
EXISTING BUILDING COMMISSIONING PROGRAM PARTICIPANT AGREEMENT

This Existing Building Commissioning Program Participant Agreement (the “**Agreement**”) is made as of the date of issuance of the Notice of Approval (the “**Effective Date**”).

BETWEEN:

(the “**Participant**”)

-and-

INDEPENDENT ELECTRICITY SYSTEM OPERATOR

(the “**IESO**”)

RECITALS:

1. The IESO is offering and administering the Save on Energy – Existing Building Commissioning Program to incentivize building owners to undertake re-commissioning services at their existing facilities.
2. The Participant wishes to participate in the Program offered by the IESO in order to access funding for the implementation of Energy Conservation Measures at its Facility.
3. The Participant will implement its Energy Conservation Measures and the IESO will provide incentive payments, all in accordance with the terms and conditions of this Agreement.
4. The IESO has appointed **CLEAResult Canada Inc.** (the “Service Provider”) to administer the Program

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

ARTICLE 1

DEFINITIONS AND INTERPRETATION

1.1 Definitions

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

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

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

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

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

"Application" means the application (including all supporting documentation) for participation in the Program executed by the Participant, and submitted in accordance with the applicable Program Requirements, which was approved by the IESO.

"Baseline Adjustment" means an adjustment to the Baseline Model necessitated in the circumstances described in Section 5.2, or in accordance with the M&V Guide.

"Baseline Adjustment ECM" means any ECM which is identified in the Program Requirements as an ineligible ECM and any other ECM which is not approved during the IESO's Technical Review of the Implementation Report.

"Baseline Model" means the Facility-specific model with inputs of at least 12 months of energy use and weather data, which is intended to represent the electricity consumption and peak demand of the Facility over the Baseline Period prior to the implementation of any ECMs under the Program.

"Baseline Period" means a minimum consecutive period of at least 12 months that is used to establish the Baseline Model.

"Building Area" means the gross floor area (in square feet) of a Facility that is heated and cooled, and excludes above grade or below grade parking garage areas.

"Business Day" means a day, other than a Saturday or a Sunday or statutory holiday in the Province of Ontario or any other day on which the IESO is not open for the transaction of business.

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

"Claimed Energy Savings" means the Energy Savings reported by the Commissioning Provider in the Implementation Report, in accordance with the M&V Guide.

"Claimed Peak Demand Savings" means the Peak Demand Savings reported by the Commissioning Provider in the Implementation Report, in accordance with the M&V Guide.

"Claimed Persisting Energy Savings" means the Energy Savings reported by the Commissioning Provider in the Persistence Report, in accordance with the M&V Guide.

"Claimed Persisting Peak Demand Savings" means the Peak Demand Savings reported by the Commissioning Provider in the Persistence Report, in accordance with the M&V Guide.

"Commissioning Provider" means the Person listed on the Qualified Commissioning Providers List and engaged by the Participant to deliver services to the Participant in connection with the Program, as such Person is identified in the Application as of the Effective Date or by notice in writing to the IESO from time to time after the Effective Date.

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

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

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

- (a) was or becomes generally known to the public other than by a breach of the Receiving Party or any of its Representatives of this Agreement;
- (b) as shown by written record, was specifically known by the Receiving Party prior to disclosure by the Disclosing Party hereunder and was not subject to any confidentiality obligation;

- (c) as shown by written record, was independently developed by the Receiving Party without use of or reference to the Confidential Information; or
- (d) was or becomes known to the Receiving Party on a non-confidential basis from a third party other than the Disclosing Party, so long as such source was not subject to any confidentiality obligation.

"Confirmed Energy Savings" means the Energy Savings confirmed by the IESO at the end of the Implementation Phase, in accordance with the M&V Guide, based on the Claimed Energy Savings reported by the Commissioning Provider in the Implementation Report.

"Confirmed Persisting Energy Savings" means the Energy Savings confirmed by the IESO at the end of the Persistence Phase, in accordance with the M&V Guide, based on the Claimed Persisting Energy Savings reported by the Commissioning Provider in the Persistence Report.

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

"Disclosing Party" means, with respect to Confidential Information, the Party disclosing Confidential Information and may be the IESO or the Participant, as applicable.

"EBCx Minimum Phase Report Requirements" means the set of minimum requirements to be met in the preparation and content of the Participant Reports, in the form made available by the IESO, as updated from time to time.

"Effective Date" has the meaning given to it in the preamble of this Agreement.

"Eligible Costs" means the costs incurred by the Participant for the performance of services by third party service providers (including the Commissioning Provider) in respect of the Program during the Investigation Phase, which meet the applicable Program Eligibility Criteria.

"Energy Conservation Measure" or "ECM" means any activity undertaken for the primary purpose of reducing, directly or indirectly, electricity consumption at the Facility.

"Energy Savings" means the reduction in modeled annualized electrical energy consumption (in kWh) resulting from the implementation of ECMs at the Facility, calculated in accordance with the M&V Guide.

"Environmental Attributes" means all benefits and entitlements associated with ECMs or the Facility having decreased environmental impacts resulting from the implementation of ECMs, and includes:

- (a) all rights to any fungible or non-fungible attributes, whether arising from the Facility itself or because of Applicable Law or voluntary programs established by any Governmental Authority;

- (b) all rights to quantify and register the foregoing with competent authorities; and
- (c) all revenues, entitlements, benefits, and other proceeds arising from or related to the foregoing.

"Event of Default" has the meaning given to it in Section 4.1.

"Facility" means the building(s), premises or lands, or part thereof, owned or occupied by a Participant and in respect of which the Participant is participating in the Program.

"FIPPA" means the Freedom of Information and Protection of Privacy Act (Ontario).

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

"Governmental Approvals" means any declaration, filing or registration with, notice to or license, permit, certificate, registration, authorization, consent or approval of, any Governmental Authority pertaining to an ECM or the Facility.

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

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

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

"IESO-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 electricity conservation and demand management programs and initiatives, as such methods and processes may be amended from time to time.

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

"Implementation Incentive" means the financial incentive in respect of the achievement of Confirmed Energy Savings, calculated in accordance with Section 5.3(b).

"Implementation Phase" means the second phase of the Program, during which ECMs are implemented at the Facility, which phase is not to exceed eighteen (18) months from the date of the IESO's approval of the Investigation Report.

