

PROCESS AND SYSTEM UPGRADES INITIATIVES 2011-2014
MONITORING AND TARGETING AGREEMENT

THIS AGREEMENT made as of the [DAY] day of [MONTH], [YEAR],

BETWEEN:

[LEGAL NAME OF THE LDC], a corporation governed by the laws of the Province of Ontario,

(the "LDC")

- and -

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

(the "Participant")

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

WHEREAS the Participant has submitted an M&T Application to the LDC to access funding for the installation of an M&T System;

AND WHEREAS the Participant reasonably expects that the M&T System will generate at a minimum the Savings Target;

AND WHEREAS the LDC has approved the M&T Application;

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

1. Defined Terms.

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

2. M&T System.

The Participant agrees to install an M&T System as described in Schedule "B", and prepare and file the M&T Annual Report as set out in Section 5.

3. Payment.

(a) The approved Participant Incentive is \$ _____ (the "Approved Amount").

(b) Subject to the Participant satisfying all of its obligations herein contained, the LDC agrees to pay the Participant Incentive to the Participant as follows:

(i) 50% of the Approved Amount, within 60 days after the execution of this Agreement by the LDC and the Participant;

(ii) subject to Section 3(b)(iii), the difference between:

(A) the lesser of (i) the Approved Amount and (ii) 80% of the amount calculated by subtracting any Third Party Contributions received by the Participant from the actual Eligible Costs incurred by the Participant in respect of the M&T System (as set out in the invoices provided by the Participant), and (iii) for Small Facilities only, \$0.20/kWh for each kWh of Savings Target(MWh); and

(B) the first instalment payment received by the Participant pursuant to Section 3(b)(i),

will be paid, within 60 days after receipt of the second M&T Annual Report from the Participant confirming that the Savings Target has been achieved and is sustainable; and

- (iii) if the Participant has not achieved the Savings Target as per Section 3(b)(ii), the LDC will pay to the Participant a *pro rata* of the payment calculated pursuant to Section 3(b)(ii) which will be calculated on the MWh savings generated by the M&T System relative to the MWh savings component of the Savings Target that the Participant expected to achieve as set out in Schedule "B".
- (c) All payments hereunder will be made in Canadian dollars by cheque or by electronic funds transfer to the Participant's account or such other mode of payment at the sole discretion of the LDC.
- (d) All payments hereunder are conditional on the Participant providing an invoice to the LDC together with sufficient documentation to support and substantiate the Participant Incentive payments. The Participant represents and warrants to the LDC each time it provides an invoice to the LDC that the actual costs set out in invoices as Eligible Costs by the Participant to support the calculation of the Participant Incentive qualify as Eligible Costs as provided in Schedule "C";
- (e) In addition to the Participant Incentive, the LDC will pay any Applicable Taxes on the Participant Incentive. The Participant will provide to the LDC sufficient supporting documentation, as requested by the LDC, to facilitate and support the LDC in claiming input tax credits in respect of the Participant Incentive. In addition, if the LDC 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 Incentive, the Participant will provide such reasonable assistance as may be required by the LDC with such discussion, negotiation or challenge. For greater certainty, in no event shall the LDC be relieved of its obligations under this Agreement, including the LDC's obligation to pay Applicable Taxes as provided hereunder, pending the outcome of any discussion, negotiation or challenge with a tax authority.

4. **Participant's Obligations**

In addition to the other obligations contained in this Agreement, the Participant will fulfill the following obligations:

- (a) develop actionable recommendations to achieve the Savings Target based on the data obtained from the M&T System within 12 months of the installation of the M&T System;
- (b) implement any Project identified by the Participant with a Project Payback of less than 12 months within 12 months of identifying such Project in the M&T Annual Report;
- (c) achieve the Savings Target within 24 months of the installation of the M&T System and sustain such Savings Target during the term of this Agreement;
- (d) notify the LDC upon the completion of the installation and commissioning of the M&T System and provide the LDC with written confirmation of the installation from a registered professional engineer licensed to practice in Ontario, who may be an employee of the Participant; and
- (e) commission the M&T System within six months of the date of this Agreement.

5. **M&T Annual Report.**

- (a) The Participant will prepare and file with the LDC a M&T Annual Report for each 12 month period following the completion of the installation of the M&T System for a period of 5 years. Each M&T Annual Reports is due one month following the end of the 12 month period that is the subject of the report.
- (b) The LDC will review each M&T Annual Report based on reporting criteria agreed upon by the LDC and the Participant, which must meet the minimum requirements set out in Schedule "D". Incomplete M&T Annual Reports will be returned by the LDC to the Participant for remedial action.

