



**Loan Agreement By And Between East Bay Community Energy Authority and**

**[Borrower Company Name]**

This Loan Agreement (the “**Agreement**”), dated as of [Date], is entered into by and between the by and between East Bay Community Energy Authority, a joint powers authority formed under the laws of the State of California (“EBCE”), and [Borrower Company Name], a [State of incorporation] [Company Type] (the “Borrower”).

**RECITALS**

1. [Add as necessary]
2. [Add as necessary]
3. [Add as necessary]
4. [Add as necessary]
5. For the foregoing reasons, the EBCE Board of Directors has authorized a loan to Borrower in the amount of **[XX Dollars] ($XX,000,000)**.
6. The proceeds of the loan shall be used solely for [Description of purpose] (the “Project”).

**NOW, THEREFORE, IN CONSIDERATION OF THE MUTUAL COVENANTS AND CONDITIONS CONTAINED HEREIN, AND OTHER VALUABLE CONSIDERATION, THE ADEQUACY OF WHICH IS HEREBY ACKNOWLEDGED, THE PARTIES AGREE AS FOLLOWS:**

# **DEFINITIONS; CONSTRUCTION; EXHIBITS**

## **Definitions**

The following capitalized terms have the meanings set forth in this Section 1.01 wherever used in this Agreement, unless otherwise provided:

1. “**Agreement**” means this Agreement, as the same may be modified from time to time, pursuant to the terms hereof.
2. “**Business Day**” means a day other than: (i) a Saturday, (ii) a Sunday, or (iii) a day on which the administrative offices of the EBCE are closed.
3. “**EBCE**” means East Bay Community Energy Authority, a joint powers authority formed under the laws of the State of California
4. “**Default Rate**” means the interest rate equal to the lesser of: (i) 6.5 percent per annum, or (ii) if lower, the highest rate permitted by law.
5. “**Event of Default**” has the meaning set forth in Section 5.1.
6. “**Fiscal Year**” means calendar year or, if the Borrower uses another 12-month period as its annual accounting period, then such other 12-month period.
7. “**Funding Date**” means the first date on which EBCE funds the Loan.
8. “**Law**” means, collectively, all federal, state or local laws, rules, regulations, statutes, ordinances, codes, orders, injunctions or decrees.
9. “**Loan**” is the loan being made by EBCE to the Borrower pursuant to the terms of this Agreement.
10. “**Loan Documents**” means this Agreement and the Promissory Note.
11. “**Material Adverse Effect**” means a material adverse effect on: (i) the business, assets, operations, prospects or condition, financial or otherwise, of the Borrower, (ii) the ability of the Borrower to perform any of its obligations under the Loan Documents, or (iii) the rights of or benefits available to EBCE under the Loan Documents.
12. “**Payment Date**” means the last Business Day of each month, commencing on [Date].
13. “**Payment Schedule**” means the schedule set forth in Exhibit A, which sets forth the scheduled principal and interest payment for the Loan on each Payment Date.
14. “**Parties**” means EBCE and the Borrower.
15. “**Project**” has the meaning set forth in Recital J.
16. “**Promissory Note**” means the promissory note, in the form attached hereto as Exhibit B, that will evidence Borrower's obligation to repay the loan.
17. “**State**” means the State of California.

## **Construction**

### Unless the context otherwise indicates, words expressed in the singular shall include the plural and vice versa and the use of the neuter, masculine, or feminine gender is for convenience only and shall be deemed to include the neuter, masculine or feminine gender, as appropriate.

### Headings of sections in this Agreement are solely for convenience of reference, do not constitute a part of this Agreement and shall not affect the meaning, construction or effect of the provisions of this Agreement.

### Each of the Parties affirms that it has reviewed and understood each and every provision of this Agreement and has consulted an attorney before executing this Agreement. As such, no court or other judicial authority shall construe any provision of this Agreement against any party by reason of such party’s being deemed to have drafted such provision.

## **Exhibits**

The following exhibits are attached to this Agreement and incorporated into this Agreement by reference:

Exhibit A: Payment Schedule

Exhibit B: Form of Promissory Note

Exhibit C: Form of Officers Certificate

Exhibit D: California Labor Code Compliance

# **LOAN TERMS; PAYMENTS**

## **Loan**

### EBCE agrees, subject to the terms and conditions set forth in this Agreement, to make the Loan in the principal amount of **[XX Dollars] ($XX,000,000)** to Borrower for the Project.

### The Loan shall be evidenced by the Promissory Note, in substantially the form set forth in Exhibit B.

### The Loan shall bear interest, commencing on [Date], at the rate of **[XX percent] (X%)** per annum (calculated on the basis of a 360-day year of twelve 30-day months), and shall be payable on each Payment Date in the amounts set forth in the Payment Schedule set forth in Exhibit A.

### Notwithstanding the foregoing, upon the occurrence of an Event of Default and so long as it is continuing and remains uncured, the Loan shall bear interest at the Default Rate. Interest due based on such Default Rate shall be in addition to any fee due pursuant to Section 2.03(c).

## **Prepayment**

### Subject to the provisions of this Section 2.02 and Section 2.03 below, the Borrower may prepay all or a portion of the outstanding principal together with accrued interest thereon of the Loan on any Payment Date without penalty, in addition to scheduled principal and interest payment due on that Payment Date.

### Unless otherwise agreed in writing by the CEO of EBCE, any partial prepayment shall be applied to scheduled principal payments in inverse order of maturity (*i.e.*, with the latest due date).

