
ENERGY PERFORMANCE PROGRAM PARTICIPANT AGREEMENT

THIS AGREEMENT made as of the _____ day of _____, _____ (the "**Effective Date**"),

BETWEEN:

INDEPENDENT ELECTRICITY SYSTEM OPERATOR, a corporation governed by the laws of the Province of Ontario,

(the "**IESO**")

- and -

LEGAL NAME OF PARTICIPANT a LEGAL FORM OF THE PARTICIPANT governed by the laws of JURISDICTION OF THE PARTICIPANT

(the "**Participant**")

(each of the IESO and the Participant may be referred to as a "**Party**" and, collectively, the "**Parties**").

WHEREAS the Participant wishes to participate in the Energy Performance Program offered by the IESO (the "**Program**") in order to access Performance Incentives for electricity savings achieved at one or more Facilities;

AND WHEREAS the Participant reasonably expects that it can achieve minimum electricity savings of at least five percent (5%) by the second year of its participation in the Program at each of its Facilities participating in the Program;

AND WHEREAS the IESO has approved the application for participation in the Program submitted by the Participant in the form of Schedule "C" hereto and any Facility Application Forms in the form of Schedule "C1" hereto (the "**Application**"), which Application is hereby incorporated by reference and forms part hereof.

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 agree as follows:

1. DEFINED TERMS

All capitalized terms not herein defined will have the meanings given to them in Schedule "A".

2. BASELINE MODELS AND PRE-PROJECT INCENTIVE

- a) Upon execution of this Agreement by the IESO, the IESO indicates its approval of the Application and the Facility Application Forms submitted therewith. The Participant may request that additional Facilities be included for participation in the Program by submitting to the IESO for approval additional Facility Application Forms, from time to time, during the Term, provided that no new Facility Application Forms may be submitted after October 15, 2024.
- b) Once the IESO has approved a Facility Application Form, including the Baseline Models for such Facility, the Participant agrees that it will not, without the prior written consent of the IESO, make any change to the Baseline Models for such Facility during the Term.
- c) The IESO may approve or reject the Baseline Models, or a Facility Application Form for a Facility in its sole discretion. If a rejection is issued for either the Baseline Models or the Facility Application Form, the IESO may, in its sole discretion, request additional information or documentation from the Participant in order to re-evaluate the Baseline Models or the Facility Application Form.
- d) If the IESO issues an approval in writing of the Baseline Models and the Facility Application Form for a Facility, the Participant shall be entitled to receive for each Facility a one-time advance of part of its anticipated Performance Incentive for such Facility, calculated as follows: $\text{Baseline Energy Consumption} * 2.5\% * \$0.04/\text{kWh}$ (the "**Pre-Project Incentive**"). Payment of the Pre-Project Incentive hereunder is conditional upon the Participant providing an invoice detailing the Facility which has been approved by the IESO and such additional information as prescribed by IESO to substantiate the payment.
- e) The Participant shall be required to report to the IESO the occurrence of any Baseline Adjustment Event, and to submit a request for a Baseline Adjustment together therewith within 60 days of becoming aware of such Baseline Adjustment Event. In the event of disagreement as to whether an event constitutes a Baseline Adjustment Event, the opinion of the IESO shall govern.

3. PARTICIPANT'S OBLIGATIONS, ELIGIBLE MEASURES AND SAVINGS REPORT

In addition to the other obligations contained in this Agreement, the Participant will fulfill the following obligations in order to maintain its eligibility in the Program and as a condition of receiving any Performance Incentives:

- a) The Participant will implement Eligible Measures for each Facility as described in the Facility Application Form submitted for each such Facility. The Participant may, from time to time, during the Term, implement Eligible Measures in addition to those described in the Facility Application Form at each Facility, provided that if additional Eligible Measures are added during the Term, the Participant will include a description of such additional Eligible Measures in the applicable Savings Report.
- b) After submission of the Baseline Models for a Facility, the Participant will not enroll in any program or initiative incentivizing electricity savings and/or peak demand savings undertaken by the Government of Ontario or the IESO to receive any incentives for that Facility, except for the Energy Manager Program offered by Save On Energy. The Participant will inform IESO if any projects receiving electricity saving incentives and/or peak demand savings are commissioned after the Baseline Models, and this will trigger a Baseline Adjustment at the discretion of the IESO.
- c) Each Facility shall achieve a minimum of five percent (5%) Electricity Savings by the end of the second Pay-for-Performance Period (the "**Minimum Savings**"). Further, and notwithstanding any renewal or extension of the Program, a Facility may participate in a maximum of three (3) consecutive Pay-for-Performance Periods.
- d) Any Facility that does not achieve the Minimum Savings, may be eliminated from further participation in the Program at the sole discretion of the IESO, upon written notice by the IESO, and the Participant shall not be entitled to any further Performance Incentive with respect to such Facility and the Participant shall reimburse the IESO for any Pre-Project Incentive the IESO provided but which the Participant did not subsequently earn in respect of the Facility. Any Facility that does not achieve the Minimum Savings and is not eliminated from further participation pursuant to this section shall reimburse the IESO for any Pre-Project Incentive provided but which the Participant did not subsequently earn upon completion of the third Pay-for-Performance Period for the Facility.
- e) The Participant must submit to the IESO a Savings Report for each Facility, containing the information as required by Schedule "F", no later than 60 days following the expiration of the Pay-for-Performance Period in respect of each such Facility, provided that the final Savings Report for any Facility must be submitted by the Participant no later than 60 days after the end of the Term. Any Performance Incentives owing for such final Pay-for-

Performance Period shall be paid based on the length of the final Pay-for-Performance Period. The Participant shall also include in its Savings Report any Measures that are not Eligible Measures and which it has implemented during the Pay-for-Performance Period. The IESO may reject a Savings Report and may refuse any Performance Incentive hereunder in its sole discretion if it believes that the Savings Report or any information or documentation provided hereunder is insufficient, inaccurate, incomplete or if any of the other requirements under this Agreement are not met, including any of the Eligibility Criteria set out in Schedule "B".

- f) In the event this Agreement is terminated in accordance with Section 6(b)(ii), the Participant may submit a Savings Report for any completed portion of a Pay-for-Performance Period, ending on the earlier of (i) the date of termination of this Agreement or (ii) the otherwise occurring end of the relevant Pay-for-Performance Period. Any Performance Incentives owing for such partial Pay-for-Performance Period shall be paid based on the length of such partial Pay-for-Performance Period.

4. PERFORMANCE INCENTIVES

- a) The IESO and the Technical Reviewer will review and assess for completeness the information contained in the Savings Report and the IESO may request such further information or evidence as it requires in its sole discretion to assess the eligibility of the Participant and the Facility to receive the Performance Incentive, including visual inspections to ensure compliance with M&V Procedures. The IESO will provide its approval or comments on the Savings Reports to the Participant within a reasonable time. If the IESO does not approve the Savings Reports, such documents will be revised by the Participant in order to address the noted deficiencies and obtain the IESO's approval of such revised Savings Reports.
- b) Subject to the terms and conditions of this Agreement, the IESO will pay the Performance Incentive for each Facility less the amount of the Pre-Project Incentive(s) received by the Participant until exhausted, provided the IESO has approved in writing the Savings Report and received all other supporting documentation and evidence as required by this Agreement or as otherwise requested by IESO. For greater certainty, Performance Incentives payable with respect to a Facility may be offset by Pre-Project Incentives paid in respect of a different Facility. The Performance Incentive shall be calculated for each Pay-for-Performance Period as follows:
 - (i) Energy Incentive Rate of \$0.04/kWh multiplied by the Electricity Savings; and
 - (ii) Peak Demand Incentive Rate of \$50/kW multiplied by the Peak Demand Savings.

- c) For each Pay-for-Performance Period, the Performance Incentive for each Facility will be limited as follows (the "**Incentive Caps**"):
- (i) The total amount calculated in accordance with Section 4(b)(i) for each Pay-for-Performance Period shall not exceed the Energy Incentive Rate multiplied by 20% of the Baseline Energy Consumption; and
 - (ii) The amount calculated in accordance with Section 4(b)(ii) for each Pay-for-Performance Period shall not exceed the Peak Demand Incentive Rate multiplied by 20% of the Baseline Peak Demand.
- d) Following the IESO's approval in writing of the Savings Report, as well as receipt of supporting documentation and information referenced in Section 4(b) above, the Participant may invoice the IESO for the Performance Incentive listed in the approved Savings Report, and the IESO will pay, at its sole discretion, the Performance Incentive listed in the approved Savings Report, less the amount of the Pre-Project Incentive(s) received by the Participant until exhausted, within 90 days and via electronic funds transfer or by cheque issued by the IESO or its subcontractor.

5. COMMUNICATION WITH TECHNICAL REVIEWER

The IESO may carry out any of the review of the Application, the Facility Application Forms, the Savings Reports, or any of the activities described in this Agreement through a Technical Reviewer. The Participant will cooperate and provide on a timely basis the requested information to the IESO or the Technical Reviewer should the IESO or the Technical Reviewer require clarification from the Participant related to any reports or information required under this Agreement. The Participant shall, at the same time as it provides information to the Technical Reviewer, provide a copy of such information to the IESO.

Communications to the Technical Reviewer shall be sent to energyperformanceprogram@ieso.ca.

6. TERM, TERMINATION AND SURVIVAL

- a) The term of this Agreement commences as of the Effective Date and terminates upon the completion of the third Pay-for-Performance Period for the Facility with the latest approved Facility Application Form that is incorporated into and forms part of this Agreement, provided that such Pay-for-Performance Period expires by December 31, 2027 (the "**Term**"), unless terminated earlier in accordance with the terms of this Agreement.

- b)** This Agreement will terminate on the expiry of the Term as provided in Section 6(a) or earlier:
- (i) as a result of the Participant's failure to observe or perform any 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; or
 - (ii) upon 60 days' notice by the IESO; or
 - (iii) if 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; or
 - (iv) at the sole discretion of IESO, where the Participant did not achieve the Minimum Savings for a Facility.
- c)** If the IESO terminates the Agreement or a Facility from the Program, pursuant to Section 6(b) or 3(d), respectively, the Participant shall reimburse the IESO for any Pre-Project Incentive the IESO provided but which the Participant did not subsequently earn under the Agreement or in respect of the Facility, as the case may be.
- d)** Sections 3(d), 6(c), 7, 9, 11, 12, 13, 14, 15, and 17(d) and (e), 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 Performance Incentive(s) pursuant to the Agreement after the expiration of the Term, then the provisions of the Agreement applicable to such Performance Incentive will survive the termination of the Agreement.

7. ENVIRONMENTAL ATTRIBUTES

All right, title and interest in and to all benefits or entitlements associated with Environmental Attributes arising in relation to the electricity savings funded by an amount paid under this Agreement are hereby unconditionally and absolutely transferred and assigned, or to the extent transfer or assignment is not permitted, held in trust for, by the Participant to, or in favour of, the IESO. The Participant acknowledges that the IESO may direct the Participant to take such actions and do all such things necessary to certify, obtain, qualify and register with the relevant authorities or agencies such Environmental Attributes for the purpose of transferring, assigning, or holding in trust, such Environmental Attributes to and for the IESO and the Participant shall comply with such directions, and the Participant will be entitled to reimbursement of the cost of complying with such direction, provided that the IESO, acting

reasonably, has approved such cost in writing prior to the cost being incurred by the Participant.

8. REPRESENTATIONS, WARRANTIES AND COVENANTS

The Participant 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) All information in the Application Form and the Facility Application Forms, including any attached documentation, as well as any information submitted pursuant to a Savings Report, is true, accurate and complete;
- b) the Participant would not otherwise have undertaken the Eligible Measures without the financial support and participation of the IESO;
- c) the Participant satisfies the eligibility criteria set out in Schedule "B" – Eligibility Criteria as of the date hereof;
- d) the Participant has the authority to execute this Agreement and to fulfill its obligations as contemplated herein;
- e) the Participant has all required rights and authority to install the Eligible Measures and to carry out all of its obligations as set out in this Participant Agreement;
- f) the Eligible Measures at each Facility will be carried out in accordance with all Applicable Laws including without limitation the *Building Code Act, 1992*, S.O. 1992, c. 23 and regulations made thereunder and all Applicable Laws related to construction;
- g) the Participant further acknowledges that it is an independent contractor, and that there is no joint venture, partnership or agency created or implied by this Agreement.

9. EVALUATION, MEASUREMENT AND VERIFICATION (EM&V); AUDIT

- a) The performance and administration of this Agreement will be subject to the IESO EM&V Protocols. In furtherance of the IESO EM&V Protocols, the Participant will cooperate with the IESO and its respective designates and will make available such information in the form and with the frequency as may be reasonably prescribed, including with respect to historical electricity consumption.

- b) The Participant will 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 Performance Incentives made under this Agreement, and all such records and data will be maintained during the term of this Agreement and for the period of time thereafter which is the greater of seven years and the period of time specified under Applicable Law. On reasonable notice, at any time during normal business hours, the Participant will provide reasonable access to the IESO and/or its respective 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 respective designates, 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 the purposes of this Section 9; 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 an Savings Report and/or the payment of any Performance Incentive made hereunder.
- c) Without limiting any other remedies of a party under this Agreement, if an audit or inspection conducted pursuant to this Section 9 discloses that there has been an overpayment or underpayment by the IESO or any misrepresentation or fraudulent activity by the Participant, 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.

10. 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 achievement of any electricity savings, which is expressly disclaimed by the Participant.

11. LIMITATION OF LIABILITY AND INDEMNITY

- a) 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 (AS DEFINED IN SECTION 11(b) BELOW) FOR ANY LIABILITIES, DAMAGES, OBLIGATIONS, PAYMENTS, LOSSES, COSTS OR EXPENSES

UNDER OR IN RELATION TO THIS AGREEMENT: (I) 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 FUNDING AMOUNT PAID BY THE IESO HEREUNDER; OR (II) DAMAGES (WHETHER DIRECT OR INDIRECT, CONSEQUENTIAL OR OTHERWISE) FOR (X) LOSS OF PROFIT, OR (Y) DIMINUTION OF VALUE OR LOSS OF USE OF ANY PROPERTY; AND (B) THE IESO AND THE INDEMNIFIED PARTIES (AS DEFINED IN SECTION 11(b) BELOW) WILL NOT BE LIABLE TO THE PARTICIPANT, ITS SUCCESSORS OR ASSIGNS OR ITS DIRECTORS, OFFICERS, EMPLOYEES, CONTRACTORS, AGENTS OR 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.

- b) 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 Person's 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 (i) any Claim by, or occurrence or event related to, any third party relating to this Agreement; and/or (ii) the negligence or wilful misconduct of the Participant, 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 wilful misconduct of the Indemnified Party, then such Indemnified Party will not be indemnified hereunder in the proportion that the Indemnified Party's negligence or wilful misconduct contributed to any Indemnifiable Loss. The IESO will hold the benefit of the Participant's obligations under this Section 11 in the IESO's own right and, in trust, for the benefit of any other Indemnified Party.

12. CONFIDENTIALITY AND PRIVACY

- a) Neither Party will use or disclose the Confidential Information of the other Party except as permitted or required by this Agreement. Subject to the foregoing, each Party will keep

the other party's Confidential Information confidential and secure using measures appropriate to the nature and sensitivity of such information.

- b)** Each Party may disclose Confidential Information of the other Party to the extent required by a Governmental Authority or as required by Applicable Law, subject to giving prior reasonable notice to the other Party of such compelled disclosure (except where prohibited by Applicable Law from doing so) so that the other Party may take such steps as it desires to challenge or contest such disclosure or seek a protective order.
- c)** 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 Section 12 and is subject to written confidentiality obligations no less stringent than those contained in this Section 12.
- d)** The IESO may disclose Confidential Information of the Participant to the OEB, the Government of Ontario and the Office of the Auditor General of Ontario or their respective successors provided that the IESO notifies such person of the confidentiality of the Confidential Information.
- e)** The Participant consents to the disclosure of:
 - (i) aggregated data relating to its participation in this Program;
 - (ii) its participation in this Program; and
 - (iii) the status and nature of the Eligible Measures undertaken under this Program provided that the IESO shall provide ten (10) Business Days notice to the Participant in advance of such disclosure.
- f)** Additionally, 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;
 - (iii) the Facility Application Form for such Facility; and
 - (iv) the Savings Report for such Facility.

- g)** Without limiting the foregoing, the Participant acknowledges and agrees that this Agreement and all Confidential Information in the possession or 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 that is provided by the IESO or its Representatives to the Participant, or provided by the Participant to the IESO or its Representatives for the purposes of this Agreement, or created by the Participant in the performance of this Agreement, and that is in the custody or control of the IESO (collectively, the "**Records**"), and may require the disclosure of the Records to third parties.

- h)** Each Party will:
 - (i) 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;
 - (ii) 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;
 - (iii) cooperate and comply with any requests or instructions issued by any privacy regulatory authority or any other Governmental Authority applicable to such Party; and
 - (iv) provide reasonable assistance to the other Party in responding to and addressing any complaint relating to the collection, use or disclosure of Personal Information.

13. INJUNCTIVE RELIEF

Each Party acknowledges that, notwithstanding Section 6(b), Section 6(d) or Section 15, any violation of the provisions of Section 12 may cause irreparable damage or injury to the other Party, the exact amount of which may be impossible to ascertain, and that, for such reason, in addition to any other remedies available to such Party, such Party is entitled to proceed to court in order to obtain injunctive relief restraining the other party from breaching, and requiring the other Party to comply with, its obligations under Section 12. Nothing in this Section 13 will be construed to limit the right of a party to obtain injunctive relief in any other circumstance in which it may be otherwise entitled to such relief.

14. FIPPA COMPLIANCE

To the extent that the IESO must comply with disclosure obligations under FIPPA, the Participant agrees (without limiting its obligation set out in Section 12):

- a) to keep the Records in its possession secure;
- b) to provide the Records to the IESO within seven 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.

15. DISPUTE RESOLUTION

If any dispute arises under or in connection with this Agreement that the Parties cannot resolve, each of the Parties will promptly advise its senior management, in writing, 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 will 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 pursuant to Schedule "D" of this Agreement.

16. SCHEDULES

The following schedules are hereby incorporated in and form part of this Agreement:

SCHEDULE "A" – DEFINITIONS

SCHEDULE "B" - ELIGIBILITY CRITERIA

SCHEDULE "C" - APPLICATION FORM

SCHEDULE "C1" - FACILITY APPLICATION FORM

SCHEDULE "D" - ARBITRATION PROVISIONS

SCHEDULE "E"- M&V PROCEDURES

SCHEDULE "F" - FORM OF SAVINGS REPORT

17. GENERAL PROVISIONS

- a) **Headings.** The insertion of headings is for convenience of reference only and will not affect the interpretation of this Agreement. The terms "hereof", "hereunder", and similar expressions refer to this Agreement and not to any particular Article, Section, Schedule or other part hereof. Unless otherwise indicated, any reference in this Agreement to an Article, Section or Schedule refers to the specified article or section of, or schedule to, this Agreement.
- b) **Entire Agreement.** Except as otherwise provided, this Agreement constitutes the entire agreement between the Parties in connection with 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.
- c) **Amendments.** This Agreement may not be varied, amended or supplemented except by an agreement in writing signed by both of the Parties.
- d) **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.
- e) **Successors and Assigns.** This Agreement will enure to the benefit of and be binding upon the Parties and their respective successors and assigns. This Agreement may not be assigned by the Participant except with the prior written consent of the IESO, which consent may be unreasonably withheld or delayed.
- f) **Further Assurances.** Each of the Parties will, 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 and delivered all such further things as may be reasonably required in order to fully perform and to more effectively implement the terms of this Agreement.

- g) 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.
- h) No Partnership, etc.** Nothing in this Agreement will be deemed to constitute a partnership or joint venture or create any fiduciary relationship between the IESO and the Participant.
- i) 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 e-mail, will be deemed to have been received on the Business Day following the sending, or if delivered by hand will be deemed to have been received on the Business Day 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 IESO:

120 Adelaide Street West, Suite 1600

Toronto, ON M5H 1T1

Attention: Manager, Program Delivery

E-mail: EnergyPerformanceProgram@ieso.ca

If to the Participant:

Attention: PRIMARY CONTACT OF PARTICIPANT

E-mail: EMAIL FOR PRIMARY CONTACT

- j) 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.
- k) Counterparts.** This Agreement may be executed in any number of counterparts and all such counterparts will, for all purposes, constitute one agreement binding on both Parties provided that each Party has signed at least one counterpart.

I) Electronic Signatures. This Agreement may be executed and delivered by electronic transmission and the Parties may rely upon all such signatures as though such signatures were original signatures.

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

**INDEPENDENT ELECTRICITY
SYSTEM OPERATOR**

**LEGAL NAME OF THE
PARTICIPANT**

Per: _____
Name:
Title:

Per: _____
Name:
Title:

I have authority to bind the
corporation

[I/We] have authority to bind the
Participant

SCHEDULE "A" – DEFINITIONS

In this Agreement, the following terms will have the following meanings:

"Agreement" means this Energy Performance Program Agreement, including all recitals and Schedules, the Application and any Facility Application Form approved by IESO hereunder, as it or they may be amended, restated or supplemented from time to time.

"Applicable Law" means: (a) applicable multi-national, international, federal, provincial or municipal laws, orders-in-council, by-laws, 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; and (d) any requirements under or prescribed by applicable common law.

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

"Baseline Adjustment" means a change to the Baseline Models necessitated by a Baseline Adjustment Event.

"Baseline Adjustment Event" means those events as described in the M&V Procedures that necessitate a change to the Baseline Models.

"Baseline Models" means a Facility-specific model or set of models, submitted with the Participant's Facility Application Form, as approved by IESO, that predicts the electricity consumption and peak demand of a Facility over a set period of time in the absence of Eligible Measures, using the Baseline Model Requirements.

"Baseline Energy Consumption" means the actual annual electricity consumption for a Facility in the absence of Eligible Measures that is used to establish the Baseline Models.

"Baseline Model Requirements" are the requirements for the Baseline Models as set out in the M&V Procedures.

"Baseline Peak Demand" means the actual average summer peak demand for a Facility, determined in accordance with the M&V Procedures, in the absence of Eligible Measures that is used to establish the Baseline Models.

"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**” of a Party means all information relating to such Party or any of its affiliates, licensors, customers (including information regarding a customer that is a consumer, wholesaler or generator) or employees in connection with or as a result of entering into this Agreement, including information concerning the disclosing Party’s past, present or future customers, suppliers, technology, or business. Notwithstanding the foregoing, “Confidential Information” does not include information that is: (A) publicly available when it is received by or becomes known to the other Party or that subsequently becomes publicly available other than through an act or omission of the other Party; (B) already known to the other Party at the time of disclosure and is not known to the other party to be the subject of an obligation of confidence; (C) independently developed by the other Party; or (D) received by the other Party in good faith without an obligation of confidence of any kind by a third party; provided, however, that, all personal information collected by a Party or for which a party is responsible under Applicable Law in connection with this Agreement is the Confidential Information of that Party, whether or not it falls into one of the exceptions set out in clause (A) through (D) of this definition.

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

“**Effective Date**” is defined in the preamble to this Agreement.

“**Electricity Savings**” means the difference between the electricity consumption predicted for a Facility by the Baseline Models over a Pay-for-Performance Period and the annual electricity consumption recorded by the Facility’s revenue-grade electricity meter for the same Pay-for-Performance Period in accordance with the M&V Procedures. In the event of a dispute, the IESO’s evaluation of Electricity Savings will be final and binding.

“**Eligible Measures**” means any Measure as defined in Schedule “B” – Eligibility Criteria.

“**Energy Incentive Rate**” means the dollar per kWh rate paid to the Participant for Electricity Savings as set out in section 4(b)(i) hereof.

“**Environmental Attributes**” means all benefits and entitlements associated with a Measure or a Facility having decreased environmental impacts resulting from the employment of an Participant, including: (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.

“Facility” means the building(s), premises or lands, or part thereof, occupied by the Participant, and over which the Participant has all required authorization and consents to carry out its obligations under this Agreement and meeting the requirements in Schedule “B” – Eligibility Criteria.

“Facility Application Form” means an application form detailing information related to a Facility, including the Baseline Models and Eligible Measures for a Facility in the form as set out in Schedule “C1” hereto.

“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, without limitation, the IESO in its capacity as the operator of the IESO-Controlled Grid, the OEB, the Electrical Safety Authority, the Office of the Auditor General of Ontario, and any Person acting under the authority of any of the foregoing, but excluding the IESO.

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

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

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

“IESO EM&V Protocols” means the methods and processes that the IESO develops for the evaluation, measurement and verification of conservation and demand management programs and initiatives, and which may be found at <http://www.ieso.ca/-/media/Files/IESO/Document-Library/conservation/LDC-toolkit/EMV-Protocols-and-Requirements-10312014.pdf?la=en>, 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 and guidelines issued by the IESO.

“Incentive Caps” has the meaning given to it in Section 4(c).

Indemnifiable Loss” has the meaning given to it in Section 11.

Indemnified Party” has the meaning given to it in Section 11.

Indemnifying Party” has the meaning given to it in Section 11.

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 a 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 OEB.

Measures” means (i) 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 (ii) any equipment, system or product related to the foregoing.

Minimum Savings” has the meaning given to it in Section 3(c).

M&V Procedures” means the measurement and verification procedures as set out in Schedule “E” hereto.

OEB” means the Ontario Energy Board or its successor.

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

Party” and **Parties**” have the meanings given to them in the preamble of this Agreement.

Past Programs” has the meaning given to it in Section 1.4 of Schedule “B” hereto.

Pay-for-Performance Period” means each 12-month period during which the Participant implements and/or maintains Eligible Measures for a Facility and during which Electricity Savings and Peak Demand Savings will be measured, with the first such period for a Facility

commencing on the date that the Facility Application Form is approved by the IESO, and the next such period commencing immediately after the expiration of 12 months.

"Peak Demand Incentive Rate" means the dollar per kW rate paid to the Participant for Peak Demand Savings as set out in Section 4(b)(ii) hereof.

"Peak Demand Savings" means the difference between the average summer peak demand predicted for a Facility by the Baseline Models over a Pay-for-Performance Period and the average summer peak demand recorded by the Facility's revenue-grade electricity meter for the same Pay-for-Performance Period in accordance with the M&V Procedures. In the event of a dispute, the IESO's evaluation of Peak Demand Savings will be final and binding.

"Performance Incentive" means the amount to be paid to the Participant for each Pay-for-Performance Period calculated as the sum of the Energy Incentive Rate multiplied by the Electricity Savings and the Peak Demand Incentive Rate multiplied by the Peak Demand Savings.

"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 identifiable individual or other information that is subject to any Privacy Laws.

"Pre-Project Incentive" has the meaning given to it in Section 2(d).

"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, MFIPPA and equivalent provincial legislation.

"Program" has the meaning given to it in the first recital to this Agreement.

"Records" has the meaning given to it in Section 12(g).

"Representative" means, in respect of one of the Parties, any one of that Party's employees, officers, directors, shareholders, contractors, agents, representatives and advisors.

"Save on Energy Program" means any energy conservation programs funded by the IESO pursuant to the Ministerial Directives dated September 30, 2020 or March 21, 2019 and as described on the Save on Energy web site found at <https://www.saveonenergy.ca/>.

“Savings Report” means a report submitted by Participants evidencing the Electricity Savings and Peak Demand Savings achieved for a Facility during a given Pay-for-Performance Period in the form attached as Schedule “F” hereto and also made available on the Website.

“Technical Reviewer” means a third party retained by the IESO.

“Term” has the meaning given to it in Section 6(a).

“Website” means the website located at the address: <https://saveonenergy.ca> or such other website as the IESO may notify the Participant of from time to time.

SCHEDULE "B" – ELIGIBILITY CRITERIA

1.1 PARTICIPANT ELIGIBILITY CRITERIA

To be an eligible Participant under the Program, a Person must:

- a)** be a electricity consumer with one or more commercial, institutional, or industrial Facilities located in Ontario;
- b)** commit to achieve at least five percent (5%) Electricity Savings per Facility by the end of the second Pay-for-Performance Period;
- c)** have the required rights and authority to have the Eligible Measures installed at a Facility; and
- d)** not be Insolvent.

1.2 FACILITY ELIGIBILITY CRITERIA

To be an eligible Facility, the proposed Facility must:

- a)** have access to hourly interval meter data from a revenue-grade meter;
- b)** have a minimum of 12 months of consecutive hourly interval data accompanied by the overlapping 24 months of monthly utility data ending no earlier than 5 months prior to the date the Facility Application Form is submitted;
- c)** have consumed a minimum of 1,500,000 kWh per annum during each of the two preceding years;
- d)** have the Baseline Models meeting the minimum standards stated in the M&V Procedures;
- e)** be connected to, or behind the meter of, an electricity consumer connected to the IESO-Controlled Grid or a Distribution System; and
- f)** meet any other eligibility programs as outlined in the M&V Procedures.

An eligible Facility may be comprised of an aggregate of multiple buildings that constitute a single "Facility" in a Facility Application Form provided that:

- g)** a maximum of five (5) buildings may be aggregated for a single Facility Application Form;
- h)** all buildings are of a similar use and type (e.g. office, grocery, retail) and have a similar load profile;

- i) aggregated buildings must each be served by General Service 50-5000 kW electricity accounts;
- j) no single building consumed more than 1,500,000 kWh annually during each of the preceding two years; and
- k) the Baseline Models employ weather data from a single Environment Canada weather station or if the National Aeronautics and Space Administration (NASA) is used as the source of the weather data, a single building included in the model is used as the weather location.

1.3 MEASURE ELIGIBILITY CRITERIA

Eligible Measures means any Measures implemented in a Facility, but specifically excluding:

- a) any Measures that are behind-the-meter generation projects;
- b) any Measures involving fuel-switching; or
- c) activities or measures promoted or funded through a different program or initiative designed to incentivize electricity savings and/or peak demand savings undertaken by the Province of Ontario or the IESO, except for the Energy Manager Program offered by Save On Energy. Any projects receiving such electricity saving incentives will trigger a Baseline Adjustment at the discretion of the IESO.

1.4 PAST PROGRAM PARTICIPATION

For greater certainty, past participation in previous Energy Performance Programs or other programs or initiatives undertaken by the Government of Ontario or the IESO pursuant to Ministerial Directives other than the Ministerial Directive dated September 30, 2020 ("**Past Programs**") does not exclude the Participant from being eligible to participate in the Program, provided that any agreements in relation to Past Programs have expired or been terminated and new Baseline Models are prepared for the Program which incorporate any energy or peak demand savings realized under Past Programs, in accordance with the M&V Procedures.

SCHEDULE “C” – APPLICATION FORM

Please refer to Application Form posted at:

<https://saveonenergy.ca/-/media/Files/SaveOnEnergy/Industry/EPP/Energy-Performance-Program-Application-Form.xlsx?la=en>

SCHEDULE "C1" – FACILITY APPLICATION FORM

Please refer to Facility Application Form posted at:

<https://saveonenergy.ca/-/media/Files/SaveOnEnergy/Industry/EPP/Energy-Performance-Program-Facility-Application-Form.xlsx?la=en>

SCHEDULE "D" – ARBITRATION PROVISIONS

1. Subject to and in accordance with the provisions of this Schedule "D", any and all differences, disputes, Claims or controversies arising out of or in any way connected with this Agreement, whether arising before or after the expiration or termination of this Agreement, (including any dispute as to whether an issue is arbitrable) will be resolved 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.
2. 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 20 days thereafter, 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 the 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.
3. The arbitration will be conducted in English in the City of Toronto (unless otherwise agreed to by the Parties) at such place therein and time as the Arbitrator may fix and, failing agreement thereto by the Parties, in accordance with such procedures as the Arbitrator will determine, in accordance with the principles of natural justice. 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.
4. The Arbitrator's written decision will be delivered to each of the Parties within 60 days following the conclusion of the arbitration hearing. The costs of any arbitration hereunder will be borne by the Parties in the manner specified by the Arbitrator in his or her decision. The decision of the Arbitrator will be final and binding upon the Parties in respect of all matters relating to the arbitration, the conduct of the Parties during the proceedings and the final determination of the issues in the arbitration. There will be no appeal from the decision of the Arbitrator to any court, except on the grounds 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.

5. Submission to arbitration under this Schedule "D" 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 hereunder.

SCHEDULE “E” – M&V PROCEDURES

Please refer to M&V Procedures Version 1.0 posted at:

<https://saveonenergy.ca/-/media/Files/SaveOnEnergy/Industry/EPP/IESO-EPP-Schedule-E-MV-Procedures.pdf?la=en>

SCHEDULE “F” – FORM OF SAVINGS REPORT

Please refer to Form of Savings Report posted at:

<https://saveonenergy.ca/-/media/Files/SaveOnEnergy/Industry/EPP/Energy-Performance-Program-Savings-Report.xlsx?la=en>