HOST COMMUNITY AGREEMENT

between

Town of Montgomery

And

KCE NY 2, LLC

Dated as of \_\_\_\_\_\_\_\_\_ 1, 2022[[1]](#footnote-1)

RELATING TO THE PREMISES LOCATED AT \_\_\_\_\_\_\_\_\_\_\_ [[2]](#footnote-2) (TAX MAP #26-1-57.221) IN THE TOWN OF MONTGOMERY, ORANGE COUNTY, NEW YORK.

HOST COMMUNITY AGREEMENT

FOR BATTERY ENERGY STORAGE SYSTEM

THIS AGREEMENT FOR A HOST COMMUNITY AGREEMENT (the “Agreement"), is made and entered into as of the date written on the cover page, above, by and between KCE NY 2, LLC ("Developer"), a Delaware limited liability company, with a principal place of business at 25 Monroe Street, #301, Albany, NY 12210 and the Town of Montgomery, New York, (the "Town"), a municipal corporation duly established with a principal place of business at 110 Bracken Road, Montgomery, NY 12549. Developer and the Town are collectively referred to in this Agreement as the "Parties" and are individually referred to as a "Party."

WHEREAS, Developer plans to build and operate an "electric energy storage system" as defined in New York Real Property Tax Law (“RPTL”) Section 487 (1)(n) (herein the "Project") with an expected storage capacity (“Capacity”') of approximately One Hundred and Sixty-Nine (169) megawatts (“MW”) on a parcel of land located within the Town of Montgomery located at \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ and identified as SBL # 26-1-57.221 as described in Exhibit A (herein the “Property”); and;

WHEREAS, Developer intends to apply or has applied to the Town of Orleans Industrial Development Agency (the “*Agency*”) for financial assistance including real property tax, sales and use tax and mortgage recording tax exemption (“*Financial Assistance*”) for the Project. The Town agrees to cooperate with Developer’s application for Financial Assistance and entry into a PILOT agreement with the Agency (the “*PILOT Agreement*”) that calls for annual PILOT payments over a term of fifteen (15) payment years in the amount of at least $1,000 per MW of installed capacity for the Project, increased by two percent (2%) annually during the term of the PILOT Agreement.

**WHEREAS,** in order to secure the benefits of the Project for the Town and its residents and memorialize Developer’s commitments to avoid or otherwise mitigate certain potential impacts from the Project, the Parties believe that their mutual best interests will be served by the execution of this Agreement.

NOW THEREFORE, in exchange for the mutual commitments set forth in this Agreement and other good and valuable consideration, the receipt and sufficiency of which are acknowledged, the parties agree as follows:

