



## Performance Guarantee Agreement

This Performance Guarantee Agreement (this “**Agreement**”) is entered into by the parties listed below (each a “**Party**” and collectively the “**Parties**”) as of the date signed by Seller below (the “**Effective Date**”).

<b>Purchaser:</b>		<b>Seller:</b>	
Name and Address	<b>City of Mesa</b> 20 East Main Street Suite 400 PO Box 1466 Mesa Arizona 85211-1466 <b>Red Mountain Multi Gen Rec Center</b> 7750 E Adobe Rd Mesa, AZ 85207 Attention: Janet Bunchman	Name and Address	<b>SolarCity Corporation</b> 3055 Clearview Way San Mateo, CA 94402 Attention: Legal Department
Phone	(480) 644-4697	Phone	(650) 638-1028
Fax	(480) 644-2655	Fax	(650) 638-1029
E-mail	<a href="mailto:Janet.Bunchman@mesaaz.gov">Janet.Bunchman@mesaaz.gov</a>	E-mail	contracts@solarcity.com

This Agreement sets forth the terms and conditions of the performance guarantee required to be provided by Seller in conjunction with that certain Solar Services Agreement by and between Seller and Purchaser dated of even date herewith (the “**SSA**”). All capitalized terms used hereunder shall have the meanings given such terms in the SSA.

### **I. PERFORMANCE GUARANTEE:**

Seller guarantees that during the term of the SSA the System will generate the guaranteed annual kilowatt-hours (kWh) (“**Guaranteed Annual kWh**”) of energy set forth as follows:

- A. Commencing on the third anniversary of the date that the System achieves permission to operate from the Utility, if at the end of each successive twelve (12) month anniversary of the date that the System achieves permission to operate from the Utility, the cumulative Actual Annual kWh (defined below) generated by the System is *less* than the Guaranteed Annual kWh, then Seller will send Purchaser a refund check equal to the difference between the Guaranteed Annual kWh and the cumulative Actual Annual kWh multiplied by the Guaranteed Energy Price per kWh (defined below). Seller will make that payment within thirty (30) days after the end of the relevant calendar year.
- B. Commencing on the third anniversary of the date that the System achieves permission to operate from the Utility, if at the end of each successive twelve (12) month anniversary of the date that the System achieves permission to operate from the Utility the Actual Annual kWh is *greater* than the Guaranteed Annual kWh during any twelve (12) month period, this surplus will be carried over and will be used to offset any deficits that may occur in the future.

C. Guaranteed Annual kWh:

Yr	Guaranteed kWh
1	491,681
2	489,223
3	486,764
4	484,306
5	481,848
6	479,389
7	476,931
8	474,472
9	472,014
10	469,556
11	467,097
12	464,639
13	462,180
14	459,722
15	457,264
16	454,805
17	452,347
18	449,888
19	447,430
20	444,972

- D. “**Actual Annual kWh**” means the AC electricity produced by the System in kilowatt-hours measured and recorded by Seller during each successive twelve (12) month anniversary (commencing on the third such anniversary) of Purchaser's last of the first monthly payments under the SSA. To measure the Actual kWh we will use the SolarGuard™ Monitoring Service or to the extent such services are not available, Seller will estimate the Actual kWh by reasonable means.
- E. “**Guaranteed Energy Price per kWh**” means \$ 0.03 per kWh with an annual increase of two percent (2.0%)
- F. The term of this Performance Gaurantee shall be concurrent with the term of the SSA.
- G. SolarCity hereby disclaims, and any beneficiary of this Agreement hereby waives any warranty with respect to any cost savings from using the System.

## II. EXCLUSIONS AND DISCLAIMER

Seller shall be excused from making payment for any failure of the System to achieve the Guaranteed kWh to the extent such failure is due to or caused by any of the following events or circumstances:

- A. Someone other than Seller or its approved service providers installed, removed, re-installed or repaired the System;
- B. Destruction or damage to the System or its ability to safely produce energy not caused by Seller or its approved service providers while servicing the System (e.g., a tree falls on the System);
- C. Purchaser's failure to perform, or breach of, Purchaser's obligations under the SSA (such as if Purchaser modifies or alters the System);
- D. any Force Majeure Event (as defined below);
- E. a power or voltage surge caused by someone other than Seller, including a grid supply voltage outside of the standard range specified by the Utility;
- F. any System failure not caused by a System defect (e.g., such as making roof repairs); or
- G. theft of the System.

### III. ADDITIONAL SERVICES

- A. **Scope of Additional Services.** Purchaser agrees that if (i) the System needs any repairs that are not the responsibility of Seller under this Agreement or the SSA, (ii) the System needs to be removed and re-installed to facilitate remodeling of the Facility or (iii) the System is being relocated to another Facility pursuant to the SSA (collectively, items (i)- (iii) are "Additional Services"), Purchaser will have Seller, or another similarly qualified service provider, at Purchaser's expense, perform such repairs, removal and reinstallation or relocation on a time and materials basis.
- B. **Approved Service Providers.** Purchaser's retention of a third party to perform Additional Services that is not qualified to perform such Additional Services will excuse Seller's obligation to meet the Annual Guaranteed kWh. Purchaser must obtain the written consent of Seller prior to engaging a third party to perform Additional Services. If Purchaser engages a third party service provider to perform Services without the prior consent of Seller, Purchaser does so at the risk that Seller will subsequently determine such service provider was not qualified to perform the Additional Services.
- C. **Pricing on Additional Services.** Performance of Additional Services by Seller will be on a time and materials basis at Seller's then current standard and reasonable rates.