### At least fifteen (15) days before any prepayment, the Borrower shall send to EBCE: (i) a written notice specifying the prepayment amount and (ii) unless no principal amount of the Loan will remain outstanding after such prepayment, a proposed revised Payment Schedule to become effective after such prepayment. EBCE shall notify the Borrower at least five (5) days before the proposed prepayment date whether such revised Payment Schedule is acceptable to EBCE. If EBCE has any objection to the proposed revised Payment Schedule, then the Parties shall cooperate in good faith to make mutually acceptable revisions. No prepayment shall be made or accepted until EBCE and the Borrower agree on a revised Payment Schedule.

## **Payments Generally**

### Borrower shall make each payment required to be made under the Loan Documents no later than 12:00 PM on its respective due dates, in immediately available funds in lawful money of the United States of America, without set-off, counterclaim, withholding or deduction of any kind whatsoever. Such payments shall be either by cashier’s check, certified check, or by wire/electronic transfer, and sent to the following (provided, that EBCE may designate a different address or a different account in writing from time to time):

#### If by check, made to “East Bay Community Energy” (with “[XXXX]” in the reference line) and sent to East Bay Community Energy Attention: CEO 1999 Harrison Street, Suite 800 Oakland, CA 94612

#### If by wire/electronic transfer, to the following account:

[ACCOUNT INFORMATION]

### If at any time EBCE receives insufficient funds from the Borrower to pay fully all amounts of principal, interest and fees then due hereunder, such funds received shall be applied: (i) first, to pay costs, expenses and fees due to EBCE hereunder, (ii) second, to pay interest then due hereunder, (iii) third, to pay principal then due hereunder; provided that, after the occurrence and during the continuation of an Event of Default, EBCE may apply insufficient funds differently at its sole discretion.

### In addition, if any principal of or interest on the Loan or other amount payable by the Borrower hereunder past due, remains unpaid for five (5) days, after written notice by EBCE, whether due at stated maturity, upon acceleration or otherwise, the Borrower agrees to pay a late charge of [XX percent] (X%) of the amount which is past due. The parties agree that such late charge represents the reasonable estimate of a fair average compensation to EBCE for additional expenses to process such delinquency.

# **FUNDING; CONDITIONS PRECEDENT TO FUNDING OF LOAN**

## **Funding**

### The Funding Date shall be the date on which EBCE issues a written acknowledgment that Borrower has satisfied the conditions set forth in Section 3.02. In the event that the Funding Date has not occurred on or before [Date], this Agreement shall terminate and EBCE shall have no further obligation hereunder.

### On the Funding Date EBCE shall issue a check or wire transfer to the Borrower in the amount of [XX Dollars] ($XX,000,000) (the “Original Funding Amount”), in lawful moneys of the United States of America. Funds shall be transferred to:

[Borrower Name]

Bank Name: [Borrow to add]

Account #: [Borrow to add]

Routing #: [Borrow to add]

### At such time that Borrower has used the Original Funding Amount, but no later than [Date], Borrower shall provide written notice to EBCE, along with such other information requested by EBCE regarding Borrower’s use of the Original Funding Amount. Following receipt of such notice and in the sole and absolute discretion of EBCE, EBCE shall pay Borrower an additional amount of [XX Dollars] ($XX,000,000) (the “Additional Funding Amount”), in the manner provided in paragraph (b) above. In the event that the Additional Funding Amount is paid after [Date], EBCE shall revise the Payment Schedule in Exhibit A.

### On or before [Date], Borrower shall provide EBCE a report about: (i) the use of the Original Funding Amount and the Additional Funding Amount, (ii) the balance remaining as of the report date, and (iii) the balance estimated to be remaining as of [Date]. On or after [Date], EBCE may, in its sole and absolute discretion, issue a written demand for Borrower to return any unused funds. Upon receipt of such notice, Borrower shall not enter into any agreements to use remaining funds and shall return to EBCE the amount demanded by EBCE within [XX] days.

## **Conditions Precedent**

### The obligations of EBCE to make the Loan hereunder shall not become effective until EBCE shall have received the following on or before the Funding Date:

#### Executed copies of this Agreement and the Promissory Note.

#### A true, correct and complete copy of each of: (A) the Certificate of Formation of the Borrower, (B) the current operating agreement of the Borrower, and (C) a Certificate of Good Standing (or similar document), issued by the Secretary of State within thirty (30) days of the Funding Date, showing the Borrower’s good standing to conduct business in the State.

#### Financial statements of the Borrower for the two full Fiscal Years completed before the Funding Date (which may be unaudited financial statements, if no audited financial statements have not been prepared and, therefore, unavailable).

#### A written description of any event or change since the end of the period covered by the Borrower’s most recent audited financial statements, which may have a Material Adverse Effect.

#### The Borrower’s most recent cash flow projection reasonably forecasting the next five years of operations (including revenues, expenses and capital expenditures) for: (i) the Borrower, and (ii) the Project.

#### Evidence of the insurance coverage meeting the requirements of Section 5.06 below (which shall include disclosure regarding all applicable deductibles).

#### A certificate of the Parent of the Borrower’s CEO and CFO, dated the Funding Date, in substantially the form set forth in Exhibit C.

#### The signed acknowledgement set forth in Exhibit D.

#### Such other certificates, instruments and other documents as EBCE may reasonably request.

### If the Borrower shall be unable to satisfy the conditions set forth in this Section 3.02, or if EBCE shall determine in good faith (and provide written notice to the Borrower) that there has been a change in law which prohibits the funding of the Loan, then this Agreement shall terminate and the Borrower and EBCE shall be under no further obligation hereunder.

# **REPRESENTATIONS AND WARRANTIES OF BORROWER**

The Borrower represents and warrants to EBCE that, as of the date of this Agreement and as of the Funding Date:

## **Organization; Authorization**

### The Borrower is a limited liability company duly organized, validly existing and in good standing under the laws of the State of [borrower state of incorporation] and has the corporate power and authority to carry on its business as it is now being conducted and to own, operate and lease its properties and assets in the State of California.

