

INDUSTRIAL ENERGY EFFICIENCY PROGRAM PARTICIPANT AGREEMENT

This Industrial Energy Efficiency Program Participant Agreement (the “**Agreement**”) is made as of this ____ day of _____, 202__ (the “**Effective Date**”),

BETWEEN:

[●][NOTE TO FINALIZATION: INSERT LEGAL NAME OF PARTICIPANT.]

(the “**Participant**”)

-and-

INDEPENDENT ELECTRICITY SYSTEM OPERATOR

(the “**IESO**”)

RECITALS:

1. The IESO is offering and administering the IEEP under the 2021-2024 Conservation and Demand Management Framework to incentivize the implementation of related industrial energy efficiency projects with an emphasis on process improvements and system optimisation.
2. The Participant wishes to participate in the IEEP offered by the IESO in order to access funding for the delivery of Electricity Savings from a Project which implements Measures to one or more Industrial Processes.
3. The Participant submitted a Stage 1 Application and a Stage 2 Application (collectively, with the Stage 1 Application, the “**Application Package**”) seeking to participate in the IEEP.
4. The Participant’s Stage 2 Application was accepted by the IESO and the Participant was offered the opportunity to participate in the IEEP by a notice in writing from the IESO on [●], 202[●].
5. The Participant will implement its Project and the IESO will provide incentive payments upon completion of the Project, 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:

“2020 Ministerial Directive” means the direction given to the IESO by the Minister of Energy, Northern Development and Mines on September 30, 2020 to design, coordinate, deliver and/or fund the delivery of certain electricity conservation and demand management programs under the Save on Energy brand through the 2021-2024 Conservation and Demand Management Framework beginning on January 1, 2021.

“2021-2024 Conservation and Demand Management Framework” means the framework established by the 2020 Ministerial Directive.

“Actual Electricity Savings” means the amount of the actual Electricity Savings delivered by the Project as reflected in the first annual M&V Report approved by the IESO.

“Actual Participant Incentive” means the amount of the actual financial incentive payable by the IESO to the Participant in respect of the Project.

“Affiliate” means any Person that: (a) Controls a Participant; (b) is Controlled by a Participant; or (c) is Controlled by the same Person that Controls a Participant.

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

“Anticipated Electricity Savings” means the estimated Electricity Savings anticipated to be delivered by the Project, as set out in the M&V Plan. For clarity, the amount of the Anticipated Electricity Savings is [●] MWh per year.

“Applicable Law” means any applicable law, including any statute, legislation, treaty, regulation and any applicable guideline, directive, rule, standard, requirement, policy, order, judgment, injunction, award or decree of a Governmental Authority and any applicable Governmental Approvals.

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

“Application Package” has the meaning given to it in the Recitals of this Agreement.

“Approved Amount” means the amount which is the lesser of:

- (a) the Proposed Participant Incentive; and
- (b) 75% of the amount resulting from the total Eligible Costs minus any Third Party Contributions.

“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 the IESO is 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.

“Commercially Reasonable Efforts” means all efforts required to satisfy, complete or achieve a condition, obligation or undertaking contemplated herein and which do not require the Party

to expend any funds or assume liabilities other than expenditures and liabilities which are reasonable in nature and amount.

“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; or
- (c) all information derived from any such confidential information.

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

- (a) 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;
- (b) 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;
- (c) as shown by written record, was independently developed by the Receiving Party without use of or reference to the Confidential Information; or
- (d) 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.

“Control” means, with regard to any Person, the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of such person, corporation or entity, whether through the ownership of securities, by contract or otherwise.

“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 preamble of this Agreement.

“Electricity Savings” means the annualized electricity consumption reduction, based on the normal operating conditions in relation to the Project.

“Electricity Savings Period” means a period of forty-eight (48) months after the end of the M&V Reporting Period.

“Eligibility Criteria” means the eligibility criteria for participation in the IEEP (including in relation to participants, facilities, projects, measures and costs) as set out in the Program Requirements.

“Eligible Costs” means the costs incurred to implement the Project which meet the applicable Eligibility Criteria.

