

(Consolidated Version)

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**DEMAND-SIDE MANAGEMENT CONTRACT (DSM Contract)**

**Between**

●

**- and -**

**ONTARIO ELECTRICITY FINANCIAL CORPORATION**

DATED as of the ● day of ●, 200●

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## DEMAND-SIDE MANAGEMENT CONTRACT

This Demand-Side Management Contract is dated as of the ● day of ●, 200● between ●, a [● ]*[Note to Finalization: Set forth the legal form of the Supplier]* created under the laws of ● (the “**Supplier**”), and having its principal place of business at ●, and Ontario Electricity Financial Corporation (the “**Buyer**”). The Supplier and the Buyer are each referred to herein as a “**Party**” and collectively as the “**Parties**”.

**WHEREAS** the Government of Ontario, through the Minister of Energy, issued a request for proposals dated September 13, 2004, as amended, to solicit the long-term supply of approximately 2,500 MW of new clean generating capacity and demand-side management projects in Ontario (the “**2,500 MW RFP**”);

**AND WHEREAS** the Supplier submitted a proposal to plan, design, finance, construct, operate, and maintain the DSM Project and to achieve verifiable Electricity savings as a direct result of the installation of the Operating Equipment, that expressed as capacity using the conversion methodology specified by the Buyer, will be equal to or greater than the DSM Project Equivalent Capacity;

**AND WHEREAS** the Supplier’s proposal was selected by the Government of Ontario, and accordingly the Supplier and the Buyer wish to execute this Agreement in order to formalize the long-term contractual arrangements for the Supplier to develop and operate the DSM Project and to achieve verifiable Electricity savings as a direct result of the installation of the Operating Equipment, that expressed as capacity using the conversion methodology specified by the Buyer, will be equal to or greater than the DSM Project Equivalent Capacity on the terms and conditions set out herein;

**AND WHEREAS** the Government of Ontario introduced Bill 100 into the Legislative Assembly of Ontario on June 15, 2004, being draft legislation entitled the *Electricity Restructuring Act, 2004* which, if enacted, would amongst other things create the Ontario Power Authority, a statutory body with the right to recover its costs, including all costs under this Agreement, from Electricity consumers through appropriate settlement mechanisms;

**AND WHEREAS** this Agreement is being entered into by the Buyer on the understanding that upon the coming into effect of appropriate legislation and the establishment of the Ontario Power Authority, the Buyer shall have the unilateral right to assign this Agreement and all benefits thereunder to the Ontario Power Authority, and the Ontario Power Authority shall assume the obligations of the Buyer hereunder and be novated into this Agreement in the place and stead of the Buyer;

**NOW THEREFORE**, in consideration of the mutual agreements set forth herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and intending to be legally bound, the Parties agree as follows:

## **ARTICLE 1 DEFINITIONS**

### **1.1 Definitions**

In addition to the terms defined elsewhere herein, the following capitalized terms shall have the meaning stated below when used in this Agreement:

**“2,500 MW RFP”** has the meaning ascribed to it in the recitals to this Agreement and, for greater certainty, shall include all addenda in respect of the 2,500 MW RFP provided in writing by or on behalf of the Ontario Ministry of Energy from time to time prior to the date of this Agreement, a copy of which is attached as Exhibit H.

**“Actual DSM Costs”** means, collectively, the Actual Variable Costs and the Actual Incremental Capital Cost.

**“Actual Hourly Electricity Savings Profile”** means the Actual Electricity Savings Profile.

**“Actual Incremental Capital Costs”** means the actual Incremental Capital Costs incurred by the Supplier in connection with the DSM Project, as authenticated by the DSM Verification Consultant.

**“Actual Incremental Electricity Savings”** means the actual Incremental Electricity Savings achieved by the DSM Project, as authenticated by the DSM Verification Consultant, during a given period.

**“Actual Peak Electricity Savings”** means the actual Peak Electricity Savings achieved by the DSM Project as determined in accordance with the methodology set out in Exhibit K.

**“Actual Project Electricity Cost Savings”** or **“APECS”** means the actual annual Incremental Electricity Cost Savings, expressed in Dollars, achieved by the DSM Project, as determined by the Measurement and Verification Data submitted by the Supplier for a given Savings Period.

**“Actual Project Equivalent Capacity”** or **“APEC”** means the actual equivalent capacity of the DSM Project, as determined by the Measurement and Verification Data submitted by the Supplier for a given Savings Period, expressed in MW, as calculated in accordance with the methodology set out in Exhibit K, and **“APEC<sub>SPx</sub>”** and **“APEC<sub>SPx-1</sub>”** shall have the meanings ascribed to them in Exhibit J.

**“Actual Seasonal Capacity”** means the actual Seasonal Capacity of the DSM Project for a given Season as determined in accordance with the methodology set out in Exhibit K.

**“Actual Seasonal Capacity Other”** means the Actual Seasonal Capacity for the Other Period.

**“Actual Seasonal Capacity Summer”** means the Actual Seasonal Capacity for Summer.

**“Actual Seasonal Capacity Winter”** means the Actual Seasonal Capacity for Winter.

**“Actual Variable Cost Over-Payment”** or **“AVCOP”** shall have the meaning ascribed to it in Exhibit J.

“**Actual Variable Costs**” or “**AVC**” means the Variable Costs incurred by the Supplier during a given Settlement Period, expressed in Dollars, and “**AVC<sub>SPX-1</sub>**” shall have the meaning ascribed to it in Exhibit J.

“**Affiliate**” means any Person that: (i) Controls a Party; (ii) is Controlled by a Party; or (iii) is Controlled by the same Person that Controls a Party.

“**Agencies**” means all advisory, adjudicative, regulatory (including those with governing boards), and operational service agencies (which deliver goods or services to the public), of the Government of Ontario.

“**Agreement**” means, subject to Section 1.9, the DSM Contract, the 2,500 MW RFP, and the Proposal, collectively, as may be amended, restated or replaced from time to time.

“**Arm’s Length**” means, with respect to two or more Persons, that such Persons are not related to each other within the meaning of subsections 251(2), (3), (3.1), (3.2), (4), (5) and (6) of the *Income Tax Act* (Canada) or that such Persons, as a matter of fact, deal with each other at a particular time at arm’s length.

“**Assignee**” has the meaning ascribed to it in Section 15.5(c).

“**Automatic System Voltage Support**” means the capability of the DSM Project to, both automatically and under the direction of the IMO, respond to changes in system voltage in such a manner as to control these changes within an acceptable range and which requires the automatic or manual adjustment in production or absorption of reactive power by the DSM Project. Automatic System Voltage Support shall be deemed to be provided if the requirements set out in Section 2.6(d) have been met.

“**Average Cost of Electricity (COD)**” means the weighted average cost of Electricity, expressed in \$/kWh, associated with the Incremental Electricity Savings of the DSM Project as of the Commercial Operation Date, which shall be calculated as follows:

- (i) for each hour of the Hourly Electricity Savings Profile, determine the average HOEP for such hour based on historical IMO data for the two year period prior to the Commercial Operation Date;
- (ii) multiply the average HOEP for each hour of the Hourly Electricity Savings Profile, as determined in (i) above, by the Incremental Electricity Savings associated with such hour as set out in the Hourly Electricity Savings Profile;
- (iii) sum all of the amounts determined in (ii) above for all applicable hours in a year;
- (iv) to the amount determined in (iii) above, add the total delivery and other regulated charges avoided as a result of the DSM Project Annual Electricity Savings, based on the regulated rates applicable to such charges on the Commercial Operation Date; and
- (v) divide the total amount determined in (iv) above by the DSM Project Annual Electricity Savings to determine the weighted average cost of Electricity, expressed in \$/kWh.



**“Average Cost of Electricity (Proposal)”** means the weighted average cost of Electricity, expressed in \$/kWh, associated with the Incremental Electricity Savings of the DSM Project as of September 13, 2004, which shall be calculated as follows:

- (i) for each hour of the Hourly Electricity Savings Profile, determine the average HOEP for such hour based on historical IMO data for the period from September 16, 2002 to September 15, 2004;
- (ii) multiply the average HOEP for each hour of the Hourly Electricity Savings Profile, as determined in (i) above, by the Incremental Electricity Savings associated with such hour as set out in the Hourly Electricity Savings Profile;
- (iii) sum all of the amounts determined in (ii) above for all applicable hours in a year;
- (iv) to the amount determined in (iii) above, add the total delivery and other regulated charges avoided as a result of the DSM Project Annual Electricity Savings, based on the regulated rates applicable to such charges on September 13, 2004; and
- (v) divide the total amount determined in (iv) above by the DSM Project Annual Electricity Savings to determine the weighted average cost of Electricity, expressed in \$/kWh.

**“Bank Act”** means the *Bank Act* (Canada), as amended from time to time.

**“Business Day”** means a day, other than a Saturday or 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.

**“Buyer”** means Ontario Electricity Financial Corporation and its successors and permitted assigns.

**“Buyer Event of Default”** has the meaning ascribed to it in Section 9.3.

**“Buyer Statement”** has the meaning ascribed to it in Section 11.2(g).

**“Claim”** means a claim or cause of action in contract, in tort, under any Laws and Regulations or otherwise.

**“Commercial Operation”** has the meaning ascribed to it in Section 2.4.

**“Commercial Operation Date”** means the date on which Commercial Operation is first attained.

**“Commercially Reasonable Efforts”** means efforts which are designed to enable a Party, directly or indirectly, to satisfy a condition to, or otherwise assist in the consummation of, the transaction contemplated by this Agreement and which do not require the performing Party to expend any funds or assume liabilities other than expenditures and liabilities which are reasonable in nature and amount in the context of the transaction contemplated by this Agreement.