### The Borrower has the full power, authority and legal right to undertake the Project.

### The Borrower has full power, authority and legal right to enter into and execute the Loan Documents.

## **Enforceability; No Conflict**

### The Loan Documents and all other documents or instruments executed or delivered in connection herewith have been duly authorized by all necessary action on the part of the Borrower, have been duly executed and delivered and are the legal, valid and binding obligations of Borrower and are enforceable in accordance with their respective terms, subject to applicable bankruptcy, insolvency, reorganization, moratorium and other laws affecting creditors’ rights generally and subject to general principles of equity, regardless of whether considered in a proceeding in equity or at law.

### The execution, delivery and performance by Borrower of the Loan Documents do not and will not conflict with, or result in, any breach or violation of any of the terms and conditions of, or constitute a default under, or give rise to a right to require the Borrower to make any payment under, or result in the creation of any lien or encumbrance upon any assets or properties of the Borrower pursuant to: (a) the certificate of formation or operating agreement or other organizational or constituent documents of Borrower, (b) any Law or requirement imposed under any permit or by any governmental authority applicable to Borrower, (c) any judicial order, judgment, injunction or decree to which the Borrower is a party or by which it is bound or (d) any agreement to which the Borrower is a party or by which it is bound.

## **Audited Financial Statements; Cash Flow Projections**

### The financial statements delivered by the Borrower to EBCE present fairly, in all material respects, the financial position of the Borrower as of their respective dates. Except as disclosed to EBCE in writing, since the date of the most recent financial statements, there has been no material adverse change in the business, assets, operations, prospects or condition (financial or otherwise) of the Borrower.

### The cash flow projections provided to EBCE regarding the Borrower and the Project have been prepared in good faith and reflect the true expectation of the Borrower (subject to reasonable assumptions), based on the experience of the Borrower.

## **Outstanding Indebtedness**

### Borrower does not have any outstanding indebtedness except: (i) the indebtedness evidenced by the Note, (ii) debt pursuant to Regulation CF and (iii) as previously disclosed to EBCE in writing or included in the submitted financial statements.

### Except as previously disclosed to EBCE in writing, there are no outstanding liens on record against any of the Borrower’s properties or assets.

## **Insurance**

All premiums in respect of all insurance maintained by or on behalf of the Borrower, including all insurance required hereunder, have been paid. The Borrower believes that the insurance maintained by or on behalf of the Borrower is adequate.

## **Compliance with Laws and Agreements**

### The Borrower is in compliance with all Laws applicable to it or its property and all leases, agreements and other instruments binding on it or its property, except where failures to do so, in the aggregate, could not reasonably be expected to result in a Material Adverse Effect. No material default (however defined) under any such agreement or instrument has occurred and is continuing.

### The Borrower has timely filed or caused to be filed all tax returns and reports required to have been filed by it and has paid or caused to be paid all taxes required to have been paid by it as and when due.

## **No Litigation**

There are no actions, suits or proceedings pending against or, to the knowledge of the Borrower, threatened against or affecting the Borrower by or before any arbitrator or court or governmental or administrative body or agency. The Borrower is not subject to any judgment, confession of judgment, injunction, decree, order, order to show cause, writ, lien or attachment of any kind, whether or not final or contingent, and none of the foregoing has been filed, recorded or otherwise attached to any of Borrower’s assets or properties.

## **Disclosure**

The Borrower has disclosed to EBCE all agreements, instruments and corporate or other restrictions to which Borrower is subject, and all other matters known to it that, individually or in the aggregate, could reasonably be expected to result in a Material Adverse Effect. None of the information contained in this Agreement or any other instrument, document, list, certificate, statement, schedule or exhibit delivered to EBCE in connection with the negotiation of this Agreement or the Promissory Note or delivered hereunder or thereunder (as modified or supplemented by other information so furnished) contains any untrue statement or material fact or omits to state a material fact necessary in order to make the statements contained herein or therein not misleading.

# **COVENANTS**

So long as any portion of the Loan remains outstanding or any other amount is unpaid hereunder, the Borrower shall comply with the following covenants:

## **Continuation of Business**

### The Borrower shall not assign, sell, transfer, dispose or encumber its assets or revenues (including accounts receivables) or rights with respect thereto, in any manner that would adversely affect its continuing existence or otherwise reasonably be expected to have a Material Adverse Effect.

### Borrower shall obtain and maintain in full force such government approval, authorization, certificate of need, license, or designation as required to operate its business.

## **Undertaking of Project; Use of Proceeds; Applicability of Prevailing Wage Requirements**

### The Borrower shall use proceeds of the Loan solely for the Project.

### The Borrower acknowledges that use of the proceeds of the Loan outside of the scope of the Project may constitute a “gift of public funds,” which is prohibited by Cal. Const., art. XVI, §6.

### The Borrower acknowledges that, in view of the benefit conferred by EBCE’s assistance to the Project in the form of the Loan, use of Loan for any construction is subject to the provisions of Division 2, Part 7, Chapter 1 (commencing with Section 1720) of the California Labor Code, as if they are undertaken by EBCE. The Borrower agrees to comply with, and to require any and all contractors performing construction, alteration, demolition, installation, repair work or any other work constituting a public work as described in California Labor Code Section 1720, in connection with the Project, to comply with the provisions set forth in Exhibit D.

## **Compliance with Law and Contracts**

### The Borrower shall conduct its business in a manner that complies with all applicable Law.

### Borrower will not commit any default on its contractual obligations in any manner which could reasonably be expected to result in a Material Adverse Effect.

