



## Town Council Agenda Report

---

Date: September 10, 2019 Item No. 12

To: Honorable Mayor and Town Council

Subject: APPROVE ENTERING INTO A LONG-TERM RENEWABLE ENERGY CONTRACT WITH 3 PHASES RENEWABLES INC.

From: Douglas Robertson, Town Manager

Submitted by: Sydnie Harris, Director of Finance  
Finance Department

Budgeted Item:  Yes  No  N/A

---

### RECOMMENDED ACTION

Approve entering into a long-term renewable energy contract with 3 Phases Renewables Inc. 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 3 Phases Renewables Inc. (3 Phases) for approximately 7 MW of output, 17% of which is for AVCE. The project is a biogas facility in Carson, California.

As a condition of the contract, 3 Phases 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 10% 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**

\$ 27,500 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

Proposed Execution Version

CONFIRMATION  
LONG-TERM CONTRACT FOR PCC3 RECS

THIS CONFIRMATION FOR LONG-TERM CONTRACT FOR PCC3 RECS (this “Confirmation”) is entered into this [ ] day of September, 2019 (“Effective Date”), by and between Town of Apple Valley, California, d/b/a Apple Valley Choice Energy (“AVCE” or “Buyer”) and 3 Phases Renewables Inc. (“3 Phases” or “Seller”), each referred to herein individually as a “Party” and collectively as the “Parties”, regarding the purchase and sale of the Product (as defined below) under the terms and conditions herein. Capitalized terms used in this Confirmation and not defined herein have the meaning assigned thereto in the Master Agreement or Schedule R (each as defined below). The Master Agreement and this Confirmation shall be collectively referred to herein as the “Agreement.”

WHEREAS, Buyer is subject to Section 399.13(b) of the California Public Utilities Code, which requires all California load-serving entities (LSEs) to meet sixty-five (65%) of their California Renewables Portfolio Standard (RPS) obligations with supply contracts of ten years or longer; and

WHEREAS, Seller has procured a portfolio of renewable energy supplies, including RECs under one or more long-term power purchase agreement(s) (PPAs);

NOW, THEREFORE, in consideration of the mutual covenants and agreements in this Confirmation and for other good and valuable consideration, the sufficiency of which is hereby acknowledged, and intending to be legally bound hereby, the Parties agree as follows:

*Master Agreement:* This Confirmation shall be governed by the terms and conditions of the WSPP Agreement, version dated June 21, 2018, promulgated by WSPP, Inc. as amended from time to time, (the “Master Agreement”), such terms and conditions are incorporated by reference as if fully set forth in this Confirmation, including but not limited to Schedule R of the Master Agreement (“Schedule R”). The Master Agreement, including Schedule R, shall govern this REC Transaction, except as modified in this Confirmation. References herein to sections in Schedule R shall appear, for example, as “Section R-2.3.4”. References in Schedule R to “Renewable Energy Facility” shall be interpreted as references to a Project (as defined below in this Confirmation).

*Product:* As used herein, “Product” shall mean Portfolio Content Category 3 (“PCC 3”) - Firm RECs consisting of RECs generated by the Project under the Applicable Program that qualify as a Firm REC as described in Section R-2.3.1 of Schedule R.

*Environmental Attributes:* The Environmental Attributes conveyed under this Confirmation as part of the Product are All Attributes, including all Environmental Attributes required under the Applicable Program (as defined in the Definitions section hereof).

*Project:* As used herein “Project” shall mean a facility that qualifies as an ERR (as defined in Special Provision (A)(1) below) and otherwise meets the requirements of the Confirmation.  
  
Seller may source the Product to meet the Contract Quantity from any Project(s) listed in Exhibit A (the “Original Project”). Seller may add to Exhibit A additional facilities meeting the requirements of a Project hereunder from time to time with prior written notice to Buyer.

*Delivery Term:* Commencing on January 1, 2021 and continuing through December 31, 2030 and continuing through the completion of the payment of amounts due pursuant to this Confirmation and the transfer of all RECs to Buyer through WREGIS.

**Proposed Execution Version**

*Contract Quantity:* Seller shall deliver to Buyer an annual quantity (“Annual Quantity”) of the Product for each year of the Delivery Term, as set forth in Exhibit B.

*Contract Price:* The price for each MWh of Product delivered to Buyer (the “Contract Price”) shall be [REDACTED] per MWh (i.e., per REC) of Product conveyed to Buyer in accordance with the terms of this Confirmation.

*REC Transfer:* During the Delivery Term, Seller shall transfer the RECs to Buyer’s WREGIS account (Buyer’s WREGIS Account Holder Name: Apple Valley Choice Energy).

