



## RESOLUTION NO. U-11276

1 A RESOLUTION authorizing the execution of a power service agreement  
2 between Tacoma Power and Linde, Inc. under the terms of Schedule  
3 CP.

4 WHEREAS the City of Tacoma, Department of Public Utilities, Light  
5 Division (d.b.a. "Tacoma Power"), supplies Schedule CP electric service to  
6 Linde, Inc. ("Linde"), a large industrial customer, pursuant to a Power Service  
7 Agreement, and

8 WHEREAS Linde's current five-year agreement with Tacoma Power  
9 expires September 30, 2021, and

10 WHEREAS Tacoma Power proposes a new three-year agreement, with  
11 a potential additional three year renewal, with Linde on the terms and conditions  
12 specified in the proposed Power Service Agreement, and

13 WHEREAS it is in the best public interest to approve to proposed  
14 Agreement with Linde; Now, Therefore;

15 BE IT RESOLVED BY THE PUBLIC UTILITY BOARD OF THE CITY OF TACOMA:

16 That Tacoma Power's request to execute a Power Service Agreement,  
17 with Linde, Inc., is hereby approved, and the proper officers of the City are  
18 authorized to execute said agreement, substantially in the form on file with the  
19 Clerk of the Board and as approved by the City Attorney.  
20

21 Approved as to form:

22 \_\_\_\_\_  
23 /s/  
24 Chief Deputy City Attorney

\_\_\_\_\_  
Chair

\_\_\_\_\_  
Secretary

25 \_\_\_\_\_  
26 Clerk

Adopted \_\_\_\_\_



## Board Action Memorandum

**TO:** Jackie Flowers, Director of Utilities  
**COPY:** Charleen Jacobs, Director and Board Offices  
**FROM:** Rick Applegate, Senior Power Analyst  
**MEETING DATE:** September 8, 2021  
**DATE:** August 27, 2021

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**SUMMARY:** Tacoma Power requests authority to execute a new Power Service Agreement with Linde Inc. (Linde or Company) under the terms of Schedule CP.

**BACKGROUND:** Linde is a large industrial customer of Tacoma Power that has received Schedule CP service for several decades. Its current power service agreement expires at the end of September and the company has requested a new agreement, which is required in order to remain on the rate schedule. Linde is one of three industrial customers with power service agreements expiring at this time.

The proposed Power Service Agreement contains many of the same provisions as the expiring agreement. However, the new agreement provides for a shorter duration and increased flexibility for the Company to manage its changing electrical requirements. Where the prior agreement lasted for a term of five years, the proposed agreement will have a three-year term, with a potential three-year renewal. It also includes some minor modifications to reflect Tacoma Power's prevailing policies. Overall, the proposed agreement seeks to maintain Linde's current service arrangement as a Schedule CP customer.

**ARE THE EXPENDITURES AND REVENUES PLANNED AND BUDGETED?** Yes.

**IF THE EXPENSE IS NOT BUDGETED, PLEASE EXPLAIN HOW THEY ARE TO BE COVERED.**

**IF THE ACTION REQUESTED IS APPROVAL OF A CONTRACT, INCLUDE LANGUAGE IN RESOLUTION AUTHORIZING \$200,000 INCREASE IN ADMINISTRATIVE AUTHORITY TO DIRECTOR?** Yes.

**ATTACHMENTS:** Proposed Power Service Agreement with attached addendum.

**CONTACT:** Contact and Presenter: Rick Applegate, Senior Power Analyst, (253) 502-8012.  
Supervisor: Clay Norris, Power Manager, (253) 320-0786.

## POWER SERVICE AGREEMENT

THIS AGREEMENT, made, entered into, and executed in duplicate, this \_\_\_\_\_ day of \_\_\_\_\_, 2021 by and between the City of Tacoma, Department of Public Utilities, Light Division, doing business as and hereinafter called "Tacoma Power", and Linde Inc., a Delaware corporation organized and existing under and by virtue of the laws of the State of Delaware and authorized to do business in the State of Washington, hereinafter called the "Company". Tacoma Power and the Company are collectively referred to as the "Parties" and each individually as a "Party".

