

RESOLUTION 2020-055
OF THE COUNCIL OF THE CITY OF FORT COLLINS
AUTHORIZING ACQUISITION OF CERTAIN ASSETS AND
OPERATIONAL CONTROL OF THE COMMUNITY SOLAR PROJECT
LOCATED AT THE RIVERSIDE AVENUE AND
MULBERRY STREET INTERSECTION

WHEREAS, the City entered into an agreement with Clean Energy Collective (CEC) in 2014 to develop a community solar project through which the City's Electric Utility could facilitate "virtual net metering" for customers who are unable to locate photovoltaic solar panels on their properties; and

WHEREAS, the City and CEC thereafter collaborated on the construction and electric system interconnection of the Riverside Solar Project (the Project) at the northeast corner of Riverside Avenue and Mulberry Street on real property lease by CEC from the City; and

WHEREAS, the Project began commercial operation in 2015, at which time City utility customers purchased from CEC 25-year subscription-ownership interests that included individual ownership of solar panels and the energy generated for the anticipated 25-year life of the Project; and

WHEREAS, subscribing customers thereafter began receiving credits directly on their City utility bills, based on the subscription interest each owned in the Project and a formula relying on electric service rates annually adopted by Council; and

WHEREAS, in October 2018, pursuant to Ordinance No. 155, 2017, the City transitioned applicable electric utility service rates from a "tiered-based" structure to a "time-of-day-based" structure (TOD), and began applying TOD credits to community solar projects in January 2019; and

WHEREAS, after implementing TOD credit rates, the City and CEC encountered unanticipated complications in applying TOD rates to Project customer bill credit formulae; and

WHEREAS, the City and CEC explored options for integrating TOD credit rates into Project processes and determined in 2020 the integration could best be achieved with maximum benefit to customers by consolidating all program management and customer support functions under City Utility Services; and

WHEREAS, Utility Services staff and CEC thereafter prepared an Asset Purchase Agreement (APA) and developed a list of assets and operational arrangements required for Utilities Services to take over ownership of certain assets and operation of the Project; and

WHEREAS, under the proposed APA, subscribing customers owning panels in the Project will continue to receive credits on their bill, as they currently do, based on applicable TOD rates set forth in City Code Chapter 26, and Project operations will be simplified through local management of both operation and billing/credit functions by the Electric Utility; and

WHEREAS, among the assets and interests to be transferred by CEC to the City is an Operation & Maintenance fund (O/M Fund) established for the purpose of maintaining the Project, capital for which is sustained through installments from the bill credits otherwise issued to subscribing customers; and

WHEREAS, the O/M Fund balance is currently \$50,000, annual revenue deposits into the O/M Fund are approximately \$10,000, and annual Project O/M expenditures are approximately \$10,000; and

WHEREAS, staff recommends Council approve and authorize the City Manager to execute the Asset Purchase Agreement (APA) attached hereto as Exhibit "A," incorporated by this reference, to complete the transfer of Project operation from CEC to the City; and

WHEREAS, the City Council desires to approve the APA between the City and CEC to transfer ownership of certain assets in and control of the Riverside Community Solar Project to the City to enable the Electric Utility's continued operation of the Project directly for the benefit of its ratepayers.

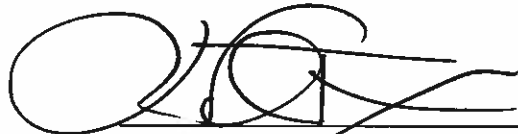
NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF FORT COLLINS as follows:

Section 1. That the City Council hereby makes and adopts the determinations and findings contained in the recitals set forth above.

Section 2. That the City Manager is hereby authorized to sign, on behalf of the City, the APA in substantially the form attached hereto as Exhibit "A", with such additional or modified terms and conditions as the City Manager, in consultation with the City Attorney determines to be necessary and appropriate to protect the interests of the City or effectuate the purposes of this Resolution.

Section 3. That the City Manager or his delegee is hereby further authorized to sign, on behalf of the City, all closing and other documents necessary to complete the transaction contemplated by the APA.

Passed and adopted at a regular meeting of the Council of the City of Fort Collins this 16th day of June, A.D. 2020.