“Environmental Attributes” means all benefits and entitlements associated with a Measure or a Facility having decreased environmental impacts resulting from the implementation of a Project, and includes:

- (a) all rights to any fungible or non-fungible attributes, whether arising from a Facility itself, from the interaction of a Facility with a Distribution System or the IESO-Controlled Grid or because of Applicable Law or voluntary programs established by any Governmental Authority;
- (b) all rights relating to the nature of the energy source as may be defined and awarded through Applicable Law or voluntary programs and specific Environmental Attributes include ownership rights to any applicable credits, entitlements or other instruments resulting from the interaction of a Facility or a Measure with a Distribution System or the IESO-Controlled Grid or as specified by Applicable Law or voluntary programs;
- (c) all rights to quantify and register the foregoing with competent authorities; and
- (d) all revenues, entitlements, benefits, and other proceeds arising from or related to the foregoing.

“Event of Default” has the meaning given to it in Section 8.3.

“Facility” means the building(s), premises or lands, or part thereof, over which the Participant has all required authorization and approvals to carry out the Project and which meets the Eligibility Criteria, as more particularly described in the Stage 2 Application.

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

“Force Majeure” means events beyond the reasonable control of a Party applying reasonable diligence and foresight given the nature of the obligations under this Agreement, including, as applicable, any acts of God and the public enemy, the elements; fire; accidents; vandalism; sabotage; power failure; strikes, lockouts or any other industrial, civil or public disturbances; any laws, orders, rules, regulations, acts or restraints of any government or governmental body or authority, civil or military, including the orders and judgments of courts and any other similar causes or acts.

“Generation” means a process used to produce energy in the form of electricity.

“Good Engineering Practices” means any of the practices, methods and activities adopted by a significant portion of North American industries as good practices applicable to the design, building, and operation of projects of similar type, size and capacity or any of the practices, methods or activities which, in the exercise of skill, diligence, prudence, foresight and reasonable judgment by a prudent engineer in light of all the facts known at the time the decision was made, could reasonably have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety, expedition and Applicable Law; Good Engineering Practices are not intended to be the optimum practices, methods or acts to the exclusion of all others, but rather are intended to delineate acceptable practices, methods or acts generally accepted in North American industries.

“Governmental Approvals” means any declaration, filing or registration with, notice to or license, permit, certificate, registration, authorization, consent or approval of, any Governmental Authority pertaining to a Project.

“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 the operator of the IESO-Controlled Grid, the Ontario Energy Board, the Electrical Safety Authority, the Office of the Auditor General of Ontario, 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 EM&V Protocols” means the methods and processes that the IESO develops for the evaluation, measurement and verification of electricity conservation and demand management programs and initiatives, as such methods and processes may be amended from time to time.

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

“Indemnifiable Loss” has the meaning given to it in Section 8.3.

“Indemnified Party” has the meaning given to it in Section 8.3.

“Industrial Process” means any process: (a) of extraction, growth, refining, processing, production, manufacture or preparation of materials, and (b) which consumes electricity.

“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.

“Invoice Reconciliation Form” means an invoice reconciliation form which specifically itemizes Eligible Costs and describes: (a) all eligible equipment, systems, parts and other products, and the relating prices paid for same; (b) all eligible services and the relating prices paid for same; and (c) the anticipated In-Service Date.

“In-Service Date” means the date that a Project is fully implemented in accordance with the M&V Plan and starts delivering Electricity Savings, as approved by the IESO.

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

“M&V” means measurement and verification.

“M&V Plan” means the measurement and verification plan prepared by the Participant in compliance with the International Performance Measurement and Verification Protocol (IPMVP) Core Concepts, October 2016, EVO 10000 – 1:2016 (or later), which outlines:

- (a) how the performance of the Measures and the Project will be measured, analyzed and reported both prior to and following Project implementation; and
- (b) the methodology and activities to be undertaken to quantify and verify the Electricity Savings delivered by the Project,

and is approved by the IESO and the Technical Reviewer as a part of the review and acceptance process of the Stage 2 Application, as such plan may be further amended in accordance with Section 6.2.

“M&V Report” means a measurement and verification document, prepared by the Participant in accordance with the M&V Plan, which includes the analysis by the Participant of the actual Electricity Savings delivered by the Measure or Measures included in a Project.

“M&V Reporting Period” has the meaning given to it in Section 6.3(a).

“Material Adverse Effect” means any change (or changes taken together) in, or effect on, the affected Party that materially and adversely affects the ability of such Party to perform its obligations under this Agreement.

“Measure” means any activity undertaken for the primary purpose of obtaining or effecting, directly or indirectly, conservation demand management, including the installation, retrofit, replacement, modification or commissioning of equipment, systems, processes or behaviours that consume or result in the consumption of electricity, or any equipment, system or product related to the foregoing.