### RECITALS

WHEREAS, the Company requires electric energy for its industrial plant facilities in Tacoma Power's service area, and

WHEREAS, Tacoma Power currently serves the Company's electrical energy requirements under a Power Service Agreement that expires on September 30, 2021; and

WHEREAS, the Parties now desire to enter into a new Power Service Agreement.

NOW, THEREFORE, for good and valuable consideration, including the mutual covenants set forth in this Agreement, the Parties hereto mutually agree as follows:

Section 1. TERM OF CONTRACT. This Agreement shall be effective at the beginning of the Hour Ending (HE) 01 Pacific Prevailing Time (PPT) on October 1, 2021 and shall continue in effect until HE 24 PPT on September 30, 2024. Upon expiration and unless a Party has given written notice to the other Party by June 1, 2024, that the Party does not wish for the Agreement to continue, this Agreement will automatically renew for one additional term of three (3) years. Notwithstanding anything herein to the contrary however, Tacoma Power may not terminate this Agreement pursuant to this Section 1 until after September 30, 2022.

This Agreement may (a) be shortened in term or terminated in its entirety in the sole reasonable discretion of Tacoma Power if such shortening or termination is necessary to maintain or obtain the exclusion from gross income for federal income tax purposes of the interest on bonds issued by Tacoma Power for electric utility purposes, (b) be terminated in its entirety in the sole reasonable discretion of Tacoma Power if the existence of this Agreement causes Tacoma Power's issuance of such bonds to be unreasonably burdensome or costly, or (c) as otherwise provided in this Agreement. In the event of any such termination occurring under parts (a) through (c) in this Section 1, the Superintendent of Tacoma Power may continue to serve Company based on the same terms and conditions set forth herein until such time as the Parties agree an acceptable replacement contract that maintains the material benefits to the Parties as set forth in this Agreement.

Section 2. AGREEMENT TO SELL AND PURCHASE. Tacoma Power will deliver or make available at the Point of Delivery hereinafter specified and will sell to the Company, and the Company will purchase and pay for, according to Schedule CP as set forth in Tacoma Municipal Code Section 12.06.260 and as hereafter amended, all electric energy and delivery services used for its operations thereat except as herein provided. The following conditions shall apply:

- (a) Point of Delivery – includes all points of interconnection between the Company and

Tacoma Power at 2902 20<sup>th</sup> Street East, Fife Washington 98424 shall be the Point of Delivery.

(b) Character of Service – The service commitment under this Agreement is for Firm Power requirement for 60 hertz, 3-phase alternating current made available or delivered at a nominal primary voltage of 115,000 volts.

(c) Firm Power – “Firm Power” is electric power which Tacoma Power will make available continuously except when the operation of Tacoma Power’s facilities is suspended, interrupted, interfered with or curtailed due to causes beyond its control and as further explained in Section 10 herein.

(d) Resale of Power Prohibited - The Company shall use all power delivered by Tacoma Power hereunder solely at said plant site and none shall be delivered or sold to third parties or used by Company at another location. Use by affiliates or subsidiaries at least 50% owned by the Company (or Company’s parent company) at the plant site or abutting thereon shall not be deemed a resale.

(e) Applicable Rates – Schedule CP.

Section 3. CONTRACT DEMAND. The term “Contract Demand” shall mean the contractual maximum 30-minute integrated demand at which Tacoma Power shall deliver electric energy to the Company under the terms and conditions stated in the Agreement. For the term of the Agreement, the amount of Contract Demand in kilowatts shall be set out in a separate confidential addendum, which is hereby incorporated herein by reference and made a part of this Agreement as Exhibit A. Contract Demand may be revised according to the following:

(a) Increases in Contract Demand. The Company’s Contract Demand may be increased, if approved by the Public Utility Board by either a motion or a resolution, only under the following circumstances: (1) by Tacoma Power in the event the delivery of Firm Power regularly exceeds the established Contract Demand specified in Exhibit A, upon thirty (30) days’ written notice to the Company, provided that an increase in Contract Demand will not be required for an inadvertent or occasional overrun of Contract Demand, or (2) upon receipt of a written request from the Company, by the amount requested, if such written request to Tacoma Power is made at least six (6) months prior to the effective date of the change or earlier upon mutual written agreement prior to the effective date of such change, or as otherwise approved by the Public Utility Board.

