corrected, Power Provider shall be responsible for conducting monthly on-site readings of the standard electricity meter to determine the output of the Generating Facility delivered to Purchaser. Data retrieved from any such meter shall serve as the basis for establishing quarterly Solar Power Payments in accordance with Exhibit A.

B. Power Provider shall maintain all DAS data and shall provide to Purchaser a report of the Site's individual metered energy, as read and collected on a monthly basis, once each month within fourteen (14) business days after the last day of the preceding month. Power Provider shall verify and adjust all DAS data at least once per calendar year based on readings from the foregoing standard meter. Subject to Section 9.A, such data, as verified and adjusted, shall serve as the basis for invoicing Purchaser for all delivered energy. Power Provider shall preserve all data compiled hereunder for a period not less than three years.

C. Not more than twice per calendar year, Purchaser shall have the right to audit all such DAS data upon reasonable notice, and any such audit shall be at Purchaser's sole cost (unless an audit reveals at least a ten percent (10%) overcharge to Purchaser, in which case Power Provider shall bear the cost of that audit). Purchaser shall have a right of access to all meters at reasonable times and with reasonable prior notice for the purpose of verifying readings and calibrations. If the metering equipment is found to be inaccurate, it shall be corrected and past readings shall be promptly adjusted in an equitable manner.

D. Power Provider shall provide Purchaser with a link and access passwords to any web-site associated with the DAS so the Purchaser may freely view the available data and analytics and diagnostics.

10. DELIVERY

A. Title and risk of loss of the Energy Output shall pass from Power Provider to Purchaser upon delivery of the Energy Output at the Energy Delivery Point. All deliveries of Energy Output hereunder shall be in the form of three-phase, sixty-cycle alternating current or similar to properly integrate with the Site's electrical system. Purchaser shall purchase and accept delivery of metered Energy Output at the Energy Delivery Point.

B. Power Provider shall ensure that all energy generated by the Generating Facility conforms to Utility specifications for energy being generated and delivered to the Site's electric distribution system, which shall include the installation of proper power conditioning and safety equipment, submittal of necessary specifications, coordination of Utility testing and verification, and all related costs.

C. Purchaser shall be responsible for arranging delivery of Energy Output from the Energy Delivery Point to Purchaser's facilities and any installation and operation of equipment on Purchaser's side of the Energy Delivery Point necessary for acceptance and use of the Energy Output. The Parties acknowledge that adjustments in the terms and conditions of this Agreement may be appropriate to account for rule changes in the respective Utility or Utility control areas, by the respective independent system operators, or their successors, that could not be anticipated at the date of execution of this Agreement or that are beyond the control of the Parties, and the Parties agree to make such commercially reasonable amendments as are reasonably required to comply therewith, subject to the approval of City Council with respect to Purchaser.

11. INVOICES AND PAYMENT

A. Power Provider shall invoice Purchaser on the first day of each Quarterly Period (each, a “Quarterly Invoice Date”), commencing on the first Quarterly Invoice Date to occur after the Operations Date, for the Solar Power Payment in respect of such Quarterly Period. The first invoice shall include any production that occurred prior the initial Quarterly Invoice Date. The last invoice shall be pro rated, as necessary, to include production only through the Expiration Date of this Agreement.

B. The City shall process all invoices for payment received from the Power Provider on a timely basis of net thirty (30) days after invoice date which is in accordance with the City’s Prompt Payment Ordinance, Denver Revised Municipal Code (“DRMC”) §§ 20-107, *et. seq.* The Power Provider agrees that interest and late fees shall be payable by the City hereunder only to the extent authorized and provided for in the City’s Prompt Payment Ordinance.

C. The final annual quarterly payment shall be reduced by an amount equal to any outstanding unpaid DIA Loan payments from the Power Provider and as required by the Loan Agreement. Should the outstanding unpaid Loan payment exceed the last annual quarterly PPA payment, such unpaid outstanding loan balance will be carried over to and deducted from subsequent PPA payments until netted to zero.

