

ENERGY EFFICIENCY AUCTION PILOT PROGRAM AGREEMENT

This Energy Efficiency Auction Pilot Program Agreement (the “**Agreement**”) is made as of this ____ day of _____, 2020 (the “**Effective Date**”),

BETWEEN:

[NTD: INSERT NAME OF PARTICIPANT]
(the “**Participant**”)

-and-

INDEPENDENT ELECTRICITY SYSTEM OPERATOR
(the “**IESO**”)

WHEREAS the IESO is conducting the Energy Efficiency Auction Pilot Program to procure peak demand savings from energy efficiency and non-dispatchable load-shifting measures to inform long-term options for enabling such measures to compete to meet electricity system needs.

AND WHEREAS the Participant wishes to participate in the Energy Efficiency Auction Pilot Program offered by the IESO in order to access payments for delivery of peak demand savings from the implementation of energy efficiency and/or non-dispatchable load shifting measures.

AND WHEREAS the Participant submitted a package, in the form required by the IESO, requesting to participate in the Energy Efficiency Auction Pilot Program (the “**Enrollment Package**”), which Enrollment Package is hereby incorporated by reference and forms part hereof. If the Enrollment Package is accepted by the IESO, the Participant intends to submit at least one offer in the pilot auction.

AND WHEREAS if any of the Participant’s offers are accepted, the Participant will provide the peak demand savings and the IESO will provide an incentive for delivering such peak demand savings, all in accordance with the terms and conditions of this Agreement.

NOW THEREFORE, in consideration of the mutual covenants and agreements herein contained and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

ARTICLE 1 DEFINITIONS AND INTERPRETATION

1.1 Definitions.

The following capitalized terms shall have the meanings stated below when used in this Agreement:

“**Accepted Offer Price**” means the dollar per kW rate offered by the Participant and awarded by the IESO in the Energy Efficiency Auction for the applicable Obligation Period and used to calculate the EE Capacity Payment in accordance with the terms of the Agreement.

“Agreement” means this Energy Efficiency Auction Pilot Program Agreement, including all recitals and schedules, and the Enrollment Package, as they may be amended or restated from time to time.

“Applicable Law” means:

- (a) applicable multi-national, international, Canadian federal, provincial or municipal laws, orders-in-council, bylaws, codes, rules, policies, regulations and statutes;
- (b) applicable orders, decisions, codes, manuals, interpretation bulletins, judgments, injunctions, decrees, awards, directives, directions and writs of any court, tribunal, arbitrator, Governmental Authority or other Person having jurisdiction;
- (c) applicable rulings and conditions of any licence, permit, certificate, registration, authorization, consent and approval issued by a Governmental Authority;
- (d) any requirements under or prescribed by applicable common law; and
- (e) the IESO Market Rules.

“Applicable Taxes” means any applicable HST and any other applicable sales or use taxes.

“Accepted Auction Offer” means the Participant’s offer to deliver EE Capacity with respect to a single Energy Efficiency Resource that was submitted to the Energy Efficiency Auction and accepted by the IESO. An Accepted Auction Offer will include details such as the quantity of EE Capacity to be provided, the \$/kW price, effective useful life, and the Obligation Period to which it relates.

“Business Day” means a day, other than a Saturday or a Sunday or statutory holiday in the Province of Ontario or any other day on which banking institutions in Toronto, Ontario are not open for the transaction of business.

“Claim” means any actual, threatened or potential civil, criminal, administrative, regulatory, arbitral or investigative demand, allegation, action, suit, investigation or proceeding or any other claim or demand, whether in contract, tort, or otherwise.

“Confidential Information” means any and all information and materials, whether recorded or not, and however fixed, stored, or expressed, which:

- (a) is furnished or disclosed by the Disclosing Party or its Representatives to the Receiving Party or its Representatives in connection with the Program or this Agreement, whether before or after its execution, that:
 - (i) has been identified or marked as confidential; or
 - (ii) is confidential by its nature or by virtue of the circumstances in which it is received;
- (b) otherwise comes into the knowledge, possession or control of the Receiving Party under or during the performance of this Agreement and that is confidential by its nature or by virtue of the circumstances in which it is received;

- (c) is Personal Information; or
- (d) all information derived at any time from any such confidential information.

Notwithstanding the forgoing, Confidential Information does not include information that the Receiving Party is able to demonstrate to the Disclosing Party's satisfaction, acting reasonably,

- (i) was or becomes generally known to the public other than by a breach of the Receiving Party or any of its Representatives of this Agreement;
- (ii) as shown by written record, was specifically known by the Receiving Party prior to disclosure by the Disclosing Party hereunder and was not subject to any confidentiality obligation;
- (iii) as shown by written record, was independently developed by the Receiving Party without use of or reference to the Confidential Information; or
- (iv) was or becomes known to the Receiving Party on a non-confidential basis from a third party other than the Disclosing Party, so long as such source was not subject to any confidentiality obligation.

“Demand Reduction Window” means the hours when EE Capacity is measured for the purpose of the Participant fulfilling their EE Capacity Obligation. The Demand Reduction Window for the relevant Obligation Periods are as follows:

- (a) For the Summer Obligation Period, during Business Days between hour ending 13:00 to 21:00 (12pm to 9pm); and
- (b) For the Winter Obligation Period, during Business Days between hour ending 17:00 to 21:00 (4pm to 9pm).

“Disclosing Party”, with respect to Confidential Information, is the Party disclosing Confidential Information and may be the IESO or the Participant, as applicable.

“Distribution System” means a system connected to the IESO-Controlled Grid for distributing electricity at voltages of 50 kilovolts or less and includes any structures, equipment or other thing used for that purpose.

“Effective Date” has the meaning given to it in the first paragraph of this Agreement.

“EE Auction Pilot M&V Procedures” means the methods and processes the IESO has established for measuring EE Capacity delivery as set out in Schedule “B”.

“EE Capacity” is the average reduction in demand delivered by an EE Resource during the Demand Reduction Window for an Obligation Period as measured in accordance with the M&V Plan. In the event of a dispute, the IESO's evaluation of EE Capacity will be final and binding.

“EE Capacity Obligation” means the amount of EE Capacity awarded at the Energy Efficiency Auction with respect to a specific Energy Efficiency Resource that the Participant is obligated to provide during the applicable Obligation Period.

“EE Capacity Payment” means the amount to be paid to the Participant for each Obligation Period for delivering EE Capacity, as calculated in accordance with the terms of this Agreement.

“EE Resource Plan” means the Energy Efficiency Resource Plan submitted by the Participant to the IESO prior to the commencement of the Energy Efficiency Auction in the form provided by the IESO, and as updated by the EE Resource Plan Update.

“EE Resource Plan Update” means the update to the EE Resource Plan that the Participant is required to submit in accordance with Section 4.2.

“Energy Efficiency Auction” means the auction operated by the IESO to procure EE Capacity Obligations.

“Energy Efficiency Resource” means one or more Measures at one or more Facilities, as described in the Participant’s EE Resource Plan

“Enrollment Package” has the meaning ascribed to it in the Recitals of this Agreement.

“Facility” means the building(s), premises or lands, or part thereof forming part of the Participant’s Energy Efficiency Resources, and over which the Participant has all required authorization and consents to carry out its obligations under this Agreement and meeting the eligibility requirements set out in Schedule “A”.

“FIPPA” means the *Freedom of Information and Protection of Privacy Act* (Ontario).

“Governmental Authority” means any federal, provincial, or municipal government, parliament or legislature, or any regulatory authority, agency, tribunal, commission, board or department of any such government, parliament or legislature, or any court or other law, regulation or rule-making entity, having jurisdiction in the relevant circumstances, including the IESO in its capacity as operator of the IESO-Controlled Grid, the Ontario Energy Board, the Electrical Safety Authority, the Environmental Commissioner’s Office, and any Person acting under the authority of any of the foregoing.