Pricing for increased Contract Demand, shall be established at Tacoma Power’s sole discretion, according to either (1) the rates defined in Schedule CP, or (2) a mutually negotiated rate, which may be based on market prices, and is subject to approval by the Public Utility Board and the Tacoma City Council. Increased Contract Demand at a negotiated rate will be served on a date that is mutually agreed upon. Any increased Contract Demand shall only be served in accordance with Tacoma Power’s contract(s) with applicable power supplier(s).

(b) Decreases in Contract Demand. In the event the Company determines that it is necessary to reduce its Contract Demand to not less than eight thousand (8,000) kilowatts, it shall give Tacoma Power written notice of such intention at least sixty (60) days prior to the start of the month when the change will become effective.

Any delivery of power in excess of the effective Contract Demand shall be considered a

Contract Demand Overrun. Tacoma Power shall not be obligated to continue to deliver power in excess of the Contract Demand. The charges for such Contract Demand Overrun shall be in accordance with provisions of the Schedule CP.

Independent of Contract Demand, Company shall notify Tacoma Power of planned changes in electrical energy usage of more than ten (10) MW by email at least ninety (90) minutes prior to the change. The email message must include the date and hour in which the change is planned to occur as well an indication of whether consumption will increase or decrease by more than ten (10) MW. The email message does not need to define a specific amount of change or total consumption and a single email may provide notice of multiple changes within a 48-hour period. Tacoma Power shall provide the Company with the address (or addresses) to which the email is to be sent and may from time to time modify that address (or addresses) with notice to the Company. While the Parties acknowledge that changes in usage of more than ten (10) MW can have a potentially adverse impact on Tacoma Power operations, no default or charges shall occur as the result of Company's failure to notify Tacoma Power of a change.

**Section 4. DISPUTE RESOLUTION.** All disputes arising under or in connection with this Agreement must be resolved as provided in this Section 4 as the exclusive method or procedure resolving disputes hereunder. Except as set forth herein, no suit at law or in equity based on such dispute may be instituted by any Party except to enforce, modify or vacate an arbitrator's award consistent with this Agreement and R.C.W. Chapter 7.04A *et seq.*

(a) **Mediation.** The Parties must first mediate any claim, dispute, or controversy (collectively, a "dispute" herein), with a mutually selected mediator, whose efforts will be to assist the Parties to resolve disputed issues through a mediated process of discussion and evaluation of alternative resolutions. The mediation must be scheduled within thirty (30) days of notice and request by either Party, and the mediation will be non-binding, confidential and off the record in accordance with Federal Rule of Evidence 408 and its state law equivalents.

(b) **Binding Arbitration.** If the Parties are unable to resolve any disputed issues through mediation, either Party may initiate binding arbitration, to be held in Tacoma, Washington, for the purpose of resolving a dispute under this Agreement within ninety (90) days after the mediation terminates (as evidenced by notice by any Party to the others that the mediation is terminated). The Parties should attempt to select an arbitrator from Judicial Arbitration and Mediation Services, Inc., American Arbitration Association or any other reputable firm offering similar services, and if no agreement can be reached, the Presiding Judge of Pierce County Superior Court shall select the arbitrator. Discovery shall be allowed to the same extent and manner permitted by the Washington State Superior Court Civil Rules. The arbitrator has authority to decide any and all issues in dispute, provided that all issues of law shall be subject to review and vacation by application to Superior Court within 30 days of the arbitrator's decision, unless Chapter 7.04A RCW prohibits such review and vacation. It is further provided that either Party shall be entitled to seek injunctive relief prior to and pending arbitration. Except as expressly set forth herein, Chapter 7.04A RCW is applicable to the arbitration.