6. **Communication with Technical Reviewer.**

The Participant will cooperate and provide on a timely basis the requested information to the LDC or the Technical Reviewer should the LDC or the Technical Reviewer, respectively, require clarification from the Participant when reviewing the M&T Annual Report or require access to the Participant's Facility or System to review and inspect the M&T System and its operation. The Participant shall, at the same time as it provides information to the Technical Reviewer, provide a copy of such information to the LDC.

7. **Term.**

This Agreement will terminate on the earliest of:

- (a) 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 LDC to cure such failure;
- (b) 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;
- (c) six months and one day after the date hereof if the M&T System has not been commissioned; and
- (d) 5 years after the date the M&T System was installed and in-service.

Sections 3(e), 7, 8, 10, 11, 12, 13, 14, 15, 16, 21 and 25, 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.

8. **Environmental Attributes.**

All right, title and interest in and to all benefits or entitlements associated with Environmental Attributes are hereby unconditionally and absolutely transferred and assigned, or to the extent transfer or assignment is not permitted, held in trust for, by the Participant to, or in favour of, the LDC in its capacity as agent for and on behalf of the OPA, and not for the LDC's own benefit. Until the OPA notifies the Participant otherwise, the LDC, in its capacity as agent, shall be entitled, unilaterally and without the consent of the Participant, to deal with such Environmental Attributes on behalf of the OPA in any manner the LDC determines. The Participant acknowledges that the OPA may direct the Participant in the same manner as the LDC and that until the OPA notifies the Participant otherwise the LDC may direct the Participant to take such actions and do all such things necessary to certify, obtain, qualify and register with the relevant authorities or agencies such Environmental Attributes for the purpose of transferring, assigning, or holding in trust, such Environmental Attributes to and for the OPA and the Participant shall comply with such directions, and the Participant will be entitled to reimbursement of the cost of complying with such direction, provided that the LDC, acting reasonably, has approved such cost in writing prior to the cost being incurred by the Participant.

9. **Representations and Warranties.**

The Participant represents and warrants to the LDC as follows, and acknowledges that the LDC is relying on such representations and warranties in entering into this Agreement:

- (a) the Participant would not have undertaken the purchase and installation of a M&T System without the Participant Incentive;
- (b) the Participant will contribute a minimum of 20% of the Eligible Costs incurred for the purchase and installation of the M&T System;
- (c) as of the date hereof, the Participant satisfies the Participant Eligibility Criteria, the Project satisfies the M&T Project Eligibility Criteria, and the estimated costs relating to the M&T System qualify as Eligible Costs, in each case as provided in Schedule "C";
- (d) the Participant has executed and delivered the Release and Waiver, and has not taken any actions to amend or suspend it or to terminate its existence and it continues in full force and effect as of the date hereof; and
- (e) the Participant has not entered into an agreement with a contractor or a consultant and has not ordered or purchased any equipment for use in relation to the M&T System.

10. **Evaluation, Monitoring and Verification; Audit.**

- (a) The performance and administration of this Agreement will be subject to the OPA EM&V Protocols, which will include evaluation of the effectiveness of this Agreement in meeting the objectives of the M&T Initiative. In furtherance of the OPA EM&V Protocols, the Participant will cooperate with the LDC, the OPA and their 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 and the LDC will both keep complete and accurate books, accounts and records and all other data required by each of them respectively for the purpose of proper administration, monitoring and verification of 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 LDC, the OPA, and/or their respective designates to such books, accounts, records and other data and: (A) at the reasonable request of the LDC and/or OPA, make available to the LDC, the OPA and/or their respective designates, the personnel of the Participant and its subcontractors involved in the installation, the commissioning and the operation of the M&T System and the maintenance of such books, accounts, records and data referred to

above for the purpose of this Section 10; and (B) permit the LDC, the OPA and/or their respective designates to examine and audit and take copies and extracts from such documents.

11. 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 the M&T Initiative hereunder is based on its own assessment of the M&T Initiative and not on any reliance on anticipated or projected results, and that such participation may not result in the achievement of any electricity savings, demand savings or the achievement of the Savings Target, which is expressly disclaimed by the Participant.

