

Funding Agreement

[Insert Council name]

and

[Community Energy Foundation] Incorporated

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Funding Agreement

Date

Parties

[Insert Council name]

being a body corporate under the *Local Government Act 1999* (SA)
ABN [insert] of [insert address]

(Council)

[Community Energy Foundation] Incorporated

ABN [insert] of [insert address]

(Foundation)

Recitals

- A. The councils comprising [insert name of regional local government association (if applicable)] (including the Council) have established the Foundation for the principal purpose of protecting and enhancing the natural environment or a significant aspect of it by:
- (a) reducing the cost of living pressures for community constituents (including local residents and businesses) by pooling the individual electricity demand of those community constituents;
 - (b) developing a self-funded model that localises the economic benefits of energy supply;
 - (c) procuring energy services that reduce carbon emissions;
 - (d) empowering the community to transition to a clean energy future; and
 - (e) identifying the [insert name of relevant region] region as a region of choice for client-ready development and investment.

[HWLE Drafting Note: The above objectives should be updated to reflect the objectives listed in the Foundation's Constitution.]

- B. The Council has agreed to provide funding to the Foundation to assist the Foundation with its establishment and ongoing

operations in accordance with the terms and conditions of this agreement.

The parties agree, in consideration of, among other things, the mutual promises contained in this agreement as follows:

1. Definitions and interpretation clauses

1.1 Definitions

In this agreement:

- Business Day** means:
- (a) for the purposes of clause 7, a day on which banks are open for business in the city where the notice or other communication is received, excluding a Saturday or a Sunday or a public holiday in that city; and
 - (b) for all other purposes, a day on which banks are open for business in Adelaide, South Australia, excluding a Saturday, Sunday or public holiday.
- Expiry Date** means the date specified in Item 1 of Schedule 1.
- Funding** means the funding provided by the Council for the Funded Activities as specified in Item 2 of Schedule 1.
- Funded Activities** means the activities specified in Item 3 of Schedule 1.
- Government Agency** means any government or governmental, administrative, monetary, fiscal or judicial body, department, commission, authority, tribunal, agency or entity in any part of the world and includes any self-regulatory organisation established under statute or any stock exchange.
- Term** has the meaning given to that term in clause 2.

1.2 Interpretation

In this agreement unless a contrary intention is expressed:

- (a) headings and italicised, highlighted or bold type do not affect the interpretation of this agreement;
- (b) the singular includes the plural and the plural includes the singular;
- (c) a gender includes all other genders;

- (d) other parts of speech and grammatical forms of a word or phrase defined in this agreement have a corresponding meaning;
- (e) a reference to a 'person' includes any individual, firm, company, partnership, joint venture, an unincorporated body or association, trust, corporation or other body corporate and any Government Agency (whether or not having a separate legal personality);
- (f) a reference to any thing (including any right) includes a part of that thing, but nothing in this clause 1.2(f) implies that performance of part of an obligation constitutes performance of the obligation;
- (g) a reference to a clause, party, annexure, exhibit or schedule is a reference to a clause of, and a party, annexure, exhibit and schedule to, this agreement and a reference to this agreement includes any clause, annexure, exhibit and schedule;
- (h) a reference to a document (including this agreement) includes all amendments or supplements to, or replacements or novations of, that document;
- (i) a reference to a party to any document includes that party's successors and permitted assigns;
- (j) a reference to time is to Adelaide, South Australia time;
- (k) a reference to any legislation includes all delegated legislation made under it and includes all amendments, consolidations, replacements or re-enactments of any of them, from time to time;
- (l) a reference to an agreement other than this agreement includes an undertaking, deed, agreement or legally enforceable arrangement or understanding whether or not in writing;
- (m) a reference to a document includes any agreement or contract in writing, or any certificate, notice, deed, instrument or other document of any kind;
- (n) a provision of this agreement may not be construed adversely to a party solely on the ground that the party (or that party's representative) was responsible for the preparation of this agreement or the preparation or proposal of that provision;
- (o) a reference to a body, other than a party to this agreement (including an institute, association or authority), whether statutory or not, which ceases to exist or whose powers or functions are transferred to another body, is a reference to the body which replaces it or which substantially succeeds to its powers or functions;
- (p) the words 'include', 'including', 'for example', 'such as' or any form of those words or similar expressions in this agreement do not limit what else is included and must be construed as if they are followed by the words 'without limitation', unless there is express wording to the contrary;