(c) **Costs.** If a Party is found to have brought any arbitration or litigation proceeding which is determined to be frivolous or without merit, the opposing Party shall be entitled to recover its reasonable attorneys' fees and all other costs incurred in that action or proceeding as well as any lawsuit instituted to enforce an arbitrator's award, in addition to any other relief to which it may be entitled, to include without limitation its share of the arbitrator's fee (and mediator's fees), and any other amounts incurred in connection therewith. Costs of any

mediation will be borne by the Parties to such mediation equally.

(d) **Litigation.** Notwithstanding the provisions of Section 4(b), for disputes where one Party's liquidated claim aggregates at \$600,000 or greater, either Party may choose to terminate participation in arbitration, and/or proceed directly into Pierce County Superior or Federal Court, provided that termination of the arbitration and filing of such legal action in Pierce County Superior or Federal Court must be accomplished within ten business days of receiving notice of the (at least) \$600,000 liquidated amount in the arbitration proceeding pleadings.

(e) **Statute of Limitations.** No demand for arbitration may be made after the date when institution of legal or equitable proceedings based on such dispute would be barred by the otherwise applicable statute of limitations.

(f) **Equitable Remedies for Breach.** Each Party to this Agreement will have the remedies which are available to it for the violation of any of the terms of this Agreement or resolution of any other dispute, which is the subject of arbitration under this Section, including, but not limited to, the equitable remedies of specific performance and/or injunction, which remedies may be awarded by the arbitrator.

(g) **Questions of Arbitrability.** All questions relating to the arbitrability of any dispute must be decided by arbitration in the same manner and with the same effect as all other controversies that may arise hereunder.

**Section 5. BILLING.** Billing for power made available or delivered under the Agreement shall be rendered monthly by Tacoma Power on or before the tenth day of the succeeding calendar month and at the prescribed rates and under conditions as set forth in this Agreement.

Should Tacoma Power's metering equipment fail, the amount of power delivered or made available will be determined based on the best information available. Said determination shall for billing purposes have the same force and effect as an exact meter reading.

If any billing amount is disputed, the Company will provide written explanation specifying in detail the basis for the dispute and shall pay the portion of the invoice which is not disputed, no later than the fifteenth day from the date the bill is mailed. If the disputed billing amount is determined to be correct, or if a different billing amount is determined to be correct, such outstanding billing amount shall be paid within fifteen (15) calendar days of the determination, with accrued interest, at the lower of 1% per month or the maximum allowed by Washington State law, from the original due date to the date of payment.

**Section 6. PAYMENT FOR POWER.** All bills shall be payable at the City Treasurer's office within fifteen (15) days from the date the bill is mailed; the fifteenth day shall be the due date, provided however, that if the fifteenth day be a Saturday, Sunday, or holiday, the following business day shall then be the due date. Failure to receive a bill shall not release Company from liability for payment. A late payment charge as established by City ordinance shall also be applicable to Company.

Undisputed payments that are in arrears greater than thirty-five days from the date of invoice may result in a written Disconnection Notice. Subsequent failure to satisfy overdue undisputed payment obligations may result in an Event of Default as defined in Section 7.

**Section 7. EVENTS OF DEFAULT.** An "Event of Default" shall mean, with respect to a

Party (a "Defaulting Party"), the occurrence of any of the following:

- (a) the failure to make, when due, any undisputed payment required pursuant to this Agreement if such failure is not remedied with fifteen (15) Business Days after written Disconnection Notice;
- (b) any representation or warranty made by such Party herein is false or misleading in any material respect when made or when deemed made or repeated;
- (c) Company makes an assignment for the benefit of creditors or institutes any proceeding under the United States Bankruptcy Code (and amendments thereto);
- (d) the failure of the Company to satisfy the creditworthiness/collateral requirements agreed to pursuant to Section 9 hereof;
- (e) such Party consolidates or amalgamates with, or merges with or into, or transfers all or substantially all of its assets to, another entity and, at the time of such consolidation, amalgamation, merger or transfer, the resulting, surviving or transferee entity fails to assume all the obligations of such Party under this Agreement to which it or its predecessor was a Party by operation of law or pursuant to an agreement reasonably satisfactory to the other Party;
- (f) failure to operate under or follow the material terms of this Agreement.