*Invoicing and Payment:* During the Delivery Term, approximately once per quarter, Seller will invoice Buyer for an amount equal to the product of (a) the Contract Price and (b) the portion of the Contract Quantity delivered to Buyer, as evidenced by quantity of WREGIS Certificates transferred to Buyer’s WREGIS account by Seller.

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.

*Supporting Data:* Because the Product is being sold by Seller to Buyer to facilitate Buyer’s compliance with the California Renewables Portfolio Standard, including the requirements of Section 399.13(b) of the California Public Utilities Code and CPUC Decision D.17-06-026, Seller will use reasonable efforts to assist Buyer, if necessary, in timely providing required data and/or documentation, as requested by jurisdictional regulatory authorities, to support Buyer’s compliance.

*Change in Law Provisions:* The REC Transaction under this Confirmation is Regulatorily Continuing as defined in Section R-5.2.2(b) of Schedule R. In the event of a Change in Law in the designated Applicable Program Seller shall make commercially reasonable efforts to obtain compliance with such Change in Law, provided that Seller shall not be required to spend more than \$10,000.00 during the Delivery Term in Seller’s efforts to obtain such compliance. Seller shall keep Buyer reasonably informed of its efforts to obtain compliance. If despite such efforts to obtain compliance, including expenditure by Seller of the amount specified in the preceding sentence, Seller cannot obtain compliance, the Parties shall work in good faith to try and revise this Confirmation so that this Confirmation complies with the requirements of such Change in Law. In the event the Parties cannot reach agreement on any such amendments to this Confirmation after sixty (60) days of commencement of discussions regarding such Change in Law (“Negotiation Period”), then either Party may terminate this Confirmation within thirty (30) days after the Negotiation Period upon written notice to the other Party, which shall be effective the next Business Day after such notice is received, and any such termination shall be without further liability to either Party, subject to payment of any amounts owing between the Parties prior to such termination.

*Compliance With RPS:* Seller represents and warrants to Buyer that the purchase and sale of Product pursuant to this Confirmation is a resale and that such resale meets the following additional requirements as of the Effective Date and throughout the Delivery Term:

**Proposed Execution Version**

- (i) The Product consists of unbundled Renewable Energy Credits originally associated with generation eligible under the California Renewables Portfolio Standard; or
- (ii) The Product consists of RECs eligible under the California Renewables Portfolio Standard.

**SPECIAL PROVISIONS:**

**A. Non-Modifiable Standard Terms and Conditions**

- (1) **Eligibility:** Seller, and, if applicable, its successors, represents and warrants that throughout the Delivery Term of this Agreement that: (i) the Project qualifies and is certified by the CEC 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 Project’s 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. [STC 6, Non-Modifiable. (Source: D.07-11-025, Attachment A.) D.08-04-009]
- (2) **Applicable Law:** Governing 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. [STC 17, Non-Modifiable. (Source: D.07-11-025, Attachment A) D.08-04-009]
- (3) **Transfer of Renewable Energy Credits:** 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. [STC REC-1, Non-modifiable. D.11-01-025]
- (4) **Tracking of RECs in WREGIS:** Seller warrants that all necessary steps 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 the contract. [STC REC-2, Non-modifiable. D.11-01-025]

**B. Additional Terms and Conditions**

- (1) **Seller Representations and Warranties.** Seller represents and warrants:
  - (a) The contract for the Original Project between Seller and upstream counterpart(ies) must have a delivery term of at least ten (10) years;
  - (b) At the time of delivery, all rights, title, and interest in the Product are free and clear of all liens, taxes, claims, security interests, or other encumbrances of any kind whatsoever;
  - (c) Seller has not sold the Product to be transferred to Buyer to a third party;
  - (d) the Product meets the requirements set forth in PUC Code 399.16(b)(3) and the RPS compliance requirements for Portfolio Content Category 3 as set forth in CPUC Decision 11-12-052; and

**Proposed Execution Version**

- (e) the Product meets the requirements of PUC Code 399.13(b) and CPUC Decision D.17-06-026.
- (2) Buyer Representations and Warranties. Buyer represents and warrants that Buyer has taken all necessary steps to establish a WREGIS account to receive the RECs to be transferred from Seller to Buyer prior to the first delivery under this Confirmation.