12. 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 LDC OR ANY OTHER INDEMNIFIED PARTY (AS DEFINED IN SECTION 12(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 ADVISORS' FEES SUFFERED OR INCURRED BY THE PARTICIPANT AND IN ANY EVENT LIMITED TO THE PARTICIPANT INCENTIVE PAYMENTS AMOUNT PAID BY THE LDC 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 LDC AND THE OTHER INDEMNIFIED PARTIES (AS DEFINED IN SECTION 12(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 LDC, the OPA, the Government of Ontario, the members of the Government of Ontario's Executive Council and their respective affiliates, and each of the foregoing Person's respective directors, officers, employees, shareholders, advisors, third party service providers and agents (including contractors and their employees) (collectively, the "**Indemnified Party**") harmless from and against any and all Claims, losses, damages, liabilities, penalties, obligations, payments, costs and expenses and accrued interest thereon (including the costs and expenses of, and accrued interest on, any and all actions, suits, proceedings for personal injury (including death) or property damage, assessments, judgments, settlements and compromises relating thereto and reasonable lawyers' fees and reasonable disbursements in connection therewith) (each, an "**Indemnifiable Loss**"), asserted against or suffered by the Indemnified Party relating to, in connection with, resulting from, or arising out of (i) any Claim by, or occurrence or event related to, any third party relating to this Agreement; and/or (ii) the negligence or wilful misconduct of the Participant, except in either case to the extent that any injury or damage related to such Claim, occurrence or event is attributable to the negligence or wilful misconduct of the Indemnified Party. For greater certainty, in the event of contributory negligence or wilful misconduct of the Indemnified Party, then such Indemnified Party will not be indemnified hereunder in the proportion that the Indemnified Party's negligence or wilful misconduct contributed to any Indemnifiable Loss. The LDC will hold the benefit of the Participant's obligations under this Section 12 in the LDC's own right and, in trust, for the benefit of any other Indemnified Party.

13. Confidentiality.

(a) Each Party will, in its capacity as a Receiving Party:

- (i) not use or reproduce Confidential Information of the Disclosing Party for any purpose, other than as and to the extent expressly permitted under this Agreement or as may be reasonably necessary for the exercise of its rights or the performance of its obligations set out in this Agreement;
- (ii) not disclose, provide access to, transfer or otherwise make available any Confidential Information of the Disclosing Party except as expressly permitted in this Agreement; and
- (iii) take all measures reasonably required to maintain the confidentiality and security of all Confidential Information of the Disclosing Party that it Handles.

(b) The Receiving Party may disclose Confidential Information of the Disclosing Party:

- (i) to a third party that is not a Representative of the Receiving Party if and to the extent required by a Governmental Authority or otherwise as required by Applicable Laws, provided that the Receiving Party must first give the Disclosing Party notice of such compelled disclosure (except where prohibited by Applicable Laws from doing so) and must use Commercially Reasonable Efforts to provide the Disclosing Party with an opportunity to take such steps as it desires to challenge or contest such disclosure or seek a protective order. Thereafter, the Receiving Party may disclose

the Confidential Information of the Disclosing Party, but only to the extent required by Applicable Laws and subject to any protective order that applies to such disclosure; and

- (ii) to:
- A. its accountants, internal and external auditors and other professional advisors if and to the extent that such Persons need to know such Confidential Information in order to provide the applicable professional advisory services relating to the Receiving Party's business;
 - B. potential permitted assignees or successors of the Receiving Party if and to the extent that such Persons need to know such Confidential Information in connection with a potential sale, merger, amalgamation or other transaction or transfer involving the business, assets or services provided by the Receiving Party; and
 - C. employees of each Party and its other Representatives if and to the extent that such Persons need to know such Confidential Information to perform their respective obligations under this Agreement;

provided that any such Person is aware of the provisions of this Section 13 and has entered into a written agreement with the Receiving Party that includes confidentiality obligations in respect of such Confidential Information that are no less stringent than those contained in this Section 13.

(c) Without limiting the foregoing, each Party acknowledges and agrees that:

- (i) the LDC will Handle reports, data and other information, including Confidential Information of the Participant or its subcontractors or Representatives, to the OPA on an ongoing basis as part of its participation in the M&T Initiative or other CDM initiatives offered by the OPA and may do so without further notice to or further consent of the Participant; and the LDC and OPA may disclose and provide reports, data and other information, including Confidential Information of the Participant or its subcontractors or Representatives, to the OEB, the Ontario Ministry of Energy and the Ontario Environmental Commissioner for Handling by such entities provided that the LDC or the OPA, as the case may be, has in place with any such Person a written agreement that includes confidentiality obligations in respect of such Confidential Information that are comparable to those contained in this Section 13;
- (ii) this Agreement and all Confidential Information in the possession or control of the LDC, the OPA or the Participant are subject to Applicable Laws that include the access provisions of MFIPPA or FIPPA, as the case may be, and that as a result, third parties may obtain access to each Party's Confidential Information. Moreover, the LDC and its Representatives are subject to MFIPPA or FIPPA and the OPA and its Representatives are subject to FIPPA, and that MFIPPA or FIPPA, as the case may be, applies to and governs all recorded information in any form or medium that is provided by the LDC or the OPA, respectively, or its Representatives to the Participant or provided by the Participant to the LDC or the OPA, respectively, 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 LDC or the OPA, as the case may be (collectively, the "**Records**"), and may require the disclosure of such Records to third parties;
- (iii) each Party is responsible for ensuring that its agreements with Representatives contemplate and permit such potential access or disclosure, and will be fully liable to any such Representatives for any Claim arising out of or relating to such access;
- (iv) the LDC and the OPA may at any time make public the Participant's participation in the M&T Initiative and data relating to the M&T System, including a description of the Project and type of Facility, historical energy use and consumption, aggregated with other studies in a manner intended to report on the M&T Initiative; and
- (v) the Participant may acknowledge the assistance provided by the LDC and the OPA in all public communications, provided that the LDC and the OPA will have the right to approve in writing all such public communications in advance.

