

GENERAL ADMINISTRATION DIVISION

Report No. 3

OGDENSBURG CITY SCHOOL DISTRICT
OGDENSBURG, NEW YORK

SUBJECT: Resolution to Authorize the SolarCity Letter Agreement Related to Power Purchase Agreement

DATE: November 21, 2016

REASON FOR BOARD CONSIDERATION:

To present information to the Commissioners regarding the Letter Agreement Related to Power Purchase in relation to the Tri-County Energy Consortium Electricity Purchase Agreement and SolarCity Corporation.

FACTS AND ANALYSIS:

Pursuant to Article 5-G of the New York General Municipal law, local governments (schools, towns, villages, counties) can contractually agree to combine their efforts to perform a function or service that they could do individually, through the use of an *inter-municipal cooperation agreement*. These agreements are common, and are used to allow local governments to cooperate on a variety of initiatives from road and highway maintenance, gasoline procurement, electricity, bid sharing, and maintenance services.

RECOMMENDED ACTION:

Moved by _____ and supported by _____ that, having the recommendation of the Superintendent of Schools, the Board of Education of the Ogdensburg City School District does hereby agree to authorize the Superintendent of Schools to sign the SolarCity Letter Agreement Related to Power Purchase Agreement, on this 21st day of November, 2016.

APPROVED FOR PRESENTATION TO THE BOARD:


Superintendent

TMV/alf
Attachment



Confidential

October ____, 2016

[Member notice information]

[Tri-County notice information]

Re: Letter Agreement related to Power Purchase Agreement

Dear _____:

This letter agreement ("Agreement") among SolarCity Corporation, a Delaware corporation ("SolarCity"), [insert school name] (the "Member") and Tri-County Energy Cooperative ("Tri-County") sets forth certain matters related to the Tri-County Energy Consortium Power Purchase Agreements between Consortium and SolarCity, a standard copy of which is attached to this Agreement as Exhibit A (the "PPA"), and the standard Energy Purchasing Agreement between the [insert school name] and Tri-County, a copy of which is attached to this Agreement as Exhibit B (the "EPA"). Each of SolarCity, Member and Tri-County as the parties hereto are sometimes referred to collectively as the "Parties". Capitalized terms used but not defined in this Agreement have the meanings ascribed to them in the PPA and the EPA, which are hereby incorporated by reference.

1. Member Liability for Tri-County Obligations under the PPA.

1.1 Consistent with Section 2.3 of the Tri-County Energy Cooperative agreement among Member, Tri-County, and certain other third parties, Member shall be jointly and severally liable, according to the limitations of this section, with Tri-County for all amounts owing by TriCounty to SolarCity under the PPA for an amount not exceeding the Member's pro-rata obligation to Tri-County under the EPA, whether for electricity delivered or otherwise, in each case subject to the terms and conditions of the PPA and the EPA.

1.2 An absolute condition precedent to Solar City's ability to exercise any and all rights under this side letter agreement, including but not limited to its ability to seek repayment under one or more PPA's directly from the Member, is Tri-County's failure and default to make required payments to Solar City under the terms of one or more of the PPAs between the Parties. To the extent that Tri-County defaults in its payments to Solar City under one or more of the Parties PPAs, any amount owing under the PPA agreement or agreements in default shall mean that SolarCity shall

have the right to seek immediate payment of such amount from Member, limited to the extent such amount represents an amount equal to Member's obligation to Tri-County under the EPA as stated in this side letter agreement.

2. Payment Procedures Before and After Default.

- 2.1** The Parties understand and agree that where there is no default under any PPA between the Parties, SolarCity shall invoice Tri-County monthly for the electric energy generated by SolarCity and delivered to the Delivery Point, as defined in the PPA (the "SolarCity Tri-County Invoice"). The Parties further understand and agree that within 30 days of receipt of the SolarCity Tri-County Invoice, Tri-County shall pay SolarCity the amount of the SolarCity Tri-County Invoice. Payment arrangements between TriCounty and the Member will be determined by TriCounty pursuant to TriCounty's By-Laws and agreements with the Member.
- 2.2** In the event of a default by Tri-County in its payment obligations to SolarCity under one or more PPAs, SolarCity shall have the right to invoice Member directly for the Member's pro-rata share as articulated in section 1.1 above and the Parties' EPA for the electric energy generated by SolarCity and delivered to the Delivery Point, as defined in the PPA (the "SolarCity Member Invoice"). Within 30 days of receipt of the SolarCity Member Invoice, the Member shall pay SolarCity the amount of the SolarCity Member Invoice.
- 2.3** Member's payment directly to SolarCity shall satisfy Member's obligation to Tri-County for the amount of such payment. Member's obligations under this Agreement are absolute, unconditional, continuing and irrevocable and are in no way conditioned on or contingent upon any attempt to enforce in whole or in part any of Tri-County's obligations to SolarCity, the existence or continuance of Tri-County as a legal entity, the consolidation or merger of Tri-County with or into any other entity, the sale, lease or disposition by Tri-County of all or substantially all of its assets to any other entity, the bankruptcy or insolvency of Tri-County, the admission by Tri-County of its inability to pay its debts as they mature, or the making by Tri-County of a general assignment for the benefit of, or entering into a composition or arrangement with, creditors.
- 2.4** Should a member fail to make the appropriate payment to Solar City upon Tri-County's default and SolarCity's request for payment in connection therewith, SolarCity may pursue any remedy under this Agreement, under the PPA, at law or in equity, including an action for damages and termination of this Agreement or the PPA, in connection with any failure by Member to pay amounts for which it is liable pursuant to this Agreement.