12. DISPUTES

A. Either Party may, in good faith, dispute the correctness of any invoice or any adjustment to an invoice rendered or adjust any invoice for any arithmetic, computational or meter-related error within twelve (12) months of the date the invoice or adjustment to an invoice was rendered. In the event a Party disputes all or a portion of an invoice, or any other claim or adjustment arises, that Party shall pay the disputed and undisputed portion when due and provide the other Party notice of the dispute and the amount in dispute. In such event, the Parties shall first use good faith, reasonable, diligent efforts to resolve such dispute within a reasonable period of time not to exceed thirty (30) days from the date of such notice.

B. If the Parties do not resolve a dispute under Section 12.A within thirty (30) days, then such dispute, or any other disputes arising under or related to this Agreement, shall be resolved by administrative hearing which shall be conducted in accordance with the procedures set forth in D.R.M.C. § 5-17. The Parties hereto agree that the Manager of Aviation’s determination resulting from said administrative hearing shall be final, subject only to the Power Provider’s right to appeal the Manager’s determination under Colorado Rule of Civil Procedure 106.

13. TITLE TO GENERATING FACILITY AND OTHER PROPERTY RIGHTS

A. Notwithstanding the Generating Facility’s presence on the Site, Power Provider shall at all times retain title to and be the legal and beneficial owner of the Generating Facility, and the Generating Facility shall remain the property of Power Provider or Power Provider’s assigns. Power Provider shall be entitled to, and is hereby authorized to, file one or more

precautionary financing statements or fixture filings in such jurisdictions as it deems appropriate with respect to the Generating Facility in order to protect its rights in the Generating Facility.

B. The Parties specifically acknowledge and agree that Power Provider shall be the owner of the Generating Facility for federal income tax purposes, and in that connection shall be entitled to the depreciation deductions associated with the Generating Facility as well as any tax credits or other tax benefits provided under the Code to which such Generating Facility may be entitled.

C. Nothing in this Agreement shall be construed to convey to Purchaser a license or other right to trademarks, copyrights, technology or other intellectual property of Power Provider.

14. REPRESENTATIONS AND WARRANTIES

Each Party represents and warrants to the other Party as follows:

A. such Party is duly organized, validly existing and in good standing under the laws of the state of its formation and has all requisite power and authority to enter into this Agreement, to perform its obligations hereunder and to consummate the transactions contemplated hereby;

B. the execution and delivery of this Agreement and the performance of such Party's obligations hereunder have been duly authorized by all necessary company action;

C. this Agreement is a legal, valid and binding obligation of such Party enforceable against such Party in accordance with its terms, subject to the qualification, however, that the enforcement of the rights and remedies herein is subject to (i) bankruptcy and other similar laws of general application affecting rights and remedies of creditors and (ii) the application of general principles of equity (regardless of whether considered in a proceeding in equity or at law); and

D. neither the execution and delivery of this Agreement by such Party nor compliance by such Party with any of the terms and provisions of this Agreement conflicts with, breaches or contravenes the provisions of such Party's organizational documents or any state statutes as applies to such Party. Power Provider further represents and warrants to the Purchaser that to Power Provider's knowledge, no governmental approval (other than any governmental approvals which have been previously obtained or disclosed in writing to Purchaser) is required in connection with the due authorization, execution and delivery of this Agreement by Power Provider or the performance by Power Provider of its obligations hereunder which Power Provider has reason to believe that it will be unable to obtain in due course. Purchaser further represents and warrants to the Power Provider that to the Department of Aviation's knowledge, except for building permits and approval by the City Council and FAA, no governmental approval (other than any governmental approvals which have been previously obtained or disclosed in writing to Power Provider) is required in connection with the due authorization, execution, and delivery of this Agreement by Purchaser or the performance by Purchaser of its obligations hereunder which Purchaser has reason to believe that it will be unable to obtain in due course.

15. COVENANTS AND LIENS

Notwithstanding the Generating Facility's presence on the Site, Purchaser shall not directly or indirectly cause, create, incur, assume or suffer to exist any mortgage, pledge, lien (including mechanics', labor or materialman's lien), charge, security interest, encumbrance or claim on or with respect to the Generating Facility or any interest therein. Purchaser also shall pay promptly before a fine or penalty may attach to the Generating Facility any taxes, charges or fees of whatever type of any relevant governmental authority for which Purchaser is responsible pursuant to the terms of this Agreement and applicable law. If Purchaser breaches its obligations under this Section, it shall immediately notify Power Provider in writing, shall promptly cause such liens to be discharged and released of record, and any such taxes, charges or fees to be paid, without cost to Power Provider.

