



## Town Council Agenda Report

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Date: September 10, 2019 Item No. 11

To: Honorable Mayor and Town Council

Subject: APPROVE ENTERING INTO A LONG-TERM RENEWABLE ENERGY CONTRACT WITH DIRECT ENERGY BUSINESS MARKETING, LLC

From: Douglas Robertson, Town Manager

Submitted by: Sydnie Harris, Director of Finance  
Finance Department

Budgeted Item:  Yes  No  N/A

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### RECOMMENDED ACTION

Approve entering into a long-term renewable energy contract with Direct Energy Business Marketing, LLC for Apple Valley Choice Energy.

### SUMMARY

Apple Valley Choice Energy (AVCE) is required by Senate Bill 350 to enter into long-term contracts for a certain portion of its state mandated renewable energy. This agreement is one of several that will be brought to the Town Council for approval for AVCE to be compliant with this requirement.

### BACKGROUND

In October 2015, the State of California enacted Senate Bill 350, also known as The Clean Energy and Pollution Reduction Act of 2015 (the Act). The Act established new clean energy, clean air, and greenhouse gas reduction goals for the state. Specifically, the Act requires that all load serving entities, including Community Choice Aggregators (CCAs) enter into long-term renewable energy contracts with energy delivery to begin by the 2021 – 2024 compliance period (Compliance Period 4).

In order to meet this requirement, California Choice Energy Authority (CalChoice), on behalf of AVCE and its other member agency CCAs, issued a Request for Proposals for Renewable Energy Projects in December 2018. CalChoice received over 100 proposals. CalChoice held a workshop in January with AVCE and other member agencies in attendance to review and short-list proposals based on cost, location, and portfolio diversity. Several wind, solar, biogas, and small hydro-electric projects were short-listed.

CalChoice and its legal and technical team spent several months negotiating and finalizing commercial and contract terms on behalf of its member agencies and continues to do so. CalChoice, and its member agencies, will be contracting with Direct Energy Business Marketing, LLC (Direct Energy) for approximately 2 MW of output, 18% of which is for AVCE. These projects, Athos Solar and North Shore Solar, are in Riverside County, California.

As a condition of the contract, Direct Energy recognizes and accepts the secured deposit account in the name of AVCE as credit and collateral, and no other security or credit backing by the town will be required.

The contract volume will fulfill approximately 9% of AVCE's long-term requirements for Compliance Period 4 as mandated by the Act. As such, staff will be returning in upcoming months with additional contract approval requests.

### **FISCAL IMPACT**

\$ 150,750 annually for ten years. There will be sufficient revenues generated by AVCE to cover operating expenses, including power procurement, and to fund reserves to provide financial and rate stability to the program.

### **ATTACHMENTS**

Power Purchase Agreement

CONFIRMATION  
FOR  
LONG-TERM CONTRACT FOR PCC1 RENEWABLE ENERGY

THIS CONFIRMATION FOR LONG-TERM CONTRACT FOR PCC1 RENEWABLE ENERGY (this "Confirmation") is entered into this 11 day of September, 2019 (the "Effective Date"), by and between Direct Energy Business Marketing, LLC, a Delaware limited liability company ("Seller") and Town of Apple Valley, California, d/b/a Apple Valley Choice Energy ("Buyer"), and is made a part of that certain EEI Master Agreement between Buyer and Seller dated January 30, 2017 (the "Master Agreement"). This Confirmation and the Master Agreement together constitute the "Agreement". Terms capitalized but not defined herein are defined in the Master Agreement. In the event of any conflict or inconsistency among the documents to the Agreement, the following order of precedence shall apply: (i) this Confirmation; then (ii) the Cover Sheet; then (iii) the Master Agreement (excluding the Cover Sheet).

**Seller:** Direct Energy Business Marketing, LLC

**Buyer:** Town of Apple Valley, California, d/b/a Apple Valley Choice Energy

**Generating Facilities:** Resource #1: ColGreen North Shore Solar (CEC RPS ID: 61666A),  
Resource #2: IP Athos Solar (CEC RPS ID: 63755C)

**Contract Quantity:** Up to [REDACTED] MWh of Product generated annually for a maximum total Delivery Term quantity of up to [REDACTED] MWh of Product. Volume is contingent on generation from Generating Facilities with Buyer receiving eighteen percent (18%) of the first [REDACTED] MWh of generation from the Generating Facilities per calendar year.