"Implementation Report" means the report prepared by the Commissioning Provider, in accordance with the EBCx Minimum Phase Report Requirements, and submitted by the Participant to the IESO for Technical Review and approval, which: (a) describes the ECMs that have been implemented at the Facility; (b) includes an updated version of the M&V Plan included with the Investigation Report, if any; (c) sets out the Claimed Energy Savings and Claimed Peak Demand Savings; and (d) includes confirmation from the Commissioning Provider that the Participant has been trained on the proper use of the implemented ECMs and provided with a copy of the Implementation Report and any other documentation necessary to maintain the ECMs during the Persistence Phase.

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

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

"Intellectual Property Rights" means:

- (a) any and all proprietary rights anywhere in the world provided under patent law, copyright law (including moral rights), trade-mark law, design patent or industrial design law, semi-conductor chip or mask work or integrated circuit topography law, trade secret law, or any other statutory provision or common law principle applicable to this Agreement that may provide a right in either hardware, software, content, documentation, Confidential Information, trade-marks, ideas, formulae, algorithms, concepts, inventions, processes or know-how generally, or the expression or use of such hardware, software, content, documentation, Confidential Information, trade-marks, ideas, formulae, algorithms, concepts, inventions, processes or know-how;
- (b) any and all applications, registrations, licences, sub-licences, franchises, agreements or any other evidence of a right in any of the foregoing; and
- (c) all licences and waivers and benefits of waivers of the intellectual property rights set out in (a) and (b) above, all future income and proceeds from the intellectual property rights set out in (a) and (b) above, and all rights to damages and profits by reason of the infringement or violation of any of the intellectual property rights set out in (a) and (b) above.

"Investigation Incentive" means the financial incentive in respect of the Participant's engagement of third party service providers (including the Commissioning Provider) in connection with the Program, calculated in accordance with Section 5.3(a).

"Investigation Phase" means the first phase of the Program, during which the Commissioning Provider and Participant conduct energy baseline exercises, inspect the Facility, identify potential ECMs, and plan for the Implementation Phase.

"Investigation Report" means the report prepared by the Commissioning Provider, in accordance with the EBCx Minimum Phase Report Requirements, and submitted by the Participant to the IESO for Technical Review and approval, which: (a) documents the existing conditions of the Facility; and (b) includes a list of ECM opportunities and energy savings estimates for each such opportunity, an implementation plan and the initial M&V Plan, if required by the M&V Guide.

"Invoice Reconciliation Form" means an invoice reconciliation form which specifically itemizes Eligible Costs and describes all eligible services and the relating prices paid for same.

"kW" means a kilowatt; and **"kWh"** means a kilowatt hour.

"M&V Guide" means the document containing the procedures for Measurement & Verification applicable to the Program and made available at the Program Website.

"M&V Plan" means the measurement and verification plan prepared by the Commissioning Provider and agreed to by the Participant, which specifies the approach to Measurement & Verification and is in compliance with the M&V Guide.

"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.

"Measurement & Verification" or **"M&V"** means the process of planning, measuring, collecting and analyzing data for the purpose of verifying and reporting Energy Savings within a facility resulting from the implementation of ECMs.

"Notice of Approval" means the notice issued by the Service Provider or the IESO, which provides the IESO's approval of the Application.

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

"Participant Incentives" means, in respect of the Program, the financial incentives payable or paid to the Participant in accordance with this Agreement, which are the Investigation Incentive, the Implementation Incentive and the Persistence Incentive.

"Participant Incentive" means any one or more of the Participant Incentives, as the case may be.

“Participant Reports” means, collectively, the Investigation Report, the Implementation Report and the Persistence Report.

“Participant Report” means any one or more of the Participant Reports, as the case may be.

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

“Peak Demand Savings” means the average load reduction in electricity demand between the business case and the energy efficient case occurring between 3 p.m. to 9 p.m. on Business Days, June 1 through September 30 resulting from the implementation of ECMs at the Facility.

“Persistence Incentive” means the financial incentive in respect of the achievement of Confirmed Persisting Energy Savings, calculated in accordance with Section 5.3(c).

“Persistence Phase” means the third and final phase of the Program, comprising of the 12-month period following the end of the Implementation Phase, during which the Participant will maintain the ECMs and apply the training and instructions in respect thereof provided by the Commissioning Provider.

“Persistence Report” means the report prepared by the Commissioning Provider, in accordance with the EBCx Minimum Phase Report Requirements, and submitted by the Participant to the IESO for Technical Review and approval, which: (a) documents the results of the Program activities of the Participant and the Commissioning Provider during the Persistence Phase (including maintenance of the ECMs); and (b) sets out the Claimed Persisting Energy Savings and Claimed Persisting 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.

“Program” or **“Existing Building Efficiency Program”** means the Save on Energy – Existing Building Commissioning Program offered by the IESO to incentivize building owners to undertake re-commissioning services at their existing facilities.

“Program Deliverables” means, collectively, the M&V Plan, the Participant Reports and such other documentation or deliverables as may be required to calculate and/or confirm the Participant Incentives and the Energy Savings.

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

"Program Phases" means, collectively, the Investigation Phase, the Implementation Phase and the Persistence Phase. **"Program Phase"** means any one of the Program Phases, as applicable.

"Program Requirements" means, collectively, the IESO Program Requirements – Existing Building Commissioning and any other terms and conditions governing the Program published on the Program Website, as may be amended from time to time.

"Program Website" means the IESO's Save On Energy website at <https://SaveONenergy.ca/ebcx>.

"Qualified Commissioning Providers List" means the list of qualified commissioning providers authorized by the IESO to deliver third party services (including commissioning) in connection with the Program.

"Receiving Party" means, with respect to Confidential Information, the Party receiving Confidential Information and may be the IESO or the Participant, as applicable.

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

"Save on Energy" is an IESO trademark in connection with energy efficiency programs offered by the IESO.

"Services" means the deliverables, products and services delivered by the Commissioning Provider in connection with the Program, including the commissioning and other services delivered to the Applicants and Participants. For clarity, the performance of the Services may include the implementation of ECM measures by the Commissioning Provider at the facility of a Participant.

"Service Provider" has the meaning set out in the Recitals.

"Technical Review" means the process undertaken by the IESO to review and confirm the Program Deliverables submitted to the IESO (including the Participant Reports) comply with this Agreement and the Program Requirements. As a part of Technical Review, the IESO may confirm Program eligibility, completeness and technical accuracy of such deliverables and/or to verify the reporting of Energy Savings and Peak Demand Savings and the accuracy of calculations in respect of the Participant Incentives.

"Term" has the meaning ascribed to it in Section 3.1.