“**Company Representative**” has the meaning ascribed to it in Section 14.1.

“**Completion and Performance Security**” has the meaning ascribed to it in Section 5.1.

“**Connection Point**” means the point where the Load is connected to either the Transmission System or Local Distribution Systems. For certainty, the Connection Point will be defined by reference to electrical connection points.

“**Contingent Support Payment**” or “**CSP**” means the amount payable from the Buyer to the Supplier for each Settlement Month during the Term, expressed in Dollars and calculated in accordance with Exhibit J, and “**CSP<sub>SPP</sub>**” and “**CSP<sub>VC</sub>**” shall have the meanings ascribed to them in Exhibit J.

“**Contract Year**” means a twelve (12) month period during the Term which begins on the Term Commencement Date or an anniversary date thereof.

“**Control**” means, with respect to any Person at any time, (i) holding, whether directly or indirectly, as owner or other beneficiary, other than solely as the beneficiary of an unrealized security interest, securities or ownership interests of that Person carrying votes or ownership interests sufficient to elect or appoint the majority of individuals who are responsible for the supervision or management of that Person, or (ii) the exercise of de facto control of that Person, whether direct or indirect and whether through the ownership of securities or ownership interests, by contract or trust or otherwise.

“**Costs**” means all costs and expenses reasonably incurred by the Terminating Party either in terminating any arrangements relating to the transactions provided for under this Agreement, or for entering into any new arrangements to replace this Agreement, and all reasonable legal fees and expenses incurred in connection with enforcing its rights under this Agreement.

“**Credit Rating**” means, (i) with respect to the Supplier (or the Guarantor, if a Guarantee is in place) its long-term senior unsecured debt rating (not supported by third party credit enhancement) or its corporate credit rating (as applicable) as provided by S&P, Moody’s or DBRS or any other established and reputable debt rating agency, agreed to by the Parties from time to time, each acting reasonably, and (ii) with respect to a financial institution, its long-term senior unsecured debt rating or its deposit rating as provided by Moody’s, S&P, Fitch IBCA, or DBRS or any other established and reputable rating agency, as reasonably agreed to by the Parties from time to time.

“**Creditworthiness Value**” has the meaning ascribed to it in Section 5.4(b).

“**DBRS**” means Dominion Bond Rating Service Limited or its successors.

“**Defaulting Party**” has the meaning ascribed to it in Section 9.5.

“**Discriminatory Action**” has the meaning ascribed to it in Section 12.1.

“**Discriminatory Action Compensation**” has the meaning ascribed to it in Section 12.2.

“**Discriminatory Action Compensation Amount**” has the meaning ascribed to it in Section 12.3(e).

**“Discriminatory Action Compensation Notice”** has the meaning ascribed to it in Section 12.3(e).

**“Dollars”**, or **“\$”** means Canadian dollars and cents.

**“DSM Contract”** means this Demand-Side Management Contract, including the Exhibits attached hereto, as it may be amended, restated or replaced from time to time. Unless otherwise indicated, references to Articles, Sections and Exhibits are references to Articles, Sections and Exhibits in the DSM Contract.

**“DSM Costs”** means collectively the DSM Incremental Capital Costs and DSM Variable Costs.

**“DSM Incremental Capital Costs”** means the Incremental Capital Costs expected to be incurred in connection with the DSM Project, as submitted by the Supplier in its Proposal and set out in Exhibit B.

**“DSM Project”** means the demand-side management project to be constructed, developed and operated by the Supplier, as summarized in Exhibit A and described in the Proposal, and includes the Operating Equipment and the Load. For certainty, if the demand-side management project consists of an aggregation of multiple Loads, then the DSM Project shall be comprised of the aggregate all of such Loads.

**“DSM Project Annual Electricity Savings”** means the annual Incremental Electricity Savings, expressed in kWh, to be achieved as a result of the DSM Project, as set out in Exhibit B.

**“DSM Project Equivalent Capacity”** means the equivalent value of the Peak Electricity Savings converted to capacity expressed in MW, as set out in and calculated in accordance with the methodology set out in Exhibit B.

**“DSM Protocols”** has the meaning ascribed to it in Section 2.6(c).

**“DSM Third Party Agreement”** means a written agreement with a third party Load, containing the provisions set out in Exhibit S.

**“DSM Variable Costs”** means the Variable Costs expressed by the Supplier in its Proposal and used to calculate the NRR(Variable Costs) set out in Exhibit B.

**“DSM Verification Certificate”** means each of (i) a DSM Verification Certificate - Capacity Confirmation, (ii) a DSM Verification Certificate – Commercial Operation, or (iii) a DSM Verification Certificate - Monthly.

**“DSM Verification Certificate - Capacity Confirmation”** means a certificate in the form set out in as Exhibit L-3.

**“DSM Verification Certificate – Commercial Operation”** means a certificate in the form set out in as Exhibit L-1.

**“DSM Verification Certificate - Monthly”** means a certificate in the form set out in as Exhibit L-2.

**“DSM Verification Consultant”** means the third party technical consultant or successor thereof, duly qualified to practice engineering in Ontario, approved by the Buyer, whose services are procured at the expense of the Supplier to, among other things, carry out the Measurement and Verification Activities specified in the Measurement and Verification Plan and to confirm to the Buyer, as required, that the terms of the Measurement and Verification Plan have been satisfied.

**“Early Termination Date”** has the meaning ascribed to it in Section 9.5.

**“Early Termination Payment”** has the meaning ascribed to it in Section 9.5.

**“Efficiency Baseline”** means the Electricity consumption of the DSM Project, normalized for weather (using at least the prior 10 years of weather data), occupancy and other factors, as determined in accordance with the Measurement and Verification Plan, based on the use of equipment that meets, but does not exceed, the Minimum Equipment Efficiency Standard.

**“Electricity”** means electric energy, measured in MWh.

**“Electricity Act”** means the *Electricity Act, 1998* (Ontario), as amended or replaced from time to time.

**“Emission Reduction Credits”** means the credits associated with the amount of emissions to the air avoided by reducing the emissions below the lower of actual historical emissions or regulatory limits, including “emission reduction credits” as defined in O.Reg. 397/01 made under the *Environmental Protection Act* (Ontario), as amended from time to time, or such other regulation as may be promulgated under the *Environmental Protection Act* (Ontario).

**“End of Term Payment”** shall have the meaning ascribed to it in Exhibit J.

**“End of Term Statement”** shall have the meaning ascribed to it in Exhibit J.

**“End-User”** means a Person who owns or operates an End-User Load.

**“End-User Load”** means a load facility which utilizes electricity supplied through a direct connection to the Transmission System or the Local Distribution System.

**“Environmental Attributes”** means environmental attributes associated with the DSM Project having decreased environmental impacts, and includes:

- (a) rights to any fungible or non-fungible attributes, whether arising from the DSM Project itself, from the interaction of the DSM Project with the IMO-Controlled Grid or the Local Distribution System or because of applicable legislation or voluntary programs established by governmental authorities or agencies;
- (b) any and all rights relating to the nature of the energy source as may be defined and awarded through applicable legislation or voluntary programs. Specific environmental attributes include ownership rights to Emission Reduction Credits or entitlements resulting from interaction of the DSM Project with the IMO-Controlled Grid or the Local Distribution System or as specified by applicable legislation or voluntary programs, and the right to quantify and register these with competent authorities; and

- (c) all revenues, entitlements, benefits, and other proceeds arising from or related to the foregoing.

**“Equivalent Capacity Benchmark Date”** means the first day of the first full Season following the Commercial Operation Date.

**“Equivalent Capacity Confirmation Date”** means a date which is either: (i) the first day that is at least six months after the Initial Equivalent Capacity Confirmation Date and is the last day of a Season; or (ii) six months following an Equivalent Capacity Confirmation Date which is the last day of a Season.

**“EST”** shall mean Eastern Standard Time.

**“Event of Default”** means a Supplier Event of Default or a Buyer Event of Default.

**“Final Settlement Period”** means the period, if any, following the last Equivalent Capacity Confirmation Date to the end of the Term.

**“Financial Indicators”** means the Tangible Net Worth and the Credit Rating.

**“FIPPA”** means the *Freedom of Information and Protection of Privacy Act* (Ontario), as amended or supplemented from time to time.

**“FIPPA Records”** has the meaning ascribed to it in Section 7.5.

**“Fitch IBCA”** means Fitch IBCA, Duff & Phelps, a division of Fitch Inc., or its successors.

**“Force Majeure”** has the meaning ascribed to it in Section 10.3.

**“GAAP”** means Canadian or U.S. generally accepted accounting principles approved or recommended from time to time by the Canadian Institute of Chartered Accountants or the Financial Accounting Standards Board, as applicable, or any successor institutes, applied on a consistent basis.