Section 8. REMEDIES UPON AN EVENT OF DEFAULT. If an Event of Default occurs as described in Section 7, the non-defaulting Party shall serve written notice of the default to the Defaulting Party. Unless the non-defaulting Party agrees to an alternative arrangement in writing, the Defaulting Party shall have fifteen (15) business days to cure the default, and if the default is not cured within that time period, the non-defaulting Party may either suspend performance or terminate the Agreement. Suspension of service and termination of this Agreement does not release the Defaulting Party from its liability to the other for any loss, damage, claim, cost, charge or expense arising from the Event of Default, provided such failure is not excused by the non-defaulting Party in writing. No waiver by either Party hereto of any one or more defaults by the other in the performance of any provision of the Agreement shall operate or be construed as a waiver of any future default or defaults, whether of a like or of a different character.

Section 9. CREDIT REQUIREMENTS. Should the Company's creditworthiness, financial responsibility, or performance viability become unsatisfactory to Tacoma Power because Company fails to maintain at least a BBB- rating, or equivalent with at least one of the following credit ratings agencies: S&P, Moody's, and Fitch, and upon Tacoma Power providing documentation of such condition, then Tacoma Power may require the Company to provide Performance Assurance (as specified below). Tacoma Power will provide the Company with written notice requesting Performance Assurance in an amount limited to three (3) months worth of the last six (6) months average payments, if the Company were to fail to perform its obligations. Upon receipt of such notice the Company shall have thirty (30) Business Days to remedy the situation by providing such Performance Assurance to Tacoma Power. Performance Assurance shall, at Tacoma Power's sole discretion, consist of, (1) the posting of a Letter of Credit, (2) the posting of other acceptable collateral or security by the Company, or (3) a Guarantee Agreement executed by a creditworthy entity. In the event that the Company fails to provide such Performance Assurance to Tacoma Power within thirty (30) Business Days of receipt of notice, then an Event of Default under Section 7 will be deemed to have occurred and

Tacoma Power will be entitled to the remedies set forth in Section 8 of this Agreement.

Section 10. INTERRUPTION OF SERVICE.

(a) In the event that the Company is unable to use wholly or in part, Firm Power because of circumstances reasonably beyond the control of the Company (including acts of war, natural disasters, strikes, lockouts or unavailability of electric or water service), but excluding business conditions, Tacoma Power, upon request of the Company in writing, shall determine if an adjustment of applicable billing determinants is appropriate. If such an adjustment is appropriate, Tacoma Power may, in its sole discretion, adjust the applicable billing determinants and the Company shall pay for electrical power according to the rate schedule determined by Tacoma Power to be applicable based on the adjusted billing determinants.

(b) Electric service is inherently subject to interruption, suspension, curtailment, failure and fluctuation. Tacoma Power shall have no liability to the Company for any interruption, suspension, curtailment, failure, or fluctuation in service or for any loss or damage caused thereby if such interruption, suspension, curtailment, failure or fluctuation is caused in whole or in part by a force beyond the control of Tacoma Power including but not limited to acts of war, natural disasters, strikes, lockouts, droughts, etc. ("Uncontrollable Force"). Such interruption, suspension, curtailment, failure, or fluctuation in service shall not be held to constitute a breach of contract on the part of Tacoma Power, or in any way affect any liability for payment for power made available or for money due on or before the date on which such failure or interference occurred.