## **Payment of Indebtedness and Other Obligations; Incurrence of Other Indebtedness or Creation of Lien**

### Borrower shall pay and discharge, when due (i) all of its debts and other obligations and liabilities, including, but not limited to, payroll obligations, and (ii) all taxes, assessments and other governmental charges on its income and properties, in each case as and when the same are due, and in all events before the same shall become delinquent or in default such that interest or penalties would accrue, except where: (I) the validity or amount thereof is being diligently contested in good faith by appropriate proceedings, (II) the Borrower has set aside on its books reserves with respect thereto that are reasonably adequate, (III) such contest effectively suspends collection of the contested obligation and the enforcement of any lien securing such obligation, or Borrower has posted such bonds or other security or instruments as may be necessary to remove any such lien from title to any of Borrower’s assets or properties, and (IV) the failure to make payment pending such contest could not reasonably be expected to result in a Material Adverse Effect.

### Without EBCE’s prior written consent, the Borrower shall not borrow money from other sources (or enter into capital leases or similar instrument), that exceeds [XX Dollars] ($XX,000,000) in the aggregate.

### The Borrower shall not create, assume or allow any security interest or lien on any property that the Borrower now or later owns, except for: (i) liens and security interest in favor of EBCE, (ii) liens for taxes not yet due, (iii) liens outstanding on the date of this Agreement and disclosed to EBCE in writing, and (iv) liens arising in the ordinary course of business securing amounts the Borrower owes in the operation of its business.

## **Books and Records; Financial Statements**

### Borrower shall, at all times, keep proper books of record and account in which complete and correct entries are made of all transactions relating to its business and activities. The Borrower will permit any representatives designated by EBCE, upon reasonable prior notice, to visit and inspect its properties, to examine and make extracts from its books and records, to audit such books and records, and to discuss its affairs, finances and condition with its officers and independent accountants, all at such reasonable times and as often as reasonably requested.

### After the close of each calendar year, the Borrower shall cause an independent certified public accountant to prepare on a consolidated basis an audit of the financial transactions and records of EBCE for such Fiscal Year. No later than four (4) months days after the end of each Fiscal Year, the Borrower shall furnish to EBCE a copy of the full audited financial report for such Fiscal Year.

## **Insurance**

### Borrower shall procure and maintain general comprehensive liability insurance and automobile liability insurance (for any owned, non-owned or hired vehicle), against loss arising from personal injury and death or property damage caused by accident or occurrence, in the amount not less than One Million Dollars ($1,000,000.00) for any occurrence or accident, Two Million Dollars ($2,000,000.00) annual aggregate and naming EBCE and its officials, officers, employees, agents, and contractors as additional insured. Such insurance may be provided through a combination of primary and excess (or umbrella) policies. All such policies (other than umbrella policies, if such endorsement is not available for umbrella policies) shall name EBCE as an additional insured.

### The Borrower shall comply with all State requirements relating to the procurement and maintenance of workers’ compensation insurance, any state mandated disability benefits insurance, and such other forms of insurance which the Borrower is required by Law to provide in at least the coverage amounts required by Law.

### Borrower shall provide EBCE at least thirty (30) days prior written notice of cancellation of any policy required by this Agreement, except that the Borrower shall provide at least ten (10) days prior written notice of cancellation of any such policy due to non-payment of premium. If any of the required coverage is cancelled or expires during the term of this Agreement, the Borrower shall deliver renewal certificate(s) including the required Additional Insured endorsement to EBCE at least ten (10) days prior to the effective date of cancellation or expiration.

### All required policies of insurance shall be endorsed to waive the right of subrogation. All insurance policies obtained by the Borrower, including all deductibles, shall be reasonably satisfactory to EBCE. Copies of the insurance policies and endorsements for all insurance required to be obtained by Borrower shall be delivered to EBCE prior to the Funding Date.

## **Disclosure Notices**

### The Borrower shall furnish to EBCE prompt written notice of any of the following:

#### The occurrence of an Event of Default;

#### Any development in the business or affairs of the Borrower that results in, or could reasonably be expected to result in, a Material Adverse Effect; or

#### Any upcoming change in the senior management of the Borrower; or

#### Any upcoming change in the Borrower’s primary business location(s).

### Each notice delivered under this Section shall be accompanied by a statement describing the nature thereof and the action the Borrower proposes to take with respect thereto.

## **Indemnification; Costs and Expenses**

### To the fullest extent permitted by law, the Borrower shall indemnify defend, and hold harmless EBCE and its officials, officers, employees, agents, and contractors (collectively, the “Indemnitees”) against and hold the Indemnitees harmless from any and all claims, actions, suits, proceedings, damages, liabilities, reasonable costs, reasonable expenses (collectively, “Claims”), including attorneys’ fees, arising out of, connected with or resulting from any acts or omission to act by the Borrower (or the Borrower’s officers, employees, agents or contractors) in connection with or related to the Loan, this Agreement or the Project; provided, however, that the Borrower shall not be required to indemnify the Indemnitees for any Claims that are caused by the sole gross negligence, bad faith or willful misconduct of the Indemnitees.

### Borrower’s duty to indemnify, defend, and hold harmless EBCE and the Indemnitees shall extend to Claims, including attorneys’ fees, arising out of, connected with or resulting from any acts or omission to act by the Borrower (or the Borrower’s officers, employees, agents or contractors) in connection with or related to the requirements of Division 2, Part 7, Chapter 1 (commencing with Section 1720) of the California Labor Code.

### Borrower shall not assert, and hereby waives, any claim against any Indemnitee on any theory of liability, for special, indirect, consequential or punitive damages (as opposed to direct or actual damages) arising out of, in connection with, or as a result of, this Agreement, the Loan or the use of the proceeds thereof, or the Project.