“MW” means a megawatt; and **“MWh”** means a megawatt hour.

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

“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.

“Program” or **“Industrial Energy Efficiency Program”** or **“IEEP”** means the program offered by the IESO under the under the 2021-2024 Conservation and Demand Management Framework to incentivize the implementation of related industrial energy efficiency projects with an emphasis on process improvements and system optimisation.

“Program Deliverables” means, collectively, the M&V Plan, the first quarter M&V Report, the first annual M&V Report and such other documentation or deliverables as may be required to calculate and/or confirm the Actual Participant Incentive and the actual Electricity Savings delivered by the Project.

“Program Requirements” means the IEPP Program Requirements published online by the IESO, as may be amended from time to time.

“Project” means one or more Measures which will be undertaken by the Participant within one or more Facilities, in accordance with the Eligibility Criteria, in order to deliver Electricity Savings, as more particularly described in the Stage 2 Application.

“Proposed Participant Incentive” means the amount of the financial incentive in respect of the Project proposed by the Participant, and approved by the IESO as a part of the review and acceptance process of the Stage 2 Application. For clarity, the amount of the Proposed Participant Incentive is [●] dollars (\$[●]).

“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.

“Stage 1 Application” means the stage 1 application for participation in the IEPP (including all supporting documentation) submitted by the Participant, on [●], 202[●], in accordance with the applicable Program Requirements, on the basis of which the IESO recommended that the Participant submit the Stage 2 Application.

“Stage 2 Application” means the stage 2 application for participation in the IEEP (including the M&V Plan and all other supporting documentation) submitted by the Participant, on [●], 202[●], in accordance with the applicable Program Requirements, which was accepted by the IESO for participation in the IEEP. For clarity, the Stage 2 Application includes any amendments to the stage 2 application approved by the IESO as a part of the review and acceptance process of the stage 2 application.

“Technical Reviewer” means the personnel of a Person retained by the IESO, with the necessary experience and qualifications to carry out certain functions under the IEEP.

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

“Third Party Contribution” means any financial or other contribution (including the value of contributions in kind) towards the costs of a Project (which qualify as Eligible Costs) from or by any Person other than the Participant or the IESO, including but not limited to federal initiatives or gas incentives.

“Third Party Owner” means, if any, the Person(s) having ownership or operational authority over of the Facility or Facilities, if different from the Participant.

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 any Schedules to the Agreement 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; and
 - (iii) A reference to dollar amounts are a reference to Canadian dollars.

- 1.3 Schedules. The following documents are hereby incorporated in and form part of this Agreement: the version of the IEEP Program Requirements in effect as of the Effective Date, provided that such version shall continue to apply notwithstanding any subsequent amendments to the IEEP Program Requirements, unless the Parties otherwise agree in writing; and
- (b) the Stage 2 Application.

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, the Facility or Facilities, the Measure or Measures and the Project meet the Eligibility Criteria;
 - (b) the Participant and any Third Party Owner would not have undertaken the Project without the Proposed Participant Incentive;
 - (c) all statements, specifications, data and information in the Application Package, 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 Application Package or Program Deliverables misleading or inaccurate;
 - (d) the Participant has all required rights and authority to implement the Project and to carry out all of its obligations as set out in this Agreement;
 - (e) 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;
 - (f) 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;
 - (g) to the knowledge of the Participant, there is no bankruptcy, insolvency, reorganization, receivership, seizure, realization, arrangement or other similar proceedings pending against, or being contemplated by any Third Party Owner or threatened against any Third Party Owner;
 - (h) there are no actions, suits, proceedings, judgements, rulings or orders by or before any Governmental Authority or arbitrator, or, to the knowledge of the Participant, threatened against the Participant, that could have a Material Adverse Effect on the Participant;
 - (i) to the knowledge of the Participant, there are no actions, suits, proceedings, judgements, rulings or orders by or before any Governmental Authority or arbitrator, or

threatened against any Third Party Owner, that could have a Material Adverse Effect on the Participant;