1.2 Interpretation

- (a) The headings are for convenience of reference only and will not affect the interpretation of this Agreement.
- (b) The provisions of the body of this Agreement and any Schedules to the Agreement are to be read and interpreted together. If there is any inconsistency between the provisions of the body of this Agreement and any Schedule to this Agreement, the

body of this Agreement shall prevail to the extent of the inconsistency, unless the Schedule expressly refers to the section of the body of the Agreement over which it prevails.

- (c) Notwithstanding the fact that this Agreement was drafted by the IESO's legal and other professional advisors, the Parties acknowledge and agree that any doubt or ambiguity in the meaning, application or enforceability of any term or provision of this Agreement shall not be construed or interpreted against the IESO or in favour of the Participant when interpreting such term or provisions, by virtue of such fact.
- (d) In this Agreement, unless the context otherwise requires:
 - (i) Words denoting inclusion (e.g. "including") followed by a list of specific matters or items, such lists will not restrict the generality of such provision;
 - (ii) A reference to any statute, regulation, proclamation, order in council, ordinance, by-law, resolution, rule, order or directive includes all statutes, regulations, proclamations, orders in council, ordinances, bylaws or resolutions, rules, orders or directives varying, consolidating, re-enacting, extending or replacing it and a reference to a statute includes all regulations, proclamations, orders in council, rules and bylaws of a legislative nature issued under that statute; and
 - (iii) A reference to dollar amounts are a reference to Canadian dollars.

1.3 Schedule. The following documents are hereby incorporated in and form part of this Agreement:

- (a) the version of the Program Requirements in effect as of the Effective Date, provided that such version shall continue to apply notwithstanding any subsequent amendments to the Program Requirements, unless the Parties otherwise agree in writing; and
- (b) the Application.

ARTICLE 2

REPRESENTATIONS AND WARRANTIES

2.1 Participant Representations and Warranties. The Participant covenants, represents and warrants to the IESO as follows, and acknowledges that the IESO is relying on such

representations and warranties in entering into this Agreement (by issuing a Notice of Approval):

- (a) the Participant, the Facility and the Energy Conservation Measures meet the Program Eligibility Criteria;
- (b) all statements, specifications, data and information in the Application, Program Deliverables, including any attached documentation are true, accurate and complete in all material respects and there is no material information omitted which makes the Application or Program Deliverables misleading or inaccurate;
- (c) the Participant has all required rights and authority to implement the Energy Conservation Measures and to carry out all of its obligations as set out in this Agreement;
- (d) the Participant is a legal entity validly established under the laws of its jurisdiction, is registered or otherwise qualified to carry on business in the Province of Ontario, and has the requisite power, authority and capacity to enter into this Agreement and perform its obligations hereunder;
- (e) 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;
- (f) 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;
- (g) to the knowledge of the Participant, there are no actions, suits, proceedings, judgements, rulings;
- (h) the Commissioning Provider is a Person listed on the Qualified Commissioning Providers List;
- (i) the Participant shall make any declaration, filing or registration with, give any notice to or obtain any Governmental Approval required by Applicable Law, as a condition to entering into the Agreement and to fulfill its obligations. Further, all Governmental Approvals that are required at the time of this representation for the performance of the Participant's obligations have been obtained;
- (j) the execution of the Agreement and the performance of the Participant's obligations under them will not result in the breach or violation of any of the provisions of its

material obligations or any judgements, decree, order or award to which it is subject or any Governmental Approval held by it;

- (k) the Participant is not a non-resident of Canada for the purposes of the Income Tax Act (Canada); and
- (l) the performance by the Participant of its obligations under this Agreement and the possession and use of the Program Deliverables by the IESO or its Representatives do not and will not infringe the Intellectual Property Rights of any third party.

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

ARTICLE 3

TERM

- 3.1 **Term.** The term of this Agreement ("**Term**") commences as of the Effective Date and, unless terminated earlier in accordance with the terms of this Agreement, expires upon the IESO's payment of the Persistence Incentive.

ARTICLE 4

EVENTS OF DEFAULT AND TERMINATION

- 4.1 **Event of Default.** The occurrence of any of the following events shall be an event of default by the Participant ("**Event of Default**") if such event is not remedied within fifteen (15) Business Days following written notices from the IESO to the Participant, provided that such cure period may be extended by the IESO if the IESO is satisfied that the Participant is diligently remediating such event and such event is capable of being cured during such extended cure period:
- (a) the Participant fails to perform any material covenant or obligations set forth in the Agreement;
 - (b) any representation or warranty made by the Participant in this Agreement is not true or correct in any material respect when made;

- (c) the Participant fails or ceases to hold a Governmental Approval necessary for the implementation of an ECM;
- (d) documents are filed in an office of public record in respect of, or a judgement or order is issued by a court of competent jurisdiction ordering, the dissolution, termination of existence, liquidation or winding up of the Participant;
- (e) the Participant amalgamates with, or merges with or into, or transfers the Facility and/or all or substantially all of its assets to, another Person, unless at the time of such amalgamation, merger or transfer, there has been a permitted and valid assignment by the Participant of the Agreement to the resulting, surviving or transferee Person and such Person has assumed all of the obligations of the Participant under the Agreement;
- (f) the Participant makes an assignment for the benefit of its creditors generally under any Applicable Law, or consents to the appointment of a receiver, manager, receiver-manager, monitor, trustee in bankruptcy or liquidator for all or part of its property or files a petition or proposal to declare bankruptcy or to reorganize pursuant to the provisions of any Applicable Law; and
- (g) the Participant has made a material amendment to the M&V Plan which has not first been approved in the Implementation Report or otherwise in writing by the IESO.

4.2 Remedies for Events of Default. If the Participant cannot or will not remedy an Event of Default within the time period required by Section 4.1, upon written notice to the Participant, the IESO may terminate the Agreement and the Participant will no longer be eligible to receive any Participant Incentive which has not yet been paid by the IESO. Without limiting the generality of Section 6.8, in the event of such a termination, the IESO shall be entitled to be reimbursed by the Participant for all or a portion of any Implementation Incentive paid to the Participant, as determined by the IESO acting reasonably. For clarity but subject to Section 6.8, the IESO shall not be entitled to be reimbursed by the Participant for any portion of the Investigation Incentive paid by the IESO in the event of such a termination.

4.3 Remedies for Termination Non-Exclusive. The termination of this Agreement by the IESO shall not limit, waive or extinguish in any way the recourse of the IESO to any remedies available to it in relation to such termination at law, in equity or otherwise, nor shall such termination affect any rights that the Indemnified Party may have pursuant to any indemnity given under this Agreement.