14. **Injunctive Relief.**

Each Party acknowledges that any violation of the provisions of Section 13 may cause irreparable damage or injury to the other Party (including, in the case of the LDC, any of the other Indemnified Parties), 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 (including, in the case of the LDC, any of the other Indemnified Parties), such Party (including, in the case of the LDC, any of the other Indemnified Parties) is entitled to proceed immediately to court in order to obtain, and the other Party will consent to, interim, interlocutory, and final injunctive relief restraining the other Party from breaching, and requiring the other Party to comply with, its obligations under Section 13, without a requirement that a finding of irreparable harm or other criteria for the awarding of injunctive relief be made. Nothing in this Section 14 will be construed to limit the right of a Party (including, in the case of the LDC, any of the other

Indemnified Parties) to obtain injunctive relief in any other circumstance in which it may be otherwise entitled to such relief.

15. MFIPPA and FIPPA Compliance.

To the extent that the LDC or the OPA, as the case may be, must comply with disclosure obligations under MFIPPA or FIPPA, the Participant agrees (without limiting its obligation set out in Section 13):

- (a) to keep the Records in its possession secure;
- (b) to provide the Records to the LDC or the OPA, as the case may be, within seven calendar days of being directed to do so by the LDC or the OPA, as the case may be, for any reason under MFIPPA or FIPPA, as applicable, including an access request or privacy issue; and
- (c) to implement other specific security measures that in the reasonable opinion of the LDC or the OPA, as the case may be, would improve the adequacy and effectiveness of the Participant's measures to ensure, for the purposes of MFIPPA or FIPPA, as applicable, the security and integrity of the Records held in the Participant's possession.

16. 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 "E" of this Agreement.

17. Schedules.

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

- Schedule "A" - Definitions
- Schedule "B" – Description of M&T System
- Schedule "C" - Eligibility Criteria
- Schedule "D" – M&T Annual Report Requirements
- Schedule "E" - Arbitration Provisions
- Schedule "F" – Form of Release and Waiver

18. 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.

19. Entire Agreement.

Except as otherwise provided, this Agreement, together with the Release and Waiver, 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.

20. Amendments.

This Agreement may not be varied, amended or supplemented except by an agreement in writing signed by both of the Parties.

21. **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 LDC and the Participant each hereby attorns to the exclusive jurisdiction of the courts of the Province of Ontario.

22. **Successors and Assigns.**

This Agreement will enure to the benefit of and be binding upon the Parties and their respective successors and assigns. This Agreement may not be assigned by the Participant to another Person other than an affiliate except with the prior written consent of the LDC, which consent may be unreasonably withheld or delayed.

23. **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.

24. **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.

25. **Third Party Beneficiaries.**

Except as provided in Sections 8, 10, 12, 13, 14, 15 and this Section 25, this Agreement is solely for the benefit of:

- (a) the LDC, and successors and assigns, with respect to the obligations of the Participant under this Agreement, and
- (b) the Participant, and its successors and permitted assigns, with respect to the obligations of the LDC under this Agreement;

and this Agreement will not be deemed to confer upon or give to any other Person any Claim or other right or remedy. The Participant appoints the LDC as the trustee for the OPA of the applicable provisions set out in this Agreement, including Sections 10, 12, 13, 14, 15 and this Section 25, and the LDC accepts such appointment. The LDC is the agent of the OPA for the purpose of Section 8.

26. **No Partnership, etc.**

Nothing in this Agreement will be deemed to constitute a partnership or joint venture or create any fiduciary relationship between the LDC and the Participant.

27. **Force Majeure**

The LDC shall not be in default and shall not be deemed to be in default, of its obligations in this Agreement by reason of delay or of failure or inability to perform its obligations hereunder where the said delay, failure or inability is due solely to any cause which is unavoidable or beyond the reasonable control of the LDC, including without limitation any act of God or other cause which frustrates the performance of the LDC's obligations in this Agreement.