16. LOSS

If the Generating Facility is (i) materially damaged or destroyed, or suffers any other material loss or (ii) condemned, confiscated or otherwise taken, in whole or in material part, or the use thereof is otherwise diminished so as to render impracticable or unreasonable the continued production of energy, to the extent there are sufficient insurance or condemnation proceeds available to Power Provider, Power Provider shall either cause (A) the Generating Facility to be rebuilt and placed in Commercial Operation at the earliest practical date or (B) another materially identical Generating Facility to be built in the proximate area of the Site and placed in Commercial Operation as soon as commercially practicable.

17. DEFAULT AND REMEDIES

A. Event of Default. With respect to a Party, there shall be an event of default if:

- (i) such Party fails to pay any amount within sixty (60) days after such amount is due, or as otherwise provided by the City's Prompt Payment Ordinance;
- (ii) except as otherwise set forth in this Section 17.A, such Party is in breach of any representation or warranty set forth herein or fails to perform any material obligation set forth in this Agreement and such breach or failure is not cured within sixty (60) days after notice from the non-defaulting Party; provided, however, that the cure period shall be extended by the number of days during which the defaulting Party is prevented from taking curative action solely by Force Majeure if the defaulting Party had begun curative action and was proceeding diligently, using commercially reasonable efforts, to complete such curative action;
- (iii) such Party admits in writing its inability to pay its debts generally as they become due;
- (iv) such Party files a petition or answer seeking reorganization or arrangement under the federal bankruptcy laws or any other applicable law or statute of the United States of America or any State, district or territory thereof;
- (v) such Party makes an assignment for the benefit of creditors;
- (vi) such Party consents to the appointment of a receiver of the whole or any substantial part of its assets;
- (vii) such Party has a petition in bankruptcy filed against it, and such petition is not dismissed within ninety (90) days after the filing thereof;
- (viii) a court of competent jurisdiction enters an order, judgment, or decree appointing a receiver of the whole or any substantial part of such Party's assets, and such

order, judgment or decree is not vacated or set aside or stayed within ninety (90) days from the date of entry thereof;

- (ix) under the provisions of any other law for the relief or aid of debtors, any court of competent jurisdiction shall assume custody or control of the whole or any substantial part of such Party's assets and such custody or control is not terminated or stayed within ninety (90) days from the date of assumption of such custody or control; or
- (x) Purchaser or Power Provider materially breaches the Lease and such breach is not cured within sixty (60) days after notice from the non-defaulting Party.
- (xi) **Cross Default with Lease.** Notwithstanding anything to the contrary under this Power Purchase Agreement or the Ground Lease Agreement, a default by any party under this agreement shall be an event of default under the other agreement.

B. **Remedies.** Upon an event of default by one Party, the other Party shall have the right, but not the obligation, to terminate or suspend this Agreement with respect to all obligations arising after the effective date of such termination or suspension (other than payment obligations relating to obligations arising prior to such termination or suspension). The Parties agree that in the event of a default under this contract that leads to termination, the non-defaulting Party may pursue all remedies available to it in law and in equity.

C. **No Waiver.** Any waiver at any time by either Party of its rights with respect to an event of default under this Agreement, or with respect to any other matters arising in connection with this Agreement, shall not be deemed to be a waiver with respect to any subsequent default or other matter. Any waiver under this Agreement must be in writing signed by the waiving Party.

D. Notwithstanding any provision to the contrary under this Agreement, neither Purchaser nor any party related to Purchaser shall bear or be deemed to bear any significant financial burden if there is nonperformance by Power Provider under this agreement, as the phrase "any significant financial burden if there is nonperformance" is used in Section 7701(e)(4)(A)(ii) of the Internal Revenue Code.

E. Notwithstanding any provision to the contrary under this Agreement, neither Purchaser nor any party related to Purchaser shall be deemed to receive any significant financial benefit if the operating costs of the Generating Facility are less than the standard of performance and/or operation set forth in this Agreement, as the phrase "significant financial benefit if the operating costs of the Generating Facility are less than the standards of performance or operation" is used in Section 7701(e)(4)(A)(iii) of the Internal Revenue Code.