Mayor

ATTEST:



City Clerk



Execution Copy

ASSET PURCHASE AGREEMENT

This Asset Purchase Agreement (this “**Agreement**”), dated as of June [], 2020 (the “**Effective Date**”), is by and between CLEAN ENERGY COLLECTIVE, LLC, and CEC Solar #1038, LLC, a Colorado limited liability company (“**Seller**”) and THE CITY OF FORT COLLINS, a Colorado municipal corporation, through Fort Collins Utilities, (“**Buyer**”) for the purchase and sale of certain assets as described herein. Buyer and Seller are referred to herein as a “**Party**” or the “**Parties**”, individually or collectively, as appropriate.

AGREEMENT

WHEREAS, Clean Energy Collective, LLC, is a Colorado limited liability company and the sole owner of CEC Solar #1038, LLC, a Colorado limited liability company.

WHEREAS, Seller has developed, constructed and operated a solar array facility (the “**Project**”) located at the site owned by the Buyer and described in Exhibit A.

WHEREAS, since 2015, Seller has marketed and sold subscriptions in the Project to Fort Collins electric utility customers (“**Customers**”), operated the Project on behalf of such Customers, and brokered the exchange of pro-rata Customer interests in the solar power generated by the Project for Customer utility bill credits issued by Buyer.

WHEREAS, Seller owns a 100% interest in the Project Assets (as defined below).

WHEREAS, Seller desires to sell the Project Assets to Buyer, and Buyer desires to purchase such Project Assets.

WHEREAS, Buyer agrees to extend Seller’s current Customer utility bill credit model for 90 days after the Effective Date to facilitate Customers’ transition to Continuing Customer Agreements or transfer of interests in the Project.

NOW THEREFORE, in consideration of the mutual covenants and agreements hereinafter set forth and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereto agree as follows:

1. Purchase and Sale. On the terms and subject to the conditions set forth in this Agreement, at the Closing, (a) Seller agrees to sell, transfer, convey, assign and deliver all of its right, title and interest in and to the assets set forth in Exhibit B free and clear of all liens, mortgages, and other encumbrances other than Permitted Liens (the “**Project Assets**”), and (b) Buyer agrees to purchase and accept from Seller all such right, title and interest in and to the Project Assets.

(iii) the Sales Commission Agreement by and between CEC Solar #1038, LLC and Clean Energy Collective, LLC (“CEC”), dated April 30, 2014; (iv) the Development Agreement by and between the City of Fort Collins and Seller, dated March 20, 2015; (v) the Community Solar Generator Interconnection Agreement by and between Buyer and Seller, dated May 20, 2015; (vi) the Application Services Agreement by and between Also Energy, Inc. and Energy Equipment Limited, dated January 19, 2016; (vii) the Renewable Generator Power Purchase Agreement dated April 10, 2014, as amended; and (viii) the Land Lease Option Agreement (Solar Farm) by and between Seller and the City of Fort Collins, dated October 6, 2014, as amended.

9. Closing Deliverables of Buyer. On or before the Closing, Buyer shall deliver or cause to be delivered to Seller the following documents and shall take or cause to be taken the following actions:

(a) Buyer shall deliver to Seller a counterpart signature to any Termination Agreement to which Buyer or the City of Fort Collins is a party, duly executed by Buyer or the City of Fort Collins, as applicable;

(b) Buyer shall deliver to Seller any consents, approvals and filings needed, including but not limited to approval by the Fort Collins City Council, to execute, deliver and perform Buyer’s obligations under this Agreement;

(c) Buyer shall pay or cause to be paid the Purchase Price as provided in Section 5;
and

(d) Buyer shall produce proof that Buyer has sent each customer Continuing Customer Agreements in substantially the model form attached hereto as Exhibit D to be effective 90 days after the Closing Date (collectively, the “Continuing Customer Agreements”).

10. Seller’s General Covenants, Representations and Warranties. As of the Closing Date, Seller hereby represents and warrants to Buyer, as follows:

(a) it is duly organized, validly existing and in good standing under the laws of its jurisdiction of organization;

(b) it has the legal authority to enter into this Agreement and to perform its obligations hereunder;

(c) that this Agreement is enforceable and binding against Seller in accordance with its terms and conditions, except as such enforceability may be limited or denied by (i) applicable bankruptcy, insolvency, reorganization, moratorium or similar laws affecting creditors’ rights and the enforcement of debtors’ obligations generally, and (ii) general principles of equity, regardless of whether enforcement is pursuant to a proceeding in equity or at law;

(d) this Agreement and the performance of its obligations hereunder neither violate any applicable law nor conflict with nor cause a breach under its organizational documents or any other agreements to which it is a party;

(e) Seller has satisfied all reporting and/or payment obligations related to any tax credits associated with the Project such that no lien will attach to the Project Assets or claim against Buyer may be made with regard to such tax credits;

12. Limitation of Liability.

(a) For purposes of this Agreement, “**Damages**” means such damages as shall be payable in connection with this Agreement, under law or at equity.