ARTICLE 5

ECM IMPLEMENTATION AND INCENTIVE PAYMENTS

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

- (a) each Participant Incentive:
 - (i) the Participant shall implement the Energy Conservation Measures, to the extent applicable, and diligently perform all of its other obligations hereunder, in accordance with this Agreement, Good Engineering Practices and all Applicable Laws;
 - (ii) the Participant shall provide prompt notice in writing to the IESO of any change to the identity of the Commissioning Provider and shall ensure that a commissioning provider from the Qualified Commissioning Providers List has prepared the applicable Participant Report;
 - (iii) the Participant shall obtain and maintain all Governmental Approvals necessary for the design, engineering, installation, verification, operation and maintenance of each ECM;
 - (iv) the Participant shall submit the applicable Participant Report for Technical Review by the IESO; and
 - (v) the Participant shall (or shall cause the Commissioning Provider to) provide written clarification on any aspect of any Program Deliverable or other document or information submitted by the Participant to the satisfaction of the IESO within ten (10) Business Days of such request or such other time period agreed by the IESO in writing; and
- (b) the Implementation Incentive and Persistence Incentive:
 - (i) the Participant shall take all necessary steps to have any components, materials, fluids and gases that were removed or replaced as part of the implementation of any ECM disposed of or decommissioned in accordance with appropriate disposal or decommissioning processes, Applicable Laws, and in accordance with commercially reasonable environmental practices and shall be prepared to evidence, upon request by the IESO, such activities through appropriate disposal certificates or similar or other documentation as may be acceptable to the IESO, in its discretion; and

- (ii) the Participant shall ensure that the Claimed Peak Demand Savings are included as a part of the Implementation Report and the Claimed Persisting Peak Demand Savings are included as a part of the Persistence Report. For clarity, the Claimed Peak Demand Savings and the Claimed Persisting Peak Demand Savings are provided to the IESO for information purposes only and do not play any role in the calculation of the Participant Incentives.

5.2 **Baseline Adjustments**

- (a) If the Participant implements any Baseline Adjustment ECM at the Facility after the commencement of the Baseline Period, a Baseline Adjustment shall be triggered for the calculation of the Implementation Incentive and the Persistence Incentive, as the case may be.
- (b) For clarity, during the Implementation Phase the Participant may implement additional ECMs not identified in the Investigation Report without triggering a Baseline Adjustment.

5.3 **Calculation of the Participant Incentives**

- (a) The Investigation Incentive shall be determined by the IESO as a part of the IESO's approval of the Investigation Report. Subject to the terms of this Agreement, the amount of the Investigation Incentive will be calculated as \$0.06 multiplied by the Building Area up to a maximum amount of \$50,000 for each Facility under this Participant Agreement, provided that the total amount of the Investigation Incentive payable under this Participant Agreement shall not exceed seventy-five percent (75%) of the total Eligible Costs. As a part of the calculation of the Investigation Incentive, the Participant shall prepare and submit to the IESO, in form and substance acceptable to the IESO, an Invoice Reconciliation Form in respect of the Eligible Costs. The Invoice Reconciliation Form will be deemed to be a representation and warranty of the Participant to the IESO that the work required to be completed and the costs incurred have been completed and paid, as applicable.
- (b) The Implementation Incentive shall be determined by the IESO as a part of the IESO's approval of the Implementation Report. Subject to the terms of this Agreement, the amount of the Implementation Incentive will be calculated as \$0.03 per kWh of Confirmed Energy Savings, provided that the total amount of the Implementation Incentive payable under this Participant Agreement shall not exceed the lesser of: (i) \$50,000; and (ii) 30% of the annual electricity consumption of the Facility (in kWh) calculated pursuant to the Baseline Model.
- (c) The Persistence Incentive shall be determined by the IESO as a part of the IESO's approval of the Persistence Report. Subject to the terms of this Agreement, the

amount of the Persistence Incentive will be calculated as \$0.03 per kWh of Confirmed Persisting Energy Savings, provided that the total amount of the Persistence Incentive payable under this Participant Agreement shall not exceed the lesser of: (i) \$50,000; and (ii) 30% of the annual electricity consumption of the Facility (in kWh) calculated pursuant to the Baseline Model.

- (d) All Participant Incentives are to be substantiated by the Participant using the templates described in the EBCx Minimum Phase Report Requirements.

- 5.4 **Participant Incentive Payments.** Subject to the terms of this Agreement, the IESO shall make payment of each Participant Incentive following the IESO's approval of the applicable Participant Report. Following the approval of each Participant Report, the IESO shall issue a notification of such approval to the Participant and request an invoice in respect of the applicable Participant Incentive. The IESO will not pay, and the Participant will not be entitled to any payment referred to herein unless the applicable Program Deliverables in respect of such payment have been approved by the IESO and provided all other supporting documentation and evidence as required by this Agreement or as otherwise requested by the IESO has been delivered by the Participant or the Commissioning Provider.
- 5.5 **Applicable Taxes.** In addition to the Participant Incentives, the IESO will pay any Applicable Taxes on the Participant Incentives, excluding, for certainty, any income taxes or Worker Safety Insurance Board amounts. The Participant will provide to the IESO sufficient supporting documentation, as requested by the IESO, to facilitate and support the IESO in claiming input tax credits in respect of the Participant Incentives. In addition, if the IESO has reasonable grounds to commence a discussion, negotiation, or challenge, in any manner whatsoever, with a tax authority regarding the validity of any Applicable Taxes imposed on the Participant Incentives, the Participant shall provide such reasonable assistance as may be required by the IESO with such discussion, negotiation, or challenge. For greater certainty, in no event shall the IESO be relieved of its obligations under this Agreement, including the IESO's obligation to pay Applicable Taxes as provided hereunder, pending the outcome of any discussion, negotiation or challenge with a tax authority.
- 5.6 **Method of Payment.** The Participant shall submit to the IESO an invoice for each payment described in Section 5.4. The IESO will make payment to the Participant within a reasonable period following receipt of such invoices, which period may be more than ninety (90) days after the IESO's receipt of such invoices. Payments will be made by electronic funds transfer or cheque payable to the Participant.

ARTICLE 6

EVALUATION, MEASUREMENT AND VERIFICATION; AUDIT

6.1 **M&V Plan.** The M&V Guide sets out the conditions under which an M&V Plan is required to participate in the Program. The Participant shall fulfill all of its obligations pursuant to any required M&V Plan. If required by the M&V Guide, the initial M&V Plan will be submitted by the Participant as a part of the Investigation Report and an updated M&V Plan will be submitted by the Participant as a part of the Implementation Report. The Parties acknowledge and agree that the Parties may otherwise mutually agree to amend the M&V Plan without the execution of a formal amendment to this Agreement in accordance with Section 10.13.