28. **Notices**

Any notice to be given under this Agreement unless expressly provided otherwise herein must be in writing and will be given by facsimile or e-mail or other means of electronic communication or by hand-delivery as provided. Any notice, if sent by facsimile or e-mail or other means of electronic communication, 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 LDC:

-
- Attention: •
- Fax: •

E-mail: ●

With a copy to:

●

Attention: ●

Fax: ●

E-mail: ●

If to the Participant:

Attention: ●

Fax: ●

E-mail: ●

With a copy to:

●

Attention: ●

Fax: ●

E-mail: ●

29. **Counterparts.**

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

30. **Facsimile/Electronic Signatures.**

This Agreement may be executed and delivered by facsimile transmission or by any other method of electronic transmission and the Parties may rely upon all such signatures as though such signatures were original signatures.

[Remainder of page intentionally left blank.]

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

[LEGAL NAME OF LDC]

[LEGAL NAME OF PARTICIPANT]

Per: _____
Name:
Title:

Per: _____
Name:
Title:

Per: _____
Name:
Title:

Per: _____
Name:
Title:

[I/We] have authority to bind the LDC

[I/We] have authority to bind the Participant

SCHEDULE "A" DEFINITIONS

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

“**Agreement**” means this Monitoring and Targeting Agreement, including all recitals and Schedules, as it or they may be amended, restated or supplemented from time to time.

“**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.

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

“**Approved Amount**” has the meaning given to it in Section 3(a).

“**Arbitrator**” has the meaning given to it in Section (a) of Schedule "E".

“**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.

“**CDM**” means electricity conservation and demand management.

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

“**Commercially Reasonable Efforts**” means all efforts which may be required to enable a Person, directly or indirectly, to satisfy, consummate, complete or achieve a condition, transaction, activity, obligation or undertaking contemplated by this Agreement and which do not require such Person to expend any funds or assume liabilities other than expenditures and liabilities which are reasonable in nature and amount in the context of the purpose of, and the condition, transaction, activity, obligation or undertaking contemplated by, this Agreement.

“**Confidential Information**” of a Party means any and all information of such Party or any of its affiliates, licensors, customers and employees or other service providers, and information on the M&T Application, and, in the case of the LDC, includes the OPA and Governmental Authorities (the “**Disclosing Party**”) that has or will come into the possession or knowledge of the other Party, or any of their respective affiliates, licensors, customers and employees or other service providers and, in the case of the LDC, includes the OPA, (the “**Receiving Party**”) 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 Receiving Party or that subsequently becomes

publicly available other than through a direct or indirect act or omission of the Receiving Party (but only after it becomes publicly available);

- (b) established by evidence to have been already known to the Receiving Party at the time of its disclosure to the Receiving Party and is not known by the Receiving Party to be the subject of an obligation of confidence of any kind;
- (c) independently developed by the Receiving Party without any use of or reference to the Confidential Information of the Disclosing Party as established by evidence that would be acceptable to a court of competent jurisdiction; or
- (d) received by the Receiving Party in good faith without an obligation of confidence of any kind from a third party who the Receiving Party had no reason to believe was not lawfully in possession of such information free of any obligation of confidence of any kind, but only until the Receiving Party subsequently comes to have reason to believe that such information was subject to an obligation of confidence of any kind when originally received;

provided, however, that, for the purposes of this Agreement, all Personal Information concerning any Participant will constitute Confidential Information, whether or not it falls into one of the exceptions set out in clause (a) through (d) of this definition.

“**Disclosing Party**” has the meaning given to it in the definition of “**Confidential Information**”.

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

“**Eligible Costs**” means the costs that meet the eligibility criteria set out in Section 2 of Schedule "C".

“**Eligible Person**” means a Person that satisfies the eligibility criteria set out in Section 1 of Schedule "C".

“**Eligible M&T Project**” means a Project that meets the eligibility criteria set out in Section 3 of Schedule "C".

“**Energy Manager**” means a person engaged by a Participant whose primary responsibility is to propose and lead methodologies and processes to reduce energy consumption in a Facility or a System.

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

- (a) all rights to any fungible or non-fungible attributes, whether arising from a Facility itself, from the interaction of a Facility with a Distribution System or the IESO-Controlled Grid

or because of applicable Laws and Regulations or voluntary programs established by any Governmental Authority;

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

“**Facility**” means the building(s), premises or lands, or part thereof, owned or occupied by the Participant and in which the M&T System is located, and includes both a Large Facility and a Small Facility.

“**Facility Load Factor**” (“**FLF**”) means the actual annual electricity consumption of a Facility expressed in MWh (“**AA**”) divided by the product of the one hour period in any calendar year of greatest electricity consumption of the Facility expressed in MW (“**FAP**”) multiplied by 8760 hours ($FLF = AA/(FAP \times 8760 \text{ hours})$).

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

“**Governmental Authority**” means any federal, provincial, or municipal government, parliament or legislature, or any regulatory authority, agency, tribunal, commission, board or department of any such government, parliament or legislature, or any court or other law, regulation or rule-making entity, having jurisdiction in the relevant circumstances, including the IESO, the OEB, the Electrical Safety Authority, the Ontario Environmental Commissioner, and any Person acting under the authority of any of the foregoing, but excluding the OPA.

