

RESOLUTION NO. _____

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF COLUSA APPROVING AN OPTION EXERCISE AND AGREEMENT TO RECEIVE AND DISBURSE FEDERAL INFLATION REDUCTION ACT INVESTMENT TAX CREDITS WITH BC&E COLUSA 1 LLC

WHEREAS, the City of Colusa and Company have entered into that certain Power Purchase Agreement dated July 18, 2023 (the “PPA”), that has considerable benefits to both the City of Colusa and Company; and

WHEREAS, to make such Power Purchase Agreement both attractive and beneficial to the City of Colusa, and as further consideration of such transaction, the parties have negotiated to provide to the City of Colusa an option (the “Option”) to purchase a 12.5% ownership stake in BC&E for a total consideration of \$1, as set forth in the Resolution of the Managing Members of the Company dated June 15, 2023 (the “Resolution”), and legally referred to under California Law as a “membership interest” (the “Units”); and

WHEREAS, BC&E, pursuant to the Operating Agreement of BC&E, and pursuant to California Law, has authorized the issuance of 100,000 Units to the Members of BC&E, and such 100,000 Units currently constitute 100% of the authorized Units of BC&E; and

WHEREAS, the Resolution has been unanimously approved by all the Members of BC&E pursuant to the Operating Agreement of BC&E; and

WHEREAS the City now desires to accept the option on the terms and conditions set forth in the Option Exercise and Agreement to Receive and Disburse Federal Inflation Reduction Act Investment Tax Credits.

NOW THEREFORE, THE CITY COUNCIL OF THE CITY OF COLUSA DOES HEREBY RESOLVE:

1. Recitals. The foregoing recitals are true and correct and made part of this Resolution.
2. Approval. The City of Colusa City Council approves the resolution and the Option Exercise and Agreement to Receive and Disburse Federal Inflation Reduction Act Investment Tax Credits is substantially the form attached as Exhibit A hereto and incorporated by reference herein.
3. Authorization. The City Council authorizes the City Manager to sign the Option Exercise and Agreement to Receive and Disburse Federal Inflation Reduction Act Investment Tax Credits and necessary and related documents required to effectuate the intent of said agreement, and:
4. Effective Date. This Resolution shall be effective immediately.

The City Clerk shall certify the passage and adoption of this Resolution and enter it into the book of original resolutions.

Passed and adopted this 20th day of August 2024, by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

DANIEL VACA, MAYOR

A TEST:

Shelly Kittle, City Clerk

Exhibit A to Resolution No.

OPTION EXERCISE AND AGREEMENT TO RECIEVE AND DISBURSE FEDERAL INFLATION REDUCTION ACT INVESTMENT TAX CREDITS

This Agreement ("Agreement") is made and entered into as of [Date], by and between BC&E USA COLUSA 1 LLC, a California Limited Liability Company ("BC&E" or "Company"), and the City of Colusa, California ("City"), collectively (the "Parties").

RECITALS

WHEREAS, the City has the right to acquire a 12.5% Unit interest in the Company pursuant to that certain Option Grant dated July 18, 2023, between the Company and the City.

WHEREAS, the Company has sufficient Units available under its Operating Agreement dated June 15, 2023, and the Managing Members have authorized the issuance of such Units as set forth in the Resolution of the Managing Members of the Company dated June 15, 2023, and in a form as demonstrated by a copy of Unit Certificate Number 12 attached hereto as Exhibit A.

WHEREAS the Company is eligible to receive certain investment tax credits ("ITCs") under the Federal Inflation Reduction Act by virtue of the construction of the HREC conversion facility located in Colusa, California (the "Conversion Facility").

WHEREAS the Company qualifies for certain ITCs under the Federal Inflation Reduction Act and has taken such acts as necessary and sufficient to satisfy the IRS safe harbor requirement and other general qualifications for Company to qualify and to file for and claim the ITCs, and therefore the Company intends to file a tax return for the tax year 2023 to claim ITCs available under the Federal Inflation Reduction Act.

WHEREAS the Company desires, under the Direct Pay Option through the IRS vetting process, to designate the City as the recipient of the ITCs, and the City agrees to receive and distribute the ITCs.

NOW, THEREFORE, in consideration of the mutual covenants and agreements herein contained, the parties hereto agree as follows:

SECTION 1: EXERCISE OF OPTION

1.1 Exercise of Option. The City hereby exercises its right to acquire a 12.5%-unit interest in the Company pursuant to the Option Grant, upon satisfaction of the conditions set forth in section 1.2 below, and as allowed by Company's Operating Agreement and as authorized by the Managing Members of the Company in a Unit Certificate. Company shall issue said Unit Certificate within 10 business days of the execution of this Agreement and the passage of Resolution Number ___ of the City Council of City, authorizing the City Manager of City to enter into this Agreement.