6.2 **Reporting**

- (a) The Participant will submit each Participant Report to the IESO within a reasonable timeframe following the end of the Investigation Phase, Implementation Phase and Persistence Phase, as applicable. For clarity:
 - (i) the Implementation Report shall not be submitted to the IESO later than eighteen (18) months from the date of the IESO's approval of the Investigation Report; and
 - (ii) the Participant shall not be entitled to submit the Implementation Report or Persistence Report unless the Participant Reports for all prior Program Phases have been submitted and approved by the IESO.
- (b) The preparation of the M&V Plan in the Implementation Report and Persistence Report, if any, will depend on the complexity of the M&V as described in the M&V Guide and will align with one of the following options in the M&V Guide: no M&V; basic M&V; or enhanced M&V.
- (c) The IESO will conduct a Technical Review of each Participant Report. The IESO may request such further information or evidence as it reasonably requires during such Technical Review. The IESO will provide its approval or comments on each Participant Report to the Participant within a reasonable time. If the IESO does not approve a Participant Report, such report will be revised by the Participant in order to address the noted deficiencies and obtain the IESO's approval of such revised Participant Report. The IESO may, acting reasonably, reject a Participant Report if it believes that the Participant Report or any other information or documentation provided hereunder is insufficient, inaccurate, incomplete or if any other of the other requirements under this Agreement are not met, including any of the Program Eligibility Criteria.

- 6.3 **IESO EM&V Protocols.** The IESO and its evaluation service provider(s) (collectively, the “**Program Operators**”) will conduct an evaluation of the Program to determine and verify the energy savings and peak demand savings achieved, in accordance with the IESO EM&V Protocols. Activities undertaken by the Program Operators may include site visits, process interviews, provision of documentation, surveys, studies, audits, evaluations or verifications. The Participant consents to participate in any survey, studies, audits, or other evaluation, monitoring and verification activities that may be conducted by the Program Operators, and their respective agents in connection with the Program, and any other provisions that may be required by the IESO. The Participant agrees to support the Program Operators by:
- (a) communicating with the Program Operators to facilitate the Program’s evaluation process;
 - (b) providing details regarding the Participant and its activities as requested by the Program Operators;
 - (c) providing the Program Operators with access to paper and electronic copies of necessary files, information and data, and analysis; and
 - (d) ensuring availability of appropriate staff for interview, on request of the Program Operators.
- 6.4 **Canada’s Anti-SPAM Legislation.** By signing this Agreement, you agree that you are providing your “express consent” (as that term is described in Canada’s Anti-Spam Legislation (CASL) and its associated regulations) for the IESO (or its service providers or your local electricity utility or local distribution company, on the IESO’s behalf) to contact you at the email address identified in your Application for the purpose of receiving electronic communications regarding the IESO’s Save on Energy programs, events and ways to save on energy. You may withdraw your consent at any time or manage your subscription preferences [here](#). If you have any questions, you may also reach the IESO at: 120 Adelaide Street West, Suite 1600, Toronto, ON, M5H 1T1; www.ieso.ca; www.saveonenergy.ca; or 905 403-6900.
- 6.5 **Collection of Participant Information.** The Participant understands and agrees that by submitting the Application, whether or not this Application is accepted: a) it hereby consents to the collection, use, disclosure and other handling of any information it provides to the Program Operators, which may include personal information and records showing past and current energy usage (the “**Participant Information**”), by the Program Operators for purposes relating to the operation, administration, compliance or assessment of the Program or other Save on Energy programs, including for dispute resolution, and in connection with any reporting activities, follow-up surveys, studies and audits relating to the Program, which shall include, without limitation: i) sharing of Participant Information among the Program Operators and/or the IESO; ii) use by the Program Operators of the Participant Information provided by

the Participant to conduct, analyze and report on the results of surveys, and to modify the Program based on such surveys; and iii) disclosure to the Ontario Energy Board, the Ontario Ministry of Energy and Electrification or the Auditor General of Ontario or their respective successors; b) it hereby consents to the disclosure by the IESO of Participant Information to local electricity utilities or local distribution companies and to the IESO receiving information related to the Participant that is collected by local electricity utilities or local distribution companies, required for the purpose of administering (which includes marketing and outreach activities) and assessing the Program and/or other Save on Energy programs and to determine the Participant's eligibility to receive a Participant Incentive by ensuring the Participant meets the eligibility requirements set out in the Program Requirements and does not receive more than one financial incentive funded by the IESO for the same Energy Conservation Measure.

6.6 **Books and Records**

- (a) The Participant shall keep complete and accurate books, accounts and records and all other data required by it for the purpose of proper administration, monitoring and verification of this Agreement, including the Participant Incentives paid under this Agreement, and all such records and data shall be maintained during the Term and for the period of time thereafter which is the greater of seven years following the expiry or earlier termination of the Agreement and the period of time specified under Applicable Law.
- (b) On reasonable notice, at any time during normal business hours, and at such frequency as the IESO reasonably requires for a period of seven years following the expiry or earlier termination of the Agreement, the Participant shall provide reasonable access to the IESO and/or its Representative 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 Representatives, the personnel of the Participant and its subcontractors involved in the operation of the Participant's business and the maintenance of such books, accounts, records and data referred to above for purposes of this Article or to confirm that the Participant has performed its obligations under this Agreement; and (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 the Facility in order to verify any of the information reported in a Participant Report and/or the payment of any Participant Incentive made hereunder.

- 6.7 **Responsive Knowledgeable Staff.** The Participant shall ensure that its relevant personnel are available to and cooperate with the IESO and its third party service providers in respect of the Program. The Participant shall, within ten (10) Business Days of a request by the IESO or any of its third party service providers, provide the IESO or such third party service provider, as the case may be, with:

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

6.8 **Overpayments and Underpayments.** Without limiting any other remedies of the Parties, if an audit or inspection conducted pursuant to this Agreement discloses that there has been an overpayment or underpayment by the IESO, the amount of the overpayment or underpayment will be payable or repayable to the IESO or to the Participant, as the case may be, promptly following such disclosure. In the case of an overpayment made by the IESO, the amount of such overpayment may be set-off against any future amounts payable to the Participant under this Agreement.