Should Tacoma Power's electrical service be subject to an Uncontrollable Force, or should there be a general power shortage throughout the Pacific Northwest so that in the opinion of Tacoma Power, it will be extremely difficult, if not impossible, for Tacoma Power to maintain its power supply for essential domestic and public service without curtailing Contract Demand, upon Tacoma Power Superintendent's notification, pursuant to Section 20 of the Agreement, the Company shall reduce its Firm Power to the extent and for such a period as set forth in the notification. Such notice for curtailment shall define the emergency or condition within the notice and may be the result of any of the following: (1) extraordinary weather conditions impacting system supply; (2) insufficient resources due to physical or extraordinary market circumstances; or (3) the existence of any conditions that may lead to declaration or a North American Electric Reliability Corporation (NERC) Energy Emergency Alert. Tacoma Power shall use best efforts to provide the Company with advance notice of the Firm Power curtailment emergency or condition. No allowance will be made by Tacoma Power for loss of production or of sales by the Company. "Essential domestic and public service" includes but is not limited to necessary service for residential customers, hospitals and other health care facilities, nursing homes, schools, fire, law enforcement stations, utility services and other necessary public services requested for public safety.

(c) Each Party shall notify the other in advance for predetermined suspensions, interruptions or interferences, and as soon as possible in the case of unforeseen difficulties. The Company shall cooperate with Tacoma Power to schedule and allow Tacoma Power to perform all substation maintenance of Tacoma Power-owned equipment. Tacoma Power will endeavor to perform substation maintenance to coincide with the Company's planned downtime. Notwithstanding Section 10 (d), predetermined suspensions, interruptions or interferences shall not be considered as a basis for adjusting monthly billings under this Section 10.

(d) Should the events described in subsections (b) and (c) occur, neither Party,



including its respective officers, agents or employees shall be liable to the other for damages or for breach of contract, and/or for acts or for omissions resulting in personal or property damage to the other. Interruptions of service totaling less than two (2) hours and occurring within any single 24-hour period of time shall not be considered as a basis for adjusting monthly billings under this Section. If Tacoma Power is unable to deliver electrical energy or unable to deliver electrical energy safely due to the condition of Company's equipment and facilities arising from causes within Company's reasonable control, notwithstanding Section 10(a), Tacoma Power is under no obligation to adjust the billing determinants.

Section 11. ADJUSTMENT OF RATES. For the Schedule CP rates, rate review dates will be the same as for all other customers within this class. Tacoma Power shall provide Company with reasonable (regular or electronic mail) notice and information pertaining to proposed rate proceedings including Utility Board or City Council study sessions on such matters.

Section 12. SELF-GENERATION. In the event the Company hereafter elects to generate all or a part of its power requirements, it shall give written notice of such intention to Tacoma Power at least ninety (90) days prior to the start of the month that self-generation becomes effective. Self-generation in an amount exceeding five hundred (500) kilowatts will not be permitted under this Agreement and will require the execution of Power Service Agreement that supersedes this Agreement and provides for standby capacity service under a Tacoma rate schedule that allows for such service.

Section 13. LIABILITY.

(a) The Company is responsible for all actions of its employees, agents, contractors and guests who may be injured by any of the equipment located at the Company-owned substation. Prior to maintaining or working with any electrical equipment at or near the substation, Company is responsible for obtaining from Tacoma Power (and verifying) all appropriate clearances and tagging which indicates that the electrical facilities are not energized. The Company hereby agrees to defend, indemnify and hold harmless Tacoma Power, its officers and employees, agents, contractors and guests from any and all costs and expenses including reasonable attorneys' fees arising from any injuries or alleged injuries, including death, to any person including Company employees, contractors and agents, or damage to or destructions of property which may result from Company's negligence in using the electric power provided pursuant to this Agreement or that occurs at and are due to the Company's negligence in installing or maintaining the Company-owned substation and/or other electrical facilities located on the Company's premises.

(b) Tacoma Power is responsible for providing and maintaining the equipment it owns. Tacoma Power hereby agrees to defend, indemnify and hold harmless the Company, its officers and employees, agents, contractors and guests from any and all costs and expenses, including reasonable attorneys' fees, arising from any injuries or alleged injuries, including death, to any person, including Tacoma Power employees, Tacoma Power contractors or agents, or damage to or destruction of property which may result from the negligence of Tacoma Power in delivery of power or in failing to properly install or maintain Tacoma Power-owned facilities.