**“Good Engineering and Operating Practices”** means any of the practices, methods and activities adopted by a significant portion of the North American electric utility industry 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 judgement by a prudent operator of a demand-side management project in light of 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 Laws and Regulations. Good Engineering and Operating Practices are not intended to be limited to 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 the North American electric utility industry. Without limiting the generality of the foregoing and in respect of the operation of the DSM Project, Good Engineering and Operating Practices include taking reasonable steps to ensure that:

- (a) adequate materials, resources and supplies, including fuel, are available to meet the DSM Project's needs under reasonable conditions and reasonably anticipated abnormal conditions;
- (b) sufficient operating personnel are available and are adequately experienced and trained to operate the DSM Project properly, efficiently and taking into account manufacturers' guidelines and specifications and are capable of responding to abnormal conditions;
- (c) preventative, routine and non-routine maintenance and repairs are performed on a basis that ensures reliable long-term and safe operation and taking into account manufacturers' recommendations and are performed by knowledgeable, trained and experienced personnel utilising proper equipment, tools and procedures; and
- (d) appropriate monitoring and testing is done to ensure equipment is functioning as designed and to provide assurance that equipment will function properly under both normal and abnormal conditions.

**“Government of Ontario”** means Her Majesty the Queen in right of Ontario.

**“Governmental Authority”** means any federal, provincial, municipal or local 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, for greater certainty, the IMO, the OEB, the Electrical Safety Authority, and any Person acting under the authority of any Governmental Authority.

**“GST”** means the goods and services tax exigible pursuant to the *Excise Tax Act* (Canada), as amended from time to time.

**“Guarantee”** has the meaning ascribed to it in Section 5.4.

**“Guarantor”** has the meaning ascribed to it in Section 5.4.

**“HOEP”** means the arithmetic hourly average of the uniform Ontario hourly Electricity prices as defined by the IMO Market Rules.

**“Hourly Electricity Savings Profile”** means the Electricity savings associated with the DSM Project, expressed in kWh for each hour, over the period specified by the Buyer.

**“IMO”** means the Independent Electricity Market Operator established under Part II of the *Electricity Act*, or its successor.

**“IMO-Administered Markets”** has the meaning ascribed to it by the IMO Market Rules.

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

**“IMO Market Rules”** means the rules governing the IMO-Controlled Grid and establishing and governing the IMO-Administered Markets, together with all market manuals, policies, and guidelines issued by the IMO, all as amended or replaced from time to time.

“**including**” means “including, without limitation”.

“**Incremental Capital Costs**” means the incremental portion of the capital cost for all of the Operating Equipment associated with the DSM Project, which shall be equal to the sum of the differences for each unit of Operating Equipment between the capital cost of a unit of Operating Equipment and the capital cost for a comparable unit of equipment that meets, but does not exceed, the Minimum Equipment Efficiency Standard.

“**Incremental Electricity Cost Savings**” or “**IECS**” means the portion of the Electricity savings associated with the DSM Project, expressed in Dollars, that is attributable to the installation of the Operating Equipment, which shall be equal to the portion of the total Electricity savings of the DSM Project that exceeds the savings that would have been achieved as a result of the installation of comparable equipment that meets, but does not exceed, the Minimum Efficiency Standard. For greater certainty, IECS shall be calculated by multiplying Incremental Electricity Savings by the then current Electricity rates paid by the End-user.

“**Incremental Electricity Savings**” or “**IES**” means the incremental Electricity savings of the DSM Project that are attributable to the installation of the Operating Equipment, which shall be equal to the difference, as expressed in kWh, between the Efficiency Baseline and the Post-Installation Consumption for a given period.

“**Indemnifiable Loss**” has the meaning ascribed to it in Section 13.3.

“**Indemnitees**” has the meaning ascribed to it in Section 13.3.

“**Initial Equivalent Capacity Confirmation Date**” means the day that is one year after the Equivalent Capacity Benchmark Date.

“**Insolvency Legislation**” means the *Bankruptcy and Insolvency Act* (Canada), the *Winding Up and Restructuring Act* (Canada) and the *Companies’ Creditors Arrangement Act* (Canada) and the bankruptcy, insolvency, creditor protection or similar laws of any other jurisdiction (regardless of the jurisdiction of such application or competence of such law), as they may be amended from time to time.

“**Interest Multiplier**” or “**IM**” shall have the meaning ascribed to it in Exhibit J.

“**Interest Rate**” means the annual rate of interest established by [*Note to Finalization: Buyer to name a Schedule I bank*] or its successor, from time to time, as the interest rate it will charge for demand loans in Dollars to its commercial customers in Canada and which it designates as its “**prime rate**” based on a year of 365 or 366 days, as applicable. Any change in such prime rate shall be effective automatically on the date such change is announced by [*Note to Finalization: Buyer to name a Schedule I bank*].

“**ITA**” means the *Income Tax Act* (Canada), as amended from time to time.

“**kW**” means kilowatt.

“**kWh**” means kilowatt hour.

“**Late Capacity Confirmation Certificate**” has the meaning ascribed to it in Section 4.2.

“**Late Monthly Certificate**” has the meaning ascribed to it in Section 4.2.

“**Laws and Regulations**” means:

- (a) applicable federal, provincial or municipal laws, orders-in-council, by-laws, codes, rules, policies, regulations and statutes;
- (b) applicable orders, decisions, codes, judgments, injunctions, decrees, awards 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;
- (d) any requirements under or prescribed by applicable common law; and
- (e) the IMO Market Rules, as well as any manuals or interpretation bulletins issued by the IMO from time to time that are binding on the Supplier.

“**Letter of Credit**” means one or more irrevocable and unconditional standby letters of credit issued by a financial institution listed in either Schedule I or II of the *Bank Act* or such other financial institution having a minimum Credit Rating of (i) A- with S&P, (ii) A3 with Moody’s, (iii) A low with DBRS, or (iv) A with Fitch IBCA, in substantially the form attached as Exhibit C or in a form acceptable to the Buyer, acting reasonably, and otherwise conforming to the provisions of Section 5.3.

“**Load**” means the load or loads from which the Supplier will achieve the verifiable Electricity savings as a direct result of the installation of the Operating Equipment, or as applicable, the person who owns or operates such load or loads.

“**Load Outage**” means a partial or total reduction of the Electricity consumption of the Load, howsoever caused, that results in a partial or total interruption in the ability of the DSM Project to deliver the DSM Project Annual Electricity Savings.

“**Local Distribution System**” means a system for conveying Electricity at voltages of 50 kilovolts or less and includes any structures, equipment or other things used for that purpose.

“**Located Within a Priority Electrical Zone**” means that the load reduction associated with the DSM Project is achieved at End-User(s) connected directly to the stations or to transmission or distribution facilities between and among the stations set out in Appendix O of the 2,500 MW RFP.

“**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 hereunder.

“**Measurement and Verification Activities**” means all measurement and verification activities carried out by the DSM Verification Consultant, as set out in the Measurement and Verification Plan.



**“Measurement and Verification Data”** means all measurement and verification data collected by the DSM Verification Consultant in connection with the Measurement and Verification Activities described in the Measurement and Verification Plan.

**“Measurement and Verification Guidelines for DSM”** means M&V Guidelines: Measurement and Verification for Federal Energy Projects Version 2.2, dated September 2000, issued by the Office of Energy Efficiency and Renewable Energy of the United States of America Department of Energy, and referenced as DOE/GO-102000-0960, following M&V method Option B of the four method Options contained therein, a copy of which is contained in Exhibit N.

**“Measurement and Verification Plan”** means the measurement and verification plan prepared and submitted by the Supplier in accordance with Section 4.1, which outlines in detail the methodology and all of the Measurement and Verification Activities that shall be undertaken by the DSM Verification Consultant during each month during the Term, or such other applicable period, to measure and verify: (1) the Efficiency Baseline; (2) the Electricity savings achieved by the DSM Project and the effectiveness of the Operating Equipment; (3) the DSM Costs; and (4) to confirm that the terms of the Measurement and Verification Plan have been complied with.

**“Milestone Dates”** means those dates set forth in the second column of the table contained in Exhibit F, with respect to the attainment of the corresponding Milestone Events set out in the first column of the table contained in Exhibit F.

**“Milestone Events”** means those events set forth in the first column of the table contained in Exhibit F which are considered critical by the Parties for the timely design, construction, completion, and operation of the DSM Project, and which are to be completed by the corresponding Milestone Dates.

**“Minimum Equipment Efficiency Standards”** means the efficiency level that is the higher of: (i) the current minimum equipment efficiency standards applicable to the classes of Operating Equipment, established pursuant to the *Energy Efficiency Act* (Ontario) and associated regulations, as contained in the guide to the *Energy Efficiency Act* (Ontario) attached as Exhibit O; or (ii) the efficiency level of the equipment that is to be replaced, or which has been replaced by, the Operating Equipment.

**“Monthly Payment”** has the meaning ascribed to it in Section 3.2.

**“Monthly Statement”** has the meaning ascribed to it in Section 4.3.

**“Moody’s”** shall mean Moody’s Investors Service, Inc. or its successor.

**“M<sub>SPx</sub>”** and **“M<sub>SPx-1</sub>”** shall have the meanings ascribed to them in Exhibit J.

**“MW”** means megawatt.

**“MWh”** means megawatt hour.

**“Negative Outlook”** means, with respect to any of S&P, Moody’s, DBRS, a potential or threatened downgrade to the Credit Rating of the Supplier or Guarantor or their respective permitted assignees.

“**New Agreement**” means a new agreement substantially in the form of this Agreement, which is to be entered into with a Secured Lender who is at Arm’s Length with the Supplier or a Person identified by such Secured Lender following termination of the Agreement, as set out in Section 11.2(g).

“**Notice of Discriminatory Action**” has the meaning ascribed to it in Section 12.3(a).

“**Notice of Dispute**” has the meaning ascribed to it in Section 12.3(b).