- (j) the Participant has, or will ensure that any Third Party Owner has, obtained all of the necessary internal approvals in order to proceed with the implementation of the Project;
- (k) the Participant has, or will ensure that any Third Party Owner has, title to, a leasehold interest in, or other contractual rights in respect of the Facility, sufficient to enable the Participant to undertake the Project;
- (l) the Participant and/or any Third Party Owner, as the case may be, shall make any declaration, filing or registration with, give any notice to or obtain any Governmental Approval required by Applicable Law, as a condition to entering into the Agreement and to fulfill its obligations. Further, all Governmental Approvals that are required at the time of this representation for the performance of the Participant's obligations have been obtained;
- (m) the execution of the Agreement and the performance of the Participant's obligations under them will not result in the breach or violation of any of the provisions of its material obligations or any judgements, decree, order or award to which it is subject or any Governmental Approval held by it;
- (n) the Participant has not, and any Third Party Owner has not, prior to submitting the Stage 1 Application, entered into an agreement with any contractor or consultant, or ordered or purchased any equipment for use in relation to the Project, other than in connection with any pre-project development;
- (o) the Participant is not a non-resident of Canada for the purposes of the Income Tax Act (Canada);
- (p) the Participant shall not, and shall ensure that any Third Party Owner shall not, directly or indirectly assign, transfer or sell any electricity it generates from a Project into a Distribution System or the IESO- Controlled Grid;
- (q) for a Generation Project only, the Participant shall not, and shall ensure that the Third Party Owner shall not, use the Generation Project at any time during the Term for the primary purpose of reducing electricity demand during the five critical system peak hours;
- (r) where the Participant is an Affiliate of a LDC, the execution and implementation of the Project and the consummation of the transactions contemplated therein are in compliance with all of the requirements under the Ontario Energy Board's Affiliate Relationships Code; and
- (s) 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.

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

ARTICLE 3 TERM

- 3.1 **Term.** The term of this Agreement (“**Term**”) commences as of the Effective Date and, unless terminated earlier in accordance with the terms of this Agreement, terminates on the first day of the month immediately following the end of the Electricity Savings Period.

ARTICLE 4 EVENTS OF DEFAULT AND TERMINATION

- 4.1 **Event of Default.** The occurrence of any of the following events shall be an event of default by the Participant (“**Event of Default**”) if such event is not remedied within fifteen (15) Business Days following written notices from the IESO to the Participant, provided that such cure period may be extended by the IESO if the IESO is satisfied that the Participant is diligently remedying such event and such event is capable of being cured during such extended cure period:
- (a) the In-Service Date has not occurred in accordance with Section 6.1;
 - (b) the Project fails to deliver the Actual Electricity Savings in any given year during the Electricity Savings Period;
 - (c) the Participant fails to perform any material covenant or obligations set forth in the Agreement;
 - (d) any representation or warranty made by the Participant in this Agreement is not true or correct in any material respect when made;
 - (e) the Participant or any Third Party Owner fails or ceases to hold a Governmental Approval necessary for the implementation of the Project;
 - (f) the Facility ceases to carry on business in the ordinary course;
 - (g) documents are filed in an office of public record in respect of, or a judgement or order is issued by a court of competent jurisdiction ordering, the dissolution, termination of existence, liquidation or winding up of the Participant or any Third Party Owner;
 - (h) the Participant and/or any Third Party Owner amalgamates with, or merges with or into, or transfers the Facility and/or all or substantially all of its assets to, another Person, unless at the time of such amalgamation, merger or transfer, there has been a permitted and valid assignment by the Participant of the Agreement to the resulting, surviving or transferee Person and such Person has assumed all of the obligations of the Participant under the Agreement;
 - (i) the Participant and/or any Third Party Owner, as the case may be, makes an assignment for the benefit of its creditors generally under any Applicable Law, or consents to the appointment of a receiver, manager, receiver-manager, monitor, trustee in bankruptcy or liquidator for all or part of its property or files a petition or proposal to declare bankruptcy or to reorganize pursuant to the provisions of any Applicable Law; and

- (j) the Participant has made a material amendment to the M&V Plan which has not first been approved in writing by the IESO.

4.2 **Remedies for Events of Default.** If the Participant cannot or will not remedy an Event of Default within the time period required by Section 4.1, the IESO may exercise any one or more of the following remedies:

- (a) upon written notice to the Participant, the IESO may terminate the Agreement and the Participant will no longer be eligible to receive the Actual Participant Incentive if the Actual Participant Incentive has not yet been paid by the IESO; or
- (b) the IESO will be entitled to be paid by the Participant an amount as liquidated damages and not as a penalty, calculated as follows:
 - (i) in respect of the Event of Default described in Section 4.1(b), (the amount of the Actual Participant Incentive paid by the IESO to the Participant to date) x (the number of years the Event of Default has persisted ÷ 4); and
 - (ii) in respect of all other Events of Default, (the amount of the Actual Participant Incentive paid by the IESO to the Participant to date) x (the number of months the Event of Default has persisted ÷ 48).