“HST” means any tax payable under Part IX of the *Excise Tax Act* (Canada).

“IESO” means the Independent Electricity System Operator established under Part II of the *Electricity Act, 1998* (Ontario), and any successor thereto.

“IESO-Controlled Grid” has the meaning ascribed to it by the IESO Market Rules.

“IESO Market Rules” means the rules made under Section 32 of the *Electricity Act, 1998* (Ontario), together with all market manuals, policies, guidelines and interpretation bulletins issued by the IESO.

“IESO Intellectual Property” means any Intellectual Property developed and owned by the IESO or licensed by the IESO from a third party.

“Indemnifiable Loss” has the meaning given to it in Section 7.3.

“Indemnified Party” has the meaning given to it in Section 7.3.

“Insolvent”, in respect of a Person, means a Person:

- (a) who is for any reason unable to meet its obligations as they generally become due or otherwise acknowledges its insolvency;
- (b) who has ceased paying its current obligations in the ordinary course of business as they generally become due;
- (c) who has ceased to carry on business in the ordinary course;
- (d) who institutes any proceeding, takes any corporate action, or executes any agreement to authorize its participation in or the commencement of any proceeding seeking:
 - (i) to adjudicate it as bankrupt or insolvent;
 - (ii) liquidation, dissolution, winding-up, reorganization, arrangement, protection, relief or composition of it or any of its property or debts or making a proposal with respect to it under any law relating to bankruptcy, insolvency, reorganization or compromise of debts or other similar laws; or
 - (iii) appointment of a receiver, trustee, agent, custodian or other similar official for it or for any substantial part of its properties and assets; or
- (e) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all its obligations, due and accruing due.

“LDC” means a local electricity distribution company duly licensed by the Ontario Energy Board.

“Intellectual Property” means any property, tangible or intangible, that is subject to Intellectual Property Rights, including, as applicable, ideas, formulae, algorithms, concepts, techniques, processes, procedures, approaches, methodologies, plans, systems, research, information, documentation, data, data compilations, specifications, requirements, designs, diagrams, programs, inventions, technologies, tools, products knowledge, know how and other material or things.

“Intellectual Property Rights” means:

- (a) any and all proprietary rights anywhere in the world provided under patent law, copyright law (including moral rights), trade-mark law, design patent or industrial design law, semi-conductor chip or mask work or integrated circuit topography law, trade secret law, or any other statutory provision or common law principle applicable to this Agreement that may provide a right in either hardware,

software, content, documentation, Confidential Information, trade-marks, ideas, formulae, algorithms, concepts, inventions, processes or know-how generally, or the expression or use of such hardware, software, content, documentation, Confidential Information, trade-marks, ideas, formulae, algorithms, concepts, inventions, processes or know-how;

- (b) any and all applications, registrations, licences, sub-licences, franchises, agreements or any other evidence of a right in any of the foregoing; and
- (c) all licences and waivers and benefits of waivers of the intellectual property rights set out in (1) and (2) above, all future income and proceeds from the intellectual property rights set out in (1) and (2) above, and all rights to damages and profits by reason of the infringement or violation of any of the intellectual property rights set out in (1) and (2) above.

“M&V Plan” means the measurement and verification plan prepared in alignment with the EE Auction Pilot M&V Procedures by the Participant, and approved by the IESO, acting reasonably, outlining the methodology and activities to be undertaken to quantify and verify EE Capacity achieved by the Participant’s Energy Efficiency Resource.

“M&V Report” means a measurement and verification document, prepared in alignment with the agreed M&V Plan and EE Auction Pilot M&V Procedures, containing the analysis by the Participant of the quantified EE Capacity delivered by an Energy Efficiency Resource during the applicable Obligation Period.

“Measure” means:

- (a) any activity undertaken for the primary purpose of obtaining or effecting, directly or indirectly, conservation and demand management, including the installation, retrofit, replacement, modification, commissioning or re-commissioning of equipment, systems, processes or behaviours that consume or result in the consumption of electricity; or
- (b) any equipment, system or product related to the foregoing;
that meets the eligibility criteria set out in Schedule “A”.

“Obligation Period” means the period(s) of time during which the Participant is required to fulfill its EE Capacity Obligation. In the Energy Efficiency Auction there are two Obligation Periods: (i) Summer, being from June 1 to August 31; and (ii) Winter, being from November 1 to February 28.

“Participant” has the meaning given to it in the preamble of this Agreement.

“Participant Intellectual Property” means any Intellectual Property developed and owned by the Participant or licensed by the Participant from a third party.

“Party” means each of the IESO and the Participant, and the IESO and the Participant are collectively referred to as the **“Parties”**.

“Person” means a natural person, firm, trust, partnership, association, unincorporated organization, limited partnership, company or corporation (with or without share capital), joint venture, sole proprietorship, Governmental Authority or other entity of any kind.

“Personal Information” means information about an identifiable individual or other information that is subject to any Privacy Laws.

“Privacy Laws” means all federal, provincial, state, municipal or other applicable statutes, laws or regulations of any Governmental Authority in any jurisdiction governing the handling of information about an identifiable individual, including the *Personal Information and Protection of Electronic Documents Act* (Canada), FIPPA, and the *Municipal Freedom of Information and Protection of Privacy Act* (Ontario).

“Program” or **“Energy Efficiency Auction Pilot Program”** means the auction conducted by the IESO to procure peak demand savings from energy efficiency and non-dispatchable load-shifting measures and the corresponding implementation of those energy efficiency and non-dispatchable load-shifting measures in accordance with the terms of this Agreement.

“Program Deliverables” means collectively the EE Resource Plan, EE Resource Plan Update, Energy Efficiency Resource Report, M&V Plan, M&V Report and such other documentation or deliverables provided or required to be provided to the IESO in accordance with this Agreement or otherwise in relation to the Program.

“Receiving Party”, with respect to Confidential Information, is the Party receiving Confidential Information and may be the IESO or the Participant, as applicable.

“Representative” means, in respect of one of the Parties, any one of that Party’s employees, officers, directors, contractors, agents, representatives and advisors.

“Term” has the meaning ascribed to it in Section 3.1.

1.2 Interpretation.

- (a) The headings are for convenience of reference only and will not affect the interpretation of this Agreement.
- (b) The provisions of the body of this Agreement and the Schedules are to be read and interpreted together. If there is any inconsistency between the provisions of the body of this Agreement and any Schedule to this Agreement, the body of this Agreement shall prevail to the extent of the inconsistency, unless the Schedule expressly refers to the section of the body of the Agreement over which it prevails.
- (c) Notwithstanding the fact that this Agreement was drafted by the IESO’s legal and other professional advisors, the Parties acknowledge and agree that any doubt or ambiguity in the meaning, application or enforceability of any term or provision of this Agreement shall not be construed or interpreted against the IESO or in favour of the Participant when interpreting such term or provisions, by virtue of such fact.