(b) WITHOUT DISCLAIMING ANY EXPRESS WARRANTIES SET FORTH IN THIS AGREEMENT, SELLER MAKES NO WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE AND ANY AND ALL IMPLIED WARRANTIES ARE DISCLAIMED. SELLER MAKES NO WARRANTIES OR REPRESENTATIONS REGARDING THE FUTURE PERFORMANCE OF THE PROJECT, ANY FUTURE PRODUCTIONS LEVELS OF ELECTRIC GENERATION OF THE PROJECT OR REVENUES THEREFROM, INCLUDING REVENUE IN CONNECTION WITH THE SALE OF NET METERING CREDITS, UTILIZATION OF TAX BENEFITS OR ENVIRONMENTAL ATTRIBUTES. THE PARTIES HEREBY ACKNOWLEDGE AND AGREE THAT, TO THE EXTENT REQUIRED BY APPLICABLE LAW, THE DISCLAIMERS CONTAINED IN THIS AGREEMENT ARE “CONSPICUOUS” FOR THE PURPOSES OF SUCH APPLICABLE LAW. THE PARTIES AGREE THAT THE EXPRESS REMEDIES AND MEASURES OF DAMAGES PROVIDED IN THIS AGREEMENT SATISFY THE ESSENTIAL PURPOSES HEREOF. THE LIABILITY OF ANY PARTY UNDER THIS AGREEMENT SHALL BE LIMITED TO THE SOLE AND EXCLUSIVE REMEDY OF DIRECT ACTUAL DAMAGES ONLY, AND ALL LOSS OF BUSINESS, LOSS OF TAX CREDITS OR OTHER TAX BENEFITS, LOSS OR DELAY OF FUNDING, INTEREST CHARGES, COST OF CAPITAL, CLAIMS OF CUSTOMERS, BUSINESS INTERRUPTION, LOST PROFITS, INCIDENTAL, INDIRECT, CONSEQUENTIAL AND OTHER DAMAGES IN LAW OR EQUITY ARE WAIVED, WHETHER BY STATUTE, IN TORT OR UNDER CONTRACT, UNDER ANY INDEMNITY PROVISION OR OTHERWISE, REGARDLESS OF WHETHER SUCH DAMAGE WAS FORESEEABLE AND WHETHER OR NOT THE OTHER PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, AND NOTWITHSTANDING THE FAILURE OF ANY AGREED OR OTHER REMEDY OF ITS ESSENTIAL PURPOSE, NOTWITHSTANDING THE CONTRARY, IF THE DAMAGES ATTRIBUTABLE TO ANY BREACH OF THIS AGREEMENT BY SELLER SHALL EXCEED THE PURCHASE PRICE TO SELLER HEREUNDER, THEN SELLER’S LIABILITY IN CONNECTION WITH THIS AGREEMENT SHALL BE LIMITED TO THE DIRECT ACTUAL DAMAGES AND ALLOCATED ACCORDING TO THE RESPONSIBILITIES SET FORTH IN SECTION 4, AND SUCH DIRECT ACTUAL DAMAGES (AS SO LIMITED) SHALL BE THE SOLE AND EXCLUSIVE REMEDY IN RESPECT TO ANY BREACH BY SELLER OF THIS AGREEMENT AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED.

(c) BUYER ACKNOWLEDGES AND CONFIRMS THAT IT IS NOT RELYING UPON ANY REPRESENTATION, WARRANTY, GUARANTY, PROMISE, STATEMENT OR INDUCEMENT, ORAL OR WRITTEN, EXPRESSED OR IMPLIED, WHICH MAY HAVE BEEN MADE BY SELLER OR OTHERS ACTING OR PURPORTING TO ACT ON BEHALF OF SELLER WITH RESPECT TO THE PAST, PRESENT OR FUTURE CONDITION OF THE PROJECT ASSETS, THEIR ACTUAL OR PROJECTED INCOME, EXPENSES, OPERATION, VALUE, USES, MAINTENANCE, OR ANY OTHER ASPECT OF THIS TRANSACTION OR THE PROJECT ASSETS, EXCEPT THE ABSENCE OF ASSOCIATED LIENS AND OTHER ENCUMBRANCES OF ANY FORM OTHER THAN PERMITTED LIENS, AND BUYER AGREES TO ACCEPT TITLE TO THE PROJECT ASSETS IN THEIR PRESENT CONDITION, “AS-IS”, WITHOUT WARRANTY, EXCEPT AS OTHERWISE EXPRESSLY PROVIDED FOR HEREIN.