1. Host Community Payments. The Developer or its assignees commits to make payments as donations (“Host Fee”) to the Town that will support the public health mission of the Town as it relates to the Project, during the term of the Agreement, as follows.
	1. Purpose. The payments made under this agreement shall be used to benefit the public.
	2. Payment. For the purposes stated herein, the Developer will provide annual Host Fee payments for fifteen (15) years of $500.00 per megawatt of Capacity. Such 15-year term shall commence on the Commercial Operation Date. “Commercial Operation Date” shall mean the date specified by Developer in a written notice addressed and delivered to the Town stating that the Project has satisfied utility testing requirements and will deliver and sell electricity to the New York State Electric Grid.
	3. Adjustment to Host Fee. The Host Fee amount shall increase every year by a rate of two percent (2%).
	4. Late payment. Any Host Fee not paid as of the date due shall be deemed late without any requirement of notice from the Town. Late fees shall be assessed at a rate of two percent (2%) for the first month or a portion of a month due, and one percent (1%) for each subsequent month or a portion of a month on the original amount outstanding, until the Host Fee is paid.
2. Change in Capacity at or after Mechanical Completion: Adjustments to Payments. To the extent that the Capacity of the Project is more or less than the 169 MW, whether on, or due to a change any time after, the date when the Project is mechanically complete and Developer has commenced storage of electricity, the payments will be increased or decreased on a pro rata basis.
3. Payment Collection. Payments for the Town shall be made payable to the Town of Montgomery and mailed to the Town Hall, 110 Bracken Road, Montgomery, NY 12549 and are due no later than February 15th of each year.
4. Term. The term (the "Term") of this Agreement shall commence as of the date the first payment is due pursuant to Section 1. For the avoidance of doubt, in the event that no electric energy storage system is successfully installed upon the Property, then the Agreement shall be void.
5. Assignments; Binding Effect.
	1. Assignment. Developer and any assignee shall at all times have the right to sell, convey, lease, assign, sublet, grant, encumber, pledge, hypothecate, mortgage or otherwise transfer the whole or any portion or portions of its interests in and to this Lease, the Improvements without Town’s consent (any such sale, assignment, or other transfer, hereinafter a “Transfer” and the interests conveyed by such Transfer, hereinafter the “Transferred Interests”). Following such Transfer, the term “Developer” shall be deemed to include each Assignee then holding any Transferred Interest and Town shall recognize the Assignee as Developer’s legal successor with respect to such Transferred Interest. Furthermore, upon a Transfer, (i) Assignee shall have all of the rights, benefits, and obligations of Developer under and pursuant to this Agreement with respect to such Transferred Interest; and (ii) Developer shall be relieved of all of its duties and obligations under this Agreement relating to the Transferred Interests accruing after the effective date of such Transfer.
	2. Binding Effect. This Agreement shall inure to the benefit of, and shall be binding upon, the Town, the Developer and their respective successors and assigns. The provisions of this Agreement are intended to be for the benefit of the Town.
6. Additional Documentation and Actions. Subject to applicable laws and regulations, each Party will, from time to time hereafter, execute and deliver or cause to be executed and delivered, such reasonable additional instruments and documents as the other Party reasonably requests for the purpose of implementing or effectuating the provisions of this Agreement. Developer shall pay all reasonable attorneys' and consulting fees incurred by the Town to review and negotiate any such instruments or documents.
7. Notices. All notices, consents, requests, or other communications provided for or permitted to be given hereunder by a Party must be in writing and will be deemed to have been properly given or served upon the personal delivery thereof, via courier delivery service, by hand, or by certified mail, return receipt requested. Such notices shall be addressed or delivered to the Parties at their respective addresses shown below.

# If to Developer:

KCE NY 2, LLC

c/o Key Capture Energy, LLC

25 Monroe Street, #301

Albany, NY 12210

Attn: Contracts

# If to Town:

Attn: Town Supervisor

110 Bracken Road

Montgomery, NY 12549

Any such addresses for the giving of notices may be changed by either Party by giving written notice as provided above to the other Party. Notice given by counsel to a Party shall be effective as notice from such Party.