2.5 Nothing in this Agreement shall be deemed a limitation or expansion on the rights of Tri-County, SolarCity, or Member to challenge or correct in good faith the amount of the SolarCity TriCounty Invoice or Member Invoice under the PPA or EPA and in accordance with those agreements.

3. Representations and Warranties. Each Party represents and warrants to the other the following:

3.1 Such Party is duly organized, validly existing and in good standing under the laws of the jurisdiction of its formation; the execution, delivery and performance by such Party of this Agreement have been duly authorized by all necessary corporate, partnership or limited liability company action, as applicable, and do not and shall not violate any law; and this Agreement is valid obligation of such Party, enforceable against such Party in accordance with its terms (except as may be limited by applicable bankruptcy, insolvency, reorganization, moratorium and other similar laws now or hereafter in effect relating to creditors' rights generally).

3.2 Such Party has obtained all licenses, authorizations, consents and approvals required by any Governmental Authority or other third party and necessary for such Party to execute and deliver this Agreement, and such Party is in compliance with all laws that relate to this Agreement in all material respects.

4. Termination. This Agreement shall remain in full force and effect until the expiration or earlier termination of the PPA, including all Additional Terms. No termination shall affect any rights of SolarCity or obligations of Member or Tri-County hereunder with respect to any amounts incurred or accrued by Tri-County prior to such expiration or termination, as applicable, and all such rights and obligations shall survive such expiration or termination.

5. Assignment.

5.1 This Agreement may not be assigned in whole or in part by any Party without the prior written consent of the other Parties, which consent shall not be unreasonably withheld or delayed. If, in the case of SolarCity only, Member and Tri-County have been provided with reasonable proof that SolarCity's proposed assignee has comparable experience in operating and maintaining solar photovoltaic systems and the financial capability to do the same, Member's and Tri-County's withholding of consent shall be deemed unreasonable.

5.2 Notwithstanding Section 6.1, SolarCity may assign, mortgage, pledge or otherwise directly or indirectly assign its interests in this Agreement to any Financing Party, any entity through which SolarCity is obtaining financing from a Financing Party, any affiliate of SolarCity or any person succeeding to all or substantially all of the assets of SolarCity (provided

that SolarCity shall be released from liability hereunder as a result of any of the foregoing permitted assignments only upon assumption of SolarCity's obligations hereunder by the assignee).

- 5.3 This Agreement shall be binding on and inure to the benefit of the successors and permitted assigns.

6. Miscellaneous.

- 6.1 There no third party beneficiaries to this Agreement.
- 6.2 If any provision of this Agreement is determined to be unenforceable, that provision shall be severed from the remainder of the Agreement, and replaced automatically by a provision containing terms as nearly like the unenforceable provision as possible, or otherwise modified in such fashion as to preserve, to the maximum extent possible, the original intent of the parties, and this Agreement, as so modified, shall continue in full force and effect.
- 6.3 Any waiver of rights or obligations hereunder must be made specifically in writing.
- 6.4 Each of the Parties agrees to provide such information, execute and deliver any instruments and documents and to take such other actions as may be necessary or reasonably requested by the other Party which are not inconsistent with the provisions of this Agreement and the PPA and which do not involve the assumptions of obligations other than those provided for in this Agreement or the PPA, to give full effect to this Agreement and the PPA and to carry out the intent of this Agreement and the PPA.
- 6.5 Nothing in this Agreement shall create a joint venture, partnership or establish a relationship of principal and agent or any other fiduciary relationship between or among any of the Parties.
- 6.6 This Agreement, together with any Exhibits, completely and exclusively states the agreement of the Parties regarding its subject matter and supersedes all prior proposals, agreements, or other communications between the parties, oral or written, regarding its subject matter. This Agreement may be modified only by a writing signed by all Parties. If any provision of this Agreement is found unenforceable or invalid, such unenforceability or invalidity shall not render this Agreement unenforceable or invalid as a whole. In such event, such provision shall be changed and interpreted so as to best accomplish the objectives of such unenforceable or invalid provision within the limits of applicable law. This Agreement may be executed in any number of separate counterparts and each counterpart shall be considered an original and together shall comprise the same Agreement. The captions or headings in this

Agreement are strictly for convenience and shall not be considered in interpreting this Agreement

- 6.7 The Parties agree that the Confidentiality and Publicity provisions (Section 20) of the EPA shall apply to the PPA and this Agreement.
- 6.8 Nothing in this Agreement shall be read as limiting SolarCity's remedies against Tri-County as stated in the PPA.

[Intentionally Blank Space]

[Signature page follows.]

If this Agreement is not executed by SolarCity and delivered to SolarCity on or prior to December 31, 2016, it shall be null and void.

Very truly yours,

SOLARCITY CORPORATION

By: _____

Name: _____

Title: _____

Agreed and accepted effective as of the date first set forth above:

TRI-COUNTY ENERGY COOPERATIVE

By: John Warnock

Name: John Warnock

Title: Executive Director

[MEMBER]

By: Timothy M. Vernsey

Name: Timothy M. Vernsey

Title: Superintendent