18. LIMITATION OF LIABILITY

IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER PARTY FOR CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY OR INDIRECT DAMAGES,

LOST PROFITS OR BUSINESS INTERRUPTION DAMAGES, BY STATUTE, IN TORT, CONTRACT OR OTHERWISE.

19. AGREEMENT SUBORDINATE TO AGREEMENTS WITH UNITED STATES

This Agreement is subject and subordinate to the terms, reservations, restrictions and conditions of any existing or future agreements between the City and the United States, the execution of which has been or may be required as a condition precedent to the transfer of federal rights or property to the City for Airport purposes and the expenditure of federal funds for the development of the Airport or airport system. The provisions of the attached Appendices are incorporated herein by this reference.

20. AIRPORT SECURITY

A. It is a material requirement of this Agreement that the Power Provider at its sole expense and without reimbursement by the City shall comply with all rules, regulations, written policies and authorized directives from the City and/or the Transportation Security Administration with respect to Airport security. The Power Provider shall conduct all of its activities at the Airport in compliance with the Airport security program, which is administered by the Security Division of the City's Department of Aviation. Violation by the Power Provider or any of its employees, subcontractors or vendors of any rule, regulation or authorized directive from the City or the Transportation Security Administration with respect to Airport Security shall be grounds for immediate termination by the City of this Agreement for cause.

B. The Power Provider, promptly upon notice of award of this Agreement, shall meet with the Airport's Assistant Security Manager to establish badging and vehicle permit requirements for Power Provider's operations under this Agreement. The Power Provider shall obtain the proper access authorizations for all of its employees, subcontractors and vendors who will enter the Airport to perform work or make deliveries, and shall be responsible for each such person's compliance with all Airport rules and regulations, including without limitation those pertaining to security. Any person who violates such rules may be subject to revocation of his/her access authorization. The failure of the Power Provider or any subcontractor to complete any required services hereunder shall not be excused on account of the revocation for good cause of access authorization of any person.

C. The security status of the Airport is subject to change without notice. If the security status of the Airport changes at any time during the Term of this Agreement, the Power Provider shall take immediate steps to comply with security modifications which occur as a result of the changed status. The Power Provider may at any time obtain current information from the Airport Security Office regarding the Airport's security status in relation to the Power Provider's operations at the Airport.

D. The Power Provider shall return to the City at the expiration or termination of this Agreement, or upon demand by the City, all access keys or access badges issued to it or any subcontractor for any area of the Airport, whether or not restricted. If the Power Provider fails to do so, the Contractor shall be liable to reimburse the City for all the City's costs for work

required to prevent compromise of the Airport security system. The City may withhold funds in the amount of such costs from any amounts due and payable to the Power Provider under this Agreement.

21. NONDISCRIMINATION

In connection with the performance of work under this Agreement, Power Provider agrees not to refuse to hire, discharge, promote or demote, or to discriminate in matters of compensation against any person otherwise qualified, solely because of race, color, religion, national origin, gender, age, military status, sexual orientation, marital status, or physical or mental disability; and Power Provider further agrees to insert the foregoing provision in all subcontracts hereunder.

22. BOND ORDINANCES; GOVERNING LAW; VENUE

This Agreement shall be deemed to have been made in, and shall be construed in accordance with the laws of the State of Colorado and the Charter and Ordinances of the City and County of Denver. This Agreement is in all respects subject and subordinate to any and all City bond ordinances applicable to the Denver Municipal Airport System and to any other bond ordinances which amend, supplement, or replace such bond ordinances. Venue for any action hereunder shall be in the City and County of Denver, State of Colorado.

23. INSPECTION OF RECORDS

A. In connection with any services performed hereunder on items of Work toward which federal funds may be received under the Airport and Airway Improvement Act of 1982, as amended, the City and County of Denver, the Federal Aviation Administration, the Comptroller General of the United States and any other duly authorized representatives shall have access to any books, documents, papers and records of the Power Provider which are directly pertinent to a specific grant program for the purpose of making audit, examination, excerpts and transcriptions. The Power Provider further agrees that such records will contain information concerning the specific tasks performed along with the applicable federal project number.