“**NRR**” or “**Net Revenue Requirement**” means the amount, expressed in Dollars per MW-month, that is the sum of NRR(Simple Payback Period) and NRR(Variable Costs).

“**NRR(Simple Payback Period)**” or “**NRR<sub>SPP</sub>**” is the monthly payment, expressed in \$/MW-month, that the Supplier requires in order to reduce the Simple Payback Period to three years. For purposes of Exhibit J and determining the Monthly Payment, NRR(Simple Payback Period) shall be equal to the lesser of NRR(Simple Payback Period) (Proposal) and NRR(Simple Payback Period) (COD).

“**NRR(Simple Payback Period) (COD)**” means the NRR(Simple Payback Period) calculated by the Buyer as of the Commercial Operation Date in accordance with Section 2 of Exhibit Q, using Simple Payback Period (COD).

“**NRR(Simple Payback Period) (Proposal)**” means the NRR(Simple Payback Period) calculated by the Buyer in accordance with Section 1 of Exhibit Q, using Simple Payback Period (Proposal).

“**NRR(Variable Costs)**” or “**NRR<sub>VC</sub>**” is the simple monthly average of the total DSM Variable Costs over the Term set out in Exhibit B, expressed in \$/MW-month.

“**O&M Cost**” or “**O&M**” means the costs that are required to operate and maintain the DSM Project.

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

“**On-peak Hours**” means the 16 hour period between 7:00 a.m. and 11:00 p.m. local time on Business Days.

“**Ontario Emissions Trading Program**” or “**OETP**” means the Ontario Emissions Trading Program operating under Regulation 397/01 of the *Environmental Protection Act* (Ontario).

“**Ontario Public Service**” or “**OPS**” means the ministries, Ontario Electricity Financial Corporation, and other administrative units of the Government of Ontario over which Ministers of the Crown preside, and for the purposes of this Agreement includes the Agencies and the Ontario Power Authority (if created).

“**Operating Equipment**” means the new equipment associated with the measures to be implemented pursuant to the DSM Project the implementation of which enables the Supplier to achieve verifiable Electricity savings equal to or greater than the DSM Project Annual Electricity Savings, which is comprised entirely of Qualifying Equipment and Qualifying Heating and

Cooling Equipment or equipment that directly controls Qualifying Equipment and Qualifying Heating and Cooling Equipment.

**“Operating Equipment Outage”** means the removal of the Operating Equipment from service, restriction of use, or reduction in performance of the Operating Equipment for any reason including, but not limited to, to permit the performance of inspections, tests or repairs on the Operating Equipment, which results in a partial or total interruption in the ability of the DSM Project to deliver the DSM Project Equivalent Capacity. For greater certainty, an Operating Equipment Outage does not include a Load Outage.

**“OPS Confidential Information”** means all information of the Ontario Public Service that is of a confidential nature, including all confidential information in the custody or control of the OPS, whether recorded or not and however fixed, stored, expressed or embodied, that has been identified as confidential and which comes into the knowledge, possession or control of the Supplier in connection with the Agreement. For greater certainty, OPS Confidential Information shall:

- (a) include: (i) all new information derived at any time from any such confidential information described above, whether created by the OPS, the Supplier or any third-party; and (ii) all information that the OPS is obliged, or has the discretion, not to disclose under provincial or federal legislation; and
- (b) not include information that: (i) is or becomes generally available to the public without fault or breach on the part of the Supplier of any duty of confidentiality owed by the Supplier to the OPS or to any third-party; (ii) the Supplier can demonstrate to have been rightfully obtained by the Supplier, without any obligation of confidence, from a third-party who had the right to transfer or disclose it to the Supplier free of any obligation of confidence; (iii) the Supplier can demonstrate to have been rightfully known to or in the possession of the Supplier at the time of disclosure, free of any obligation of confidence when disclosed; or (iv) is independently developed by the Supplier.

**“Other Season”** means all calendar days that are not calendar days in Summer or Winter.

**“Outage”** means an outage of the DSM Project that is either an Operating Equipment Outage or a Load Outage.

**“Outage Factor”** is the factor to be applied, in respect of any Settlement Month, to the calculation of the applicable Monthly Payment to account for Outages during such Settlement Month and shall be equal to the quotient obtained by dividing (i) the actual Electricity savings achieved by the DSM Project during all On-Peak Hours in the Settlement Month, by (ii) the Electricity savings that would have been achieved by the DSM Project during all On-Peak Hours had there been no Outages in the Settlement Month.

**“Payback Reduction Amount”** is the total amount, expressed in Dollars, that the Supplier requires to reduce the Simple Payback Period to three years, as determined in accordance with the methodology set out in Exhibit Q.

**“Payment Adjustment”** shall have the meaning ascribed to it in Exhibit J.

“**Payment Date**” has the meaning ascribed to it in Section 4.4.

“**Payment Variation**” and “**PV<sub>SPX-1(VC)</sub>**” and “**PV<sub>SPX-1(APEC)</sub>**” shall have the meanings ascribed to them in Exhibit J.

“**Peak Day**” means a day upon which the highest demand for Electricity expressed in KW is achieved in respect of the Load.

“**Peak Electricity Savings**” means the Electricity savings achieved or to be achieved by the DSM Project on a Typical Peak Day in a given Season during On-peak Hours, expressed as Electricity in kWh.

“**Person**” means a natural person, firm, trust, partnership, limited partnership, company or corporation (with or without share capital), joint venture, sole proprietorship, Governmental Authority or other entity of any kind.

“**Planned Outage**” means a Operating Equipment Outage which is planned and intentional and has been disclosed to the Buyer and which is not a result of an event of Force Majeure invoked by the Supplier.

“**Post-Installation Consumption**” means the Electricity consumption of the DSM Project, normalized for weather (using at least the prior 10 years of weather data), occupancy and other factors as specified in the Measurement and Verification Plan as measured based on the use of the Operating Equipment.

“**Present Value Discount Rate**” means:

- (a) if the time remaining in the Term is one (1) year or less, the yield of Canadian Government Treasury Bills with a term closest to the time remaining in the Term; and
- (b) if the time remaining in the Term is greater than one (1) year, the yield of Government of Canada Bonds with a term closest to the time remaining in the Term.

“**Priority Electrical Zone**” means an electrical area identified as a Priority Electrical Zone in Appendix O of the 2,500 MW RFP.

“**Proposal**” means the proposal submission made by the Supplier in response to the 2,500 MW RFP in respect of constructing and developing the DSM Project and which was selected by the Government of Ontario, and all clarifications in respect of such Proposal provided by the Supplier in writing as requested by or on behalf of the Ontario Ministry of Energy from time to time in accordance with the 2,500 MW RFP prior to the date of this Agreement, a copy of all of which is attached as Exhibit I.

“**Proposal Amendment**” has the meaning ascribed to it in Section 2.1(c).

“**PST**” means the Ontario provincial sales tax exigible under the *Retail Sales Tax Act* (Ontario), as amended from time to time.

**“Qualifying Equipment”** means equipment that is regulated under the Energy Efficiency Act (Ontario) and equipment that directly controls the consumption of Electricity products regulated under the *Energy Efficiency Act* (Ontario).

**“Qualifying Heating and Cooling Equipment”** means district heating and cooling equipment that is replacing or used in the place of, and reduces the kWh Electricity consumption relative to, operating equipment of a type for which the *Energy Efficiency Act* (Ontario) currently prescribes a minimum efficiency.

**“Records”** means any recorded information in any form: (a) provided by the Buyer to the Supplier, or provided by the Supplier to the Buyer, for purposes of this Agreement, or (b) created by the Supplier in the performance of the Agreement, and shall include or exclude any information specifically described in Exhibit G.

**“Residual Payment Adjustment”, “RPA<sub>SPx</sub>”, and “RPA<sub>SPx-1</sub>”** shall have the meanings ascribed to them in Exhibit J.

**“S&P”** means the Standard and Poors Rating Group (a division of McGraw-Hill Inc.) or its successors.

**“Savings Period”** means either: (i) the period between the Equivalent Capacity Benchmark Date and the Initial Equivalent Capacity Confirmation Date or (ii) the twelve month period that is immediately prior to any Equivalent Capacity Confirmation Date.

**“Season”** means each of Summer, Winter, and Other Season.

**“Seasonal Capacity”** means, as is applicable during the relevant Season, either **“Seasonal Capacity Other”**, **“Seasonal Capacity Summer”** or **“Seasonal Capacity Winter”**.

**“Seasonal Capacity Other”** means the Seasonal Capacity Other, as defined in the 2,500 MW RFP and as stated by the Supplier in its Proposal.”

**“Seasonal Capacity Summer”** means the Seasonal Capacity Summer, as defined in the 2,500 MW RFP and as stated by the Supplier in its Proposal.

**“Seasonal Capacity Winter”** means the Seasonal Capacity Winter, as defined in the 2,500 MW RFP and as stated by the Supplier in its Proposal.

**“Secured Lender”** means a lender under a Secured Lender’s Security Agreement.

**“Secured Lender’s Security Agreement”** means an agreement or instrument, including a deed of trust or similar instrument securing bonds or debentures, containing a charge, mortgage, pledge, security interest, assignment, sublease, deed of trust or similar instrument with respect to all or any part of the Supplier’s Interest granted by the Supplier that is security for any indebtedness, liability or obligation of the Supplier, together with any amendment, change, supplement, restatement, extension, renewal or modification thereof.