“**Handle**” or “**Handling**” means to access, receive, collect, use, store, process, record, disclose, transfer, retain, dispose of, destroy, manage or otherwise handle.

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

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

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

“**IESO 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.

“**Indemnifiable Loss**” has the meaning given to it in Section 12(b).

“**Indemnified Party**” has the meaning given to it in Section 12(b).

“**Indemnifying Party**” has the meaning given to it in Section 12(b).

“**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: (a) to adjudicate it a bankrupt or insolvent; (b) 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 (c) 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.

“**Large Facility**” means any Facility with a Peak Demand of more than 200 kW and more than 15 GWh per year of electricity consumption, and that is not a Small Facility.

“**Laws and Regulations**” 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 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.

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

“**Local Distribution Company**” means the owner or operator of a Distribution System that is licensed by the OEB as an electricity distributor.

“**Measures**” means: (i) any activity undertaken for the primary purpose of obtaining or effecting, directly or indirectly, CDM, including the installation, retrofit, replacement, modification or 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.

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

“**MW**” means a megawatt.

“**MWh**” means a megawatt hour.

“**M&T Annual Report**” means a document prepared by the Participant relating to the opportunities implemented due to the installation of the M&T System which meets the M&T Annual Report Requirements.

“**M&T Annual Report Requirements**” means the requirements set out in Schedule “D”.

“**M&T Application**” means an application (File Number ●, dated ● and confirmed by the LDC on ●) submitted by the Participant to the LDC for a Participant Incentive from the LDC prepared in accordance with instructions posted on the Website from time to time.

“**M&T Initiative**” means the OPA-designed initiative under the OPA’s Process and System Upgrades Initiatives designed to provide a Participant Incentive to a Participant for the purpose of installing a M&T System.

“**M&T System**” means a System that monitors the energy performance (including electricity performance) of a System relative to the production of such System, for purposes which include setting targets for future energy performance, and assisting with the implementation of savings targets through continuous feedback obtained or received from the M&T System.

“**M&V Plan**” means a measurement and verification plan outlining the methodology and activities to be undertaken to quantify and verify electricity savings from a Project.

“**OEB**” means the Ontario Energy Board or its successor.

“**OPA**” means the Ontario Power Authority or its successor.

“**OPA EM&V Protocols**” means the methods and processes that the OPA develops for the evaluation, measurement and verification of CDM programs and initiatives, as such methods and processes may be amended from time to time.

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

“**Participant Incentive**” means funding that may be paid by the LDC to the Participant pursuant to this Agreement.

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

“**Peak Demand**” means the one hour of greatest electricity demand as metered during the previous 12 months prior to entering into this Agreement”.

“**Peak Demand Savings**” means [●] [Note to finalization: definition to be included in this form of agreement upon notice issued by the OPA pursuant to the Process and System Upgrades Initiatives 2011-2014: Monitoring and Targeting Initiative Schedule “D-2”].

“**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.

“**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.

“**Project**” means one or more Measures, which, when implemented in respect of a single System or Facility, are expected to deliver the Savings Target.

“**Project Benefits**” means the annual electricity savings and benefits not related to electricity savings, including from reducing other energy consumption, use of alternative fuels, positive and negative differences in operating and maintenance costs and other avoided costs.

“**Project Payback**” means estimated Project costs divided by Project Benefits.

“**Receiving Party**” has the meaning given to it in the definition of “Confidential Information”.

“**Records**” has the meaning given to it in Section 13(c)(ii).

“**Release and Waiver**” means the release and waiver and consent in the form attached hereto at Schedule “F” executed by the Participant in favour of the LDC, among others, and submitted by the Participant with its M&T Application.

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

“**Savings Target**” means the electricity savings (MW and MWh) specified in Schedule “B” and to be achieved at the end of 24 months and sustained for the term of this Agreement.

“**Small Facility**” means a Facility with a Peak Demand of more than 200 kW but less than 15 GWh per year of electricity consumption.

“**System**” will be defined broadly and means an integrated or interdependent combination of installed equipment and processes that: (a) may be used for (i) manufacturing or other industrial or commercial processes, or (ii) circulating or distributing inside, outside or between Facilities commodities, goods or utilities (including heating, cooling, air or other gases, water or other liquids); and (b) consumes electricity.

“**Technical Reviewer**” means a Person retained by the OPA having on its staff individuals who have professional experience and qualifications as approved by the OPA.

“**Third Party Contributions**” means any financial or other contribution (including the value of contributions in kind) towards the Eligible Costs of the M&T System from or by any Person other than the Participant or the LDC.