6.9 **Compliance and Evaluation, Measurement and Verification Audit:** The Participant will participate in any surveys, studies, audits, reporting, evaluations or verifications conducted by the Program Operators in connection with the Program, including for the purpose of proper administration, compliance, monitoring and verification of this Agreement or evaluation of the Program, and will provide to the Program Operators reasonable access to the Participant's records and facilities for such purposes. The Program Operators may undertake quality assurance and quality control activities in connection with the Application, including by collecting photographic evidence, conducting a physical or virtual inspection of the Facility, collecting evidence of Eligible Costs and any payments for the supply and/or installation of the replacement Measure(s), or requesting other information as may be reasonable required to verify project details in respect of the existing equipment prior to its removal and/or the replacement Energy Conservation Measure(s) following installation, at the IESO's sole discretion. The Participant will permit physical or virtual inspections to be conducted in the Facility by the Program Operators if the Participant is selected by the IESO or its service providers for a quality assurance and quality control review. The Participant consents to the Program Operators contacting the Participant directly, including by phone, email and other electronic communication, in connection with surveys, studies, audits, and reporting for the purposes of this Section 6.9.

ARTICLE 7

INDEMNITY AND LIMITATION OF LIABILITY

- 7.1 **No Warranty.** Except as specifically set forth or referenced in this Agreement, there are no representations, warranties or conditions of either Party express, implied, statutory or otherwise, regarding any matter, including any implied warranties or conditions of quality or fitness for a particular purpose. Without limiting the generality of the foregoing, the Participant acknowledges that its participation in this Program is based on its own assessment of this Program and not on any reliance on anticipated or projected results, and that such participation may not result in the delivery of the Energy Savings, which is expressly disclaimed by the Participant.
- 7.2 **Limitation of Liability.** Notwithstanding anything contained herein to the contrary:
- (a) In no event will the Participant be entitled to recover from the IESO or any other Indemnified Party any liabilities, damages, obligations, payments, losses, costs or expenses under or in relation to this Agreement or the Program:
 - (i) for any amount in excess of the actual compensatory direct damages, court costs and reasonable lawyers' and other advisors' fees suffered or incurred by the Participant and in any event limited to the total amount of the Participant Incentives paid or payable by the IESO hereunder; or
 - (ii) for any damages (whether direct or indirect, consequential or otherwise) for loss of profit or diminution of value or loss of use of any property; and
 - (b) The IESO and the Indemnified Parties will not be liable to the Participant, its successors or assigns or its Representatives, for any special, incidental, punitive, exemplary or consequential damages which may arise under or in relation to this Agreement, regardless of whether such liability arises under contract, tort or any other legal theory.
- 7.3 **Indemnification.** The Participant (the "**Indemnifying Party**") will indemnify, defend and hold the IESO, the Government of Ontario, the members of the Government of Ontario's Executive Council and their respective Affiliates, and each of the foregoing Persons' respective directors, officers, employees, shareholders, advisors, third party service providers and agents (including contractors and their employees) (collectively, the "**Indemnified Party**") harmless from and against any and all Claims, losses, damages, liabilities, penalties, obligations, payments, costs and expenses and accrued interest thereon (including the costs and expenses of, and accrued interest on, any and all actions, suits, proceedings for personal injury (including death) or property damage, assessments, judgments, settlements and compromises relating thereto and reasonable lawyers' fees and reasonable disbursements in connection therewith) (each, an "**Indemnifiable Loss**"), asserted against or suffered by the Indemnified Party relating to, in connection with, resulting from, or arising out of:

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

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

ARTICLE 8

CONFIDENTIALITY AND FIPPA

- 8.1 **Rights to Confidential Information.** All Confidential Information remains, at all times, the exclusive property of the Disclosing Party. Neither the Receiving Party nor any of its Representatives has any licence or other right to use or disclose any Confidential Information for any purpose whatsoever other than to use the Confidential Information in connection with the Program, or as otherwise agreed to in this Agreement.
- 8.2 **Use and Disclosure of Confidential Information.** The Receiving Party shall with respect to the Disclosing Party's Confidential Information:
 - (a) hold the Confidential Information secure and in confidence using the same degree of care and security to safeguard such Confidential Information as it uses to protect its own information of like character, but in no event less than a reasonable degree of care and security;
 - (b) not, without the Disclosing Party's prior written consent, use or disclose the Confidential Information for any purpose other than in respect of the Program or in accordance with the terms of this Agreement;

- (c) limit the disclosure of Confidential Information to only those of its Representatives who have a need to know for the purpose of assisting the Receiving Party in complying with its obligations under this Agreement and have agreed to protect it from unauthorized use or disclosure. The Receiving Party will be responsible for any breaches of this Agreement by any of its Representatives, as if such Representatives were a party to this Agreement;
- (d) cause its Representatives to whom it has disclosed Confidential Information to comply with his, her or its obligations to the extent that such obligations relate to the protection of any Confidential Information; and
- (e) promptly notify the Disclosing Party in writing of any unauthorized disclosure, loss or inability to account for the Confidential Information.

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

- (a) Each Party may disclose Confidential Information on a need-to-know basis to:
 - (i) its accountants, internal and external auditors and other professional advisors;
 - (ii) potential permitted assignees or successors of such Party in connection with a potential sale, merger, amalgamation or other transaction or transfer involving the business, assets or services provided by such Party; and
 - (iii) directors, officers, and employees of such Party and its service providers,
- (b) The IESO may use or disclose Confidential Information regarding the Participant's participation in the Program for the purpose of administering other conservation and demand management programs to the Participant.
- (c) The Participant hereby consents to the collection, use, disclosure and other handling of any reports, data and other information about the Participant and its Representatives, including Confidential Information, by the IESO in connection with the operation, administration or assessment of the Program or this Agreement (including verification of compliance), and in connection with any reporting, follow-up surveys, studies, audits, evaluations, measurements, verifications or investigations relating to the Program. The Participant further consents to disclosure by the IESO of such reports, data and other information to the Ontario Energy Board, the Government of Ontario and the Environmental Commissioner of Ontario,

provided that the IESO notifies such entity of the confidential nature of any Confidential Information.

- (d) The IESO may publicly disclose any or all of the following:
- (i) the Participant's name, contact information (including its address for service and the name of its company representative), and its participation in the Program;
 - (ii) data relating to the Program, including a description of any type of Energy Conservation Measure and/or Facility and historical energy use and consumption, which is aggregated with other measures implemented by other Program participants in a manner that is intended to report on the Program or conservation and demand management initiatives; and
 - (iii) the status and nature of the Energy Conservation Measures undertaken under this Program provided that the IESO shall provide ten (10) Business Days' notice to the Participant in advance of such disclosure.