For clarity, the IESO will not be entitled to any liquidated damages if it has not yet made any payments in respect of the Actual Participant Incentive.

4.3 **Remedies for Termination Non-Exclusive.** The termination of this Agreement by the IESO, and, if applicable, the payment of any liquidated damages in accordance with Section 4.2(b), 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 5 PROJECT IMPLEMENTATION AND INCENTIVE PAYMENTS

5.1 **Participant's Obligations.** The Participant shall fulfill the following obligations as a condition of receiving any payment in respect of the Actual Participant Incentive:

- (a) the Participant shall implement the Project and diligently perform all of its other obligations hereunder, in accordance with this Agreement, Good Engineering Practices and all Applicable Laws. The Participant shall cause any Third Party Owners to take such action and do all other lawful things as may be necessary in order for the Participant to satisfy the foregoing obligation.
- (b) the Participant shall ensure that all equipment being replaced in whole or in part by any Measure, when removed, is not sold for re-use and is decommissioned or disposed of in accordance with Applicable Laws;
- (c) the Participant shall, and shall cause any Third Party Owner to, obtain and maintain all Governmental Approvals necessary for the design, engineering, installation, verification, operation and maintenance of the Project;

- (d) the Participant shall not, and shall cause any Third Party Owner to not, at any time modify, vary or amend in any material respect the scope or objectives of the Project without first notifying the IESO in writing and obtaining the IESO's written consent;
- (e) the Participant shall provide written clarification on any aspect of any Program Deliverable or other document or information submitted by the Participant to the satisfaction of the IESO and/or its Technical Reviewer within ten (10) Business Days of such request or such other time period agreed by the IESO in writing;
- (f) the Participant shall maintain, or cause to be maintained, all of the equipment and improvements installed or implemented for a Project in good working order and operate and maintain, or cause to be operated and maintained, such equipment and improvements without any modification such that Commercially Reasonable Efforts are made to maintain the Electricity Savings through the Electricity Savings Period;
- (g) the Participant shall ensure that the In-Service Date for the Project will be the earlier of (i) the third anniversary of the Effective Date, and (ii) December 31, 2026; and
- (h) the Participant shall ensure that any Third Party Owner acknowledges and consents to the implementation of the Project and agrees to reasonable access by the IESO and/or its Technical Reviewer for the purposes of administering this Agreement and conducting any evaluation of the Project and the achievement of Electricity Savings.

5.2 **Calculation of Participant Incentive Payment.** The Actual Participant Incentive shall be determined by the IESO following the IESO's approval of the Participant's first annual M&V Report. Subject to the terms of this Agreement, the Actual Participant Incentive amount will be calculated in accordance with the following:

- (a) if the Project delivers Actual Electricity Savings which are less than 50% of the Anticipated Electricity Savings, the Actual Participant Incentive shall be equal to \$0;
- (b) if the Project delivers Actual Electricity Savings which are equal to or greater than 50% but less than 75% of the Anticipated Electricity Savings, the Actual Participant Incentive shall be equal to 50% of the Approved Amount; or
- (c) if the Project delivers Actual Electricity Savings which greater than 75% of the Anticipated Electricity Savings, the Actual Participant Incentive shall be equal to 100% of the Approved Amount.

As a part of the calculation of the Actual Participant Incentive, the Participant shall prepare and submit to the IESO, in form and substance acceptable to the IESO, an Invoice Reconciliation Form in respect of the Eligible Costs. The Invoice Reconciliation Form will be deemed to be a representation and warranty of the Participant to the IESO that the work required to be completed and the costs incurred have been completed and paid, as applicable.