**Product:** PCC1 Renewable Energy. "PCC1 Renewable Energy" means Energy and the associated Bundled RECs (defined below) generated by the Generating Facility which meet the criteria for Section 399.16(b)(1) of the California Public Utilities Code and CPUC Decision 11-12-052, applicable to the REC Vintage as outlined in Ordering Paragraph 4, excluding Excess Energy and Capacity Attributes. "Bundled RECs" means Renewable Energy Credits associated with the generation of Energy from the Generating Facilities.

**Delivery Term:** January 1, 2021 – December 31, 2030 (10 years)

**Delivery Point:** Resource #1: COLNSGS\_7\_N001 CAISO pNode  
Resource #2: SCE Red Bluff 220kV substation

**Scheduling Coordinator:** Seller or Seller's agent to perform the functions of Scheduling Coordinator ("SC"). As SC, Seller will be entitled to retain all payments from, and be responsible for paying all charges assessed by, the CAISO associated with energy delivered from the Generating Facility at and after the Delivery Point. Seller may schedule, bid or offer all Energy in its sole discretion.

**Contract Price:** The Contract Price for each MWh of Product delivered to Buyer shall consist of the Energy Price and the Bundled REC Price, calculated as follows:

Contract Price = Energy Price + Bundled REC Price

Where:

“Energy Price” is the applicable day-ahead or hour-ahead LMP at the Delivery Point per MWh; and

“Bundled REC Price” is [REDACTED] /MWh for the Delivery Term.

**CAISO Energy:** Seller will receive all revenues from CAISO and will be responsible for all current and future CAISO costs, including all deviation/imbalance fees and deviation/imbalance revenues, associated with energy delivered from the Generating Facility to the Delivery Point. “CAISO” means the California Independent System Operator Corporation or any successor entity performing similar functions.

**Bundled REC Settlement:** With respect to all Bundled RECs required to be provided to Buyer hereunder, Seller shall take all actions and execute all documents or instruments necessary to ensure that all WREGIS Certificates associated with such Bundled RECs are issued and tracked for purposes of satisfying the requirements of the California Renewables Portfolio Standard and transferred in a timely manner to Buyer for Buyer’s sole benefit. Seller shall comply with the WREGIS Operating Rules regarding the certification and transfer of such WREGIS Certificates to Buyer and Buyer shall be given sole title to all such WREGIS Certificates.

**Definitions:** “California Renewables Portfolio Standard” or “RPS” means the California renewables portfolio standard, as set forth in Cal. Pub. Util. Code §§ 399.11 et seq. and Cal. Pub. Res. Code §§ 25740-25751, and as administered by the CEC as set forth in the CEC RPS Eligibility Guidebook (9<sup>th</sup> Ed.), as may be subsequently modified by the CEC, and the California Public Utilities Commission (“CPUC”) as set forth in CPUC Decision (“D”) 08-08-028, D.08-04-009, D.11-01-026, D.11-12-020, D.11-12-052, D.12-06-038, D.14-12-023, D.16-12-040, and D.17-06-026 and as may be modified by subsequent decision of the CPUC or by subsequent legislation, and regulations promulgated with respect thereto.

“Capacity Attribute” means any current or future defined characteristic, certificate, tag, credit, or accounting construct associated with the amount of power that the Generating Facility can generate and deliver to the CAISO Controlled Grid (as defined in the CAISO Tariff) at a particular moment and that can be purchased and sold under CAISO market rules, including Resource Adequacy Benefits.

“Energy” means energy generated by a Generating Facility.

“Excess Energy” means Energy not associated the Product.

“Green Attributes” means any and all credits, benefits, emissions reductions, offsets, and allowances, howsoever entitled, attributable to the generation from the Project, and its avoided emission of pollutants. Green Attributes include but are not limited to Renewable Energy Credits, as well as: (1) any avoided emission of pollutants to the air, soil or water such as sulfur oxides (SO<sub>x</sub>), nitrogen oxides (NO<sub>x</sub>), carbon monoxide (CO) and other pollutants; (2) any avoided emissions of carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), nitrous