- (d) In this Agreement, unless the context otherwise requires:
- (i) Words denoting inclusion (e.g. “including”) followed by a list of specific matters or items, such lists will not restrict the generality of such provision;
 - (ii) A reference to any statute, regulation, proclamation, order in council, ordinance, by-law, resolution, rule, order or directive includes all statutes, regulations, proclamations, orders in council, ordinances, bylaws or resolutions, rules, orders or directives varying, consolidating, re-enacting, extending or replacing it and a reference to a statute includes all regulations, proclamations, orders in council, rules and bylaws of a legislative nature issued under that statute;
 - (iii) A reference to dollar amounts are a reference to Canadian dollars;

1.3 **Schedules.** The following Schedules are hereby incorporated in and form part of this Agreement:

Schedule “A” – Eligibility Criteria
Schedule “B” – EE Auction Pilot M&V Procedures
Schedule “C” – EE Capacity Obligation Details

ARTICLE 2 REPRESENTATIONS AND WARRANTIES

2.1 **Participant Representations and Warranties.** The Participant covenants, represents and warrants to the IESO as follows, and acknowledges that the IESO is relying on such representations and warranties in entering into this Agreement:

- (a) The Participant is a corporation validly established under the laws of its jurisdiction, is registered or otherwise qualified to carry on business in the Province of Ontario, and has the requisite power, authority and capacity to enter into this Agreement and perform its obligations hereunder;
- (b) This Agreement has been duly authorized, executed and delivered by the Participant and is a valid and binding obligation of the Participant enforceable in accordance with its terms and conditions except as such enforcement may be limited by bankruptcy, insolvency and other laws affecting the rights of creditors generally and except that equitable remedies may only be granted in the discretion of a court of competent jurisdiction;
- (c) There is no bankruptcy, insolvency, reorganization, receivership, seizure, realization, arrangement or other similar proceedings pending against, or being contemplated by the Participant or, to the knowledge of the Participant, threatened against the Participant;
- (d) The Participant satisfies the Participant eligibility criteria set out in Schedule “A”;
- (e) All statements, specifications, data and information in the Program Deliverables, including any attached documentation, and/or submitted in a M&V Report is true,

accurate and complete in all material respects and there is no material information omitted which makes the Program Deliverables misleading or inaccurate;

- (f) The Participant would not otherwise have undertaken the Energy Efficiency Resources without the EE Capacity Payment
- (g) the Participant has not entered into a binding commitment to acquire the Measure or services required to install or implement the Measure prior to the publication of the post-auction report unless the IESO has approved such binding commitment in writing;
- (h) The Participant has all required rights and authority to install or implement the Measures and to carry out all of its obligations as set out in this Agreement;
- (i) The performance by the Participant of its obligations under this Agreement and the possession and use of the Program Deliverables by the IESO or its Representatives do not and will not infringe the Intellectual Property Rights of any third party; and

The representations and warranties provided in this Section 2.1 will be continuing throughout the term of this Agreement. Any change in the accuracy of such representations and warranties shall promptly be communicated by the Participant to the IESO in writing.

2.2 IESO Representations and Warranties. The IESO covenants, represents and warrants to the Participant as follows, and acknowledges that the Participant is relying on such representations and warranties in entering into this Agreement:

- (a) The IESO is a corporation without share capital created under the laws of Ontario, and has the requisite power to enter into this Agreement and to perform its obligations hereunder;
- (b) This Agreement has been duly authorized, executed, and delivered by the IESO and is a valid and binding obligation of the IESO enforceable in accordance with its terms, except as enforcement may be limited by bankruptcy, insolvency and other laws affecting the rights of creditors generally and except that equitable remedies may be granted solely in the discretion of a court of competent jurisdiction; and
- (c) There are no bankruptcy, insolvency, reorganization, receivership, seizure, realization, arrangement or other similar proceedings pending against, or being contemplated by the IESO or, to the knowledge of the IESO, threatened against the IESO.

ARTICLE 3 TERM AND TERMINATION

- 3.1 **Term.** The term of this Agreement commences as of the Effective Date and, unless terminated earlier in accordance with the terms of this Agreement, terminates on the second anniversary of the last day of the Participant's final Obligation Period.
- 3.2 **Termination.** If any of the following events occur, the IESO may terminate this Agreement by providing the Participant with written notice:
- (a) The Participant fails to observe or perform any covenant or obligation required to be observed or performed under this Agreement and such failure continues for a period of thirty (30) calendar days after delivery of written notice by the IESO to cure such failure;
 - (b) Any information contained in the Participant's Enrollment Package or Accepted Auction Offer is inaccurate, incomplete or misleading;
 - (c) Any representation or warranty made by the Participant in this Agreement is not true or correct in any material respect when made and is not made true or correct in all material respects within thirty (30) calendar days after receipt by the Participant of written notice of such fact from the IESO;
 - (d) The Participant becomes or is declared Insolvent, becomes the subject of any proceeding related to its liquidation or insolvency which is not dismissed within ninety (90) calendar days, or makes an assignment for the benefit of creditors;
 - (e) An effective resolution is passed or documents are filed in an office of public record in respect of, or a judgment or order is issued by a court of competent jurisdiction ordering, the dissolution, termination of existence, liquidation or winding up of the Participant or of the owner(s) or occupier(s) of the Facilities unless such filed documents are immediately revoked or otherwise rendered inapplicable, or unless there has been a permitted and valid assignment of this Agreement by the Participant under this Agreement to a Person which is not dissolving, terminating its existence, liquidating or winding up and such Person has assumed all of the Participant's obligations under this Agreement.
 - (f) The Participant assigns this Agreement without first obtaining the consent of the IESO; or
 - (g) Without cause upon sixty (60) calendar days' written notice by the IESO.
- 3.3 **Remedies for Termination Non-Exclusive.** The termination of this Agreement by the IESO, and, if applicable, the return of EE Capacity Payment in accordance with Section 5.9, shall not limit, waive or extinguish in any way the recourse of the IESO to any remedies available to it in relation to such termination at law, in equity or otherwise, nor shall such termination affect any rights that the Indemnified Party may have pursuant to any indemnity given under this Agreement.

**ARTICLE 4
ENERGY EFFICIENCY AUCTION**

- 4.1 **Securing an EE Capacity Obligation.** If the Participant is awarded an EE Capacity Obligation in the Energy Efficiency Auction:
- (a) The Agreement shall be deemed to be amended to include the details of all applicable Accepted Auction Offers as Schedule “C” to this Agreement as of the date on which the Participant receives notice that it has been awarded an EE Capacity Obligation;
 - (b) The Participant shall implement its Energy Efficiency Resources and fulfill its EE Capacity Obligation in accordance with the terms and conditions of this Agreement;
 - (c) If the Participant is not already a market participant or otherwise registered with the IESO in the system known as “Online IESO”, the Participant shall register for “Online IESO” as a program participant, including executing the IESO’s then current version of the Participation Agreement, to facilitate EE Capacity Payments;
 - (d) The Participant shall provide to the IESO the following:
 - (i) An EE Resource Plan Update no later than the day that is the midpoint between the first day of the Participant’s first Obligation Period and the day on which the Participant was notified that it had been awarded an EE Capacity Obligation. The EE Resource Plan Update shall be in the form provided by the IESO;
 - (ii) An Energy Efficiency Resource Report no later than sixty (60) calendar days before the Participant’s first Obligation Period. The Energy Efficiency Resource Report shall be in the form provided by the IESO; and
 - (iii) An M&V Plan for each Energy Efficiency Resource no later than sixty (60) calendar days before the Obligation Period to which the Energy Efficiency Resource relates. The M&V Plan shall be consistent with the EE Auction Pilot M&V Procedures.
- 4.2 **IESO Discretion.** Notwithstanding Section 4.1, the IESO may, at its sole discretion, waive the Participant’s obligation to submit the EE Resource Plan Update if the Participant has provided to the IESO an Energy Efficiency Resource Report in advance of the date on which the Participant is required to submit the EE Resource Plan Update. The IESO may, in its sole and absolute discretion, require the Participant to include additional information that the IESO determines relevant in the EE Resource Plan Update, the Energy Efficiency Resource Report, and/or the M&V Plan.
- 4.3 **Relinquishing EE Capacity Obligation.** Subject to the following, the Participant may, at any time, in its sole and absolute discretion, relinquish any or all of its EE Capacity Obligations by providing at least thirty (30) calendar days’ written notice to the IESO. The Participant shall not relinquish part of an EE Capacity Obligation and if the Participant relinquishes any or all of its EE Capacity Obligations it waives any right to receive and releases the IESO from any and all Claims it may have against the IESO in connection with or in any way arising from any EE Capacity Payment related to the

relinquished EE Capacity Obligation(s). If the Participant relinquishes any EE Capacity Obligation prior to the Obligation Period to which the EE Capacity Obligation relates, the Participant shall no longer be required to conduct any measurement and verification with respect to the applicable Obligation Period; however, the Participant shall make itself available to discuss lessons learned, processes, and such other matters as the IESO reasonably determines necessary to evaluate the Program. If the Participant relinquishes any EE Capacity Obligation during or following the Obligation Period to which the EE Capacity Obligation relates, the Participant shall continue to be required to conduct measurement and verification required pursuant to its M&V Plan and submit its M&V Report with respect to the applicable Obligation Period.