B. The City and the Auditor of the City or any of his duly authorized representatives, until the expiration of three years after the final payment under this Agreement, shall have access to and the right to examine any directly pertinent books, documents, papers and records of the Power Provider which are related to Work performed under this Agreement without regard to whether the Work was paid for in whole or in part with federal funds or was otherwise related to a federal grant program.

C. In addition to the foregoing, Each Party hereto shall keep complete and accurate records of its operations hereunder and shall maintain such data as may be necessary to determine with reasonable accuracy any item relevant to this Agreement. Each Party shall have the right to examine all such records insofar as may be necessary for the purpose of ascertaining the reasonableness and accuracy of any statements of costs relating to transactions hereunder.

24. ASSIGNMENT

A. Neither party shall have the right to assign any of its rights, duties or obligations under this agreement without the prior written consent of the other party, which consent may not be unreasonably withheld or delayed. Notwithstanding the foregoing, the Power Provider may assign any of its rights, duties or obligations under this agreement (i) to one or more of its affiliates, (ii) to one or more affiliates or third parties in connection with a sale-and-leaseback or other financing transaction, (iii) to any person or entity succeeding to all of the assets and liabilities of the Power Provider, or (iv) to a successor entity in a merger transaction.

B. With respect to an assignment pursuant to the immediately preceding section, the City acknowledges and agrees that, upon receipt of written direction by a financing-transaction assignee of the Power Provider ("Lender"), and notwithstanding any instructions to the contrary from the Power Provider, the City will recognize Lender, or any qualified third party operator or owner to whom Lender has reassigned the rights of the Power Provider under this agreement, as the proper successor to the Power Provider and fully entitled to receive the rights and benefits of the Power Provider hereunder so long as Lender or its assignee performs the obligations of the Power Provider hereunder. The City shall be protected and shall incur no liability in acting or proceeding in good faith upon any such foregoing written notice and direction by Lender which the City shall in good faith believe (1) to be genuine and (2) a copy of which shall have been delivered to the Power Provider. The City shall be under no duty to make any investigation or inquiry as to any statements contained or matters referred to in any such foregoing notice and direction, but may accept and rely upon them as conclusive evidence of the truth and accuracy of such statements.

C. Purchaser agrees to notify Lender in writing, at the address to be designated by Lender upon not less than five (5) business days' written notice to Purchaser prior to any notice by Purchaser hereunder, of any act or event of default of Power Provider under the Agreement of which Purchaser has knowledge that would entitle Purchaser to cancel, terminate, annul, or modify the Agreement or otherwise proceed with enforcement remedies against Power Provider, and Lender shall have the same amount of time as Power Provider, but at least ten (10) days with respect to any monetary default and at least thirty (30) days with respect to any non-monetary default, to cure any default by Power Provider under the Agreement; provided that in no event shall Lender be obligated to cure any such default.

25. NO THIRD PARTY BENEFICIARIES

It is expressly understood and agreed that enforcement of the terms and conditions of this Agreement, and all rights of action relating to such enforcement, shall be strictly reserved to the City and the Power Provider, and nothing contained in this Agreement shall give or allow any such claim or right of action by any other or third person on such Agreement. It is the express intention of the City and the Power Provider that any person other than the City or the Power Provider receiving services or benefits under this Agreement shall be deemed to be an incidental beneficiary only.

26. INDEPENDENT CONTRACTOR

failure, delay or interruption is due to causes which were not reasonably foreseeable and are beyond the control of Power Provider, including without limitation strikes, boycotts, labor disputes, embargoes, shortages of materials, acts of God, acts of the public enemy, acts of superior governmental authority, weather conditions, floods, riots, rebellion, sabotage or any other circumstance for which Power Provider is not responsible or which is not in its power to control.

30. SET-OFF

Except as otherwise set forth herein, each Party reserves to itself all rights, set-offs, counterclaims and other remedies and/or defenses to which it is or may be entitled, arising from or out of this Agreement or arising out of any other contractual arrangements between the Parties. All outstanding obligations to make, and rights to receive, payment under this Agreement may be offset against each other.

31. BINDING EFFECT

The terms and provisions of this Agreement, and the respective rights and obligations hereunder of each Party, shall be binding upon, and inure to the benefit of, the Parties and their respective successors and permitted assigns.