- (q) a reference to a day is to the period of time commencing at midnight and ending 24 hours later;
- (r) if a period of time is specified and dates from a day or the day of an act, event or circumstance, that period is to be determined exclusive of that day;
- (s) if an act or event must occur or be performed on or by a specified day and occurs or is performed after 5.00 pm on that day, it is taken to have occurred or been done on the next day; and
- (t) a reference to '\$', 'A\$', 'AUD', 'dollars' or 'Dollars' is a reference to the lawful currency of the Commonwealth of Australia.

1.3 Business Day

If anything under this agreement is required to be done by or on a day that is not a Business Day that thing must be done by or on the next Business Day.

2. Term

This agreement is effective from the date of this agreement and, subject to any early termination under this agreement, continues until the Expiry Date (**Term**).

3. Payment of Funding

3.1 Payment

Subject to the Foundation complying with its obligations in this agreement (including under clause 4) at all times during the Term, the Council must pay the Funding to the Foundation in the manner specified in Item 3 of Schedule 1.

3.2 Repayment and withholding payment

- (a) The Council may, in its absolute discretion:
 - (i) withhold; and/or
 - (ii) request that the Foundation refund,
 any or all of the Funding if the Council determines that the Foundation has:
 - (iii) inadequately carried out the Funded Activities;
 - (iv) inappropriately dealt with the Funding, whether intentionally or not; and
 - (v) breached a term of this agreement.

- (b) Any monies held by the Council under clause 3.2(a) may be returned or paid to the Foundation on the satisfactory performance of the Funded Activities or the remedy of any such breach (as applicable).

4. Application of Funding

- (a) The Foundation agrees to use and apply the Funding for the sole purpose of undertaking the Funded Activities.
- (b) If any part of the Funding is no longer required for the Funded Activities or exceeds the amount that the Foundation requires from the Council to undertake the Funded Activities, the Foundation must:
 - (i) immediately notify the Council of the unexpended amount; and
 - (ii) subject to the Council providing the Foundation with a written direction to repay the unexpended amount to the Council's nominated bank account, repay to the Council the unexpended amount within **5** Business Days after the Council gives the notice.
- (c) The Foundation must not, without the prior written consent of the Council, transfer or deal with the Funding in anyway other than in accordance with this agreement.

5. Records and reporting

5.1 Records

- (a) The Foundation must ensure that it keeps adequate financial records and accounts (including receipts and invoices) detailing the use of the Funding.
- (b) The Foundation will, at the request of the Council, grant access to the Foundation's books (including its financial records and accounts) for the purpose of the Council or any other person nominated by the Council, including for the purposes of:
 - (i) taking copies of those materials; or
 - (ii) assessing and confirming the manner in which the Funding has been used (including that the Funding has been used for the Funded Activities).
- (c) The Foundation will maintain the Foundation's books (including its financial records and accounts) in such a way as to ensure easy identification of all receipts and expenditure relating to the Funded Activities for a period of no less than seven years from the date of this agreement.

[HWLE Drafting Note: We have included general reporting provisions allowing the relevant Council to request reports as required. If a more structured reporting framework is preferred (e.g. monthly/quarterly reports), this clause should be amended accordingly.]

5.2 Reporting

- (a) The Foundation must submit to the Council, any report as reasonably required by the Council (including as to the form and content of that report) in relation to the Funded Activities.
- (b) Where the report is a financial acquittal report, the Council, in its absolute discretion, may require that the Foundation procure that the acquittal report be independently audited. The Foundation must pay the cost of any audit required by the Council in accordance with this clause 5.2(b).
- (c) If requested to by the Council at any time during the term of this agreement, the Foundation shall submit to the Council an annual report containing an audited statement of income and expenditure and a balance sheet.
- (d) If the Council considers (in its absolute discretion) that the form or content of any report under this clause 5.2 is inadequate or unsatisfactory, the Council may request a further or revised report. The Foundation must submit the revised report within [20] Business Days of the request.