### IV. Force Majeure.

If Seller is unable to perform all or some of its obligations under this Agreement because of a Force Majeure Event, Seller will be excused from whatever performance is affected by the Force Majeure Event, provided that:

- A. Seller, as soon as is reasonably practical, gives Purchaser notice describing the Force Majeure Event;
- B. Seller's suspension of its obligations is of no greater scope and of no longer duration than is required by the Force Majeure Event; and
- C. No Seller obligation that arose before the Force Majeure Event that could and should have been fully performed before such Force Majeure Event is excused as a result of such Force Majeure Event.

"Force Majeure Event" means any event, condition or circumstance beyond the control of and not caused by Seller's fault or negligence. It shall include, without limitation, failure or interruption of the production, delivery or acceptance of electricity due to: an act of god; war (declared or undeclared); sabotage; riot; insurrection; civil unrest or disturbance; military or guerilla action; terrorism; economic sanction or embargo; civil strike, work stoppage, slow-down, or lock-out; explosion; fire; earthquake; abnormal weather condition or actions of the elements; hurricane; flood; lightning; wind; drought; the binding order of any governmental authority (provided that such order has been resisted in good faith by all reasonable legal means); the failure to act on the part of any governmental authority (provided that such action has been timely requested and diligently pursued); unavailability of electricity from the utility grid, equipment, supplies or products; and failure of equipment not utilized by Seller or under its control.

### V. LIMITATIONS ON LIABILITY

- A. **NO CONSEQUENTIAL DAMAGES.** In no event shall either party or its agents or subcontractors be liable to the other for special, indirect, punitive, exemplary, incidental or consequential damages of any nature. Some states do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation may not apply in such states.
- B. **LIMITATION OF DURATION OF IMPLIED WARRANTIES.** Any implied warranties, including the implied warranties of fitness for particular purpose and merchantability arising under state law, shall in no event extend past this Agreement. Some states do not allow limitations on how long an implied warranty lasts, so the above limitation may not apply in such states.
- C. **LIMIT OF LIABILITY.** Notwithstanding any other provision of this Agreement to the contrary, Seller's total liability to Purchaser arising out of or relating to this Agreement shall in no event:
  - a. For System Failure or Replacement: exceed the total of the Purchaser's payments made during the Term of the PPA

- b. For damages to Purchaser's Facility, Premises or belongings: exceed three million dollars (\$3,000,000).

**VI. CLAIMS AND NOTICES**

A. Making a Claim; Transferring this Agreement.

- a. **Claims Process.** Purchaser can make a claim by:

- i. Emailing Seller at the email address below;
- ii. Writing us a letter and sending it overnight mail with a well-known service; or
- iii. Sending us a fax at the number below.

- b. **Transferable Agreement.** Seller will accept and honor any valid and properly submitted claim made during the term of this Agreement by any person to whom Purchaser properly transfers the SSA.

**VII. NOTICE.** Notice shall be provided to the addresses below:

If to Seller:

SolarCity Corporation  
3055 Clearview Way  
San Mateo, CA 94402  
Attention: Contracts  
Telephone: 650-638-1028  
Facsimile: 650-638-1029  
Email; contracts@solarcity.com

If to Purchaser:

Janet Bunchman  
City of Mesa  
20 East Main Street Suite 400  
PO Box 1466  
Mesa Arizona 85211-1466

All notices under this Agreement shall be in writing and shall be by personal delivery, facsimile transmission, electronic mail, overnight courier, or regular, certified, or registered mail, return receipt requested, and shall be deemed received upon personal delivery, acknowledgment of receipt of electronic transmission, the promised delivery date after deposit with overnight courier, or five (5) days after deposit in the mail. Notices shall be sent to the party identified in this Agreement at the address set forth above or such other address as either party may specify in writing. Each party shall deem a document faxed or sent by electronic mail to it as an original document.

- VIII. APPLICABLE LAW / ARBITRATION.** Any dispute arising from or relating to this Agreement shall be arbitrated in Phoenix, Arizona. The arbitration shall be administered by the AAA in accordance with its Comprehensive Arbitration Rules and Procedures, and judgment on any award may be entered in any court of competent jurisdiction. If the Parties agree, a mediator may be consulted prior to arbitration. The prevailing party in any dispute arising out of this Agreement shall be entitled to reasonable attorneys' fees and costs.

- IX. ASSIGNMENT AND TRANSFER OF THIS AGREEMENT.** Seller may assign its rights or obligations under this Agreement to a third party without your consent, provided that any assignment of Seller's obligations under this Agreement shall be to a party qualified to perform such obligation. Seller shall provide notice of any such assignment. This Agreement protects only the party that hosts the System. Purchaser's rights and obligations under this Agreement will be automatically transferred to any party to whom Purchaser properly transfers the SSA.

- X. ENTIRE AGREEMENT: CHANGES.** This Agreement contains the parties' entire agreement regarding the matters set forth herein. Seller's obligations under this Agreement are separate and distinct from the obligations of the Seller or its assigns under the SSA. No breach of this Agreement shall affect Purchaser's obligations under the SSA. The SSA may be assigned to a third party without assignment of Seller's obligations under this Agreement. Any change to this Agreement must be in writing and signed by both Parties. If any portion of this Agreement is determined to be unenforceable, the remaining provisions shall be enforced in accordance with their terms or shall be interpreted or re-written so as to make them enforceable. Provisions that should reasonably be considered to survive termination of this Agreement shall survive.

**City of Mesa**

**SolarCity Corporation**

Signature: \_\_\_\_\_

Signature: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_