4.4 **Changes to Facilities and Measures**

- (a) Except as provided in this Section, the Participant shall not add, remove, replace or change the Energy Efficiency Resources set out in its EE Resource Plan and for which it has received an Energy Efficiency Obligation.
- (b) The IESO may approve or reject any change requested in accordance with this Section in its sole and absolute discretion. If a change is rejected, the IESO may request additional information or documentation from the Participant in order to re-evaluate the requested change.
- (c) Prior to the date on which the Energy Efficiency Resource Report is due, the Participant may request additions, deletions, or replacements of the Facilities that comprise its Energy Efficiency Resource by including the change in the EE Resource Plan Update and specifically identifying the change(s). The IESO's approval of the Energy Efficiency Resource Report shall constitute the approval of the changes to the Facilities contained therein. No changes to the Facilities that comprise the Participant's Energy Efficiency Resource may be made following the date on which the Energy Efficiency Resource Report is due.
- (d) Prior to the date on which the Energy Efficiency Resource Report is due, the Participant may request changes to Measures set out in its EE Resource Plan in accordance with the following:
 - (i) The Participant may only request to replace a Measures set out in its EE Resource Plan with replacement Measures that have an effective useful life greater or equal to the lesser of the effective useful life of the Measures being replaced or ten (10) years;
 - (ii) The Participant may only request Measures be added to its Energy Efficiency Resource where such Measures have an effective useful life equal to or greater than the lessor of the weighted average effective useful life of the other Measures constituting the Energy Efficiency Resource and ten (10) years;
 - (iii) The Participant shall not be permitted to remove Measures from its Energy Efficiency Resource except as part of an approved replacement.

ARTICLE 5

IMPLEMENTATION AND EE CAPACITY PAYMENTS

- 5.1 Participant's Obligations.** The Participant shall fulfill the following obligations as a condition of receiving any EE Capacity Payments:
- (a) The Participant shall implement the Energy Efficiency Resources as described in its approved EE Resource Plan, use commercially reasonable efforts to deliver sufficient EE Capacity to meet or exceed its EE Capacity Obligation for each of its Obligation Periods and maintain the same level of EE Capacity for a period of two (2) years following the end of the applicable Obligation Period, and diligently perform all of its other obligations hereunder in accordance with this Agreement, good engineering practices and all Applicable Laws;
 - (b) The Participant shall not enroll in any program or initiative to receive any compensation or incentives for any Measure forming part of its Energy Efficiency Resource from any program from any level of Government or utility incentivizing electricity savings. For clarity, the Participant may accept funding from other sources, such as natural gas utility demand-side management incentive programs and government greenhouse gas reduction incentive programs, to deliver other non-electricity savings or broader public value;
 - (c) Participant shall inform the IESO if any projects at any Facility receiving electricity saving incentives are commissioning after the submission of its M&V Plan, and the IESO, at its sole and absolute discretion, may require changes to the M&V Plan to take such projects into account; and
 - (d) The Participant fulfills its obligations under this Agreement, including providing all Program Deliverables and providing reasonable access to the IESO for the purposes of administering this Agreement and evaluation of the Energy Efficiency Resources and the delivered EE Capacity.
- 5.2 M&V Report.** The Participant shall submit to the IESO an M&V Report in respect of each Energy Efficiency Resource containing the information as required by the EE Auction Pilot M&V Procedures no later than sixty (60) calendar days following the end of each Obligation Period.
- 5.3 M&V Report Review and Approval.** The IESO will review the M&V Report to assess alignment with the approved M&V Plan and for completeness of the information contained within. The IESO may request such further information or evidence as it requires in its sole and absolute discretion. The IESO will provide its approval or comments on the M&V Report to the Participant within a reasonable time. If the IESO does not approve the M&V Report, such documents will be revised by the Participant in order to address the noted deficiencies and obtain the IESO's approval of such revised M&V Report. The IESO may reject a M&V Report and may refuse any EE Capacity Payment hereunder in its sole and absolute discretion if it believes that the M&V Report or any other information or documentation provided hereunder is insufficient, inaccurate, incomplete or if any other of the other requirements under this Agreement are not met, including any of the eligibility criteria set out in Schedule "A".
- 5.4 Facility Meter Data Submission.** The Participant shall submit to the IESO meter data with respect to each and every Facility forming part of its Energy Efficiency Resources,

on or around the time when the Participant is required to submit its M&V Report with respect to its final Obligation Period, in accordance with the following:

- (a) If the Participant has only been awarded an EE Capacity Obligation in respect of one Obligation Period, the Participant shall provide to the IESO the hourly or sub-hourly meter data for the time period commencing six (6) months immediately preceding the date on which the first Measure implemented and ending on the latter of the end of the Obligation Period and six (6) months following the date on which the last Measure is implemented. Notwithstanding any other provision in this Agreement, the IESO shall not be required to pay any EE Capacity Payment to the Participant unless and until the Participant provides the meter data required pursuant to this section; or
- (b) If the Participant has been awarded EE Capacity Obligations in respect of two Obligation Periods, the Participant shall provide to the IESO the hourly or sub-hourly meter data for the time period commencing six (6) months immediately preceding the date on which the first Measure is implemented with respect to the first Obligation Period and ending on the latter of the end of the second Obligation Period and six (6) months following the date on which the last Measure is implemented. Notwithstanding any other provision in this Agreement, the IESO shall not be required to pay any EE Capacity Payment to the Participant with respect to the Participant's second Obligation Period unless and until the Participant provides the meter data required pursuant to this section.

5.5 EE Capacity Payment. Subject to the terms of this Agreement, the IESO shall pay to the Participant a EE Capacity Payment for each Obligation Period for which they have an EE Capacity Obligation and a M&V Report approved by the IESO, and received all other supporting documentation and evidence as required by this Agreement or as otherwise requested by the IESO.

5.6 Calculation of EE Capacity Payment. Subject to the terms of this Agreement, the EE Capacity Payment for each Obligation Period for which the Participant has an EE Capacity Obligation will be calculated in accordance with the following:

- (a) If the Participant completely fulfills their EE Capacity Obligation for the applicable Obligation Period, the EE Capacity for such Obligation Period shall be calculated as follows:

$$\text{EE Capacity Payment} = \text{EE Capacity Obligation} \times \text{Accepted Offer Price}$$

- (b) If the Participant fails to completely fulfill their EE Capacity Obligation for the applicable Obligation Period, the EE Capacity Payment for such Obligation Period shall be calculated as follows:

$$\text{EE Capacity Payment} = (\text{EE Capacity Obligation} \times \text{Accepted Offer Price}) - ((\text{EE Capacity Obligation} - \text{delivered EE Capacity}) \times (2 \times \text{Accepted Offer Price}))$$

5.7 Maximum and Minimum EE Capacity Payments. Notwithstanding anything to the contrary in this Agreement, under no circumstance shall:

- (a) The IESO provide any EE Capacity Payment for delivering EE Capacity in excess of the Participant's EE Capacity Obligation.
- (b) The EE Capacity Payment be less than \$0.