(c) In regard to the indemnity obligations above, it is understood that the Parties may be waiving Title 51 RCW, Industrial Insurance immunity, and this provision has been mutually negotiated. Provided, however, this Agreement is intended to apply only to the Company and Tacoma Power, and it shall not be interpreted to allow an employee to sue his/her employer.

(d) The obligations of the Parties under the Agreement are obligations of the Parties only, and no recourse shall be available against any officer, director, shareholder, member, employee or partner of any Party or any affiliate of a Party.

(e) The Parties agree to comply with all laws that regulate hazardous or toxic substances, as the same are or may be in the future defined by law. In this regard Tacoma Power acknowledges that it will, if legally responsible, clean up hazardous or toxic materials that Tacoma Power causes to be spilled or contaminate Company's premises.

Section 14. REGULATORY CHANGES. Any provision herein declared or rendered unlawful by any applicable court of law or regulatory agency or deemed unlawful because of a statutory change (individually or collectively, such events referred to as "Regulatory Event") will not otherwise affect the remaining lawful obligations that arise under this Agreement; and provided, further, that if a Regulatory Event occurs, the Parties shall use their best efforts to reform this Agreement in order to give effect to the original intention of the Parties. If the Parties are unable to reform this Agreement to mutual satisfaction, the Agreement may be terminated under the provisions of Section 16, Early Termination, provided that Company shall not be liable for a termination payment in such circumstances.

Section 15. GOVERNING LAW. Parties agree and stipulate that in the event any arbitration or litigation should occur concerning or arising out of this Agreement, the sole venue of any arbitration or legal action shall be in Pierce County in the State of Washington and the interpretation of the terms of this Agreement shall be governed by the laws of the State of Washington.

Section 16. EARLY TERMINATION OR REDUCTION. The Contract may be cancelled and the power service provided thereunder terminated by the Company for any reason by providing Tacoma Power with at least sixty (60) days written notice prior to the start of the month when termination becomes effective. In the event the Company exercises this early termination right, such termination shall be conditioned upon the Company compensating Tacoma Power as follows: (1) the Company shall pay to Tacoma Power the sum of the monthly demand and delivery charges for the remaining months of the Contract, not to exceed six (6) months; and (2) the Company shall pay Tacoma Power for any direct mark-to-market Losses sustained by Tacoma Power in purchasing Bonneville Power Administration block power for the purpose of serving the Company's power requirements pursuant to the terms of the Contract for the then effective BPA Period in which termination occurs. If such termination results in Gains, the amounts shall be used to offset any demand and delivery charges under (1) above that exceed \$1 million, but the use of Gains shall not exceed such demand and delivery charges.

For purposes of this Section 16, Tacoma Power shall calculate its direct mark-to-market damages by summing the Losses or Gains, and Costs incurred by Tacoma Power in liquidating the portion of the block power purchased by Tacoma Power from Bonneville Power Administration for serving the Company's power requirements pursuant to the Contract for the then effective BPA Period computed on a date designated by the Company following the date the early termination notice is received by Tacoma Power and prior to the termination of service to the Company as set forth in the termination notice. The Company shall specify the date for the calculation in its termination notice and provide Tacoma Power with at least ten (10) business days to prepare the calculation.

As used in this Section 16:

“BPA Period” means the period commencing on the October 1, 2021 and ending on September 30, 2023, the period commencing on the October 1, 2023 and ending on September 30, 2025, or if extended, the period commencing on the October 1, 2025 and ending on September 30, 2027.

“Costs” mean brokerage fees, commissions and other similar third party transaction costs, if applicable, and expenses incurred in a commercially reasonable manner by Tacoma Power in liquidating the portion of the block power purchased by Tacoma Power from Bonneville Power Administration for serving the Company’s power requirements during the remaining portion of the then effective BPA Period.

“Gains” mean an amount equal to the present value of the economic benefit to Tacoma Power, if any (exclusive of Costs), resulting from the liquidation of the portion of the block power purchased by Tacoma Power from Bonneville Power Administration for serving the Company’s power requirements during the remaining portion of the then effective BPA Period, determined in a commercially reasonable manner.