1.2 Requirement for an Agreement on Disbursement of City Funds. This exercise and acceptance of the Option is conditioned upon execution by the parties of an Agreement for Disbursement of City Funds, which will contain the terms and conditions upon which City will invest tax credits or other valuable consideration into the Company for purposes of developing the project.

SECTION 2: COLLECTION AND DISBURSEMENT OF ITCs

2.1 Filing for ITCs. City and Company shall seek and rely upon the advice of a neutral tax attorney who specializes in tax credit financing for public private partnerships and either the Company shall file a tax return for the tax year 2023 to claim the ITCs available under the Federal Inflation Reduction Act for the construction of the HREC conversion facility or the City will file appropriate forms with the Internal Revenue Service to obtain investment tax credit funds for investment into the project, subject to the terms and conditions of the Agreement for Disbursement of City Funds.

2.2 Designation of Recipient. If appropriate and necessary to utilize the elective pay provisions of the Inflation Reduction Act of 2022, the Company shall designate the City as the recipient of the full amount of the ITCs, that Company is entitled to receive because of the construction of the HREC conversion facility located in Colusa CA.

SECTION 3: INSURANCE

3.1 Tax Credit Recapture Insurance. The Company shall, at its cost and expense, obtain a tax credit recapture insurance policy that insures the City for any liability to the United States government, the United States Treasury, or the Internal Revenue Service for the recapture of any and all ITCs that the City has received pursuant to their investment of tax credit funds into the project, as well as penalties and interests should same be charged, due to any event which triggers a recapture claim to be made against the City or City's interest in the Company. The acquisition of this insurance policy is required before City disburses any funds related to the development of the Conversion Facility, excepting therefrom the actual cost of the recapture insurance policy.

SECTION 4: MISCELLANEOUS

4.1 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of California.

4.2 Entire Agreement. This Agreement constitutes the entire agreement between the parties pertaining to the subject matter hereof and supersedes all prior agreements and understandings of the parties in connection therewith.

4.3 Amendment. This Agreement shall only be amended in writing and signed by both parties.

4.4 **Successors and Assigns.** This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and assigns.

4.5 **Severability.** If any provision of this Agreement is held to be invalid or unenforceable for any reason, the remaining provisions will continue in full force without being impaired or invalidated in any way.

4.6 **Notices.** Any notice required or permitted to be given under this Agreement shall be in writing and shall be deemed to have been duly given when delivered personally, sent by registered or certified mail, return receipt requested, or sent by a nationally recognized overnight delivery service, to the addresses set forth below or to such other address as either party may designate by notice in accordance with this Section.

4.7 **Waiver.** No waiver of any term, provision, or condition of this Agreement, whether by conduct or otherwise, in one or more instances, shall be deemed to be, or construed as, a further or continuing waiver of any such term, provision, or condition, or as a waiver of any other term, provision, or condition of this Agreement.

4.8 **Force Majeure.** Neither party shall be liable for any failure or delay in performing any of its obligations under this Agreement (other than the payment of money) if such failure or delay is due to any cause beyond the reasonable control of such party, including, but not limited to, acts of God, war, strikes, labor disputes, civil disturbances, government regulations, or any other cause beyond the control of the party whose performance is affected.

4.9 **Termination.** City shall have the right to terminate this agreement and rescind any ownership in the Company should the parties, after good faith efforts and negotiations, fail to secure the policy of tax credit recapture insurance or the parties cannot agree to terms and conditions of the Agreement for Disbursement of City Funds as discussed above in section 1.2. Any termination under this section requires a 30 day notice from the City to the Company in writing signed by the Mayor.

4.10 **Confidentiality.** The parties agree to keep confidential the terms of this Agreement and any proprietary information disclosed by either party in connection with the performance of this Agreement, except as required by law or as necessary to enforce the terms of this Agreement.

4.11 **Headings.** The headings used in this Agreement are for convenience only and shall not affect the interpretation of any of the provisions hereof.

4.12 **Counterparts.** This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

4.13 **Further Assurances.** Each party agrees to perform any further acts and execute and deliver any further documents that may be reasonably necessary to carry out the provisions of this Agreement.

4.14 **Relationship of the Parties.** Nothing contained in this Agreement shall be deemed or construed as creating a joint venture or partnership between any of the parties hereto. No party is by virtue of this Agreement authorized as an agent, employee, or legal representative of any other party. No party shall have the power to control the activities and operations of any other party and their status is, and always will continue to be, that of independent contractors with respect to each other. No party shall have any power or authority to bind or commit any other party.

4.15 **Survival.** The representations, warranties, covenants, and agreements of the parties contained herein shall survive the execution and delivery of this Agreement and the consummation of the transactions contemplated hereby.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first above written.

Robert Norman, Managing Member of BC&E USA COLUSA 1 LLC

Jesse Cain, City Manager, an Authorized Officer of the City of Colusa, California

Approved as to Form:

Attest:

Ryan R. Jones, City Attorney

Shelly Kittle, City Clerk