6. Goods and Services Tax (GST)

[HWLE Drafting Note: We have contemplated that the amounts in this agreement (including the Funding) are GST-inclusive. Specific tax advice should be obtained prior to execution of this agreement as to the applicability of GST to payments made under this agreement.]

6.1 Preliminary

Words or expressions used in this clause that are defined in *A New Tax System (Goods and Services Tax) Act 1999 (GST Act)* have the same meaning given to them in that Act.

6.2 GST inclusive

Unless otherwise stated, any amount specified in this agreement as the consideration payable for any taxable supply includes any GST payable in respect of that supply.

6.3 Tax invoice

Each party agrees to do all things, including providing valid tax invoices and other documentation that may be necessary or desirable to enable or assist the other party to

claim any input tax credit, adjustment or refund in relation to any amount of GST paid or payable in respect of any supply made under or in connection with this agreement.

6.4 Reimbursement of expenses

If a third party makes a taxable supply and this agreement requires a party to this agreement (**the payer**) to pay for, reimburse or contribute to (**pay**) any expense or liability incurred by the other party to that third party for that taxable supply, the amount the payer must pay will be the amount of the expense or liability plus the amount of any GST payable in respect thereof but reduced by the amount of any input tax credit to which the other party is entitled in respect of the expense or liability.

6.5 Adjustment event

If an adjustment event arises in relation to a taxable supply made by a party under this agreement (**Supplier**), the amount paid or payable by the party to whom the taxable supply is made (**Recipient**) pursuant to clause 6.2 will be amended to reflect this and a payment will be made by the Recipient to the Supplier or vice versa as the case may be.

6.6 Non merger

This clause does not merge on completion and will continue to apply after expiration or termination of this agreement.

7. Notices

7.1 Notice requirements

Any notice, demand, approval, consent or other communication under this agreement (**Notice**) must be in writing in English or accompanied by a certified translation into English and must be:

- (a) delivered personally;
- (b) sent by regular post (or airmail if posted to or from a place outside Australia); or
- (c) sent by email,

to a party at:

- (d) the address of the party set out in clause 7.3 (**Nominated Contact Details**); or
- (e) such other contact details as the party may from time to time notify to the other party for the purposes of, and in accordance with, this clause.

7.2 When Notices considered given and received

A Notice given in accordance with clause 7.1 takes effect when received (or such later time as specified in it), and is taken to be received:

- (a) if hand delivered, on delivery;
- (b) if sent from and to a place within Australia by regular post, at 9:00 am on the sixth Business Day after the date of posting;
- (c) if sent from a place within Australia to a place outside Australia by airmail, at 9.00 am on the tenth Business Day after the date of posting;
- (d) if sent from a place outside Australia by airmail, at 9.00 am on the twelfth Business Day after the date of posting;
- (e) if sent by email to the email address set out in the Nominated Contact Details, when the email (including any attachment) is sent to the receiving party at that email address, unless the sending party receives a notification of delivery failure within 24 hours of the email being sent,

but if the delivery, receipt or transmission is not on a Business Day or is after 5.00 pm on a Business Day, the Notice is taken to be received at 9.00 am on the next Business Day after that delivery, receipt or transmission.

7.3 Nominated Contact Details

For the purposes of this clause 7, the Nominated Contact Details of the parties are as follows:

(a) The Council

Address: [Insert]

Email: [Insert]

Attention: [Insert]

(b) The Foundation

Address: [Insert]

Email: [Insert]

Attention: [Insert]

8. General

8.1 Assignment

- (a) Neither party may assign or otherwise deal with any of its rights under this agreement without the prior written consent of the other party.
- (b) An assignment in breach of clause 8.1(a) is intended by the parties to be void and of no force and effect.
- (c) A breach of clause 8.1(a) by a party entitles the other party to terminate this agreement.