“Losses” mean an amount equal to the present value of the economic loss to Tacoma Power, if any (exclusive of Costs), resulting from the liquidation of the portion of the block power purchased by Tacoma Power from Bonneville Power Administration for serving the Company’s power requirements during the remaining portion of the then effective BPA Period, determined in a commercially reasonable manner.

Section 17. PUBLIC RECORDS AND CONFIDENTIALITY. The Parties shall not disclose any information received from the other Party that has been clearly identified “Confidential” or that the Parties have agreed to mark “Confidential” except as is reasonably required in the performance of the obligations hereunder or as is otherwise required by law, court order or administrative order.

Notwithstanding the above, any documents marked “Confidential” are deemed public records subject to disclosure under the Washington State Public Records Act, Chapter 42.56 RCW (Public Records Act). Tacoma Power may be required, upon request, to disclose any documents marked “Confidential” unless an exemption under the Public Records Act or other laws applies. In the event Tacoma Power receives a request for such disclosure and determines in its legal judgment that no applicable exemption to disclosure applies, then Tacoma Power shall provide the Company ten (10) business days’ written notice of impending release. Should legal action thereafter be initiated by the Company to enjoin or otherwise prevent such release, all expense of any such litigation shall be borne by the Company, including any damages, attorneys’ fees or costs awarded by reason of having opposed disclosure. Tacoma Power shall not be liable for any release where notice was provided and Company took no action to oppose the release of information.

Further notwithstanding the above, Tacoma Power may disclose to the Bonneville Power Administration (BPA) without any notice to the Company information pertaining to Company, including this Agreement, its attachments, Company’s usage and demand data, and any other information Tacoma Power deems necessary to satisfy the terms of agreements that Tacoma Power may have with BPA.

Section 18. LIMITATION OF LIABILITY. Except as otherwise set forth in Sections 10, 13, and 16, neither Party shall be liable to the other, based on tort (including negligence and

strict liability), contract or otherwise arising out of or related to the Agreement, for any indirect, special, or consequential damage, or exemplary loss or damage, costs of capital or expenses thereof, loss of profits or revenues or the loss of use thereof, and each Party hereby releases the other from any liability for all such losses and damages. All limitations on each Party's liability contained in the Agreement shall survive the termination of the Agreement. The foregoing limitations on liability and damages shall not apply to a Party's liability and damages arising from willful misconduct.

Section 19. ASSIGNMENT. This Agreement shall inure to the benefit of and be binding upon the respective successors and assignees of the Parties hereto, provided however that neither this Agreement nor any interest therein shall be transferred or assigned by either Party without prior written consent of the other Party, which consent shall not be unreasonably withheld, conditioned, or delayed.

Section 20. NOTICES. Any notice, except notices under Section 10(b), or demand required by this Agreement shall be deemed given when received by electronic mail (with electronic mail being followed with registered or certified original), registered or certified mail and with postage prepaid thereon, addressed as follows:

To Tacoma Power:

Superintendent  
Tacoma Power  
3628 South 35th Street  
Tacoma, WA 98409-3115

To Company:

Energy Manager  
Linde Inc.  
1620 W Fountainhead Pkwy, Suite 119  
Tempe, AZ 85282

Either Party, by notice to the other, may hereafter designate a change in its address and addressee.

Notices pursuant to Section 10(b) are deemed given when received by electronic mail, or telephone (with written notice confirmation immediately following), excluding voice mail.

Section 21. SECTION HEADINGS. The section headings of this Agreement are for convenience of reference only and are not intended to restrict, affect or be of any weight in the interpretation or construction of the provisions of such sections or the Agreement.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement in duplicate, each by the signatures and attest of its duly authorized officers, as of the day and date first above written.

**Tacoma Power**

**Linde Inc.**

\_\_\_\_\_  
Chris Robinson, Superintendent

\_\_\_\_\_  
Christian Lenci, Director of Energy

\_\_\_\_\_  
Andrew Cherullo, Finance Director

Approved as to form:

\_\_\_\_\_  
Deputy City Attorney