5.3 **Participant Incentive Payment.** Subject to the terms of this Agreement, the IESO shall make payment of the Actual Participant Incentive in two installments following achievement of the In-Service Date, in accordance with the following:

- (a) Initial Payment: 50% of the Proposed Participant Incentive will be paid following the IESO's approval of the Participant's first quarterly M&V Report, provided that the actual

Electricity Savings delivered by the Project as reflected in the first quarter M&V Report approved by the IESO are equal to or greater than 25% of the Anticipated Electricity Savings. If the actual Electricity Savings are less than 25% of the Anticipated Electricity Savings, no initial payment is payable by the IESO; and

- (b) **Final Payment:** The difference between the Actual Participant Incentive calculated in accordance with Section 5.2, and the initial payment made pursuant to Section 5.3(a), if any, will be paid following the IESO's approval of the Participant's first annual M&V Report. If such difference indicates an overpayment by the IESO, in addition to other remedies available to the IESO pursuant to the terms of this Agreement, the Participant will be required to promptly repay to the IESO the amount of such overpayment.

The IESO will not pay, and the Participant will not be entitled to any payment referred to herein unless the applicable Program Deliverables in respect of such payment have been approved by the IESO and provided all other supporting documentation and evidence as required by this Agreement or as otherwise requested by the IESO has been delivered by the Participant.

- 5.4 **Applicable Taxes.** In addition to the Actual Participant Incentive, the IESO will pay any Applicable Taxes on the Actual Participant Incentive, 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 Actual Participant Incentive. 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 Actual Participant Incentive, 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.
- 5.5 **Method of Payment.** The Participant shall submit to the IESO an invoice for each payment described in Section 5.3. The IESO will make payment to the Participant within a reasonable period following receipt of such invoices, which period may be more than ninety (90) days after the IESO's receipt of such invoices. Payments will be made by electronic funds transfer or cheque payable to the Participant.

ARTICLE 6 EVALUATION, MEASUREMENT AND VERIFICATION; AUDIT

- 6.1 **In-Service Date.** The Participant will cause the Project to achieve the In-Service Date by the earlier of (i) the third anniversary of the Effective Date, and (ii) December 31, 2026. For clarity, a Project that is not in-service in accordance with the foregoing requirement will no longer be eligible to receive the Actual Participant Incentive. The Participant will deliver to the IESO and the Technical Reviewer no less than thirty (30) days written notice in advance of the proposed In-Service Date and will provide any data in electronic or written form relating thereto as maybe reasonably requested by the IESO and/or the Technical Reviewer to confirm the In-Service Date has been achieved. The IESO will notify the Participant in writing of the upon approved In-Service Date upon achievement of the In-Service Date. To confirm if a Project has achieved the In-Service Date, the IESO and/or the Technical Reviewer may conduct an on-site review of the Project.

6.2 **M&V Plan.** The Participant shall fulfill all of its obligations pursuant to the M&V Plan. The Parties acknowledge and agree that after the Effective Date, the Parties may mutually agree to amend the M&V Plan without the execution of a formal amendment to this Agreement in accordance with Section 11.13.

6.3 **M&V Reporting**

- (a) Provided that the Participant has fulfilled all of its obligations pursuant to the M&V Plan, and unless extended by the IESO in order to appropriately verify the Actual Electricity Savings for reporting and payment of the Actual Participant Incentive, the M&V reporting period for the Project shall be for a period of one year after the In-Service Date (the “**M&V Reporting Period**”).
- (b) Once the In-Service Date has been achieved, the Participant will deliver M&V Reports, in accordance with the M&V Plan, to the IESO and the Technical Reviewer during the M&V Reporting Period. The first quarterly M&V Report will be delivered within a reasonable timeframe following the end of the first quarter after the In-Service Date and the first annual M&V Report will be delivered within a reasonable timeframe following the first anniversary of the In-Service Date. The IESO may require additional M&V Reports for the Project throughout the Term and the M&V Reporting Period may be extended by the IESO, at its sole discretion.
- (c) The IESO will review each 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 reasonably requires. 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, acting reasonably, reject a M&V Report 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.

6.4 **Third Party Service Provider.** The IESO reserves the right to engage a third party service provider (including the Technical Reviewer), at any time, to exercise or perform any of the IESO’s rights or obligations under this Agreement, in full or in part. The IESO also reserves the right, at any time, to assume the role of the Technical Reviewer under this Agreement. The Technical Reviewer will provide the IESO with independent technical expertise and administrative assistance in respect of the Project and the IEEP. The Participant shall, and shall cause any Third Party Owner to, cooperate with the Technical Reviewer and provide the Technical Reviewer with any required data and information and access to the Facility in order for the Technical Reviewer to perform its obligations in respect of the Project and the IEEP, including, historical energy use, energy consumption or any other information relating to the Facility required by the Technical Reviewer for measurement and verification purposes.