32. AMENDMENTS

No modification of this Agreement shall be effective except by written amendment executed by the Parties; provided, however, if Purchaser has been notified that Power Provider has assigned any of its rights, duties or obligations under this Agreement to a Lender, then the prior written consent of Lender is required as well.

33. COUNTERPARTS

Any number of counterparts of this Agreement may be executed and each shall have the same force and effect as the original.

34. OTHER AGREEMENTS

Other than the Ground Lease Agreement and the Loan Agreement, this Agreement constitutes the entire agreement between the Parties relating to the subject matter hereof and supersedes any other prior agreements, written or oral, between the Parties concerning such subject matter. In the event of an irreconcilable conflict between a provision of this Agreement and a provision of the Lease, such that it is impossible to give effect to both, the Lease shall control to resolve such conflict.

35. SEVERABILITY

Should any provision of this Agreement for any reason be declared invalid or unenforceable by final and non-appealable order of any court or regulatory body having jurisdiction, such decision

shall not affect the validity of the remaining portions, and the remaining portions shall remain in full force and effect as if this Agreement had been executed without the invalid portion.

36. SURVIVAL

Any provision(s) of this Agreement that expressly or by implication comes into or remains in full force following the termination or expiration of this Agreement shall survive the termination or expiration of this Agreement.

37. LEGAL EFFECT OF CONTRACT

The Parties acknowledge and agree that the transaction contemplated under this Agreement constitutes a “forward contract” within the meaning of the United States Bankruptcy Code, and the Parties further acknowledge and agree that each Party is a “forward contract merchant” within the meaning of the United States Bankruptcy Code. The Parties acknowledge and agree that, for accounting or tax purposes, this Agreement is not and shall not be construed as a capital lease and, pursuant to Section 7701(e)(3) of the Internal Revenue Code, this Agreement is and shall be deemed to be a service contract with respect to the sale to the Purchaser of electric energy produced at an alternative energy facility.

38. COOPERATION

Upon the receipt of a written request from the other Party and without further consideration, each Party shall provide materials, information, assurances and take such additional actions as are reasonably necessary and desirable to carry out the terms and intent hereof. Neither Party shall unreasonably withhold, condition or delay its compliance with any reasonable request made pursuant to this section. Without limiting the foregoing, the Parties acknowledge that they are entering into a long-term arrangement in which the cooperation of both of them will be required.

39. WAIVER

The waiver by either Party of any breach of any term, condition, or provision herein contained shall not be deemed to be a waiver of such term, condition, or provision, or any subsequent breach of the same, or any other term, condition, or provision contained herein.

END OF DOCUMENT
SIGNATURE PAGES AND EXHIBIT(S) FOLLOW

Contract Control Number: PLANE-201310258-00

Contractor Name: DENVER SOLAR IV LLC

IN WITNESS WHEREOF, the parties have set their hands and affixed their seals at Denver, Colorado as of

SEAL

CITY AND COUNTY OF DENVER

ATTEST:

By _____

APPROVED AS TO FORM:

REGISTERED AND COUNTERSIGNED:

DOUGLAS J. FRIEDNASH, Attorney
for the City and County of Denver

By _____


By _____

By _____



Contract Control Number: PLANE-201310258-00

Contractor Name: DENVER SOLAR IV LLC

By: 

Name: John M. Hereford
(please print)

Title: Partner
(please print)

ATTEST: [if required]

By: _____

Name: _____
(please print)

Title: _____
(please print)



Exhibit A

Power Purchase Price

The solar power purchase price shall be:

80% of Xcel's Energy's Average Hourly Incremental Cost (AHIC) but not less than \$0.017/kWhac for 20 years.

Purchaser shall pay PPA payments quarterly at the floor rate of \$.017/kwh. At the end of the year, and after Xcel publishes the prior year's AHIC rate, the PPA payments shall be reconciled by the following formula:

If the AHIC is above \$.02125/kwh (\$.017 divided by 80%), the difference between

- 1. Prior Year AHIC times 80% and**
- 2. \$.017**

will be multiplied times the past year's solar production and paid to the Power Provider according to the terms of the Power Purchase Agreement. As an example:

**January 1, 2015 – AHIC released for prior year. AHIC applied to 2014 is \$.03/kwh. Solar production in 2014 is 3,000,000 kwh
Reconciliation: $(($.03 \times 80\%) - $.017) \times 3,000,000 = \$21,000$**

APPENDIX NO. 1

STANDARD FEDERAL ASSURANCES

NOTE: As used below the term "contractor" shall mean and include the "Party of the Second Part," and the term "sponsor" shall mean the "City."