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

8.5 **Return of Information.** Upon the expiry or termination of this Agreement or upon written request by the Disclosing Party, Confidential Information, together with all copies, extracts or other reproductions in whole or in part of such Confidential Information, provided by the Disclosing Party in printed paper format or electronic format will be returned to the Disclosing Party and Confidential Information transmitted by the Disclosing Party in electronic format will be deleted from the emails and directories of the Receiving Party's and its Representatives' computers; provided, however, that the Receiving Party may retain any copies of Confidential Information (a) required to comply with Applicable Laws, internal record retention policies or procedures or good governance, and (b) automatically created on the Receiving Party's or Representative's computer systems by its normal back-up procedures for the period it normally archives backed-up computer records; however, such Confidential Information referred to in (a) and (b) remains confidential and subject to the terms of this Agreement. Following delivery or destruction, as the case may be, on the request of the Disclosing Party, the Receiving Party will provide the Disclosing Party with written confirmation of completion.

8.6 **Injunctive and Other Relief.** The Receiving Party acknowledges that breach of any provisions of this Article may cause irreparable damage or injury to the Disclosing Party or to

any third-party to whom the Disclosing Party owes a duty of confidence, and that the injury to the Disclosing Party or to any third-party may be difficult to calculate and inadequately compensable in damages. The Receiving Party agrees that, in addition to any other remedies available to the Disclosing Party, the Disclosing Party is entitled to seek equitable relief, including injunction and specific performance, without proving any damage sustained by it or by any third-party.

8.7 **FIPPA.** Without limiting the foregoing, the Participant acknowledges and agrees that this Agreement and all Confidential Information in the custody and control of the IESO or the Participant are subject to Applicable Laws that include the access provisions of FIPPA and that as a result, third parties may obtain access to each Party's Confidential Information. Moreover, the Participant acknowledges that the IESO and its Representatives are subject to FIPPA which applies to and governs all recorded information in any form or medium, including Confidential Information, that is in the custody or control of the IESO (collectively, the "**Records**"), and may require the disclosure of the Records to third parties. To the extent that the IESO must comply with disclosure obligations under FIPPA, the Participant agrees.

- (a) to keep the Records in its possession secure; and
- (b) to provide a copy of any Records to the IESO within seven (7) calendar days of being directed to do so by the IESO for any reason under FIPPA including an access request.

For information about the IESO's general personal information practices, please refer to its privacy policy at www.ieso.ca/en/privacy.

ARTICLE 9

DISPUTE RESOLUTION

9.1 **Dispute Resolution.** If any dispute arises under or in connection with this Agreement, whether arising before or after the expiration or termination of this Agreement, that the Parties cannot resolve, then either Party may deliver a notice to the other Party describing the nature and particulars of such dispute. Within ten (10) Business Days following delivery of such notice, a senior representative from each Party will meet, either in person or by telephone, to attempt to resolve the dispute. Each senior representative shall be prepared to propose a solution to the dispute. If, following such efforts, the dispute is not resolved, the dispute will be settled by arbitration before a single arbitrator (the "**Arbitrator**") pursuant to

the *Arbitration Act, 1991* (Ontario) and otherwise in accordance with the laws of the Province of Ontario.

- 9.2 **Arbitration.** A Party desiring arbitration hereunder will give written notice of arbitration to the other Party containing a concise description of the matter submitted for arbitration ("**Notice of Arbitration**"). If the Parties fail to jointly appoint an Arbitrator within fifteen (15) Business Days of the receipt of the Notice of Arbitration, an Arbitrator will be designated by a judge of the Ontario Superior Court of Justice upon application by either Party. The Arbitrator may determine all questions of law, fact and jurisdiction with respect to the dispute or arbitration (including questions as to whether a dispute is arbitrable) and all matters of procedure relating to the arbitration. The Arbitrator may grant legal and equitable relief (including injunctive relief), award costs (including legal fees and the costs of the arbitration), and award interest. The arbitration will be conducted in English in the City of Toronto (or as otherwise agreed to by the Parties) at such place therein and time as the Arbitrator may fix. The Arbitrator shall be authorized only to interpret and apply the provisions of this Agreement and shall have no power to modify or change this Agreement in any manner. Unless otherwise agreed by the Parties, the Arbitrator's written decision will be delivered to each Party within sixty (60) calendar days following the conclusion of the arbitration hearing. Each Party shall bear (and be solely responsible for) its own costs incurred during the arbitration process, and, unless otherwise provided in the arbitral award, each Party shall bear (and be solely responsible for) its equal share of the costs of the arbitrator. The decision of the Arbitrator will be final and binding upon the Parties. There will be no appeal from the decision of the Arbitrator to any court, except on the ground that the conduct of the Arbitrator, or the decision itself, violated the provisions of the *Arbitration Act, 1991* (Ontario) or solely on a question of law as provided for in such act. Judgment upon any award rendered by the Arbitrator may be entered in any court having jurisdiction thereof. Submission to arbitration under this Agreement is intended by the Parties to preclude any action in matters which may be arbitrated hereunder, save and except for enforcement of any arbitral award.
- 9.3 **Confidentiality of Arbitration.** The arbitration and all matters arising directly or indirectly therefrom will be kept strictly confidential by the Parties and will not be disclosed to any third party except as may be compelled by law.

ARTICLE 10

MISCELLANEOUS

- 10.1 **Environmental Attributes.** All Environmental Attributes arising in respect of electricity savings for which a Participant Incentive has been funded by the IESO, whether existing now

or arising in the future (the "**Electricity Savings Environmental Attributes**") will be allocated on a proportionate basis, with the IESO owning an amount equal to the total quantity of Electricity Savings Environmental Attributes multiplied by the Environmental Attribute Funding Percentage (the result being the "**IESO Environmental Attributes**") and the Participant owning the remaining quantity of Electricity Savings Environmental Attributes (the "**Participant Environmental Attributes**"). All other Environmental Attributes arising in relation to a Participant will be owned by the Participant and the IESO will not have any entitlement to them. For the purposes of this Section 10.1, "**Environmental Attribute Funding Percentage**" means, in respect of the Facility, the total Participant Incentive paid by the IESO divided by the total amount of actual costs incurred by the Participant that meet the Program Eligibility Criteria for such costs multiplied by 100, and expressed as a percentage.