6.5 **IESO EM&V Protocols.** The IESO and its evaluation service provider(s) will conduct an evaluation of the Program to determine and verify the energy savings and peak demand savings achieved, in accordance with the IESO EM&V Protocols. Activities undertaken by the IESO may include site visits, process interviews, provision of documentation, surveys, studies, audits, evaluations or verifications. The Participant consents to participate in any survey, studies, audits, or other evaluation, monitoring and verification activities that may be conducted

by the IESO, its evaluation service provider(s) and their respective agents in connection with the Program, and any other provisions that may be required by the IESO. The Participant agrees to support the IESO and its evaluation service provider(s) by:

- (a) communicating with the IESO and its evaluation service provider(s) to facilitate the Program's evaluation process;
- (b) providing details regarding the Participant and its activities as requested by the IESO or its evaluation service provider(s);
- (c) providing the IESO or its evaluation service provider(s) with access to paper and electronic copies of necessary files, information and data, and analysis; and
- (d) ensuring availability of appropriate staff for interview, on request of the IESO or its evaluation service provider(s).

6.6 **Books and Records.** The Participant shall keep complete and accurate books, accounts and records and all other data required by it for the purpose of proper administration, monitoring and verification of this Agreement, including the Actual Participant Incentive paid under this Agreement, and all such records and data shall be maintained during the Term and for the period of time thereafter which is the greater of seven years following the end of the Electricity Savings Period and the period of time specified under Applicable Law.

6.7 **Responsive Knowledgeable Staff.** The Participant shall ensure that its relevant personnel are knowledgeable with respect to the Project, the Program Deliverables and the IESO EM&V Protocols, and are available to and cooperate with the IESO and the Technical Reviewer in respect of the foregoing. The Participant shall, within ten (10) Business Days of a request by the IESO or the Technical Reviewer, provide the IESO or the Technical Reviewer, as the case may be, with:

- (a) any reasonably requested data and information should the IESO or the Technical Reviewer require clarification from the Participant in relation to any Program Deliverables or information required under this Agreement; and
- (b) reasonable access to the Facilities and other related buildings as the case may be, in order for the Technical Reviewer to confirm the information provided in the M&V Reports and/or to substantiate the installation of eligible Measures.

6.8 **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 Electricity Savings 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 Actual Participant Incentive 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, and audits.

- 6.9 **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 AND LIMITATION OF LIABILITY

- 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 the Electricity Savings, 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 or the IEEP:
 - (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 the Actual Participant Incentive paid or payable 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; and/or
- (c) any breach by the Participant of any representations, warranties, and covenants contained in this Agreement.

The IESO will hold the benefit of the Participant's obligations under this Section 8.3 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;
- (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.

- 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; and
 - (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.

ARTICLE 9 DISPUTE RESOLUTION

- 9.1 **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.

- 9.2 **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.
- 9.3 **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 10 FORCE MAJEURE

- 10.1 **Effect of Force Majeure.** If, by reason of Force Majeure, a Party is unable, wholly or partially, to perform or comply with its material obligations hereunder, then subject to Section 10.3, that Party will be excused and relieved on a day for day basis from performing or complying with

such obligations for the period of time in which such Force Majeure will continue and for any liability for such non-performance or non-compliance during that period.

- 10.2 **Force Majeure Procedure.** A Party invoking Force Majeure will give the other Party written notice within five Business Days of the commencement and of the termination of Force Majeure, respectively.
- 10.3 **No Force Majeure Relief.** If, by reason of one or more events of Force Majeure, the In-Service Date has not occurred by December 31, 2026, then the IESO may immediately terminate this Agreement upon written notice to the Participant, notwithstanding the occurrence of such events of Force Majeure, and the Participant will no longer be eligible for the Actual Participant Incentive for the Project.