**“Senior Conference”** has the meaning ascribed to it in Section 15.1.

**“Settlement Month”** has the meaning ascribed to it in Section 4.3.

**“Settlement Period”** means either: (1) the Stub Period; (2) the six month period following the Equivalent Capacity Benchmark Date and each subsequent six month period prior to the Final Settlement Period; or (3) the Final Settlement Period. **“Settlement Period (x)”** or **“SP<sub>x</sub>”** and **“Settlement Period (x-1)”** or **“SP<sub>x-1</sub>”** shall have the meanings ascribed in Exhibit J.

**“Simple Payback Period”** means the number of years required for the Incremental Capital Cost incurred by the Supplier to be recovered through Incremental Electricity Cost Savings, as determined in accordance with Exhibit Q.

**“Simple Payback Period (COD)”** means the Simple Payback Period calculated by the Buyer as of the Commercial Operation Date in accordance with Section 2 of Exhibit Q, using the Actual Incremental Capital Costs and the Average Cost of Electricity (COD).

**“Simple Payback Period (Proposal)”** means that Simple Payback Period calculated by the Buyer in accordance with Section 1 of Exhibit Q, using the DSM Incremental Capital Costs and the Average Cost of Electricity (Proposal).

**“Statement”** means either a Monthly Statement or the End of Term Statement.

**“Stub Period”** means the period commencing on the Commercial Operation Date and ending on the Equivalent Capacity Benchmark Date.

**“Summer”** means all calendar days for the period commencing on June 16 and ending September 15 inclusive.

**“Supplier”** means ●, and includes any successor to ● resulting from any merger, arrangement or other reorganization of or including ● or any continuance under the laws of another jurisdiction or permitted assignee.

**“Supplier Event of Default”** has the meaning ascribed to it in Section 9.1.

**“Supplier Non-acceptance Notice”** has the meaning ascribed to it in Section 12.3(e).

**“Supplier’s Confidential Information”** means all information of the Supplier that is confidential and that has been marked “Confidential” by the Supplier, but which for greater certainty shall not include information that: (i) is or becomes generally available to the public without fault or breach on the part of the Buyer of any duty of confidentiality owed by the Buyer to the Supplier or to any third-party; (ii) the Buyer can demonstrate to have been rightfully obtained by the Buyer, without any obligation of confidence, from a third-party who had the right to transfer or disclose it to the Buyer free of any obligation of confidence; (iii) the Buyer can demonstrate to have been rightfully known to or in the possession of the Buyer at the time of disclosure, free of any obligation of confidence when disclosed; or (iv) is independently developed by the Buyer.

**“Supplier’s Interest”** means the right, title and interest of the Supplier in or to the DSM Project and this Agreement, or any benefit or advantage of any of the foregoing.

**“Tangible Net Worth”** means, in respect of the Supplier or Guarantor, at any time and without duplication, an amount determined in accordance with GAAP, and calculated as (a) the sum of capital stock, preferred stock, paid-in capital, contributed surplus, retained earnings, capital

reserves, and cumulative translation adjustment (whether positive or negative), minus (b) the sum of any amounts shown on account of any common stock reacquired by the Supplier or Guarantor, as applicable, patents, patent applications, service marks, industrial designs, copyrights, trade marks and trade names, and licenses, prepaid assets, goodwill and all other intangibles.

“**Taxes**” means all *ad valorem*, property, occupation, severance, production, transmission, utility, gross production, gross receipts, sales, use, excise and other taxes, governmental charges, licenses, permits and assessments, other than (i) GST and PST and (ii) taxes based on profits, net income or net worth.

“**Term**” has the meaning ascribed to it in Section 8.1(b).

“**Term Commencement Date**” means the first day of the Term.

“**Terminating Party**” has the meaning ascribed to it in Section 9.5.

“**Termination Date**” means the date on which this Agreement terminates as a result of an early termination of this Agreement in accordance with this Agreement.

“**Total Payment Adjustment**” and “**TPA<sub>SPX</sub>**” shall have the meanings ascribed to them in Exhibit J.

“**Total Payment Variation (Variable Costs)**” or “**TPV<sub>VC</sub>**” shall have the meaning ascribed to it in Exhibit J.

“**Transmission System**” means a system for conveying Electricity at voltages of more than 50 kilovolts and includes any structures, equipment or other things used for that purpose.

“**Transmitter**” means a Person licensed as a “transmitter” by the OEB in connection with a Transmission System.

“**Typical Peak Day**” means a the Peak Day normalized for weather (using at least the prior 10 years of weather data), occupancy and other factors determined in accordance with the Measurement and Verification Plan to represent the maximum demand during On-peak Hours for a day in a given Season.

“**Variable Costs**” means the variable costs that are associated with the DSM Project, which shall include O&M Costs, the administration costs, the project delivery costs and the costs related to the Measurement and Verification Activities.

“**Winter**” means all calendar days for the period commencing on December 16 and ending on March 15 inclusive.

## 1.2 Exhibits

The following Exhibits are attached to this Agreement:

Exhibit A      Summary of the DSM Project

Exhibit B	DSM Contract Values
Exhibit C	Form of Irrevocable Standby Letter of Credit
Exhibit D	Guarantee
Exhibit E	Form of Certificate of Incumbency
Exhibit F	Milestone Events and Milestone Dates for the DSM Project
Exhibit G	Records Under FIPPA
Exhibit H	2,500 MW RFP
Exhibit I	Proposal
Exhibit J	Calculation of CSP
Exhibit K	Methodology for Converting Electricity Savings into Actual Project Equivalent Capacity
Exhibit L-1	DSM Verification Certificate – Commercial Operation
Exhibit L-2	DSM Verification Certificate – Monthly
Exhibit L-3	DSM Verification Certificate - Capacity Confirmation
Exhibit M	Required Minimum Elements for a Measurement and Verification Plan
Exhibit N	Measurement and Verification Guidelines for DSM
Exhibit O	Guide to the <i>Energy Efficiency Act</i> (Ontario)
Exhibit P	Efficiency Baseline
Exhibit Q	Calculating DSM Contract Values
Exhibit R	DSM Third Party Agreement Required Provision

### **1.3 Headings and Table of Contents**

The inclusion of headings and a table of contents in this Agreement are for convenience of reference only and shall not affect the construction or interpretation of this Agreement.

### **1.4 Gender and Number**

In this Agreement, unless the context otherwise requires, words importing the singular include the plural and vice versa and words importing gender include all genders.



## **1.5 Currency**

Except where otherwise expressly provided, all amounts in this Agreement are stated, and shall be paid, in Dollars.

## **1.6 IMO Market Rules and Statutes**

Unless otherwise expressly stipulated, any reference in this Agreement to the IMO Market Rules or to a statute or to a regulation or rule promulgated under a statute or to any provision of a statute, regulation or rule shall be a reference to the IMO Market Rules, statute, regulation, rule or provision as amended, re-enacted or replaced from time to time. Notwithstanding the foregoing, any reference to the current minimum equipment efficiency standards applicable to the classes of equipment, established pursuant to the *Energy Efficiency Act* (Ontario) and associated regulations, as contained in the guide to the *Energy Efficiency Act* (Ontario) shall be a reference to the efficiency standards set out in Exhibit O. In the event of any conflict or inconsistency with the IMO Market Rules and the terms of this Agreement, the IMO Market Rules shall govern to the extent of such conflict or inconsistency.

## **1.7 Invalidity, Unenforceability, or Inapplicability of Indices and Other Provisions**

In the event that:

- (a) an arbitrator or a court of competent jurisdiction declares that any provision contained in this Agreement is invalid or unenforceable; or
- (b) an arbitrator or a court of competent jurisdiction declares that any Laws and Regulations have changed or altered (other than by way of any Discriminatory Action) from the corresponding Laws and Regulations that existed as at the date of this Agreement, in a manner that, as a direct result of the change or alteration, renders any provision contained in this Agreement inapplicable,

then the Parties shall engage in good faith negotiations to replace any provision which is declared invalid, unenforceable, or inapplicable, as the case may be, with a valid, enforceable, and applicable provision, the economic effect of which comes as close as possible to that of the invalid, unenforceable, or inapplicable provision which it replaces. For greater certainty, each of the provisions contained in this Agreement is distinct and severable and a declaration of invalidity, unenforceability, or inapplicability of any such provision or part thereof by a court of competent jurisdiction or arbitrator shall not affect the validity, enforceability, or inapplicability of any other provision of this Agreement.

## **1.8 Reference Indices**

If any index or price quotation referred to in this Agreement ceases to be published, or if the basis therefor is changed materially, there will be substituted an available replacement index or price quotation that most nearly, of those then publicly available, approximates the intent and purpose of the index or price quotation that has so ceased or changed and this Agreement shall be amended as necessary to accommodate such replacement index or price quotation, all as determined by written agreement between the Parties, or failing agreement, by mandatory and

binding arbitration under Section 15.2, without having the Settlement Conference referred to in Section 15.1.