**C. AMENDMENTS TO THE MASTER AGREEMENT; ADDITIONAL PROVISIONS**

- (1) Confidentiality.
  - (a) Section 30, Confidentiality, of the Master Agreement is amended for purposes of this Confirmation by inserting at the end of Section 30.1(6) prior to the semicolon the following: “or to Deliver RECs pursuant to the requirements of WREGIS”.
  - (b) Each Party recognizes that this Confirmation is subject to the requirements of the California Public Records Act (Government Code Section 6250 et seq.).
- (2) Credit Requirements. The Parties agree and acknowledge that this Confirmation is subject to the Security Agreement dated as of January 30, 2017, between Town of Apple Valley, California, d/b/a Apple Valley Choice Energy, as pledgor, and Wilmington Trust, National Association, a national banking association, not in its individual capacity, but solely as Collateral Agent (“Security Agreement”), and all obligations hereunder are Obligations as defined in such Security Agreement, and that the Security Agreement is incorporated into this Agreement by reference. In accordance with the Security Documents, AVCE shall ensure that SCE deposits into a lockbox account, all of the proceeds of all of the Customer account receipts (net of the amounts to be paid to SCE) received from the sale of the Product to the Customers. 3 Phases shall receive, in accordance with the Security Documents, payments for its invoices due and payable from such lockbox. Except as provided in the foregoing, Section 27 of the Master Agreement is not applicable to, and credit support is not required for Buyer under this Confirmation. Buyer’s obligation to make payments hereunder are to be made solely from the lockbox and obligations to make payments hereunder do not constitute any kind of indebtedness of Buyer or create any kind of lien on, or security interest in, any property or revenues of Buyer.
- (3) Counterparts. This Confirmation may be signed in any number of counterparts with the same effect as if the signatures to the counterparts were upon a single instrument. The Parties may rely on electronic, facsimile or scanned signatures as originals under this Confirmation. 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.
- (4) Entire Agreement; No Oral Agreements or Modifications. This Confirmation sets forth the terms of the transaction into which the Parties have entered and shall constitute the entire Agreement between the Parties relating to the contemplated purchase and sale of the Product. Notwithstanding any other provision of the Agreement, this Confirmation may only be entered into by a Documentary Writing executed by both Parties, and no amendment or modification to this Confirmation shall be enforceable except through a Documentary Writing executed by both Parties.

**D. DEFINITIONS/INTERPRETATIONS**

For purposes of this Confirmation, the following definitions shall apply:

“Applicable Program” means the California Renewables Portfolio Standard.

**Proposed Execution Version**

“California Renewables Portfolio Standard” means the renewable energy program and policies, codified in California Public Utilities Code Sections 399.11 through 399.32 and California Public Resources Code Sections 25740 through 25751, as such provisions are amended or supplemented from time to time, including without reservation the requirements of California Public Utilities Code Section 399.13(b) and CPUC Decision D.17-06-026.

“CEC” means the California Energy Commission or its regulatory successor.

“CPUC” means the California Public Utilities Commission or its regulatory successor.

“Depository Bank” has the meaning set forth in the Security Agreement.

“FERC” means the Federal Energy Regulatory Commission or its regulatory successor.

“Intercreditor and Collateral Agency Agreement” means the Intercreditor and Collateral Agency Agreement, dated as of January 30, 2017, among the Collateral Agent, 3 Phases and the PPA Providers party thereto from time to time.

“Secured Account” means deposit account no. [REDACTED] maintained in the name of AVCE at Depository Bank, and any replacement account.

“Security Agreement” has the meaning set forth in Section C (2) of this Confirmation.

“Security Documents” means, collectively, the Intercreditor and Collateral Agency Agreement, the Security Agreement and the Account Control Agreement, dated as of January 30, 2017, among the Depository Bank, AVCE and the Collateral Agent.

“STC” stands for Standard Terms and Conditions of the CPUC relating to purchase and sales of the Product.

“WECC” means the Western Electricity Coordinating Council or its successor organizations.

“WREGIS” means the Western Renewable Energy Generation Information System or its successor systems.

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

Town of Apple Valley, California, d/b/a Apple Valley Choice Energy	3 Phases Renewables Inc.
By:	By:
Name:	Name:
Title:	Title:

**Proposed Execution Version**

**EXHIBIT A**

**Renewable Energy Projects**

<b>Project Name</b>	<b>CEC RPS ID</b>	<b>City</b>	<b>State</b>	<b>Technology</b>
Joint Water Pollution Control Plant – Total Energy Facility	60633A	Carson	California	Biomethane

Exhibit A - 1



Proposed Execution Version

EXHIBIT B

Contract Quantity

Year	Annual Quantity (MWh)
2021	
2022	
2023	
2024	
2025	
2026	
2027	
2028	
2029	
2030	
Total	

Exhibit B - 1