ARTICLE 11 MISCELLANEOUS

- 11.1 **Environmental Attributes.** All Environmental Attributes arising in respect of Electricity savings for which the Actual Participant Incentive, equipment or appliance replacement or decommissioning has been funded by the IESO, whether existing now or arising in the future (the “**Electricity Savings Environmental Attributes**”) will be allocated on a proportionate basis, with the IESO owning an amount equal to the total quantity of Electricity Savings Environmental Attributes multiplied by the Environmental Attribute Funding Percentage (the result being the “**IESO Environmental Attributes**”) and the Participant or the owner(s) and occupier(s) of the Facility, as the case may be, owning the remaining quantity of Electricity Savings Environmental Attributes (the “**Participant Environmental Attributes**”). All other Environmental Attributes arising in relation to a Participant will be owned by the Participant or the owner(s) and occupier(s) of the Facility, as the case may be, and the IESO will not have any entitlement to them. For the purposes of this Section 11.1, “**Environmental Attribute Funding Percentage**” means, in respect of the Project, the total Actual Participant Incentive paid divided by the total amount of actual costs incurred by the Participant or the owner(s) and occupier(s) of the Facility, as the case may be, that meet the eligibility requirements for such costs set out under this Agreement, multiplied by 100, and expressed as a percentage.
- (a) The Participant or the owner(s) and occupier(s) of the Facility, as the case may be, shall notify the IESO in writing prior to assigning, transferring, encumbering, submitting for compliance purposes, trading or otherwise using (collectively, “realizing”) any of the Participant Environmental Attributes, with such notice to include: (i) the quantity of Participant Environmental Attributes to which the Participant believes it is entitled; (ii) the quantity of Electricity Savings Environmental Attributes and the Environmental Attributes Funding Percentage used to determine the quantity of Participant Environmental Attributes; and (iii) supporting calculations and data used to determine the total quantity of Electricity Savings Environmental Attributes and the Environmental Attribute Funding Percentage.
- (b) The IESO will contact the Participant or the owner(s) and occupier(s) of the Facility, as the case may be, prior to the IESO realizing on any of the IESO Environmental Attributes. The Participant will or will cause the or the owner(s) and occupier(s) of the Facility, as the case may be, to provide such information and cooperation as may be reasonably requested by the IESO for the purposes of confirming the allocation of Electricity Savings Environmental Attributes following a notification;

- (c) The Participant agrees that it will, or will cause the owner(s) and occupier(s) of the Facility, as the case may be, from time to time, upon written direction of the IESO, to take all such actions and do all such things necessary to:
- (i) effect the transfer and assignment to, or holding in trust for, the IESO all rights, title and interest in all IESO Environmental Attributes; and
 - (ii) certify, obtain, qualify and register with the relevant authorities or agencies IESO Environmental Attributes that are created and allocated or credited pursuant to Applicable Law from time to time for the purpose of transferring such IESO Environmental Attributes to the IESO. The Participant will be entitled to reimbursement by the IESO of the cost of complying with such a direction provided that the IESO, acting reasonably, has approved such cost of compliance in writing prior to the cost being incurred by the Participant and provided that such reimbursement will be limited to: (x) the total amount of such cost of compliance that have been approved in advanced by the IESO, multiplied by (y) the applicable Environmental Attributes Funding Percentage.

11.2 **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.

11.3 **Time is of the Essence.** Time is of the essence in the performance of this Agreement.

11.4 **Subcontracting.** The IESO reserves the right to engage a third party service provider (including the Technical Reviewer), 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 and payment of the Actual Participant Incentive. The IESO also reserves the right to, at any time, assume the role of the Technical Reviewer under this Agreement.

11.5 **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 Project, the IEEP or this Agreement, provided that the IESO will have the right to approve all such communications in advance.

11.6 **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: [●][Note to Finalization: Insert legal name of Participant.]

[●][Note to Finalization: Insert address and other details below.]

Attention: [●]

E-mail: [●]

If to the IESO: Independent Electricity System Operator

120 Adelaide Street West
Suite 1600
Toronto, Ontario
M5H 1T1
Attention: [●]
E-mail: [●]

- 11.7 **Separation of Functions.** The Participant acknowledges 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.
- 11.8 **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.
- 11.9 **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.
- 11.10 **Entire Agreement.** This Agreement constitutes the entire agreement between the Parties pertaining to its subject matter and supersedes 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.
- 11.11 **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.
- 11.12 **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.
- 11.13 **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.
- 11.14 **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.

- 11.15 **Survival.** Article 1, Article 7, Article 8, Article 9 and Sections, 6.5, 6.6, 6.8, 6.9, 11.1, 11.10, 11.11, 11.12, 11.13, 11.15 and 11.16 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.
- 11.16 **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.
- 11.17 **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**

**[●][NOTE TO FINALIZATION: INSERT
LEGAL NAME OF PARTICIPANT.]**

By:

By:

Name: [●]

Name: [●]

Title: [●]

Title: [●]

I have authority to bind the
corporation

I have authority to bind the corporation

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