oxide, hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride and other greenhouse gases (GHGs) that have been determined by the United Nations Intergovernmental Panel on Climate Change, or otherwise by law, to contribute to the actual or potential threat of altering the Earth's climate by trapping heat in the atmosphere;<sup>1</sup> (3) the reporting rights to these avoided emissions, such as Green Tag Reporting Rights. Green Tag Reporting Rights are the right of a Green Tag Purchaser to report the ownership of accumulated Green Tags in compliance with federal or state law, if applicable, and to a federal or state agency or any other party at the Green Tag Purchaser's discretion, and include without limitation those Green Tag Reporting Rights accruing under Section 1605(b) of The Energy Policy Act of 1992 and any present or future federal, state, or local law, regulation or bill, and international or foreign emissions trading program. Green Tags are accumulated on a MWh basis and one Green Tag represents the Green Attributes associated with one (1) MWh of Energy. Green Attributes do not include (i) any energy, capacity, reliability or other power attributes from the Project, (ii) production tax credits associated with the construction or operation of the Project and other financial incentives in the form of credits, reductions, or allowances associated with the project that are applicable to a state or federal income taxation obligation, (iii) fuel-related subsidies or "tipping fees" that may be paid to Seller to accept certain fuels, or local subsidies received by the generator for the destruction of particular preexisting pollutants or the promotion of local environmental benefits, or (iv) emission reduction credits encumbered or used by the Project for compliance with local, state, or federal operating and/or air quality permits. If the Project is a biomass or biogas facility and Seller receives any tradable Green Attributes based on the greenhouse gas reduction benefits or other emission offsets attributed to its fuel usage, it shall provide Buyer with sufficient Green Attributes to ensure that there are zero net emissions associated with the production of electricity from the Project.

"Renewable Energy Credits" or "REC" has the meaning set forth in California Public Utilities Code Section 399.12(h) and CPUC Decision D.08-08-028, as applicable to the specific REC Vintage(s) transferred hereunder, and as may be amended from time to time or as further defined or supplemented by Law.

"Resource Adequacy Benefits" means the rights and privileges attached to the Generating Facility that satisfy any entity's resource adequacy obligations, as those obligations are set forth in CPUC Decisions 04-01-050, 04-10-035, 05-10-042, 06-06-064, 06-07-031 and any subsequent CPUC ruling or decision and shall include any local, zonal or otherwise locational attributes associated with the Generating Facility.

"REC Vintage" means the date of Energy generation found on a WREGIS Certificate.

"Security Documents" has the meaning set forth in the Master Agreement.

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<sup>1</sup> Avoided emissions may or may not have any value for GHG compliance purposes. Although avoided emissions are included in the list of Green Attributes, this inclusion does not create any right to use those avoided emissions to comply with any GHG regulatory program.

“WREGIS” means the Western Renewable Energy Generation Information System or any successor renewable energy tracking program.

“WREGIS Certificates” has the same meaning as “Certificate” as defined by WREGIS in the WREGIS Operating Rules and are designated as eligible for complying with the California Renewables Portfolio Standard.

“WREGIS Operating Rules” means those operating rules and requirements adopted by WREGIS as of May 1, 2018, as subsequently amended, supplemented or replaced (in whole or in part) from time to time.

**Billing and Payments:**

For each month during the Delivery Term, Seller will invoice Buyer for an amount equal to the product of (a) the Bundled REC Price and (b) the portion of the Contract Quantity delivered to Buyer during such month, as evidenced by quantity of WREGIS Certificates transferred to Buyer’s WREGIS account by Seller. With respect to the Energy portion of the Product, Seller shall receive compensation directly from the CAISO for Energy delivered to the CAISO on behalf of Buyer and Buyer shall not be required to pay any additional amount to Seller in respect of such Energy, including the Energy Price.

Buyer shall make payment to Seller by wire transfer or ACH payment to the bank account provided on each monthly invoice. Buyer shall pay undisputed invoice amounts on or before the twenty-third (23<sup>rd</sup>) day of the month in which the invoice was received, provided that such invoice was received by the fifteenth (15<sup>th</sup>) day of the month, otherwise the invoice will be paid on the next month’s monthly distribution date under the Security Documents (i.e., the 23<sup>rd</sup> of the month). If such due date falls on a weekend or legal holiday, such due date shall be the next Business Day.

**Seller Credit Support:**

As set forth in the Master Agreement.

**Buyer Credit Support:**

This Confirmation is subject to the Security Documents and all obligations hereunder are Obligations as defined in such Security Documents.

**Additional Representations And Warranties:**

- (a) Seller Representations and Warranties. Seller, and, if applicable, its successors, represents and warrants that throughout the Delivery Term of this Agreement that: (i) the Generating Facilities qualify and are certified by the California Energy Commission as an Eligible Renewable Energy Resource (“ERR”) as such term is defined in Public Utilities Code Section 399.12 or Section 399.16; and (ii) the Generating Facilities output delivered to Buyer qualifies under the requirements of the California Renewables Portfolio Standard. To the extent a change in law occurs after execution of this Agreement that causes this representation and warranty to be materially false or misleading, it shall not be an Event of Default if Seller has used commercially reasonable efforts to comply with such change in law. As used in the preceding sentence, “change in law” shall have the same meaning as the defined term Change in Law, as used below.
- (b) Seller warrants that this Transaction qualifies as a long-term contract under the requirements of Section 399.13(b) of the California Public Utilities Code and CPUC Decision D.17-06-026. If, as

part of the compliance determination, a regulatory authority determines that this Transaction does not, or would not, qualify as a long-term contract under Section 399.13(b), then, without regard to the Change in Law Compliance Cost Cap, Seller will reimburse Buyer for all directly related compliance penalties. Buyer will work with Seller to minimize such penalties.