### The Borrower shall promptly pay the reasonable out-of-pocket expenses and disbursements of EBCE, including reasonable attorney fees, and related expenses and disbursements, in connection with: (A) obtaining by the Borrower of any waiver or consent under this Agreement, the Loan or any Event of Default hereunder, (B) the preparation, execution, delivery, administration, defense and enforcement or preservation of rights in connection with a workout, restructuring or waiver with respect to the Loan, and (C) the occurrence of an Event of Default and collection and other enforcement proceedings resulting therefrom.

### The Borrower shall pay all amounts due under this Section 5.08 within twenty (20) days after written demand.

### The provisions of this Section 5.08 shall survive the repayment of the Loan and the termination of this Agreement.

## **Equal Opportunity Employer**

The Borrower shall not discriminate against any employee or applicant for employment because of race, religion, color, national origin, ancestry, sex, age or other interests protected by the State or Federal Constitutions. Such non-discrimination shall include, but not be limited to, all activities related to initial employment, upgrading, demotion, transfer, recruitment or recruitment advertising, layoff or termination.

## **Further Assurances**

The Borrower shall preserve and protect the rights of EBCE pursuant to this Agreement. From and after the date of issuance of the Promissory Note, the Borrower will not contest the validity or enforceability of the Promissory Note or Loan Agreement. The Borrower shall take such action, and make, execute and deliver any and all such further instruments and assurances as may be reasonably necessary or proper to carry out the intention or to facilitate the performance of this Loan Agreement, and for the better assuring and confirming unto EBCE of its rights and benefits provided in the Loan Documents.

# **EVENTS OF DEFAULT**

## **Events of Default**

The occurrence of any of the following events shall constitute an “Event of Default” hereunder:

### The Borrower shall have failed to make a payment required hereunder when after payment becomes due, EBCE sends written notice to Borrower and such failure continues for five (5) days after the date of written notice; or

### Failure by the Borrower to observe and perform any covenant, condition or agreement on its part to be observed or performed, other than as referred to in Section 6.01(a), for a period of thirty (30) days after written notice, specifying such failure and requesting that it be remedied, is given to the Borrower by EBCE, unless EBCE agrees in writing to an extension of such time prior to its expiration; provided, if the failure stated in the notice cannot be corrected within the applicable period, EBCE will not unreasonably withhold its consent to an extension of such time if corrective action is instituted by the Borrower within the applicable period and diligently pursued until the default is corrected; or

### Any representation or warranty made by the Borrower set forth herein or in any information concerning the Borrower’s business operation or financial condition submitted by the Borrower to EBCE in connection with the Loan proves to have been incorrect in any material respect when made; or

### The Borrower is dissolved or liquidated or merged with or into any other entity; or, if Borrower ceases to exist in its present form and (where applicable) in good standing and duly qualified under the laws of the State; or all or substantially all of the assets of Borrower are sold or otherwise transferred; or

### The Borrower is subject to an order for relief by the bankruptcy court, or is unable or admits in writing its inability to pay its debts as they mature or makes an assignment for the benefit of creditors; or the Borrower applies for or consents to the appointment of any receiver, trustee or similar official for Borrower or for all or any part of its assets (or an appointment is made without its consent and the appointment continues undischarged and unstayed for sixty (60) days); or the Borrower institutes or consents to any bankruptcy, insolvency, reorganization, arrangement, readjustment of debt, dissolution, custodianship, conservatorship, liquidation, rehabilitation or similar proceeding relating to Borrower or to all or any part of its assets under the laws of any jurisdiction (or a proceeding is instituted without its consent and continues undismissed and unstayed for more than sixty (60) days); or any judgment, writ, warrant of attachment or execution or similar process is issued or levied against the improvements or any other assets of Borrower and is not released, vacated or fully bonded within sixty (60) days after its issue or levy; or

### The Borrower is in default of its obligations under any other agreement entered into with EBCE, and the default remains uncured following the expiration of any applicable cure periods.

## **Default Rate; Acceleration**

### Pursuant to Section 2.01(d), upon the occurrence of an Event of Default and so long as it is continuing and remains uncured, the Loan shall bear interest at the Default Rate.

### Upon the occurrence of an Event of Default, EBCE may, by notice in writing to the Borrower, declare the principal of the Loan then outstanding, the interest accrued thereon and any other charges due hereunder and under the Promissory Note, to be due and payable immediately, and upon any such declaration, the same shall become and shall be immediately due and payable, without protest, presentment, notice of dishonor, demand or further notice of any kind, all of which the Borrower expressly waives.

## **Other Remedies; Remedies Not Exclusive**

### EBCE may take whatever other action at law or in equity may appear necessary or desirable to enforce its rights under this Agreement.

### No remedy conferred upon or reserved to EBCE in this Agreement is intended to be exclusive of any other remedy. Every such remedy shall be cumulative and shall be in addition to every other remedy given under this Agreement or now or hereafter existing, at law or in equity or by statute or otherwise, and may be exercised without exhausting and without regard to any other remedy conferred by law.

## **Non-Waiver**

A waiver by EBCE of any default or breach of duty or contract hereunder shall not affect any subsequent default or breach of duty or contract, or impair any rights or remedies on any such subsequent default or breach. No delay or omission by a party hereunder to exercise any right or power accruing upon any default shall impair any such right or power or shall be construed to be a waiver of any such default or an acquiescence in such default, and every power and remedy conferred upon the party by law or by this Agreement may be enforced and exercised from time to time and as often as shall be deemed expedient by EBCE.

## **Restoration of Positions**

If a suit, action or proceeding to enforce any right or exercise any remedy is abandoned or determined adversely to EBCE, the Borrower and EBCE shall be restored to their former positions, rights and remedies as if such suit, action or proceeding had not been brought or taken, subject to any court directions or agreements by the Parties.