5.8 Termination Without Cause. If the IESO terminates this Agreement without cause in accordance with Section 3.2(f), the Participant's entitlement to a EE Capacity Payment shall be determined as follows:

- (a) If the IESO terminates this Agreement prior to the submission of the Participant's EE Resource Plan Update for an Obligation Period, the Participant shall be entitled to a EE Capacity Payment for such Obligation Period calculated as follows:

$$\text{EE Capacity Payment} = 0.4 \times (\text{EE Capacity Obligation} \times \text{Accepted Offer Price})$$

- (b) If the IESO terminates this Agreement following the submission of the Participant's EE Resource Plan Update for a respective Obligation Period but before the commencement of such Obligation Period, the Participant shall be entitled to a EE Capacity Payment for such Obligation Period calculated as follows:

$$\text{EE Capacity Payment} = 0.6 \times (\text{EE Capacity Obligation} \times \text{Accepted Offer Price})$$

- (c) If the IESO terminates this Agreement during an Obligation Period, the Participant shall submit a M&V Report for each Energy Efficiency Resource for any completed portion of the Obligation Period within sixty (60) calendar days of receiving notice of the termination and, subject to the IESO's approval of such M&V Report, shall be entitled to a EE Capacity Payment for such Obligation Period calculated as the sum of the following:

- (i) $(\text{CD}/\text{TD}) \times (\text{Accepted Offer Price}) \times (2 \times \text{delivered EE Capacity} - \text{EE Capacity Obligation})$; and
- (ii) $0.7 \times (\text{RD}/\text{TD}) \times \text{EE Capacity Obligation} \times \text{Accepted Offer Price}$

Where:

CD = completed days in the Obligation Period

RD = remaining days in the Obligation Period, calculated as TD - CD

TD = total days in the Obligation Period

- (d) If the IESO terminates this Agreement following the completion of an Obligation Period, the EE Capacity Payment for such Obligation Period will be calculated normally in accordance with Section 5.6.

5.9 Termination With Cause. For clarity, if the IESO terminates this Agreement for any reason other than in accordance with Section 3.2(f), including as a result of misrepresentation or fraud by the Participant, the IESO shall not be required to pay any

further EE Capacity Payment and the Participant shall repay to the IESO any EE Capacity Payment received as of the date of termination.

- 5.10 Applicable Taxes.** In addition to the EE Capacity Payment, the IESO will pay any Applicable Taxes on the EE Capacity Payment, excluding, for certainty, any income taxes or Worker Safety Insurance Board amounts. The Participant will provide to the IESO sufficient supporting documentation, as requested by the IESO, to facilitate and support the IESO in claiming input tax credits in respect of the EE Capacity Payment. In addition, if the IESO has reasonable grounds to commence a discussion, negotiation, or challenge, in any manner whatsoever, with a tax authority regarding the validity of any Applicable Taxes imposed on the EE Capacity Payment, the Participant shall provide such reasonable assistance as may be required by the IESO with such discussion, negotiation, or challenge. For greater certainty, in no event shall the IESO be relieved of its obligations under this Agreement, including the IESO's obligation to pay Applicable Taxes as provided hereunder, pending the outcome of any discussion, negotiation or challenge with a tax authority.
- 5.11 Method of Payment.** Following the IESO's approval of the Participant's M&V Report in accordance with Section 5.3, the Participant shall submit to the system known as "Online IESO" an invoice for the EE Capacity Payment set out in the approved M&V Report and the IESO will transfer such funds via electronic funds transfer into the Participant's bank account registered with the IESO in "Online IESO".

ARTICLE 6 EVALUATION, MEASUREMENT AND VERIFICATION (EM&V); AUDIT

- 6.1 EE Auction Pilot M&V Procedures.** The performance and administration of this Agreement will be subject to the EE Auction Pilot M&V Procedures to evaluate the delivery of EE Capacity. In furtherance of the EE Auction Pilot M&V Procedures, the Participant shall cooperate with the IESO and its respective designates and shall make available such information in the form and frequency as may be reasonably prescribed.
- 6.2 M&V Plan.** The Participant shall submit an M&V Plan that aligns with the requirements of the EE Auction Pilot M&V Procedures for each Energy Efficiency Resource for which the Participant has been awarded an EE Capacity Obligation at least sixty (60) calendar days prior to the start of the first Obligation Period to which the Energy Efficiency Resource relates. The M&V Plan is subject to the IESO's approval, acting reasonably. Upon approval, the M&V Plan is deemed to be incorporated into this Agreement, with the same force and effect as though fully set forth herein. The Participant shall fulfill all of its obligations pursuant to the M&V Plan.
- 6.3 Books and Records.** The Participant shall keep complete and accurate books, accounts and records and all other data, including meter data for each Facility, required by it for the purpose of proper administration, monitoring and verification of this Agreement, including EE Capacity Payments made under this Agreement, and all such records and data shall be maintained during the term of this Agreement and for the period of time thereafter which is the greater of seven years following the end of the last Obligation Period and the period of time specified under Applicable Law.

- 6.4 Responsive Knowledgeable Staff.** The Participant shall ensure that its relevant personnel are knowledgeable with the Energy Efficiency Resources, M&V Plan, EE Auction Pilot M&V Procedures and are available to and cooperate with the IESO. The Participant shall, within ten (10) Business Days of a request, provide the IESO with any requested data and information should the IESO require clarification from the Participant related to any Program Deliverables or information required under this Agreement.
- 6.5 Reasonable Access.** On reasonable notice, at any time during normal business hours, and at such frequency as the IESO reasonably requires for a period of seven years following the end of the last Obligation Period, the Participant shall provide reasonable access to the IESO and/or its representative designates to such books, accounts, records and data and: (A) at the reasonable request of the IESO, make available to the IESO and/or its Representatives, the personnel of the Participant and its subcontractors involved in the operation of the Participant's business and the maintenance of such books, accounts, records and data referred to above for purposes of this Article or to confirm that the Participant has performed its obligations under this Agreement; and (B) permit the IESO and/or its respective designates to examine and audit and take copies and extracts from such documents and to conduct site visits to inspect a Facility in order to verify any of the information reported in a M&V Report and/or the payment of any EE Capacity Payments made hereunder. If any Facilities are not owned or operated by the Participant, the Participant shall, upon request, provide to the IESO evidence of an agreement for each Facility that permits the IESO to conduct such site-visits, evaluations, audits, and access to meter data.
- 6.6 Overpayments and underpayments.** Without limiting any other remedies of the Parties, if an audit or inspection conducted pursuant to this Agreement discloses that there has been an overpayment or underpayment by the IESO the amount of the overpayment or underpayment will be payable or repayable to the IESO or to the Participant, as the case may be, promptly following such disclosure. In the case of an overpayment made by the IESO, the amount of such overpayment may be set-off against any future amounts payable to the Participant under this Agreement.

ARTICLE 7 INDEMNITY, LIABILITY & INSURANCE

- 7.1 No Warranty.** Except as specifically set forth or referenced in this Agreement, there are no representations, warranties or conditions of either Party express, implied, statutory or otherwise, regarding any matter, including any implied warranties or conditions of quality or fitness for a particular purpose. Without limiting the generality of the foregoing, the Participant acknowledges that its participation in this Program is based on its own assessment of this Program and not on any reliance on anticipated or projected results, and that such participation may not result in the delivery of EE Capacity, which is expressly disclaimed by the Participant.
- 7.2 Limitation of Liability.** Notwithstanding anything contained herein to the contrary:
- (a) In no event will the Participant be entitled to recover from the IESO or any other Indemnified Party any liabilities, damages, obligations, payments, losses, costs or expenses under or in relation to this Agreement:

- (i) For any amount in excess of the actual compensatory direct damages, court costs and reasonable lawyers' and other advisors' fees suffered or incurred by the Participant and in any event limited to the amount of EE Capacity Payment paid by the IESO hereunder; or
 - (ii) For any damages (whether direct or indirect, consequential or otherwise) for loss of profit or diminution of value or loss of use of any property; and
- (b) The IESO and the Indemnified Parties will not be liable to the Participant, its successors or assigns or its Representatives, for any special, indirect, incidental, punitive, exemplary or consequential damages which may arise under or in relation to this Agreement, regardless of whether such liability arises under contract, tort or any other legal theory.