- (c) Seller and, if applicable, its successors, represents and warrants that throughout the Delivery Term of this Agreement the Renewable Energy Credits transferred to Buyer conform to the definition and attributes required for compliance with the California Renewables Portfolio Standard, as set forth in California Public Utilities Commission Decision 08-08-028, and as may be modified by subsequent decision of the California Public Utilities Commission or by subsequent legislation. To the extent a change in law occurs after execution of this Agreement that causes this representation and warranty to be materially false or misleading, it shall not be an Event of Default if Seller has used commercially reasonable efforts to comply with such change in law. As used in the preceding sentence, "change in law" shall have the same meaning as the defined term Change in Law, as used below.
- (d) Seller warrants that all necessary steps available to allow the Renewable Energy Credits transferred to Buyer to be tracked in the Western Renewable Energy Generation Information System will be taken prior to the first delivery under this contract. For further clarity, the phrase "first delivery" means the first day of the Delivery Term.
- (e) In addition to the foregoing, Seller warrants, represents and covenants throughout the Delivery Term, that:
  - (i) Seller has the contractual rights to sell all right, title, and interest in the Product required to be delivered hereunder;
  - (ii) Seller has not sold the Product required to be delivered hereunder to any other person or entity;
  - (iii) at the time of delivery, all rights, title, and interest in the Products required to be delivered hereunder are free and clear of all liens, taxes, claims, security interests, or other encumbrances of any kind whatsoever;
  - (iv) Seller shall not substitute or purchase any Product from any other generating resource other than the Generating Facilities or the market for delivery hereunder, except for replacement Bundled RECs, which shall be subject to the prior written consent of Buyer, not to be unreasonably withheld; and
  - (v) the Generating Facility and all electrical output from the Generating Facility are, or will be by the first date of the Delivery Term, registered with WREGIS as RPS-eligible.
- (f) Throughout the Delivery Term, Seller represents, warrants and covenants that the Generating Facilities meet the criteria in either (i) or (ii):
  - (i) The Generating Facilities either has a first point of interconnection with a California balancing authority, or a first point of interconnection with distribution facilities used to serve end users within a California balancing authority area.
  - (ii) The Generating Facility has an agreement to dynamically transfer electricity to a California balancing authority.

- (g) Seller acknowledges that it is not the owner of the Generating Facilities but has contractual rights to the Product. Seller represents, warrants and covenants that the resale complies with the following conditions in (i) through (v) below throughout the Delivery Term:
- (i) The original upstream third-party contract(s) meets the criteria of California Public Utilities Code Section 399.16(b)(1)(A);
  - (ii) This Agreement transfers only Energy, RECs and Green Attributes that have not yet been generated prior to the Effective Date. Seller hereby provides and conveys all Green Attributes associated with all electricity generation from the Project to Buyer as part of the Product being delivered. Seller represents and warrants that Seller holds the rights to all Green Attributes from the Project, and Seller agrees to convey and hereby conveys all such Green Attributes to Buyer as included in the delivery of the Product from the Project;
  - (iii) The Energy transferred hereunder is transferred to Buyer in real time; and
  - (iv) If the Generating Facility has an agreement to dynamically transfer electricity to a California balancing authority, the transactions implemented under this Agreement are not contrary to any condition imposed by a balancing authority participating in the dynamic transfer arrangement.
  - (v) The purchase and resale meet all requirements of the California Renewable Portfolio Standard.
- (h) Each of Buyer and Seller hereby represents and warrants that (i) the signatories for such party hereunder and to the Master Agreement are officers of such party duly authorized to sign and act on behalf of such party and (ii) the signatures for such signatories set forth on Exhibit B are true, correct and complete specimen signatures of such signatories.