# **MISCELLANEOUS**

## **Notices**

Any notice, request, complaint, demand or other communication under this Loan Agreement shall be given by first certified or registered mail or personal delivery to the party entitled thereto at its address set forth below, by overnight mail, as a .pdf attachment to electronic mail, or by telecopy or other form of telecommunication (provided, for any electronic mail, telecopy or other form of telecommunication, the sender shall obtain confirmation of receipt of the communication by the receiving party). Notice shall be effective either: (i) upon transmission by telecopy or other form of telecommunication, (ii)  forty-eight (48) hours after deposit in the United States mail, postage prepaid, (iii) in the case of overnight mail, upon delivery to the addressed destination, or (iv) in the case of personal delivery to any person, upon actual receipt. Each entity below may, by written notice to the other party from time to time, modify addresses, telephone or e-mail addresses to which communications are to be given under this Agreement.

To EBCE: East Bay Community Energy  
1999 Harrison Street, Suite 800

Oakland, CA 94612  
Attention: [EBCE to add]  
Telephone: [EBCE to add]  
E-mail: [EBCE to add]

To Borrower: [Borrower Name]

[Borrower Address]

[Borrower Address]

Attention: [Borrower to add]  
Telephone: [Borrower to add]  
E-mail: [Borrower to add]

## **No Third Party Beneficiaries**

Nothing in this Agreement or the Promissory Note, expressed or implied, is intended to give to any entity or person other than EBCE and the Borrower any right, remedy or claim under or by reason of this Loan Agreement.

## **EBCE Obligations Limited to Funding of Loan**

EBCE’s sole obligation under this Agreement is limited to providing the funds for the Loan as described in this Agreement, subject to the conditions precedent set forth herein. Under no circumstances, including breach of this Agreement, will EBCE be liable to the Borrower for any special or consequential damages arising out of actions or failure to act by EBCE in connection with the Loan or the Loan Documents.

## **Inurement; Assignment**

The benefits of this Agreement shall inure to the successors and assigns of EBCE and the Borrower, as applicable; provided, that the Borrower may not assign this Agreement or the Promissory Note (or delegate any obligations hereunder or thereunder) without EBCE’s prior consent of EBCE, which may be given or withheld in EBCE’s sole and absolute discretion. EBCE may transfer or assign its interest in this Agreement and the Note.

## **Amendments**

This Agreement may be amended only in writing signed by the parties hereto.

## **Severability**

The unenforceability or invalidity of any provision or provisions of this Agreement (as determined by a court of competent jurisdiction) as to any persons or circumstances shall not render that provision or those provisions unenforceable or invalid as to any other provisions or circumstances, and all provisions of this Agreement, in all other respects, shall remain valid and enforceable.

## **Integration**

This Agreement, together with all exhibits hereto, constitutes the entire understanding and agreement of the parties with respect to the subject matters hereof, and integrates all of the terms and conditions mentioned herein or incidental thereto, and supersedes all prior or contemporaneous negotiations, discussions and previous agreements between EBCE and the Borrower concerning all or any part of the subject matter of this Agreement.

## **Business Days**

Whenever a scheduled Payment Date is not a Business Day, such payment may be made on the next succeeding Business Day. When any other action is provided for in this Agreement to be done on a day within a specified time period, and the day or the last day of the period falls on a day other than a Business Day, such action may be performed on the next ensuing Business Day with the same effect as though performed on the appointed day or within the specified period.

## **Governing Law; Venue**

This Agreement shall be governed and construed in accordance with the laws of the State of California. Venue for any legal action arising out of this Agreement shall be Alameda County, California.

## **Execution in Counterparts**

This Agreement may be executed in any number of counterparts and each of such counterparts shall for all purposes be deemed to be an original; and all such counterparts shall together constitute but one and the same instrument.

**IN WITNESS WHEREOF**, each of EBCE and the Borrower has caused this Agreement to be signed in its name by its duly authorized representative, all as of the date first above written.

| EBCE:  East Bay Community Energy, a California municipal corporation  By:   Nick Chaset  CEO | BORROWER:  [Borrower Company Name], a [State of incorporation] [Company Type]  By:   [Name]  [Title] |
| --- | --- |
|  |  |
| APPROVED AS TO FORM:    By:   Inder Khalsa  General Counsel |  |

**EXHIBIT A**

**PAYMENT SCHEDULE[[1]](#footnote-0)**

| Date | Month | Draw Down | Begin Balance | Interest | Payment | End  Balance |
| --- | --- | --- | --- | --- | --- | --- |

**EXHIBIT B**

**FORM OF PROMISSORY NOTE**

**PROMISSORY NOTE**

**Note Amount: [$XX,000,000] Date: \_\_\_\_\_\_\_\_\_\_\_\_**

FOR VALUE RECEIVED, **[Borrower Company Name], [Company Type], a [State of incorporation] [Company Type]** (the “**Borrower**”) promises to pay to East Bay Community Energy Authority, a joint powers authority formed under the laws of the State of California (the “**EBCE**”), the sum of **[XX Dollars] ($XX,000,000)**, plus accrued interest, and other charges owing hereunder.

This Promissory Note (the “**Note**”) evidences that certain Loan made pursuant to the Loan Agreement, dated as of [Date] (the “**Loan Agreement**”), by and between EBCE and Borrower. Capitalized term used but not defined herein have the meanings set forth in the Loan Agreement. The Loan Agreement (as the same many be amended and supplemented from time to time pursuant to the terms thereof) is hereby incorporated as though set forth herein.

The Loan was made to assist the Borrower with respect to a Project to [Insert description of purpose from Recitals in Loan Agreement].