### **1.9 Entire Agreement**

The DSM Contract, the 2,500 MW RFP, and the Proposal together constitute the entire agreement between the Parties pertaining to the subject matter of this Agreement. Notwithstanding the foregoing, the Parties acknowledge and agree that even though the 2,500 MW RFP solicits both the supply of new clean generating capacity and demand-side projects, any references to, or provisions in the 2,500 MW RFP dealing with, the supply of new clean generating capacity or demand response are not intended to apply to this Agreement. There are no warranties, conditions, or representations (including any that may be implied by statute) and there are no agreements in connection with the subject matter of this Agreement except as specifically set forth or referred to in the DSM Contract, the 2,500 MW RFP, and the Proposal. No reliance is placed on any warranty, representation, opinion, advice or assertion of fact made, prior to the issuance of the 2,500 MW RFP on September 13, 2004 by a Party to this Agreement, or its directors, officers, employees or agents, to the other Party to this Agreement or its directors, officers, employees or agents, except to the extent that the same has been reduced to writing and included as a term of this Agreement. Any conflict or inconsistency between the DSM Contract, the 2,500 MW RFP, and the Proposal shall be resolved by interpreting such documents in the following order, from highest to lowest priority, namely:

- the DSM Contract;
- the 2,500 MW RFP; and
- the Proposal,

where a document of a higher priority shall govern over a document of a lower priority to the extent of any conflict or inconsistency.

### **1.10 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 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.

### **1.11 Governing Law**

This Agreement shall be governed by and construed in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein.

### **1.12 Preparation of Agreement**

Notwithstanding the fact that this Agreement was drafted by the Buyer'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 Buyer or in favour of the Supplier when interpreting such term or provision, by virtue of such fact.

## **ARTICLE 2 DEVELOPMENT AND OPERATION OF THE DSM PROJECT**

### **2.1 Design and Implementation of the Operating Equipment**

- (a) The Supplier agrees to design, implement and, where applicable, build or acquire the Operating Equipment as described in the Proposal using Good Engineering and Operating Practices and meeting all relevant requirements of the IMO Market Rules set out in Section 14.3 and all Laws and Regulations. The Supplier shall ensure that the Operating Equipment is designed, engineered, constructed and installed to operate in accordance with the requirements of this Agreement from the Commercial Operation Date until the expiry of the Term.
- (b) The Supplier agrees that the DSM Project **[is/is not]** *[Note to Finalization: strike out as appropriate.]* is Located Within a Priority Electrical Zone.
- (c) The Supplier shall at no time after the date of this Agreement modify, vary, or amend in any material respect any of the features or specifications of the DSM Project as outlined in the Proposal (the “**Proposal Amendment**”) without first notifying the Buyer in writing and obtaining the Buyer’s consent in writing, which consent may be unreasonably withheld. Any Proposal Amendment that has not been consented to by the Buyer shall constitute a Supplier Event of Default. For purposes of this paragraph, if the Proposal provides that the DSM Project will control a Load that is electrically connected within a Priority Electrical Zone, or if a Proposal provides that the DSM Project will control multiple Loads that are each electrically connected within a Priority Electrical Zone, and/or if the Proposal provides that the DSM Project will provide Automatic System Voltage Support, then the failure of the DSM Project to meet any one or more of such requirements shall be deemed to be a Proposal Amendment.

### **2.2 Additional Development and Construction Covenants**

- (a) The Supplier agrees that the Operating Equipment and the Load shall be located in the Province of Ontario and shall affect demand in the IMO-Administered Markets and shall achieve the DSM Project Annual Electricity Savings entirely from Loads located in the Province of Ontario.
- (b) The Supplier agrees to provide, operate, and maintain, at its expense, separate meters and such other equipment or software as is necessary to measure and verify the Electricity savings achieved by the DSM Project as a direct result of the installation of the Operating Equipment in accordance with the terms of the Measurement and Verification Plan.

### 2.3 Milestone Dates

The Supplier acknowledges that time is of the essence to the Buyer with respect to attaining Commercial Operation of the DSM Project by the corresponding Milestone Date set out by the Supplier in Exhibit F, and agrees:

- (a) that the Milestone Event corresponding to the delivery to the Buyer of a certificate addressed to it from the DSM Verification Consultant, stating that the Supplier has executed DSM Third Party Agreements as collectively represent 80% of the DSM Project Equivalent Capacity (which Milestone Event is only required where the DSM Project requires the participation of multiple Loads that are third parties to the Supplier) shall be achieved in a timely manner and by its corresponding Milestone Date, failing which the Supplier shall pay to the Buyer within five (5) Business Days after receipt of an invoice from the Buyer, as liquidated damages and not as a penalty, a sum of money equal to Fifty (\$50.00) Dollars per MW multiplied by the DSM Project Equivalent Capacity for each calendar day after the applicable Milestone Date, until the corresponding Milestone Event has been achieved. However, if Commercial Operation is achieved on or before its corresponding Milestone Date, then all such liquidated damages for delays prior to Commercial Operation paid by the Supplier under this Section 2.3(a) shall be refunded to the Supplier, without interest, two weeks following the Commercial Operation Date;
- (b) that Commercial Operation shall be achieved by the corresponding Milestone Date, failing which the Supplier shall pay to the Buyer on or before five (5) Business Days after receipt of an invoice from the Buyer, as liquidated damages and not as a penalty, an amount equal to Two Hundred (\$200.00) Dollars per MW multiplied by the DSM Project Equivalent Capacity, for each calendar day after such Milestone Date until Commercial Operation has been achieved; and
- (c) The maximum amount of liquidated damages payable by the Supplier under Section 2.3 shall be an amount, expressed in Dollars, equal to the product of: (1) Two Hundred (\$200.00) Dollars per MW; (2) the DSM Project Equivalent Capacity, and (3) 545.

### 2.4 Requirements for Commercial Operation

The DSM Project will be deemed to have achieved “**Commercial Operation**” at the point in time when:

- (a) the Measurement and Verification Plan submitted by the Supplier in accordance with Section 4.1 has been approved by the Buyer;
- (b) all of the meters and such other equipment as is necessary to measure and verify the Electricity savings achieved by the DSM Project as a direct result of the installation of the Operating Equipment in accordance with the terms of the Measurement and Verification Plan have been installed and are in proper working order;

- (c) the DSM Project commences operation in compliance with all Laws and Regulations after the completion of construction, and completion of all tests;
- (d) the Supplier has delivered to the Buyer a completed schedule that lists and accurately describes all of the Operating Equipment that has been installed in connection with the DSM Project;
- (e) the Buyer has received a DSM Verification Certificate – Commercial Operation addressed to it from the DSM Verification Consultant, procured at the expense of the Supplier, stating that:
  - (i) the DSM Project has been completed in all material respects excepting punch list items that do not materially and adversely affect the ability of the DSM Project to operate in accordance with this Agreement. In the alternative, the statement set out in this Section 2.4(e)(i) may be provided to the Buyer from an independent professional engineer duly qualified to practice engineering in Ontario;
  - (ii) that the Operating Equipment has been properly installed and commissioned according to standard industry practice;
  - (iii) that the Actual Incremental Capital Costs, which shall be attached to such certificate, are accurate;
  - (iv) if the Proposal provides that the Connection Point or Connection Points with respect to multiple Loads being aggregated are within a Priority Electrical Zone, that such Connection Point(s) are located within a Priority Electrical Zone; and
  - (v) if the Proposal provides that the DSM Project will provide Automatic System Voltage Support, the DSM Project has provided Automatic System Voltage Support for eight (8) continuous hours;
- (f) the Supplier has determined the Average Cost of Electricity (COD) and has submitted this value, along with the supporting documentation and calculations, to the Buyer for its review.

## **2.5 Buyer Information During Design and Construction**

By the fifteenth (15th) day of each calendar quarter following the date of this Agreement and continuing until the Commercial Operation Date, the Supplier shall provide the Buyer with quarterly progress reports in a form agreed to by the Parties describing the status of efforts made by the Supplier to meet each Milestone Date and the progress of the design and construction work. At the Buyer's request, the Supplier shall provide an opportunity for the Buyer to meet with appropriate personnel of the Supplier to discuss and assess the contents of any such quarterly progress report.

## 2.6 Operation Covenants

- (a) The Supplier agrees to ensure that the Operating Equipment is operated and maintained during the Term such that the requirements of the Measurement and Verification Plan and other requirements as set out in Section 14.3 are met and in accordance with Good Engineering and Operating Practices.
- (b) The Supplier agrees to assume all risk, liability and obligation and to indemnify, defend, and hold harmless the Indemnitees in respect of all actions, causes of action, suits, proceedings, claims, demands, losses, damages, penalties, fines, costs, obligations and liabilities arising out of a discharge of any contaminant into the natural environment, at or related to, the DSM Project and any fines or orders of any kind that may be levied or made in connection therewith pursuant to the *Environmental Protection Act* (Ontario), the *Ontario Water Resources Act*, or the *Dangerous Goods Transportation Act* (Ontario), or other similar legislation whether federal or provincial except to the degree that such discharge shall have been due to the negligence of the Indemnitees.
- (c) In the event that the Buyer establishes rules or protocols with respect to demand-side management that are applicable to the Supplier (the “**DSM Protocols**”), the Supplier agrees to operate and maintain the DSM Project during the Term in accordance with such DSM Protocols as the Buyer may determine, and the Buyer shall compensate the Supplier for the reasonable costs incurred by the Supplier for such compliance. For greater certainty, neither the establishment of any DSM Protocol or the determination by the Buyer that the Supplier must comply with any DSM Protocol shall constitute a Discriminatory Action for the purposes of this Agreement.
- (d) If the Proposal provides that Automatic System Voltage Support will be provided by the DSM Project, the Supplier agrees to provide such Automatic System Voltage Support throughout the Term in accordance with the following requirements:
  - (A) the DSM Project shall be equipped with facilities to provide continuously acting power factor or VAR (i.e. volt amperes reactive) control that can automatically maintain, at the Connection Point: (i) a power factor within a range of +/- 1% between power factors of 90% lagging and 95% leading, or (ii) VAR consumption within +/- 2.5% of the rated MVA of such project under steady state conditions;
  - (B) the power factor or VAR controller shall have an adjustable effective response time between 10 and 60 seconds;
  - (C) the power factor or VAR controller will automatically, and in less than 5 seconds, reduce the project’s reactive power consumption by (1) 0 MVAR in response to a voltage change of 2 percent or less, and by (2) an amount increasing continuously to a maximum amount equal to “X” MVAR in response to a voltage reduction at

the Connection Point of 5 percent or greater, where “X” is a number equal to one-half of the Seasonal Capacity as expressed in MW. By way of example, if a DSM Project has a Seasonal Capacity of 8 MW, then the maximum amount of reduction referred to in subparagraph (2) will be equal to 4 MVAR in response to a voltage reduction at the Connection Point of 5 percent or greater;

- (D) the DSM Project will operate in compliance with the IMO Market Rules associated with reactive power dispatch including, when directed by the IMO, reducing its reactive power consumption up to a maximum amount equal to “X” MVAR, where “X” is a number equal to one-half of the Seasonal Capacity as expressed in MW; and
  - (E) the DSM Project will operate at all times in compliance with the load power factor requirements under the IMO Market Rules.
- (e) The Supplier shall not enrol the DSM Project under any other demand-side management program during the Term of the DSM Contract without the prior written consent of the Buyer.