**Additional Terms:**

- (a) Change in Law and Change in Law Compliance Cost Cap. To the extent a Change in Law occurs after the Effective Date that (i) causes the representations, warranties, and/or covenants in this Agreement to be materially false or misleading, (ii) prevents Seller from complying with any representations, warranties, and/or covenants in this Agreement, or (iii) increases Seller's cost to comply with any representations, warranties, and/or covenants in this Agreement beyond the amounts contemplated by Seller as of the Effective Date, then the Parties agree that the maximum amount of costs and expenses Seller shall be required to bear during the Delivery Term shall be capped at \$50,000 in the aggregate (the "Change in Law Compliance Cost Cap"). In the event that Seller anticipates the need to incur any costs or expenses, or anticipates the imposition of any charges or penalties, arising from a Change in Law in excess of the Change in Law Compliance Cost Cap, Seller will notify Buyer of such anticipated costs, expenses, charges or penalties. Buyer will have thirty (30) days from receipt of such notice to evaluate such notice, and will, by the end of such period, either (a) agree to reimburse Seller for all such costs, expenses, charges and penalties that Seller actually incurs in excess of the Change in Law Compliance Cost Cap ("Agreed Compliance Costs"), or (b) waive Seller's obligation to take any and all such actions. In the event Buyer agrees to reimburse Seller pursuant to clause (a) in the foregoing sentence, then Seller will take such actions for which Buyer has agreed to reimburse Seller the Agreed Compliance Costs, and Buyer will pay to Seller the Agreed Compliance Costs. To the extent that Buyer has not paid Seller for any Agreed Compliance Costs, Seller will not be in default under this Agreement for failure to satisfy any obligation under this Agreement, applicable law or other requirement related



to such Change in Law. "Change in Law" shall mean the occurrence, on or after the Effective Date, of any of the following: (a) the adoption or taking effect of any law, rule, regulation or treaty; (b) any change in any law, rule, regulation or treaty or in the administration, interpretation or application thereof by any Governmental Authority; or (c) the making or issuance of any request, guideline or directive (whether or not having the force of law) by any Governmental Authority. "Governmental Authority" shall mean (a) any federal, state, local, municipal or other government or (b) any other governmental, quasi-governmental, regulatory or administrative agency, commission or other authority (including the independent system operator, public utilities commission, FERC, the North American Electric Reliability Council, and any applicable regional reliability entity) lawfully exercising or entitled to exercise any administrative, executive, judicial, legislative, police, policy, regulatory or taxing authority or power.

- (b) Long-term Contract. This Confirmation is intended to qualify as a long-term contract under California Public Utilities Code Section 399.13(b), and such eligibility is a material term of this Confirmation. If, as part of the compliance determination, a regulatory authority determines that this Transaction does not, or would not, qualify as a long-term contract under Section 399.13(b), Buyer shall have the right to terminate this Confirmation on thirty (30) days' prior written notice.
- (c) Generating Facilities. Subject to the prior written consent of Buyer, which shall not be unreasonably withheld, Seller may add additional Generating Facilities to this Agreement through an amendment to the Agreement. All contracts between Seller and upstream counterparties must have a delivery term of at least ten (10) years.
- (d) Entire Agreement: Integration. This Confirmation, together with the Cover Sheet and Master Agreement, constitutes the entire agreement and understanding between Seller and Buyer with respect to the subject matter hereof and supersedes all prior agreements relating to the subject matter hereof, which are of no further force or effect. The headings used herein are for convenience and reference purposes only. This Agreement shall be considered for all purposes as prepared through the joint efforts of the Parties and shall not be construed against one Party or the other as a result of the preparation, substitution, submission or other event of negotiation, drafting or execution hereof.
- (e) Amendments. This Confirmation may only be amended, modified or supplemented by an instrument in writing executed by duly authorized representatives of Seller and Buyer; *provided*, that, for the avoidance of doubt, this Agreement may not be amended by electronic mail communications.
- (f) No Waiver. Waiver by a Party of any default by the other Party shall not be construed as a waiver of any other default.
- (g) Binding Effect. This Confirmation shall inure to the benefit of and be binding upon the Parties and their respective successors and permitted assigns.
- (h) Applicable Law. This Agreement and the rights and duties of the parties hereunder shall be governed by and construed, enforced and performed in accordance with the laws of the state of California, without regard to principles of conflicts of law. To the extent enforceable at such time, each party waives its respective right to any jury trial with respect to any litigation arising under or in connection with this agreement.
- (i) Counterparts. This Confirmation may be executed in one or more counterparts, all of which taken together shall constitute one and the same instrument and each of which shall be deemed an

original. Delivery of an executed signature page of this Confirmation by electronic mail transmission (including PDF) shall be the same as delivery of a manually executed signature page.

*[Signatures appear on following page.]*

IN WITNESS WHEREOF, the Parties have signed this Confirmation effective as of the Effective Date.

**Direct Energy Business Marketing, LLC**

**Town of Apple Valley, California, d/b/a Apple Valley Choice Energy**

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Name:  
Title:

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Name:  
Title: