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# ENERGY PERFORMANCE PROGRAM PARTICIPANT AGREEMENT

The Participant (being the “**Applicant**” in the Application) has applied for Performance Incentives, in respect of electricity savings achieved at one or more Facilities through operational and maintenance energy efficiency measures and equipment retrofits, pursuant to the Application submitted to the IESO under the Save on Energy - Energy Performance Program (the “**EPP**” or the “**Program**”) in accordance with the Program Requirements. All capitalized terms not defined herein will have the meanings given to them in Schedule A to this Agreement.

In consideration of the Performance Incentives being provided and other good and valuable consideration the receipt and sufficiency of which are hereby acknowledged, the Participant agrees to the following terms and conditions:

## 1. BASELINE ENERGY MODEL AND PRE-PROJECT INCENTIVE

- (a) Upon acceptance of the Baseline Energy Model generated via the EPP Portal and issuance of a Notice of Approval, the Facility will be deemed accepted into the Program, and the Participant shall be entitled to receive an optional, one-time advance of part of its anticipated Performance Incentive for such Facility, calculated as follows:  $\text{Baseline Energy Consumption} \times 2.5\% \times \$0.04/\text{kWh}$  (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.
- (b) Additional Facilities may be included for participation in the Program from time to time during the Term by the Participant submitting the required Facility information via the EPP Portal and accepting the Baseline Energy Model generated for such Facility, provided that no new Facilities will be accepted after December 31, 2024.
- (c) The Participant shall be required to report any Non-Routine Event (NRE) to the Service Provider via the EPP Portal as soon as they become aware of such event. The nature of the event (e.g., temporary or permanent), the dates, and an explanation of the event should be provided. In addition, the Participant is required to submit a request for a Non-Routine Adjustment (NRA) within 60 days of becoming aware of such NRE. In the event of disagreement as to whether an event constitutes a Non-Routine Event, the opinion of the IESO shall govern.

## 2. PARTICIPANT OBLIGATIONS, ELIGIBLE MEASURES AND SAVINGS SUBMISSION

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 before the end of the second Pay-For-Performance Period.
- (b) After the generation of the Baseline Energy Model for a Facility via the EPP Portal, 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. The Participant will inform IESO if any projects receiving electricity saving incentives and/or peak demand savings are commissioned after the Baseline Energy Model has been accepted by the Participant, and this will trigger an NRA at the discretion of the IESO.
- (c) Each Facility shall achieve a minimum of five percent (5%) of the Total 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 or Service Provider, 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 the Facility energy data and associated information required by the Savings Submission via the EPP Portal within 30 days following the expiration of the Pay-for-Performance Period in respect of each such Facility. The Participant shall notify the Service Provider of any Measures that are not Eligible Measures and which it has implemented during the Pay-for-Performance Period.
- (f) In the event this Agreement is terminated in accordance with Section 5(b)(ii), the Participant may notify the Service Provider of 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.

### 3. PERFORMANCE INCENTIVES

- (a) 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. The Performance Incentive shall be calculated for each Pay-for-Performance Period as follows:
  - (i) Off-Peak Energy Incentive Rate of \$0.04/kWh multiplied by the Off-Peak Electricity Savings; and
  - (ii) On-Peak Energy Incentive Rate of \$0.15/kWh multiplied by the On-Peak Electricity Savings.
- (b) The Performance Incentive for each Facility shall not exceed the Off-Peak Energy Incentive Rate multiplied by 20% of the Baseline Energy Consumption (the “**Incentive Cap**”).
- (c) The Participant shall 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 a reasonable period following receipt of such invoices, which period may be more than 90 days and via electronic funds transfer or by cheque issued by the IESO or its subcontractor. The IESO will not pay, and the Participant will not be entitled to any payment referred to herein unless the Participant has provided all supporting documentation and evidence as required by this Agreement or as otherwise requested by the IESO.

### 4. COMMUNICATION WITH SERVICE PROVIDER

The IESO reserves the right to engage a third party service provider (including the Service Provider), at any time, to exercise or perform any of the IESO’s rights or obligations under this Agreement, in full or in part, including with respect to the administration of the Program, the review of the Application or any other program deliverables, the payment of the Participant Incentives or any other activities described in this Agreement. The Participant shall cooperate and provide on a timely basis the requested information to the IESO or the Service Provider should the IESO or the Service Provider 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 Service Provider, provide a copy of such information to the IESO.

Communications to the Service Provider shall be sent to [info@energyperformanceprogram.ca](mailto:info@energyperformanceprogram.ca).

### 5. TERM, TERMINATION AND SURVIVAL

- (a) This Agreement will terminate upon the completion of the third Pay-for-Performance Period for the latest approved Facility 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 5(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 5(b) or 2(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 2(d), 5(c), 6, 8, 10, 11, 12, 13, 14, and 15(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.

## 6. ENVIRONMENTAL ATTRIBUTES

- (a) All right, title and interest in and to all benefits or entitlements associated with decreased environmental impacts now or in the future, direct or indirect, arising as a result of, relating to or in connection with the electricity savings for which an incentive has been paid, and the right to quantify and register these, including any energy efficiency certificate, renewable energy certificate, credit, reduction right, offset, allocated pollution right, emission, reduction allowance (collectively, 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 owning the remaining quantity of Electricity Savings Environmental Attributes (the "**Participant Environmental Attributes**"), where Environmental Attribute Funding Percentage means, in respect of an eligible Measure purchase and installed, the total incentive amount paid to the Participant and funded by the IESO in respect of the Measure, divided by the total amount of actual costs incurred by the Participant that meet the eligibility requirements for such costs set out under these

terms and conditions, multiplied by 100, and expressed as a percentage.

- (b) The Participant 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.
- (c) The Participant agrees that all right, title and interest in and to all benefits or entitlements associated with the IESO Environmental Attributes are hereby transferred and assigned by the Participant to, or to the extent transfer or assignment is not permitted, held in trust for, the IESO and its successors and assigns.
- (d) The IESO will be entitled unilaterally and without consent to deal with such IESO Environmental Attributes in any manner it determines. The Participant acknowledges that the IESO will contact the Participant prior to realizing on any IESO Environmental Attributes.
- (e) The Participant agrees that it will, from time to time, upon written direction of the IESO, 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 laws and regulations 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 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.

## 7. 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 provided in the Application, including any attached documentation, as well as any information submitted via the Savings Submission is true, accurate and complete and there is no material information omitted which makes the Application or program deliverables misleading or inaccurate;
- (b) the Participant would not otherwise have undertaken the Eligible Measures without the financial support and participation of the IESO;
- (c) the Participant, the Facility and the Measures satisfy 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) 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) 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;
- (h) 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;
- (i) 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.

## **8. 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:

- (i) 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 8; and
  - (ii) 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 Savings Submission 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 8 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.

## **9. 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.

## **10. 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 10(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 10(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 willful 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 willful misconduct of the Indemnified Party. For greater certainty, in the event of contributory negligence or willful misconduct of the Indemnified Party, then such Indemnified Party will not be indemnified hereunder in the proportion that the Indemnified Party's negligence or willful misconduct contributed to any Indemnifiable Loss. The IESO will hold the benefit of the Participant's obligations under this Section 10 in the IESO's own right and, in trust, for the benefit of any other Indemnified Party.

## 11. 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 11 and is subject to written confidentiality obligations no less stringent than those contained in this Section 11.
- (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) information included in the Application via the EPP Portal for such Facility; and
  - (iv) the energy savings information 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.

## 12. INJUNCTIVE RELIEF

Each Party acknowledges that, notwithstanding Section 5(b), Section 5(d) or Section 14, any violation of the provisions of Section 11 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 11. Nothing in this Section 12 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.

## 13. 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 11):

- (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.

## 14. 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 "C" of this Agreement.

## 15. 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 Participant 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 Participant, to the address identified on the Participant's profile page on the EPP Portal.

If to the IESO:

Enerva Energy Solutions Inc.  
1 Adelaide Street East, Suite 3001  
PO Box 201  
Toronto, ON M5C 2V9

Attention: Energy Performance Program Support  
E-mail: [info@energyperformanceprogram.ca](mailto:info@energyperformanceprogram.ca)

with a copy to:

Independent Electricity System Operator  
120 Adelaide Street West, Suite 1600  
Toronto, ON M5H 1T1

Attention: Manager, Business Program Performance - Custom  
E-mail: [ConservationContracts@ieso.ca](mailto:ConservationContracts@ieso.ca)

- (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) **Signatures.** This Agreement may be executed and delivered by facsimile transmission or by any other method of electronic transmission. Any such signatures, including any contract formation on the EPP Portal or record-keeping through electronic means, may be relied upon by the Participant and the IESO and shall have the same legal effect, validity of

enforceability as a manually executed signature, physical delivery thereof, or the use of a paper-based record-keeping system as the case may be.

- (I) **No Binding Obligations.** Prior to the issuance of the Notice of Approval, no binding obligations are created between the IESO and the Participant, and the IESO is not bound in any way to pay any Performance Incentives. Upon the issuance of the Notice of Approval, this Agreement shall be binding upon both Parties.

I, the Participant, certify that I understand and agree to the terms and conditions as set forth above in this Agreement and agree to be bound by this Agreement upon the issuance of a Notice of Approval.

PARTICIPANT / LEGAL COMPANY NAME:

AUTHORIZED SIGNATURE:

DATE:

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## SCHEDULE “A” – DEFINITIONS

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

**“Agreement”** means this Energy Performance Program Participant Agreement, including all recitals and Schedules, the Application and any additional documents 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.

**“Application”** means a complete application for an incentive in respect of a Facility or Facilities under the Energy Performance Program submitted by a Participant via the EPP Portal to the IESO for approval.

**“Approved Meter”** means one of the following:

- a) a meter that meets Measurement Canada requirements for revenue billing, including approval by type, has been tested and sealed by an accredited Measurement Canada meter shop, and has had a Measurement Canada S-E-04 inspection by a firm accredited by Measurement Canada for this work. The Measurement Canada meter requirements can be found here: [Measurement Canada Meter Requirements](#)
- b) a meter that meets the following requirements:
  - i. is a solid-state, true root mean square, electric meter or watt transducer;
  - ii. has been calibrated and verified in accordance with the manufacturer’s instructions to be accurate within +/- 0.5%;
  - iii. and has been approved by the IESO, in its sole and absolute discretion, for use at the Facility and for the specific Eligible Measures being implemented as part of the Energy Performance Program.

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

**“Baseline Energy Model”** means a statistical model generated for a Facility via the EPP Portal that predicts electricity consumption for that Facility over a set period of time, in accordance with the

Baseline Energy Model Requirements found in the EPP Technical Guide.

**“Baseline Energy Model Requirements”** are the requirements for the Baseline Energy Model as set out in the EPP Technical Guide.

**“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”** means the date of issuance of the Notice of Approval.

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

**“EPP Portal”** means the IESO’s online portal for the Energy Performance Program used for, but not limited to, applying to the Program, enrolling Facilities, Baseline Energy Model generation, Savings Submissions, savings and incentive determination, Interim Savings Reports and invoice submissions.



**"EPP Technical Guide"** means a document provided by the IESO that may be updated from time to time that outlines program methodologies, specifications, and guidelines, including but not limited to, the determination of the baseline energy model, goodness of fit of the model, treatment of adjustments, and estimated energy savings used within the EPP Portal.

**"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.

**"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.

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

**"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 <https://www.ieso.ca/en/Sector-Participants/Energy-Efficiency/Evaluation-Measurement-and-Verification> 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 Cap"** has the meaning given to it in Section 3(b).

**"Indemnifiable Loss"** has the meaning given to it in Section 10.

**"Indemnified Party"** has the meaning given to it in Section 10.

**"Indemnifying Party"** has the meaning given to it in Section 10.

**"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.

**"Interim Savings Reports"** means the EPP Portal reporting dashboard that presents the effects of installed measures and/or actions taken. It also captures any unexpected increase or decrease in energy savings, which are determined based on the uploaded electricity consumption data.

**"LDC"** means a local electricity distribution company duly licensed by the OEB.

**"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.

**"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 2(c).

**"Non-Routine Adjustment" or "NRA"** means a change to the Baseline Energy Models necessitated by a Non-Routine Event.

**"Non-Routine Event" or "NRE"** means certain changes to the Facility that significantly impact energy consumption but are unrelated to the Measures implemented and not otherwise addressed by the Baseline Energy Model. These changes could include modifications in the Facility size or the addition of new equipment, as further detailed in the EPP Technical Guide.

**"Notice of Approval"** means the notice issued by the Service Provider on behalf of IESO when the Participant has accepted the Baseline Energy Model for a Facility generated by the EPP Portal.

**“Off-Peak Electricity Consumption”** means electricity consumption that is not On-Peak Electricity Consumption.

**“Off-Peak Electricity Savings”** means the difference between the Off-Peak Electricity Consumption predicted for a Facility by the Baseline Energy Models over a Pay-for-Performance Period and the annual Off-Peak Electricity Consumption recorded by the Facility’s Approved Meter for the same Pay-for-Performance Period in accordance with the EPP Technical Guide. In the event of a dispute, the IESO’s evaluation of Off-Peak Electricity Savings will be final and binding.

**“Off-Peak Energy Incentive Rate”** means the dollar per kWh rate paid to the Participant for Off-Peak Electricity Savings as set out in section 3(a)(i) hereof.

**“On-Peak Electricity Consumption”** means electricity consumption, measured in kWh, during peak period hours, as defined in the IESO’s Evaluation, Measurement and Verification Protocol V4.0. For clarity, this means energy consumed during Business Days between June 1 and August 31 (inclusive), during the hours of 1 pm and 7pm (EDT).

**“On-Peak Electricity Savings”** means the difference between the On-Peak Electricity Consumption predicted for a Facility by the Baseline Energy Models over a Pay-for-Performance Period and the annual On-Peak Electricity Consumption recorded by the Facility’s Approved Meter for the same Pay-for-Performance Period in accordance with the EPP Technical Guide. In the event of a dispute, the IESO’s evaluation of On-Peak Electricity Savings will be final and binding.

**“On-Peak Energy Incentive Rate”** means the dollar per kWh rate paid to the Participant for On-Peak Electricity Savings as set out in section 3(a)(ii) hereof.

**“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”** means either the IESO or the Participant, or both, as applicable

**“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 Off-Peak Electricity Savings and On-Peak Electricity Savings will be measured, with the first such period for a Facility commencing on the date that the Participant accepts the Baseline Energy Model for a Facility and the next such period commencing immediately after the expiration of 12 months.

**“Performance Incentive”** means the amount to be paid to the Participant for each Pay-for-Performance Period as defined in Section 3(a)(i) and 3(a)(ii).

**“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 1(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 preamble to this Agreement.

**"Program Requirements"** means the program requirements for the Energy Performance Program, as made available by the IESO on the Save on Energy website as updated from time to time.

**"Records"** has the meaning given to it in Section 11(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 generated by the EPP Portal based on the Facility energy data submitted annually by Participants evidencing the Total Electricity Savings achieved for a Facility during a given Pay-for- Performance Period.

**"Savings Submission"** means the Facility energy data provided by the Participant through the EPP Portal for each Pay-for-Performance Period in order for an annual Savings Report to be generated.

**"Service Provider"** means a third party retained by the IESO.

**"Term"** has the meaning given to it in Section 5(a).

**"Total Electricity Savings"** means the sum of the Off-Peak Electricity Savings and the On-Peak Electricity Savings.

**"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.

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## **SCHEDULE “B” – ELIGIBILITY CRITERIA**

### **1.1 PARTICIPANT ELIGIBILITY CRITERIA**

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

- a)** be an electricity consumer with one or more commercial, institutional, or industrial Facilities located in Ontario;
- b)** commit to achieve at least five percent (5%) Total 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 an Approved Meter;
- b)** have a minimum of 12 months of the most recent contiguous hourly interval data and, if requested, provide further data if any insufficiencies are found;
- c)** have a >50kW commercial account with an Approved Meter;
- d)** have the Baseline Energy Models meeting the minimum standards stated in the EPP Technical Guide;
- 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 EPP Technical Guide.

### **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 Government of Ontario or the IESO. 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, as amended ("**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 Energy Models are prepared for the Program which incorporate any energy or peak demand savings realized under Past Programs, in accordance with the EPP Technical Guide.

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## SCHEDULE "C" – ARBITRATION PROVISIONS

1. Subject to and in accordance with the provisions of this Schedule "C", 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 "C" 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.