8.2 Variation

A variation of any term of this agreement will be of no force or effect unless it is in writing and signed by each of the parties.

8.3 Costs and expenses

Each party must pay its own costs (including legal costs) and expenses in connection with the negotiation, preparation, execution and delivery of this agreement.

8.4 Waiver

- (a) A waiver of a right, remedy or power must be in writing and signed by the party giving the waiver.
- (b) A party does not waive a right, remedy or power if it delays in exercising, fails to exercise or only partially exercises that right, remedy or power.
- (c) A waiver given by a party in accordance with clause 8.4(a):
 - (i) is only effective in relation to the particular obligation or breach in respect of which it is given and is not to be construed as a waiver of that obligation or breach on any other occasion; and
 - (ii) does not preclude that party from enforcing or exercising any other right, remedy or power under this agreement nor is it to be construed as a waiver of any other obligation or breach.

8.5 Severance

If a provision in this agreement is wholly or partly void, illegal or unenforceable in any relevant jurisdiction that provision or part must, to that extent, be treated as deleted from this agreement for the purposes of that jurisdiction. This does not affect the validity or enforceability of the remainder of the provision or any other provision of this agreement.

8.6 Governing law and jurisdiction

- (a) This agreement is governed by and is to be construed under the laws in force in South Australia.
- (b) Each party submits to the non-exclusive jurisdiction of the courts exercising jurisdiction in South Australia and courts of appeal from them in respect of any proceedings arising out of or in connection with this agreement. Each party irrevocably waives any objection to the venue of any legal process in these courts on the basis that the process has been brought in an inconvenient forum.

8.7 Further assurances

Each party must, at its own expense, do all things and execute all further documents necessary to give full effect to this agreement and the transactions contemplated by it.

8.8 Entire agreement

This agreement states all of the express terms of the agreement between the parties in respect of its subject matter. It supersedes all prior discussions, negotiations, understandings and agreements in respect of its subject matter.

8.9 Counterparts

- (a) This agreement may be executed in any number of counterparts, each signed by one or more parties. Each counterpart when so executed is deemed to be an original and all such counterparts taken together constitute one document.
- (b) A party that has executed a counterpart of this agreement may exchange that counterpart with another party by emailing it to the other party or the other party's legal representative and, if that other party requests it, promptly delivering that executed counterpart by hand or post to the other party or the other party's legal representative. However, the validity of this agreement is not affected if the party who has emailed the counterpart delays in delivering or does not deliver it by hand or by post.

8.10 Relationship of parties

- (a) The parties are not and are not to be taken to be in a partnership, joint venture, employment or fiduciary relationship.
- (b) Nothing in this agreement gives a party authority to bind any other party in any way.

8.11 Exercise of rights

- (a) Unless expressly required by the terms of this agreement, a party is not required to act reasonably in giving or withholding any consent or approval or exercising any other right, power, authority, discretion or remedy, under or in connection with this agreement.

- (b) A party may (without any requirement to act reasonably) impose conditions on the grant by it of any consent or approval, or any waiver of any right, power, authority, discretion or remedy, under or in connection with this agreement. Any conditions must be complied with by the party relying on the consent, approval or waiver.

8.12 Remedies cumulative

Except as provided in this agreement and permitted by law, the rights, powers and remedies provided in this agreement are cumulative with and not exclusive of the rights, powers or remedies provided by law independently of this agreement.

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Schedule 1 Reference Schedule

Item 1 Expiry Date [Insert expiry date for this agreement]

Item 2 Funding & Payment	[Milestone/Date]	Funding Payment
	[Insert Payment Milestone/Date]	\$(Insert Funding Payment)
	[Insert Payment Milestone/Date]	\$(Insert Funding Payment)
	[Insert Payment Milestone/Date]	\$(Insert Funding Payment)
	Total	\$(Insert total Funding)

Item 3 Funded Activities [Insert activities for which the Funding must be used]

Signing page

Executed as an agreement

[Insert execution blocks]

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