## **2.7 Insurance Covenants**

- (a) The Supplier hereby agrees to put in effect and maintain, or cause its contractors and subcontractors, where appropriate, to maintain from the commencement of construction of the DSM Project to the expiry of the Term, at its own cost and expense, with insurers reasonably acceptable to the Buyer and licensed to underwrite insurance in the Province of Ontario, all the necessary and appropriate insurance that a prudent Person in the business of the Supplier developing and operating the DSM Project would maintain including the following:
  - (i) “all-risk” property insurance covering property of every description, in the joint names of at least the Supplier and its principal contractors, insuring not less than the full replacement value of the DSM Project with a deductible for all perils not exceeding an amount equal to \$100,000. The policy shall also provide delayed start-up coverage for an indemnity period of not less than 30 days and a deductible period of not more than 60 days. The policy shall contain a waiver of subrogation in favour of the Indemnitees. During the construction of the DSM Project until the Commercial Operation Date, the policy shall include as additional insureds all subcontractors and the coverage shall not be less than the insurance required by IBC Forms 4042 and 4047, or their equivalent replacement;
  - (ii) boiler and machinery insurance, if applicable, in the joint names of at least the Supplier and its principal contractors, insuring not less than the full replacement value of the boilers, machinery, pressure vessels, service

supply objects and other insurable objects forming part of the DSM Project. The coverage shall not be less than the insurance provided by the "Comprehensive Boiler and Machinery Form". The policy shall contain a waiver of subrogation in favour of the Indemnitees;

- (iii) commercial general liability insurance on an occurrence basis for death, bodily injury and property damage and other types of damage that may be caused to third parties as a result of the Supplier's activities in connection with the DSM Project or performance of its obligations under this Agreement, to an inclusive limit of not less than \$10,000,000 per occurrence and in the aggregate, with a deductible not exceeding \$100,000. The coverage shall not be less than the insurance required by IBC Forms 2100 and 2320, or their equivalent replacement. The policy shall include the following clauses:
  - (A) Ontario Electricity Financial Corporation, the Ontario Power Authority (if created), the Government of Ontario, and each of the foregoing Person's respective directors, officers and employees shall be additional insureds with respect to liability arising in the course of performance of the obligations under, or otherwise in connection with, this Agreement;
  - (B) a cross-liability endorsement;
  - (C) coverage for non-owned automobile liability with blanket contractual coverage for hired automobiles;
  - (D) coverage for contingent employer's liability;
  - (E) coverage for tenant's legal liability (if applicable and with applicable sub-limits);
  - (F) coverage for broad form property damage;
  - (G) coverage for contractual liability of the Supplier under this Agreement;
  - (H) coverage for liability resulting from completed products and operations; and
  - (I) coverage for liability on the part of the Supplier resulting from activities or work performed by its contractors and subcontractors; and
- (iv) environmental/pollution liability insurance, providing coverage for first party damage and any third party claims for bodily injury, property damage and clean-up for pollution and environmental incidents arising out of the construction, operation or maintenance of the DSM Project, with a limit of not less than \$5,000,000 per occurrence and in the



aggregate. The policy shall include as additional insureds Ontario Electricity Financial Corporation, the Ontario Power Authority (if created), the Government of Ontario, and each of the foregoing Person's respective directors, officers and employees with respect to liability arising in the course of performance of the obligations under, or otherwise in connection with, this Agreement.

- (b) Following the Commercial Operation Date, the Supplier may propose to the Buyer a self-insured retention program in lieu of the deductibles set forth in the insurance coverage under Sections 2.7(a)(i) and (iii). The Buyer shall consider such proposed programs in a timely fashion and, acting reasonably, shall consent to such programs provided that the interests of the Supplier are not materially adversely affected thereby and that the savings, if any, on insurance premiums resulting therefrom are shared on an equitable basis between the Buyer and the Supplier.
- (c) For purposes of the insurance coverage under Sections 2.7(a)(i) and (ii), the Supplier may procure and maintain separate insurance policies to cover the construction period prior to the Commercial Operation Date and the operations period from and after the Commercial Operation Date.
- (d) The Supplier shall provide the Buyer with proof of the insurance required by this Agreement in the form of valid certificates of insurance that reference this Agreement and confirm the required coverage, on or before the commencement of construction of the DSM Project, and renewal replacements on or before the expiry of any such insurance. Upon the request of the Buyer, a copy of each insurance policy shall be made available to it. The policies for the insurance coverage under Sections 2.7(a)(iii) and (iv) shall be endorsed to provide the Buyer with not less than 30 days notice in writing in advance of any cancellation, and of any change or amendment restricting coverage.
- (e) If the Supplier is subject to the *Workplace Safety and Insurance Act* (Ontario), it shall submit a valid clearance certificate of *Workplace Safety and Insurance Act* coverage to the Buyer prior to the commencement date of the Agreement. In addition, the Supplier shall, from time to time at the request of the Buyer, provide additional *Workplace Safety and Insurance Act* clearance certificates. The Supplier agrees to pay when due, and to ensure that each of its subcontractors pays when due, all amounts required to be paid by it and its subcontractors, from time to time from the commencement date of this Agreement, under the *Workplace Safety and Insurance Act*, failing which the Buyer shall have the right, in addition to and not in substitution for any other right it may have pursuant to this Agreement or otherwise at law or in equity, to pay to the Workplace Safety and Insurance Board any amount due pursuant to the *Workplace Safety and Insurance Act* and unpaid by the Supplier or its subcontractors and to deduct such amount from any amount due and owing from time to time to the Supplier pursuant to this Agreement together with all costs incurred by the Buyer in connection therewith.

## **2.8 Compliance with Laws and Regulations and Governing Documentation**

- (a) The Buyer and the Supplier shall each comply, in all material respects, with all Laws and Regulations required to perform or comply with their respective obligations under this Agreement.
- (b) The Buyer and the Supplier shall each furnish, in a timely manner, information to Governmental Authorities and shall each obtain and maintain in good standing any licence, permit, certificate, registration, authorization, consent or approval of any Governmental Authority required to perform or comply with their respective obligations under this Agreement, including such licencing as is required by the OEB.

### **ARTICLE 3 SUPPLY AND PAYMENT OBLIGATIONS**

#### **3.1 Supply of DSM Project Equivalent Capacity**

- (a) The Parties acknowledge that prior to the Term Commencement Date, the Supplier shall have no obligation to demonstrate to the Buyer that there has been a verifiable Electricity savings attributable to the DSM Project.
- (b) From and after 12:01 a.m. EST on the Term Commencement Date, the Supplier agrees that it will achieve verifiable Electricity savings as a direct result of the installation of the Operating Equipment, that expressed as capacity using the conversion methodology specified by the Buyer, will be equal to or greater than the DSM Project Equivalent Capacity in accordance with the terms of this Agreement and the Monthly Payments shall begin to accrue and be payable in accordance with Section 3.2 and Article 4.
- (c) The Supplier shall from time to time during the Term of this Agreement, on behalf of the Buyer, obtain, quantify, and register with the relevant authorities or agencies all Environmental Attributes related to the DSM Project that are required pursuant to applicable legislation, and same shall be immediately transferred, assigned or held in trust for the Buyer who thereafter shall retain, all rights, title, and interest in all such Environmental Attributes. The Supplier shall not participate in any voluntary programs with respect to any Environmental Attributes associated with the DSM Project without the prior written consent of the Buyer, which consent may be unreasonably withheld.
- (d) Notwithstanding Section 3.1(c), the Supplier shall continue to be entitled to all rights, title, and interest to all emission allowances and Emission Reduction Credits that pertain to the DSM Project and of a type that were available under the Ontario Emissions Trading Program as of September 13, 2004. However, the amount of the Supplier's entitlement to any such emission allowance or Emission Reduction Credit shall be determined with reference to the levels in effect as of the date of the Supplier's claim to any such entitlement.

### **3.2 Amount of Monthly Payment**

The “**Monthly Payment**” shall be an amount equal to the Contingent Support Payment, if any, multiplied by the Outage Factor, which shall be owed by the Buyer to the Supplier.