1. Loan Terms; Payment Schedule

### So long as no Event of Default has occurred and continuing, interest shall accrue at the rate of **[XX percent] (X%)** per annum. Interest shall be calculated on the basis of a 360-day year of twelve 30-day months.

### The Borrower shall make principal and interest payment on the first of each month, commencing [Date], in the amounts set forth the Payment Schedule set forth in **Exhibit A**. As reflected in the Payment Schedule, in the absence of any prepayment (or default), the final Payment Date is [Date].

### Subject to the provisions of the Loan Agreement, the Borrower may prepay all or a portion of the outstanding principal amount of the Loan on any Payment Date, in addition to scheduled principal and interest payment due on that Payment Date. Unless otherwise agreed in writing by the CEO of EBCE, any partial prepayment shall be applied to scheduled principal payments in inverse order of maturity (*i.e.*, with the latest due date). At least fifteen (15) days before any prepayment, the Borrower shall send to EBCE: (i) a written notice specifying the prepayment amount, and (ii) unless no principal amount of the Loan will remain outstanding after such prepayment, a proposed revised Payment Schedule to become effective after such prepayment. EBCE shall notify the Borrower at least five (5) days before the proposed prepayment date whether such revised Payment Schedule is acceptable to EBCE. If EBCE has any objection to the proposed revised Payment Schedule, then the parties shall cooperate in good faith to make mutually acceptable revisions. No prepayment shall be made or accepted until EBCE and the Borrower mutually agree on a revised Payment Schedule.

1. No Waiver by EBCE

A waiver by EBCE of any default or breach of duty or contract hereunder or under the Loan Agreement shall not affect any subsequent default or breach of duty or contract, or impair any rights or remedies on any such subsequent default or breach. No delay or omission by EBCE to exercise any right or power accruing upon any default shall impair any such right or power or shall be construed to be a waiver of any such default or an acquiescence in such default, and every power and remedy conferred upon EBCE hereby or this Note or the Loan Agreement may be enforced and exercised from time to time and as often as shall be deemed expedient by EBCE.

1. Severability; Governing Law; Amendment

### The unenforceability or invalidity of any provision or provisions of this Note (as determined by a court of competent jurisdiction) as to any persons or circumstances shall not render that provision or those provisions unenforceable or invalid as to any other provisions or circumstances, and all provisions of this Note, in all other respects, shall remain valid and enforceable.

### This Note has been executed and delivered by Borrower in the State of California and is to be governed and construed in accordance with the laws thereof.

### Neither this Note nor any term hereof may be waived, amended, discharged, modified, changed, or terminated orally; nor shall any waiver of any provision hereof be effective except by an instrument in writing signed by Borrower and EBCE.

1. Certain Waivers by Borrower

The Borrower hereby waives for itself and any person or entity who now or may hereafter become liable with respect to this Note, to the fullest extent permitted by law, diligence, presentment, protest and demand, notice of dishonor and all other notices and demands without in any way affecting the liability of the Borrower and any other person or entity who now or may hereafter become liable with respect to this Note. The Borrower further waives, to the full extent permitted by law, the right to plead any and all statutes of limitations.

1. Assignment

The Borrower may not assign this Note (or delegate any obligations hereunder) without EBCE’s prior written consent, which may be given or withheld in EBCE’s sole and absolute discretion. EBCE may transfer or assign its interest in this Note.

IN WITNESS WHEREOF, the Borrower has caused this Note to be executed in its name and on its behalf by its CEO, on the date first written above.

| EBCE:  East Bay Community Energy, a California municipal corporation  By:   Nick Chaset  CEO | BORROWER:  [Borrower Company Name], a [State of incorporation] [Company Type]  By:   [Name]  [Title] |
| --- | --- |
|  |  |
|  | *[To be notarized]* |

***[Attach Exhibit A from Loan Agreement]***

**EXHIBIT C**

**FORM OF OFFICERS CERTIFICATE**

**CERTIFICATE OF   
[Borrower] CEO AND CFO**

with reference to

*Loan Agreement, dated as of [Date] (the “****Loan Agreement****”),   
by and between East Bay Community Energy, as Lender,  
and [Borrower Name], a [State of incorporation] [Company Type] (****“[Borrower Name]****”),   
as Borrower*

With reference to the above-captioned Loan Agreement, the undersigned hereby state and certify as follows:

1. The undersigned [CEO Name] is the duly acting Chief Executive Officer of [Borrower Name], and the undersigned [CFO Name] is the duly acting Chief Financial Officer of [Borrower Name]
2. By all necessary actions, [Borrower Name] has duly authorized and approve the execution and delivery of the Loan Agreement and the Promissory Note, and [Borrower Name] has duly executed and deliver the same.
3. The undersigned are familiar with, and understand, the provisions of the Loan Agreement.
4. The representations of [Borrower Name] contained in the Loan Agreement are true and correct in all material respects on and as of the date hereof with the same effect as if made on the date of.

Capitalized terms used but not defined herein have the meanings ascribed to them in the Loan Agreement.

Each of the undersigned declare under penalty of perjury under the laws of the State of California that the statements contained herein are true and correct.

Date: [Date]

| [CEO Name] | [CFO Name] |
| --- | --- |

**EXHIBIT D**

**CALIFORNIA LABOR CODE COMPLIANCE**

1. Borrower (below for the purposes of this Exhibit, “Contractor”) acknowledges that in view of the financial assistance provided by EBCE to the Project, work for the Project is subject to the provisions of Division 2, Part 7, Chapter 1 (commencing with Section 1720) of the California Labor Code relating to public works and EBCE. Contractor agrees to be bound, and to require any and all contractors and subcontractors performing such work to be bound, by all the provisions thereof as though set forth in full herein.