13. Assignment. No Party may assign this Agreement without the prior written consent of the other Party.

Attn: Tom Sweeney, CEO
Email: tom.sweeney@cleanenergyco.com

With a copy (which shall not constitute notice) to:

Katherine Worden, Chief Legal Officer
Email: katherine.worden@cleanenergyco.com

17. **Entire Agreement; Merger.** The terms of this Agreement supersede and cancel all prior and contemporaneous oral or written agreements and understandings of Buyer and Seller in respect of the Project and transactions contemplated herein. Notwithstanding the contrary, the Parties acknowledge and agree that the Mutual Non-Disclosure Agreement, dated as of January 8, 2014, between Buyer and CEC (the "NDA") shall remain in effect in accordance with its terms and conditions, and that it shall apply both to the subject matter of this Agreement, and to all matters other than the subject matter of this Agreement. However, Buyer's disclosure of this Agreement to Customers, or in the defense of any claim asserted by Customers shall not be considered a breach of the NDA.

18. **Modifications and Waivers.** No such waiver, and no modification, amendment, discharge or change of this Agreement will be valid unless the same is in writing and signed by the Party against whom the enforcement of such modification, waiver, amendment, discharge or change is sought. This Agreement may not be amended except by written agreement executed by all Parties.

19. **Successors and Assigns.** All rights and obligations arising out of this Agreement will inure to the benefit of and be binding upon the respective successors and permitted assigns of the Parties hereto.

20. **Governing Law.** This Agreement and all matters arising hereunder or in connection herewith shall be governed by, interpreted under, construed and enforced in accordance with the laws of the State of Colorado, without regard to the conflicts of law principles thereof. Venue for any action arising in connection with this Agreement shall be in Larimer County, Colorado District Court.

21. **Remedies.** Except as limited by this Agreement, all rights, powers, and remedies of the parties hereunder are cumulative and concurrent and shall be in addition to and not exclusive of any appropriate legal or equitable remedy provided by law or contract.

22. **Interpretation.** This Agreement shall be construed without regard to any presumption or rule requiring construction or interpretation against the party drafting an instrument or causing any instrument to be drafted. The headings in this Agreement are for reference only and shall not affect the interpretation of this Agreement.

23. **Severability.** If any provision of this Agreement is finally adjudicated to be invalid, illegal or unenforceable, in whole or in part, it will be deemed deleted to that extent, and all other provisions of this Agreement will remain in full force and effect.

24. **Counterparts.** This Agreement may be executed in more than one counterpart, each of which will be deemed to be an original, but all of which together will constitute one original. This Agreement will not be binding on the Parties until each Party has executed a counterpart of this Agreement. A signed copy of this Agreement delivered by facsimile, email or other means of electronic transmission shall be deemed to have the same legal effect as delivery of an original signed copy of this Agreement.

25. **Non-Recourse.** This Agreement may only be enforced against, and any claim, action, suit or other legal proceeding based upon, arising out of or related to this Agreement, or the negotiation,



LIST OF EXHIBITS TO ASSET PURCHASE AGREEMENT

Exhibit A – Description of Project

Exhibit B – Project Assets

Exhibit C – Termination Agreements

Exhibit D – Model Continuing Customer Agreement

Exhibit B

Project Assets

The following equipment:

Inverter(s)	Inverter Type:	Schneider GT500-480
	Manufacturers Serial #:	C11323160565
Racking	Racking Type:	RBI-Ground Mounted
DAS	Monitoring Type:	Also Energy

including any ancillary solar equipment located on the Site (but excluding the modules, which are owned by the Project's customers) and any existing warranties with respect to such equipment to the extent such warranties are assignable.

Balance of Operations and Maintenance fund of \$[45,417.92] less any amounts that are outstanding as of the Closing such as Seller's share of any Taxes through the Closing.

Exhibit D

Model Continuing Customer Agreement
(Subject to revision by Buyer)