7.3 **Indemnification.** The Participant (the "**Indemnifying Party**") will indemnify, defend and hold the IESO, the Government of Ontario, the members of the Government of Ontario's Executive Council and their respective affiliates, and each of the foregoing Persons' respective directors, officers, employees, shareholders, advisors, third party service providers and agents (including contractors and their employees) (collectively, the "**Indemnified Party**") harmless from and against any and all Claims, losses, damages, liabilities, penalties, obligations, payments, costs and expenses and accrued interest thereon (including the costs and expenses of, and accrued interest on, any and all actions, suits, proceedings for personal injury (including death) or property damage, assessments, judgments, settlements and compromises relating thereto and reasonable lawyers' fees and reasonable disbursements in connection therewith) (each, an "**Indemnifiable Loss**"), asserted against or suffered by the Indemnified Party relating to, in connection with, resulting from, or arising out of:

- (a) Any Claim by, or occurrence or event related to, any third party relating to this Agreement;
- (b) The negligence or wilful misconduct of the Participant or its Representatives, except in either case to the extent that any injury or damage related to such Claim, occurrence or event is attributable to the negligence or wilful misconduct of the Indemnified Party. For greater certainty, in the event of contributory negligence or other fault of the Indemnified Party, then such Indemnified Party shall not be indemnified hereunder in the proportion that the Indemnified Party's negligence or wilful misconduct contributed to any Indemnifiable Loss.;
- (c) Any breach by the Participant of any representations, warranties, and covenants contained in this Agreement; and/or
- (d) The Program Deliverables, or any part thereof, infringes any Intellectual Property Rights of a third party.

The IESO will hold the benefit of the Participant's obligations under this Section 7.3 in the IESO's own right and, in trust, for the benefit of any other Indemnified Party.

ARTICLE 8 CONFIDENTIALITY AND FIPPA

8.1 **Rights to Confidential Information.** All Confidential Information remains, at all times, the exclusive property of the Disclosing Party. Neither the Receiving Party nor any of its Representatives has any licence or other right to use or disclose any Confidential Information for any purpose whatsoever other than to use the Confidential Information in connection with the Program, or as otherwise agreed to in this Agreement.

8.2 **Use and Disclosure of Confidential Information.** The Receiving Party shall with respect to the Disclosing Party's Confidential Information:

- (a) hold the Confidential Information secure and in confidence using the same degree of care and security to safeguard such Confidential Information as it uses to protect its own information of like character, but in no event less than a reasonable degree of care and security;
- (b) not, without the Disclosing Party's prior written consent, use or disclose the Confidential Information for any purpose other than in respect of the Program or in accordance with the terms of this Agreement;
- (c) limit the disclosure of Confidential Information to only those of its Representatives who have a need to know for the purpose of assisting the Receiving Party in complying with its obligations under this Agreement and have agreed to protect it from unauthorized use or disclosure. The Receiving Party will be responsible for any breaches of this Agreement by any of its Representatives, as if such Representatives were a party to this Agreement;
- (d) cause its Representatives to whom it has disclosed Confidential Information to comply with his, her or its obligations to the extent that such obligations relate to the protection of any Confidential Information; and
- (e) promptly notify the Disclosing Party in writing of any unauthorized disclosure, loss or inability to account for the Confidential Information.

8.3 **Consent to Additional Use and Disclosure.** The Parties hereby consent to the following use and disclosure of Confidential Information:

- (a) Each Party may disclose Confidential Information on a need-to-know basis to:
 - (i) Its accountants, internal and external auditors and other professional advisors;
 - (ii) Potential permitted assignees or successors of such Party in connection with a potential sale, merger, amalgamation or other transaction or transfer involving the business, assets or services provided by such party; and
 - (iii) Directors, officers, and employees of such Party and its service providers,

Provided that any such person is notified of the confidentiality of the Confidential Information and of the provisions of this Article and is subject to written confidentiality obligations no less stringent than those contained in this Article.

- (b) the IESO may use or disclose Confidential Information regarding the Participant's participation in the Program for the purpose of administering other conservation and demand management programs to the Participant and the IESO may use the Participant's meter data for research initiatives;
- (c) the IESO may disclose and provide reports, data and other information, including Confidential Information of the Participant or its Representatives, to the Ontario Energy Board, the Government of Ontario and the Environmental Commissioner of Ontario, provided that the IESO notifies such entity of the confidential nature of the Confidential Information; and
- (d) The IESO may publicly disclose any or all of the following:
 - (i) The Participant's name, contact information (including its address for service and the name of its company representative), and its participation in the Program;
 - (ii) data relating to the Program, including a description of any type of Measure and/or Facility and historical energy use and consumption, which is aggregated with other measures implemented by other Program participants in a manner that is intended to report on the Program or conservation and demand management initiatives; and
 - (iii) the status and nature of the Measures undertaken under this Program provided that the IESO shall provide ten (10) Business Days notice to the Participant in advance of such disclosure.
- (e) For each Facility the Participant consents to the disclosure of the following information to the LDC and the local gas distributor servicing such Facility:
 - (i) The address for such Facility;
 - (ii) The contact information (name, business, telephone number and e-mail address) for a contact person at the Participant having knowledge of the Facility's participation in the Program; and
 - (iii) The M&V Report for such Facility.

8.4 **Compelled Disclosure.** The Receiving Party may disclose Confidential Information of the Disclosing Party to the extent required by a Governmental Authority or as required by Applicable Law, subject to giving prior reasonable notice to the Disclosing Party of such compelled disclosure (except where prohibited by Applicable Law from doing so) so that the Disclosing Party may take such steps as it desires to challenge or contest such disclosure or seek a protective order.

8.5 **Return of Information.** Upon the expiry or termination of this Agreement or upon written request by the Disclosing Party, Confidential Information, together with all copies, extracts or other reproductions in whole or in part of such Confidential Information, provided by the Disclosing Party in printed paper format or electronic format will be returned to the Disclosing Party and Confidential Information transmitted by the Disclosing Party in electronic format will be deleted from the emails and directories of the

Receiving Party's and its Representatives' computers; provided, however, that the Receiving Party may retain any copies of Confidential Information (a) required to comply with Applicable Laws, internal record retention policies or procedures or good governance, and (b) automatically created on the Receiving Party's or Representative's computer systems by its normal back-up procedures for the period it normally archives backed-up computer records; however, such Confidential Information referred to in (a) and (b) remains confidential and subject to the terms of this Agreement. Following delivery or destruction, as the case may be, on the request of the Disclosing Party, the Receiving Party will provide the Disclosing Party with written confirmation of completion.