“**Website**” means the website located at the address:
<https://saveonenergy.ca/>.

SCHEDULE "B"
DESCRIPTION OF M&T SYSTEM

LDC Project Identification #: •

Participant Contact Information: •

[INSERT ADDRESS, TELEPHONE NUMBER, FACSIMILE NUMBER AND EMAIL CONTACT]

Technical Reviewer: •

Company Representative:

i. **LDC:** •

ii. **Participant:** •

Municipal Address or Location: •

Type of Facility: •

Annual Hours of Operation: •

Description of the M&T System

- include a schematic of the proposed installation on the system
- location of installed meters
- attach vendors equipment capital cost and installation proposal

Energy Savings Justification

- Baseline of production, demand and energy consumption for the system/facility that will be monitored (based on the previous 12 months)
- List of action items/ projects/ plan to capture required savings of at least 0.2 MW and 0.2 MW x Facility Load Factor x 8760 hours.
- Details on proposed action items / projects such as costs, timeline, payback, potential savings
- M&V Plan, using International Performance Measurement and Verification Protocol, for proposed action items/project notes above.

Savings Target: _____ MW and _____ MWh to be achieved at the end of 24 months and sustained for the term of this Agreement.

For Large Facilities, the Savings Target is a minimum of 0.2 MW of Peak Demand Savings, as well as MWh savings equal to the product of 0.2 MW, the Facility Load Factor and 8760 hours (MWh = 0.2 MW x FLF x 8760 hours).

For Small Facilities, the Savings Target is, at the end of 24 months and compared to the 12 month period prior to entering into the Agreement, and to be sustained for the term of the M&T Agreement, a minimum of 8% of the Peak Demand, as well as MWh savings equal to 8% of the Facilities' annual consumption.

Participant Incentive: •

• **Project Budget:** •

Scheduled In-Service Date: •

Estimated Eligible Costs: •

Third Party Contributions: •

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SCHEDULE "C"
ELIGIBILITY CRITERIA

1. Participant Eligibility Criteria

To be an Eligible Person under this M&T Initiative a Person must:

- (a) be an electricity consumer, whether or not a customer of the LDC, that is directly connected to, or behind the meter of another electricity consumer connected to, a Local Distribution Company's Distribution System and is in the LDC's service area;
- (b) not be Insolvent;
- (c) have a minimum annual electricity consumption for a Facility of 15GWh for the previous calendar year (Large Facility); or have a minimum annual electricity consumption of less than 15 GWh, but a Peak Demand of more than 0.2 MW (Small Facility); and
- (d) engage an Energy Manager or similar person for the duration of the term to manage the installation and operation of the M&T System.

2. Eligible Costs

The Eligible Costs that qualify for funding under this M&T Initiative include, but are not limited to, the following costs:

- (a) cost of the M&T System software;
- (b) cost of the M&T System sub-metering to collect electricity and process data;
- (c) installation costs;
- (d) cost of the training relating to the M&T System for Participant personnel; and
- (e) cost of commissioning the M&T System installation.

3. M&T Project Eligibility Criteria

To be an Eligible M&T Project, the proposed project must:

- (a) be in respect of a single Facility of the Eligible Person connected to, or behind the meter of another electricity consumer connected to, a Local Distribution Company's Distribution System within the LDC's service area; and
- (b) be in respect of a System or a Facility that has the potential to achieve the Savings Target.

Pursuant to the terms and conditions of the M&T Initiative,

- (c) no M&T Application may be submitted to the LDC later than December 31, 2013, unless otherwise approved by the LDC.

SCHEDULE "D"
M&T ANNUAL REPORT REQUIREMENTS

1. The M&T Annual Report must include:
 - (a) the First M&T Annual Report must include:
 - (i) a schematic of the system and the location of the installed meters;
 - (ii) confirmation of installation and proper operation;
 - (iii) consumption data for 12 months;
 - (iv) list of action items/ projects/ plan to capture required savings of at least 0.2 MW and 0.2 MW x Facility Load Factor x 8760 hours;
 - (v) details on proposed action items / projects such as costs, timeline, payback, potential savings;
 - (vi) project plan and Estimated Savings for implementation of identified projects with a pay back of less than one year; and
 - (vii) partial or major equipment or operational changes to the process within the last year.
 - (b) Subsequent M&T Annual Reports must include:
 - (i) consumption and applicable energy data of previous 12 months;
 - (ii) demonstrate, following the International Performance Measurement and Verification Protocol, that required savings are achieved/maintained;
 - (iii) partial or major equipment or operational changes to the process within the last year; and
 - (iv) update on Project plan and Estimated Savings for implementation of identified projects with a pay back of less than one year.
2. Additional guidance regarding reporting may be found in the OPA's "EMV Protocols & Requirements" and at the Efficiency Valuation Organisation website (www.evo-world.org)

SCHEDULE "E"

ARBITRATION PROVISIONS

- (a) Subject to and in accordance with the provisions of this Schedule "E", 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.
- (b) 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.
- (c) 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.
- (d) 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.
- (e) Submission to arbitration under this Schedule "E" is intended by the Parties to preclude any action in matters which may be arbitrated hereunder, save and except for enforcement of any arbitral award hereunder.