1. Applicable Law. This Agreement will be made and interpreted in accordance with the laws of the State of New York. Developer and the Town each consent to the jurisdiction of the New York courts in and for the County in which the Project is located or other applicable agencies of the State of New York regarding any and all matters, including interpretation or enforcement of this Agreement or any of its provisions. Accordingly, any litigation arising under this Agreement shall be brought solely in such courts.
2. Covenants/Warranties of Developer.
	1. During the term of this Agreement, Developer will not voluntarily do any of the following:
		1. seek to invalidate this Agreement;
		2. fail to pay the Town all amounts due hereunder when due in accordance with the terms of this Agreement; or
		3. seek, for any reason, an abatement or reduction of any of the amounts due in accordance with the terms of this Agreement, except that nothing in this Agreement shall limit the right of the Developer to challenge the assessment value of the Project pursuant to the RPTL or the assessment of any taxes not governed by this Agreement.
	2. Developer represents and warrants:
		1. It is a corporation or other business entity duly organized, validly existing and in good standing under the laws of the state in which it was formed, and if a foreign corporation or entity, is, to the full extent required by law or regulation, registered with the New York Secretary of State or other agency, and has full power and authority to carry on its business as it is now being conducted.
		2. This Agreement constitutes the legal, valid and binding obligation of Developer enforceable in accordance with its terms, except to the extent that the enforceability may be limited by applicable bankruptcy, insolvency or other laws affecting enforcement of creditors' rights generally or by general equitable principles.
		3. It has taken all necessary action to authorize and approve the execution and delivery of this Agreement.
		4. The person executing this Agreement on behalf of Developer has the full power and authority to bind it to each and every provision of this Agreement.
		5. All necessary governmental guidelines have been complied with, and all filings have been completed so as to permit the exemption herein represented under section 487 of the RPTL, and no governmental objections have been received
3. Covenants/Warranties of the Town. The Town has full power and authority to enter into this Agreement and to fully perform all of its duties and obligations hereunder. The Town Board of Trustees has duly authorized the execution and delivery of this Agreement and the Town’s performance of all of its duties and obligations contained herein, and this Agreement constitutes a valid and legally binding obligation of the Town, enforceable in accordance with its terms. A copy of the Town Board of Trustees’ resolution approving this Agreement and authorizing its execution by the Mayor of the Town of Montgomery is attached hereto as Exhibit “B.”
4. Termination Rights of Town. Notwithstanding anything to the contrary in this Agreement, the Town may terminate this Agreement on thirty (30) days written notice to Developer if:
	1. Developer fails to make timely payments required under this Agreement, unless such payment is received by the Town within the 30-day notice period with interest as stated in this Agreement.
	2. Developer has filed, or has had filed against it, a petition in Bankruptcy, or is otherwise insolvent.
5. Termination Rights of Developer. The Developer may terminate this Agreement on 30 days written notice to the Town if:
	1. it does not construct the Project; and/or
	2. if the Developer decommissions the Project, in which case the final Host Fee Payment shall be due on the due date following the last Taxable Status Date (March 1) on which the system had not been decommissioned; and/or
	3. The PILOT Agreement is terminated.
6. Remedies; Waiver and Notice.
	1. No Remedy Exclusive. No remedy herein conferred upon or reserved to Party is intended to be exclusive of any other available remedy or remedies, but each and 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.
	2. Delay. No delay or omission in exercising any right or power accruing upon the occurrence of any Event of Default hereunder shall impair any such right or power or shall be construed to be a waiver thereof, but any such right or power may be exercised from time to time and as often as may be deemed expedient.
	3. No Waiver. In the event any provision contained in this Agreement should be breached by any party and thereafter duly waived by the other party so empowered to act, such waiver shall be limited to the particular breach so waived and shall not be deemed to be a waiver of any other breach hereunder. No waiver, amendment, release or modification of this Agreement shall be established by conduct, custom or course of dealing.
7. Entire Agreement. The Parties agree that this is the entire, fully integrated Agreement between them with respect to payments in lieu of taxes for the Project, and that there are no third party beneficiaries to this Agreement.
8. Amendments. This Agreement may not be effectively amended, changed, modified, altered or terminated except by an instrument in writing executed by the parties hereto.
9. Severability. If any article, section, subdivision, paragraph, sentence, clause, phrase, provision or portion of this Agreement shall for any reason be held or adjudged to be invalid or illegal or unenforceable by any court of competent jurisdiction, such article, section, subdivision, paragraph, sentence, clause, phrase, provision or portion so adjudged invalid, illegal or unenforceable shall be deemed separate, distinct and independent and the remainder of this Agreement shall be and remain in full force and effect and shall not be invalidated or rendered illegal or unenforceable or otherwise affected by such holding or adjudication.
10. Counterparts. This Agreement may be simultaneously executed in several counterparts, each of which shall be an original and all of which shall constitute but one and the same instrument.
11. Miscellaneous. The parties do not intend to create and noting contained in the Agreement shall be construed as creating, a joint venture arrangement, or partnership between Town and Developer. Nothing in the Agreement expressed or implied, is intended or shall be construed to confer upon or give to any person, firm, corporation, or legal entity, other than the parties, any rights, remedies, or other benefits under or by reason of the Agreement.

*This space intentionally left blank. Signature page follows.*

Executed by the undersigned as of the day and year first written above, each of whom represents that it is fully and duly authorized to act on behalf of and bind its principals.

KCE NY 2, LLC TOWN OF MONTGOMERY

By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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

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

EXHBIT A

The Property

EXHIBIT B

Town Resolution

1. Date will match PILOT [↑](#footnote-ref-1)
2. Will be added at a later date [↑](#footnote-ref-2)