- 8.6 **Injunctive and Other Relief.** The Receiving Party acknowledges that breach of any provisions of this Article may cause irreparable damage or injury to the Disclosing Party or to any third-party to whom the Disclosing Party owes a duty of confidence, and that the injury to the Disclosing Party or to any third-party may be difficult to calculate and inadequately compensable in damages. The Receiving Party agrees that, in addition to any other remedies available to the Disclosing Party, the Disclosing Party is entitled to seek equitable relief, including injunction and specific performance, without proving any damage sustained by it or by any third-party.
- 8.7 **FIPPA.** Without limiting the foregoing, the Participant acknowledges and agrees that this Agreement and all Confidential Information in the custody and control of the IESO or the Participant are subject to Applicable Laws that include the access provisions of FIPPA and that as a result, third parties may obtain access to each Party's Confidential Information. Moreover, the Participant acknowledges that the IESO and its Representatives are subject to FIPPA which applies to and governs all recorded information in any form or medium, including Confidential Information, that is in the custody or control of the IESO (collectively, the "Records"), and may require the disclosure of the Records to third parties. To the extent that the IESO must comply with disclosure obligations under FIPPA, the Participant agrees:
- (a) To keep the Records in its possession secure;
 - (b) To provide a copy of any Records to the IESO within seven (7) calendar days of being directed to do so by the IESO for any reason under FIPPA including an access request or privacy issue; and
 - (c) To implement other specific security measures that in the reasonable opinion of the IESO would improve the adequacy and effectiveness of the Participant's measures to ensure, for the purposes of FIPPA, as applicable, the security and integrity of the Records held in the Participant's possession.
- 8.8 **Privacy Laws.** Each Party shall:
- (a) Comply with Privacy Laws in connection with the collection, use and disclosure of Personal Information and will perform its obligations so as to enable the other Party to comply with Applicable Law;
 - (b) Promptly notify the other Party if such Party receives notice from any Governmental Authority alleging that either Party has failed to comply with Privacy Laws and, or if such Party otherwise becomes aware that either Party

may have failed or may fail to comply with Privacy Laws in connection with the performance of this Agreement;

- (c) Cooperate and comply with any request or instructions issued by any privacy regulatory authority or any other Governmental Authority applicable to such Party;
- (d) Provide reasonable assistance to the other Party in responding to and addressing any complaint relating to the collection, use or disclosure of Personal Information; and
- (e) The Participant, if it intends on collecting, using or disclosing Personal Information as part of implementing its Energy Efficiency Resources or otherwise complying with its obligations under this Agreement, shall provide written notice to the IESO prior to such collection, use, or disclosure, and the Parties shall work together to determine any necessary or advisable deviations from the standard reporting practices, including aggregation and de-identification.

ARTICLE 9 INTELLECTUAL PROPERTY

- 9.1 **IESO Ownership Rights.** The IESO and the Participant acknowledge and agree that, as between the IESO and the Participant, the IESO owns all right, title and interest, including all Intellectual Property Rights, in and to IESO Intellectual Property. The Participant does not acquire any right, title, or ownership interest of any kind whatsoever, express or implied, in IESO Intellectual Property other than the licenses granted to the Participant herein.
- 9.2 **Participant Ownership Rights.** The IESO and the Participant acknowledge and agree that, as between the IESO and the Participant, the Participant owns all right, title and interest, including all Intellectual Property Rights, in and to Participant Intellectual Property. The IESO does not acquire any right, title, or ownership interest of any kind whatsoever, express or implied, in Participant Intellectual Property other than the licenses granted to the IESO herein.
- 9.3 **IESO License to Deliverables.** The Participant hereby grants to the IESO, a perpetual, non-exclusive, sub-licensable, transferable, irrevocable, royalty-free, fully paid-up licence to use, modify, or reproduce, to all Participant Intellectual Property embedded within any and all deliverables, including Program Deliverables, provided to the IESO pursuant to this Agreement.
- 9.4 **Participant License.** The IESO hereby grants to the Participant, a non-exclusive, royalty-free, fully paid-up license to use the IESO Intellectual Property that is provided or made available by the IESO to the Participant for the sole purpose of fulfilling its obligations under this Agreement.
- 9.5 **IESO Marks.** The Participant shall not use, nor shall it permit any person employed by it to use, identifying marks of the IESO other than with the prior written consent of the IESO, which may be arbitrarily withheld.

ARTICLE 10

DISPUTE RESOLUTION

- 10.1 **Dispute Resolution.** If any dispute arises under or in connection with this Agreement, whether arising before or after the expiration or termination of this Agreement, that the Parties cannot resolve, then either Party may deliver a notice to the other Party describing the nature and particulars of such dispute. Within ten (10) Business Days following delivery of such notice, a senior representative from each Party will meet, either in person or by telephone, to attempt to resolve the dispute. Each senior representative shall be prepared to propose a solution to the dispute. If, following such efforts, the dispute is not resolved, the dispute will be settled by arbitration before a single arbitrator (the “**Arbitrator**”) pursuant to the *Arbitration Act, 1991* (Ontario) and otherwise in accordance with the laws of the Province of Ontario.
- 10.2 **Arbitration.** A Party desiring arbitration hereunder will give written notice of arbitration to the other Party containing a concise description of the matter submitted for arbitration (“**Notice of Arbitration**”). If the Parties fail to jointly appoint an Arbitrator within fifteen (15) Business Days of the receipt of the Notice of Arbitration, an Arbitrator will be designated by a judge of the Ontario Superior Court of Justice upon application by either Party. The Arbitrator may determine all questions of law, fact and jurisdiction with respect to the dispute or arbitration (including questions as to whether a dispute is arbitrable) and all matters of procedure relating to the arbitration. The Arbitrator may grant legal and equitable relief (including injunctive relief), award costs (including legal fees and the costs of the arbitration), and award interest. The arbitration will be conducted in English in the City of Toronto (or as otherwise agreed to by the Parties) at such place therein and time as the Arbitrator may fix. The Arbitrator shall be authorized only to interpret and apply the provisions of this Agreement and shall have no power to modify or change this Agreement in any manner. Unless otherwise agreed by the Parties, the Arbitrator’s written decision will be delivered to each Party within sixty (60) calendar days following the conclusion of the arbitration hearing. Each Party shall bear (and be solely responsible for) its own costs incurred during the arbitration process, and, unless otherwise provided in the arbitral award, each Party shall bear (and be solely responsible for) its equal share of the costs of the arbitrator. The decision of the Arbitrator will be final and binding upon the Parties. There will be no appeal from the decision of the Arbitrator to any court, except on the ground that the conduct of the Arbitrator, or the decision itself, violated the provisions of the *Arbitration Act, 1991* (Ontario) or solely on a question of law as provided for in such act. Judgment upon any award rendered by the Arbitrator may be entered in any court having jurisdiction thereof. Submission to arbitration under this Agreement is intended by the Parties to preclude any action in matters which may be arbitrated hereunder, save and except for enforcement of any arbitral award.
- 10.3 **Confidentiality of Arbitration.** The arbitration and all matters arising directly or indirectly therefrom will be kept strictly confidential by the Parties and will not be disclosed to any third party except as may be compelled by law.

ARTICLE 11 MISCELLANEOUS

- 11.1 **Subcontracting.** The IESO reserves the right to engage a third party service provider, at any time, to exercise or perform any of the IESO's rights or obligations under this

Agreement, in full or in part, including with respect to the review and approval of the Program Deliverables.

11.2 **Communications.** The Participant shall acknowledge the assistance provided by the IESO in all publications, publicity materials and other forms of release or communication pertaining to the Energy Efficiency Resources, the Energy Efficiency Auction Program or this Agreement, provided that the IESO will have the right to approve all such communications in advance.

11.3 **Notices.** Any notice to be given under this Agreement unless expressly provided otherwise herein must be in writing and will be given by e-mail or by hand delivery as provided. Any notice, if sent by email, will be deemed to have been received on the Business Day following the date on which it was sent, or if delivered by hand will be deemed to have been received on the Business Day it is delivered to the applicable address noted below. Either Party may, by notice of change of address to the other Party, change its address to which notices are to be sent. Notices and other communications must be addressed as follows:

If to the Participant:

[NTD: INSERT ADDRESS]

Attention:

E-mail:

If to the IESO: Independent Electricity System Operator

120 Adelaide Street West

Suite 1600

Toronto, Ontario

M5H 1T1

Attention:

E-mail:

11.4 **Separation of Functions.** The Participant acknowledged and agrees that any actions or any notice delivered pursuant to this Agreement shall not be deemed to be notice for any other purpose, including any obligation to take action or to provide notice to the IESO pursuant to the IESO Market Rules.