SCHEDULE "F"

FORM OF RELEASE AND WAIVER

RELEASE AND WAIVER AND CONSENT

FOR VALUABLE CONSIDERATION, the receipt and sufficiency of which are hereby acknowledged, the undersigned hereby, for itself and its successors and assigns:

- A. releases and forever discharges each of [NAME OF LDC] ("LDC"), the Ontario Power Authority ("OPA") and their respective representatives, affiliates, third party service providers and agents (collectively, the "Program Operators") and all of the respective past, present and future officers, directors, employees, owners, shareholders, agents, successors and assigns of the Program Operators (collectively, the "Representatives") (the Program Operators and the Representatives hereinafter collectively referred to as "Releasees") from any and all actions, causes of action, suits, complaints, disputes, debts, liabilities, obligations, damages, legal fees, costs, disbursements, expenses, claims and demands of every nature or kind whatsoever and howsoever arising, at law or in equity, or under any statute, including without limitation, claims for property damage, business interruption and personal injury of the undersigned's employees, officers, directors or licencees, which it can, will or may have by reason of any matter, cause or thing arising as a result of, in relation to or in connection with the attendance on one or more occasions by one or more of the employees, officers, directors, representatives, third party service providers or agents of any or all of the Program Operators (collectively, "Persons") at any and all facilities owned or occupied by the undersigned in connection with, arising out of or relating to the initiatives designed by the OPA for electricity conservation and demand management and directed at one of the commercial and institutional, industrial, low-income or residential electricity consumer groups (collectively referred to as the "CDM Program"), other than in the case of the gross negligence or willful misconduct of such Persons during such attendances;
- B. agrees that the undersigned will not make any claim or take any proceedings against any other person or entity with respect to any matter released and discharged in Section 1 above which may result in any claim arising against any of the Releasees for contribution or indemnity or other relief;
- C. without limiting the foregoing, the undersigned acknowledges, agrees and consents that by submitting an application ("Application") to participate in a CDM Program or any initiative thereof, whether or not its Application is ultimately accepted:
- (a) it hereby consents to the collection, use, disclosure and other handling of any information it provides to the Program Operators, including all reports, data, personal information, records showing historical energy use and consumption, and other information of the undersigned or its subcontractors or representatives (collectively, the "Applicant Information") by the Program Operators for purposes relating to the operation, administration or assessment of the CDM Program, any initiative thereof or the Application, and in connection with any reporting activities relating to the CDM Program, which shall include, without limitation: (i) sharing of Applicant Information among the Program Operators; (ii) use by the Program Operators of the Applicant Information provided by the Participant to process any of the undersigned's Applications and to conduct, analyze and report on the results of surveys and modify the CDM Program based on such surveys; and (iii) disclosure to the Ontario Energy Board, the Independent Electricity System Operator, the Ontario Ministry of Energy or the Ontario Environmental Commissioner or their respective successors;
 - (b) it hereby consents to the disclosure by the OPA to the LDC of information regarding the Participant's past participation in other OPA funded conservation and demand management programs for the purpose of processing the Participant's Application; and
 - (c) this Release and Waiver and Consent and all Applicant Information, in the possession or control of the LDC and/or the OPA are subject to applicable laws that include the access provisions of the Municipal Freedom of Information and Protection of Privacy Act (Ontario) ("MFIPPA") or the Freedom of Information and Protection of Privacy Act (Ontario) ("FIPPA"), as the case may be, and that as a result, third parties may obtain access to the Applicant Information;
- D. the foregoing Release and Waiver and Consent will continue in full force and effect for the benefit of the Releasees and will apply to each Application submitted by the undersigned to the LDC and to the extent of any conflict between this Release and Waiver and Consent and the terms of any agreement or other document entered into by the undersigned and one or more of the Program Operators pursuant to or in connection with the CDM Program or any part thereof, or any initiative under any CDM Program, the terms of this Release and Waiver and Consent will prevail; and
- E. this Release and Waiver and Consent will be governed by and construed in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable therein.

IN WITNESS WHEREOF the undersigned has executed this Release and Waiver and Consent by its duly authorized representative(s) as of the date below written.

Dated: **[DATE]** _____

[LEGAL NAME OF PERSON MAKING APPLICATION]

Name:
Title:

Name:
Title:

[I/We] have the authority to bind the corporation.