- (a) 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.
- (b) 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.
- (c) The IESO will be entitled to unilaterally and without consent deal with such IESO Environmental Attributes in any manner it determines. The Participant acknowledge that the IESO will contact the Participant prior to realizing on any IESO Environmental Attributes.
- (d) 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 Law from time to time for the purpose of transferring such IESO Environmental Attributes to the IESO. The Participant will be entitled to reimbursement by the IESO of the cost of complying with such a direction provided that the IESO, acting reasonably, has approved such cost of compliance in writing prior to the cost being incurred by the Participant and provided that such reimbursement will be limited to: (x) the total amount of such cost of compliance that have been approved in advanced by the IESO, multiplied by (y) the applicable Environmental Attributes Funding Percentage.

- 10.2 **IESO Marks.** The Participant shall not use, nor shall it permit any person employed by it to use, identifying marks of the IESO other than with the prior written consent of the IESO, which may be arbitrarily withheld.
- 10.3 **Time is of the Essence.** Time is of the essence in the performance of this Agreement.
- 10.4 **Subcontracting.** 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 and approval of the Program Deliverables and payment of the Participant Incentives. The Participant shall cooperate with any such third party service provider and provide such third party service provider with any required data and information and access to the Facility in order for such third party service provider to perform its obligations in respect of the Program, including, historical energy use, energy consumption or any other information relating to the Facility required by the third party service provider for Measurement and Verification purposes.
- 10.5 **Communications.** The Participant shall acknowledge the assistance provided by the IESO in all publications, publicity materials and other forms of release or communication pertaining to the Program or this Agreement, provided that the IESO will have the right to approve all such communications in advance.
- 10.6 **Notices.** Any notice to be given under this Agreement unless expressly provided otherwise herein must be in writing and will be given by e-mail or by hand delivery as provided. Any notice, if sent by email, will be deemed to have been received on the Business Day following the date on which it was sent, or if delivered by hand will be deemed to have been received on the Business Day it is delivered to the applicable address noted below. Either Party may, by notice of change of address to the other Party, change its address to which notices are to be sent. Notices and other communications must be addressed as follows.

If to the Participant:

Participant Legal Name:

Participant Address:

Attention:

Email:

If to the IESO:

CLEAResult

2000 SW First Avenue, Suite 220

Portland, OR 97201

USA

Attention: Program Manager

E-mail: EBCx@ieso.ca (with a copy to legal@clearresult.com)

with a copy to:

Independent Electricity System Operator

120 Adelaide Street West, Suite 1600

Toronto, Ontario M5H 1T1

Attention: Supervisor, Business Program Performance, Custom

Email: Conservationcontracts@ieso.ca (with a copy to general.counsel@ieso.ca)

- 10.7 **Separation of Functions.** The Participant acknowledges and agrees that any actions or any notice delivered pursuant to this Agreement shall not be deemed to be notice for any other purpose, including any obligation to take action or to provide notice to the IESO pursuant to the IESO Market Rules.
- 10.8 **No Partnership, etc.** Nothing in this Agreement shall create or be deemed to create a relationship of partners, joint venturers, fiduciary, principal and agent or any other relationship between the Parties.
- 10.9 **Further Assistance.** Each of the Parties shall, from time to time on written request of the other Party, do all such further acts and execute and deliver or cause to be done, executed or

delivered all such further things as may be reasonably required in order to fully perform and to more effectively implement and carry out the terms of this Agreement.

- 10.10 **Entire Agreement.** This Agreement and the Notice of Approval constitutes the entire agreement between the Parties pertaining to its subject matter and supersedes all prior representations, communications, negotiations, and understandings, whether oral, written, express or implied concerning the subject matter of this Agreement. This Agreement and all of the provisions of this Agreement shall be binding upon and shall enure to the benefit of the Parties and their respective successors and permitted assigns.
- 10.11 **Successors and Assigns.** This Agreement will enure to the benefit of and be binding upon the Parties and their respective successors and permitted assigns. Neither this Agreement nor any of the rights, interests or obligations under this Agreement may be assigned by the Participant without the prior written consent of the IESO, which consent may be unreasonably withheld or delayed.
- 10.12 **Severability.** The invalidity, unenforceability or illegality of any provision in this Agreement will not, to the extent permitted by Applicable Law, affect the validity, enforceability or legality of any other provision of this Agreement, which will remain in full force and effect. If a provision is considered to be invalid, inapplicable or unenforceable, the Parties shall then engage in good faith negotiations to replace such provision with a valid, enforceable, and applicable provision, the economic effect of which substantially reflects that of the invalid, unenforceable, or inapplicable provision which it replaces.
- 10.13 **Waiver, Amendment.** Except as expressly provided in this Agreement, no amendment or waiver of any provision of this Agreement shall be binding unless executed in writing by the Party (or Parties) to be bound thereby. No waiver of any provision of this Agreement shall constitute a waiver of any other provision nor shall any waiver of any provision of this Agreement constitute a continuing waiver or operate as a waiver of, or estoppel with respect to, any subsequent failure to comply unless otherwise expressly provided.
- 10.14 **Set-Off, Remedies Not Limited to Contract.** Either Party may set off any amounts owing to such Party under this Agreement against any amounts owed to the other Party under this Agreement. Unless expressly provided in this Agreement, the express rights and remedies of the IESO or the Participant set out in this Agreement are in addition to and shall not limit any other rights and remedies available to the IESO or the Participant, respectively, at law or in equity.
- 10.15 **Survival.** Article 1, Article 7, Article 8, Article 9 and Sections, 6.3, 6.4, 6.5, 6.6, 6.8 , 6.9, 10.1, 10.10, 10.11, 10.12, 10.13, 10.15 and 10.16 and such other provisions as are necessary for the interpretation thereof and any other provisions hereof, the nature and intent of which is to

survive termination or expiration of this Agreement, will survive the expiration or termination of this Agreement.

10.16 **Governing Law and Attornment.** This Agreement will be governed by and construed in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable therein. For the purpose of all legal proceedings, this Agreement will be deemed to have been made and performed in the Province of Ontario and the courts of the Province of Ontario will have exclusive jurisdiction to entertain any action arising under this Agreement. The IESO and the Participant each hereby attorns to the exclusive jurisdiction of the courts of the Province of Ontario.

10.17 **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 Participant Incentives. Upon the issuance of the Notice of Approval, this Agreement shall be binding upon both Parties.

IN WITNESS WHEREOF the Participant has executed this Agreement by its duly authorized respective representative(s) and agrees to be bound by this Agreement upon the issuance of a Notice of Approval.

By:

Participant Legal Name:

Signatory Signature:

Signatory Name:

Title:

I have authority to bind the corporation