11.5 **No Partnership, etc.** Nothing in this Agreement shall create or be deemed to create a relationship of partners, joint venturers, fiduciary, principal and agent or any other relationship between the Parties.

11.6 **Further Assurances.** Each of the Parties shall, from time to time on written request of the other Party, do all such further acts and execute and deliver or cause to be done, executed or delivered all such further things as may be reasonably required in order to fully perform and to more effectively implement and carry out the terms of this Agreement.

11.7 **Entire Agreement.** This Agreement constitutes the entire agreement between the Parties pertaining to its subject matter and supercedes all prior representations,

communications, negotiations, and understandings, whether oral, written, express or implied concerning the subject matter of this Agreement. This Agreement and all of the provisions of this Agreement shall be binding upon and shall enure to the benefit of the Parties and their respective successors and permitted assigns.

- 11.8 **Successors and Assigns.** This Agreement will enure to the benefit of and be binding upon the Parties and their respective successors and permitted assigns. Neither this Agreement nor any of the rights, interests or obligations under this Agreement may be assigned by the Participant without the prior written consent of the IESO, which consent may be unreasonably withheld or delayed.
- 11.9 **Severability.** The invalidity, unenforceability or illegality of any provision in this Agreement will not, to the extent permitted by Applicable Law, affect the validity, enforceability or legality of any other provision of this Agreement, which will remain in full force and effect. If a provision is considered to be invalid, inapplicable or unenforceable, the Parties shall then engage in good faith negotiations to replace such provision with a valid, enforceable, and applicable provision, the economic effect of which substantially reflects that of the invalid, unenforceable, or inapplicable provision which it replaces.
- 11.10 **Waiver, Amendment.** Except as expressly provided in this Agreement, no amendment or waiver of any provision of this Agreement shall be binding unless executed in writing by the Party (or Parties) to be bound thereby. No waiver of any provision of this Agreement shall constitute a waiver of any other provision nor shall any waiver of any provision of this Agreement constitute a continuing waiver or operate as a waiver of, or estoppel with respect to, any subsequent failure to comply unless otherwise expressly provided.
- 11.11 **Set-Off, Remedies Not Limited to Contract.** Either Party may set off any amounts owing to such Party under this Agreement against any amounts owed to the other Party under this Agreement. Unless expressly provided in this Agreement, the express rights and remedies of the IESO or the Participant set out in this Agreement are in addition to and shall not limit any other rights and remedies available to the IESO or the Participant, respectively, at law or in equity.
- 11.12 **Survival.** Articles 6, 7, 8, 9 and 10, and such other provisions as are necessary for the interpretation thereof and any other provisions hereof, the nature and intent of which is to survive termination or expiration of this Agreement, will survive the expiration or termination of this Agreement. Without limiting the generality of the foregoing, if the Participant is entitled to receive a EE Capacity Payment pursuant to this Agreement after such expiration or termination, then the provisions of the Agreement applicable to such EE Capacity Payment will survive the termination or expiration of the Agreement.
- 11.13 **Governing Law and Attornment.** This Agreement will be governed by and construed in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable therein. For the purpose of all legal proceedings, this Agreement will be deemed to have been made and performed in the Province of Ontario and the courts of the Province of Ontario will have exclusive jurisdiction to entertain any action arising under this Agreement. The IESO and the Participant each hereby attorns to the exclusive jurisdiction of the courts of the Province of Ontario.

11.14 **Counterparts.** This Agreement may be executed in two or more counterparts, and all such counterparts shall together constitute one and the same Agreement binding on both Parties provided that each Party has signed at least one counterpart.

IN WITNESS WHEREOF the Parties have executed this Agreement by their duly authorized respective representative(s) as of the date first written above.

INDEPENDENT ELECTRICITY
SYSTEM OPERATOR

[NTD: LEGAL NAME OF PARTICIPANT]

Per: _____

Per: _____

Name:
Title:

Name:
Title:

I have authority to bind the corporation

I/We have authority to bind the Participant

DRAFT

Schedule "A"
ELIGIBILITY CRITERIA

- A1. **Participant Eligibility Criteria.** To be an eligible Participant under the Program, a Person must:
- (a) Be an incorporated entity;
 - (b) Not be Insolvent; and
 - (c) Be able to provide third-party audited financial statements.
- A2. **Facility Eligibility Criteria.** To be an eligible Facility, the proposed Facility must:
- (a) Be connected to, or behind the meter of another electricity customer-connected to, the IESO-Controlled Grid or a Distribution System;
 - (b) Possess meters approved and verified by Measurement Canada for measuring demand on an hourly or sub-hourly basis; and
 - (c) Possess records of a minimum of twelve (12) consecutive months of hourly or sub-hourly meter data for the time period ending immediately prior to the installation or implementation of Measures at such Facility.
- A3. **Measure Eligibility Requirements.** The following are the eligibility requirements of a Measure:
- (a) it must relate to:
 - (i) The behind-the-meter installation of more efficient equipment or implementation of more efficient processes and systems, exceeding current building codes, appliance standards, or other relevant standards; or
 - (ii) the installation of equipment or implementation of processes and systems shifting load outside of the Demand Reduction Windows; and
 - (b) Once installed/implemented and commissioned, it must:
 - (i) provide demand reduction without requiring any notice, dynamic price signal, dispatch, or other operator intervention, while maintaining a comparable quality of service; and
 - (ii) continue to deliver the same level of EE Capacity for a minimum of two consecutive years.
- A4. **Measure Ineligibility.** Notwithstanding Section A3, the following shall not be considered Measures:
- (a) Any Measure installed or implemented, or in relation to which a binding commitment to acquire the Measure or services required to install or implement

the Measure, prior to the publication of the post-auction report, provided that the IESO may waive this restriction if the Participant can demonstrate to the IESO's satisfaction that the Participant intended to participate in the Energy Efficiency Auction prior to entering into a binding commitment. For greater certainty, existence of a long-term facilities management or maintenance service contract will not impact Measure eligibility;

- (b) any Measure enrolled in or receiving any incentives through any program from any level of Government or utility incentivizing electricity savings;
- (c) any Measure technically capable of responding to hourly or sub-hourly IESO dispatch instructions;
- (d) The displacement of load through behind-the-meter generation, including combined heat and power and renewable energy generation sources, such as solar photovoltaic, wind, and biomass;
- (e) The removal of equipment, processes, or systems, also referred to as load destruction;
- (f) switching the input fuel source for equipment, process, or system to natural gas, diesel, or other carbon-emitting fuel source;
- (g) Improvements to the efficiency of the transmission and distribution of electricity such as volt/VAR Optimization and conservation voltage regulation projects, or initiatives related to reducing electricity theft;
- (h) The installation of electrical energy storage, or thermal storage dispatchable on an hourly or sub-hourly basis; and
- (i) Any Measure that would require its operation to be shut down, cycled, or otherwise modified to comply with a demand-response (DR) activation, out of market activation (i.e. for a test activation or emergency operating action) or other market dispatch instruction where this would impact the demand reduction that would have occurred under normal operating conditions.

A5. **IESO Governs.** Notwithstanding anything in the Agreement to the contrary, in the event of disagreement in regards to the eligibility of the Participant, the Facilities or any Measure, the opinion of the IESO shall govern.

Schedule "B"
EE AUCTION PILOT M&V PROCEDURES

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Schedule "C"
EE CAPACITY OBLIGATION DETAILS

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