During the Term of this contract, the contractor, for itself, its assignees and successors in interest (hereinafter referred to as the "contractor") agrees as follows:

1. **Compliance with Regulations.** The contractor shall comply with the Regulations relative to nondiscrimination in federally assisted programs of the Department of Transportation (hereinafter "DOT") Title 49, Code of Federal Regulations, Part 21, as they may be amended from time to time (hereinafter referred to as the "Regulations"), which are herein incorporated by reference and made a part of this contract.
2. **Nondiscrimination.** The contractor, with regard to the work performed by it during the contract, shall not discriminate on the grounds of race, color, sex, creed or national origin in the selection and retention of subcontractors, including procurements of materials and leases of equipment. The contractor shall not participate either directly or indirectly in the discrimination prohibited by section 21.5 of the Regulations, including employment practices when the contract covers a program set forth in Appendix B of the Regulations.
3. **Solicitations for Subcontractors, Including Procurements of Materials and Equipment.** In all solicitations either by competitive bidding or negotiation made by the contractor for work to be performed under a subcontract, including procurements of materials or leases of equipment, each potential subcontractor or supplier shall be notified by the contractor of the contractor's obligations under this contract and the Regulations relative to nondiscrimination on the grounds of race, color, or national origin.
4. **Information and Reports.** The contractor shall provide all information and reports required by the Regulations or directives issued pursuant thereto and shall permit access to its books, records, accounts other sources of information, and its facilities as may be determined by the sponsor or the Federal Aviation Administration (FAA) to be pertinent to ascertain compliance with such Regulations, orders, and instructions. Where any information required of a contractor is in the exclusive possession of another who fails or refuses to furnish this information, the contractor shall so certify to the sponsor of the FAA, as appropriate, and shall set forth what efforts it has made to obtain the information.
5. **Sanctions for Noncompliance.** In the event of the contractor's noncompliance with the nondiscrimination provisions of this contract, the sponsor shall impose such contract sanctions as it or the FAA may determine to be appropriate, including, but not limited to:
 - a. Withholding of payments to the contractor under the contract until the contractor complies, and/or
 - b. Cancellation, termination, or suspension of the contract, in whole or in part.
6. **Incorporation of Provisions.** The contractor shall include the provisions of paragraphs 1 through 5 in every subcontract, including procurements of materials and leases of equipment, unless exempt by the Regulations or directives issued pursuant thereto. The contractor shall take such action with respect to any subcontract or procurement as the sponsor or the FAA may direct as a means of enforcing such provisions including sanctions for noncompliance. Provided, however, that in the event a contractor becomes involved in, or is threatened with, litigation with a subcontractor or supplier as a result of such direction, the contractor may request the sponsor to enter into such litigation to protect the interests of the sponsor and, in addition, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

APPENDIX NO. 2

NONDISCRIMINATION IN AIRPORT EMPLOYMENT OPPORTUNITIES

The Party of the Second Part assures that it will comply with pertinent statutes, Executive Orders and such rules as are promulgated to assure that no person shall, on the grounds of race, creed, color, national origin, sex, age, or handicap be excluded from participating in any activity conducted with or benefiting from Federal assistance. This Provision obligates the Party of the Second Part or its transferee for the period during which Federal assistance is extended to the airport program, except where Federal assistance is to provide or is in the form of personal property or real property or an interest therein or structures or improvements thereon. In these cases, this Provision obligates the Party of the Second Part or any transferee for the longer of the following periods: (a) the period during which the property is used by the sponsor or any transferee for a purpose for which Federal assistance is extended, or for another purpose involving the provision of similar services or benefits; or (b) the period during which the airport sponsor or any transferee retains ownership or possession of the property. In the case of contractors, this Provision binds the contractors from the bid solicitation period through the completion of the contract.

It is unlawful for airport operators and their lessees, tenants, concessionaires and contractors to discriminate against any person because of race, color, national origin, sex, creed, or handicap in public services and employment opportunities.