2. Work for the Project is considered the same as a public work project and requires the payment of prevailing wages for the work or craft in which the worker is employed for any public work done under the contract by Contractor or by any subcontractor pursuant to Section 1771 of the Labor Code. Pursuant to the provisions of Section 1773 of the Labor Code of the State of California, EBCE has obtained the general prevailing rate of per diem wages and the general rate for holiday and overtime work in this locality for each craft, classification, or type of workman needed to execute this contract from the Director of the Department of Industrial Relations. These rates are on file with EBCE’s Clerk or may be obtained at <http://www.dir.ca.gov/OPRL/DPreWageDetermination.htm>.

Copies may be obtained at cost at EBCE’s Clerk's office. Contractor shall post a copy of such wage rates at the job site and shall pay the adopted prevailing wage rates as a minimum. Contractor shall comply with the provisions of Sections 1775, 1776, 1777.5, 1777.6, and 1813 of the Labor Code. Pursuant to the provisions of 1775 of the Labor Code, Contractor shall forfeit to EBCE, as a penalty, not more than $200.00 for each calendar day, or portion thereof, for each laborer, worker, or mechanic employed, paid less than the stipulated prevailing rates for any work done under this contract, by the Contractor or by any subcontractor thereunder, in violation of the provisions of this Agreement.

3. In accordance with Labor Code Sections 1725.5 and 1771.1, and except for projects involving construction, alteration, demolition, installation, or repair work of $25,000 or less, or maintenance work of $15,000 or less, no contractor or subcontractor shall be qualified to bid on, be listed in a bid proposal, subject to the requirements of Section 4104 of the Public Contract Code, or engage in the performance of any public work contract unless currently registered and qualified to perform public work pursuant to Section 1725.5 [with limited exceptions for bid purposes, only, pursuant to Labor Code Section 1771.1(a)].

4. Pursuant to Labor Code Section 1776, Contractor shall maintain and make available an accurate record showing the name of each worker and hours worked each day and each week by each worker employed by Contractor performing services covered by this Agreement.  Contractor and its subcontractors shall furnish electronic certified payroll records to the Labor Commissioner in accordance with Labor Code Section 1771.4. The Project is subject to compliance monitoring and enforcement by the Department of Industrial Relations (the “DIR”). The Contractor is responsible for compliance with Section 1776 by itself and all of its subcontractors. This Project is subject to compliance monitoring and enforcement by the DIR. The Contractor shall post job site notices, as prescribed by regulation.

5. Contractor shall comply with and be bound by the provisions of Labor Code Sections 1777.5, 1777.6 and 1777.7 and California Code of Regulations Title 8, Section 200 *et seq*. concerning the employment of apprentices on public works projects. The Contractor shall be responsible for compliance with these Sections for all apprenticeable occupations. Before commencing Work on this Project, the Contractor shall provide EBCE with a copy of the information submitted to any applicable apprenticeship program. Within sixty (60) Days after concluding Work, Contractor and each of its Subcontractors shall submit to EBCE a verified statement of the journeyman and apprentice hours performed under this Contract.

6. Contractor agrees to comply with the provisions of California Labor Code Section 1813 concerning penalties for workers who work excess hours. The Contractor shall, as a penalty to EBCE, forfeit twenty-five dollars ($25) for each worker employed in the execution of the contract by the Contractor or by any subcontractor for each calendar day during which such worker is required or permitted to work more than eight (8) hours in any one (1) calendar day and forty (40) hours in any one calendar week in violation of the provisions of Division 2, Part 7, Chapter 1, Article 3 of the California Labor Code.

7. California Labor Code Sections 1860 and 3700 provide that every contractor will be required to secure the payment of compensation to its employees. In accordance with the provisions of California Labor Code Section 1861, Contractor hereby certifies as follows:

“I am aware of the provisions of Section 3700 of the Labor Code which require every employer to be insured against liability for workers’ compensation or to undertake self-insurance in accordance with the provisions of that code, and I will comply with such provisions before commencing the performance of the work of this contract.”

Date Signature \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**EXHIBIT E**

**TERMS OF PROJECTS TO BE FINANCED**

[Terms should be applicable to project type]

**EXHIBIT F**

**ANNUAL PROJECT REPORTING REQUIREMENTS**

Charging Infrastructure

* Number of operating charging stations at each project site (#)
* Ports installed at project sites (#)
* Capacity of each charging station (kW)
* Total energy consumed during the reporting period
  + Total kWh
  + Percentage used by participating customer owned/operated vehicles
  + Percentage used by other “public” MD/HD vehicles
* Total energy dispensed per charger
* Average energy dispensed per charge session
* Average charge duration
* Percentage of charging occurring overnight (5PM to 8AM)
* Maximum demand (kW) per charger
* Maximum demand for the project site (kW)

MD/HD Vehicles

* Sites where vehicles are domiciled (#)
* Zero-Emission (battery electric) vehicles supported by project site (#)
* Petroleum displacement (diesel gallons equivalent)
* Greenhouse gas emission reduction (GHG) (MT GHG)[[2]](#footnote-1)
* Oxides of Nitrogen (NOx) reduction (kg)
* Oxides of Sulfur (SOx) reduction
* Particulate Matter (PM10) reduction (kg)
* Particulate Matter (PM2.5) reduction (kg)
* Carbon Monoxide (CO reduction (kg)

1. Subject to adjustments pursuant to the terms of the Loan Agreement in the event of a prepayment or an Event of Default. [↑](#footnote-ref-0)
2. GHGs include carbon dioxide (CO2), methane (CH4), and nitrous oxide (N2O) multiplied by their respective global warming potentials as defined by the Intergovernmental Panel on Climate Change's published [Fifth Assessment Report](https://www.ipcc.ch/assessment-report/ar5/). [↑](#footnote-ref-1)