### **3.3 Supplier’s Responsibility for Taxes**

The Supplier is liable for and shall pay, or cause to be paid, or reimburse the Buyer if the Buyer has paid, all Taxes applicable to the supply of the DSM Project Annual Electricity Savings which relate to DSM Project. In the event that the Buyer is required to remit such Taxes, the amount thereof shall be deducted from any sums becoming due to the Supplier hereunder.

### **3.4 Buyer’s Responsibility for Taxes**

The Buyer is liable for and shall pay, or cause to be paid, or reimburse the Supplier if the Supplier has paid, all Taxes applicable to any Contingent Support Payment due to the Supplier. If any GST or PST is payable in connection with the Contingent Support Payment, such GST or PST shall be paid by the Buyer.

### **3.5 Non-residency**

If the Supplier is a non-resident of Canada, as that term is defined in the ITA, and the Buyer incurs any withholding or other similar Taxes as a result of such non-residency, then payments under this Agreement by the Buyer shall be reduced by the amount of such withholding Taxes and the Buyer shall remit such withholding Taxes to the applicable taxing authorities. The Buyer shall within sixty (60) days after remitting such Taxes, notify the Supplier in writing, providing reasonable detail of such payment so that the Supplier may claim any applicable rebates, refunds or credits from the applicable taxing authorities. If after the Buyer has paid such amounts, the Buyer receives a refund, rebate or credit on account of such Taxes, then the Buyer shall promptly remit such refund, rebate or credit amount to the Supplier.

### **3.6 Reduction of Net Revenue Requirement during the Term**

The Supplier acknowledges and agrees that each of NRR(Simple Payback Period) and NRR(Variable Costs) will be calculated by the Buyer and may be subject to adjustment during the Term in accordance with the terms of this Agreement.

## **ARTICLE 4**

### **MEASUREMENT AND VERIFICATION, STATEMENTS AND PAYMENTS**

#### **4.1 Measurement and Verification Plan**

- (a) Not less than ninety (90) Business Days prior to the Term Commencement Date, the Supplier shall submit to the Buyer for its approval a Measurement and Verification Plan for the DSM Project containing the minimum elements set out in Exhibit M. The Buyer agrees to review the Measurement and Verification Plan submitted by the Supplier, and to either approve the plan or provide the Supplier with its comments by the later of fifteen (15) Business Days after receipt and fifteen (15) Business Days prior to the Term Commencement Date. The receipt and review by the Ontario Ministry of Energy of an outline of a

measurement and verification plan as part of the Proposal shall not, under any circumstances, be constituted or deemed to be an express or implied acceptance or approval by the Ministry of the form, content, or methodology set out therein and shall not bind or constitute an estoppel against the Buyer or the Supplier for purposes of agreeing upon the form, content, and methodology of the Measurement and Verification Plan required to be provided by the Supplier pursuant to this Section 4.1(a).

- (b) The Supplier agrees to promptly notify and provide the Buyer with copies of any proposed amendments or modifications to the Measurement and Verification Plan, and acknowledges that no such proposed amendment or modification to the Measurement and Verification Plan shall be effective without the consent of the Buyer, which consent shall not be unreasonably withheld.

#### **4.2 Measurement and Verification Certificate**

- (a) The Supplier acknowledges and agrees that no payments shall be made by the Buyer in respect of a Settlement Month during the Term until the Supplier has delivered to the Buyer a DSM Verification Certificate - Monthly in respect of such Settlement Month executed by the DSM Monthly Verification Consultant. A DSM Verification Certificate - Monthly for a particular Settlement Month that is delivered to the Buyer within ten (10) Business Days following the end of such Settlement Month shall be considered by the Buyer in the preparation of the Statement for such Settlement Month. A DSM Verification Certificate - Monthly for a particular Settlement Month that is delivered by the Supplier more than ten (10), but less than ninety (90), Business Days, following the end of the applicable Settlement Month (a "**Late Monthly Certificate**") shall be considered by the Buyer in the preparation of the Statement for the Settlement Month in which such Late Monthly Certificate is received by the Buyer, and any payments that are owing from the Buyer to the Supplier in respect of a Settlement Month for which a Late Monthly Certificate has been delivered shall be added to the Statement for the Settlement Month in which such Late Monthly Certificate is received by the Buyer. The Buyer shall not make, nor shall it owe, any payments to the Supplier in respect of any Settlement Month for which the Supplier fails to deliver a DSM Verification Certificate - Monthly prior to the ninetieth (90<sup>th</sup>) Business Day following the end of such Settlement Month.
- (b) The DSM Verification Certificate - Monthly will be prepared by the DSM Verification Consultant in a manner consistent with the Measurement and Verification Plan, and will serve as the statement by the Supplier to the Buyer regarding the performance of the DSM Project throughout the applicable Settlement Month.
- (c) The Supplier shall within thirty (30) days of each Equivalent Capacity Confirmation Date deliver a DSM Verification Certificate – Capacity Confirmation executed by the DSM Verification Consultant to the Buyer in respect of each Savings Period during the Term immediately prior to such Equivalent Capacity Confirmation Date, and acknowledges and agrees that the Buyer will rely on same in order to calculate payments in the then current

Settlement Period. The Supplier further acknowledges that no payments whatsoever shall be made by the Buyer in respect of any Settlement Month during the then current Settlement Period until the Supplier has delivered such certificate to the Buyer. If such certificate is delivered to the Buyer within thirty (30) days following the applicable Equivalent Capacity Confirmation Date the certificate shall be considered by the Buyer in the preparation of the Statement for the first Settlement Month of the then current Settlement Period. If such certificate is delivered by the Supplier more than thirty (30), but less than one hundred and eighty (180), days, following the applicable Equivalent Capacity Confirmation Date (a “**Late Capacity Confirmation Certificate**”) shall be considered by the Buyer in the preparation of the Statement for the Settlement Month in which such certificate is received by the Buyer and any payments that are owing from the Buyer to the Supplier in respect of a prior Settlement Month of the then current Settlement Period shall be added to the Statement for the Settlement Month in which such certificate is received by the Buyer. The Buyer shall not make, nor shall it owe, any payments to the Supplier in respect of any Settlement Month during a Settlement Period for which the Supplier fails to deliver a DSM Verification Certificate - Capacity Confirmation in respect of the immediately prior Savings Period prior to the one hundred and eightieth (180<sup>th</sup>) day following the applicable Equivalent Capacity Confirmation Date.

- (d) The DSM Verification Certificate - Capacity Confirmation will be prepared by the DSM Verification Consultant in a manner consistent with the Measurement and Verification Plan, and will serve as the statement by the Supplier to the Buyer regarding the performance of the DSM Project throughout the applicable Savings Period.
- (e) In the event the DSM Verification Consultant ceases to be the DSM Verification Consultant, or is unable, for any reason, to perform Measurement and Verification Activities in respect of the DSM Project, the Supplier shall be required to appoint a replacement DSM Verification Consultant that is reasonably acceptable to the Buyer within thirty (30) Business Days of the date on which the Supplier first knew or ought to have known of the occurrence of such event. If the Supplier fails to appoint a replacement DSM Verification Consultant within forty-five (45) Business Days, upon notice to the Supplier, the Buyer may, but shall not be obligated to, appoint, at the Supplier’s sole cost and expense, a successor DSM Verification Consultant who shall serve until such time as the Supplier appoints a replacement DSM Verification Consultant.
- (f) If the Buyer, acting reasonably, determines that the DSM Verification Consultant is not acting in an impartial and independent manner, the Buyer shall have the right to require the Supplier to replace the DSM Verification Consultant, at the Supplier’s sole cost and expense, with a new third party technical consultant acceptable to the Buyer.
- (g) In addition to the obligations of the Supplier to provide Measurement and Verification Data to the Buyer under the Measurement and Verification Plan, the Supplier shall provide to the Buyer all Measurement and Verification Data together with any other data or information relating to the DSM Project

(including information related to Outages), forthwith upon request by the Buyer. Upon the Supplier becoming aware of any errors or omissions in any data or information provided in accordance with this Section, the Supplier shall notify the Buyer on a timely basis.

#### **4.3 Monthly Statements**

The Buyer shall prepare and deliver a settlement statement (the “Monthly Statement”) to the Supplier, within ten (10) Business Days after the end of each calendar month in the Term that is the subject of the Statement (the “Settlement Month”), setting out the basis for the Monthly Payment with respect to the Settlement Month, as well as the basis for any other payments owing under this Agreement by either Party to the other in the Settlement Month. A Statement may be delivered by the Buyer to the Supplier by facsimile or electronic means, and shall include the reference number assigned to this Agreement by the Buyer. In preparing the Statement, the Buyer shall consider any DSM Verification Certificate - Capacity Confirmation delivered by the Supplier, but the Buyer, acting reasonably, shall not be bound by any statement, value, or certification set out in any such DSM Verification Certificate.

#### **4.4 Payment**

The Buyer shall remit to the Supplier the full payment in respect of the Statement no later than ten (10) Business Days after delivery of the Statement to the Supplier (the “**Payment Date**”). Any and all payments required to be made by the Buyer under any other provision of this Agreement shall be made by wire transfer to the account designated below or as otherwise agreed by the Parties.

#### **4.5 Interest**

The Buyer shall pay interest on any late payment to the Supplier, from the Payment Date to the date of payment provided that such late payment was through no fault of the other Party. The interest rate applicable to such late payment shall be the Interest Rate in effect on the date that the payment went into arrears, calculated daily, but shall not, under any circumstances, exceed the maximum interest rate permitted by Laws and Regulations.

#### **4.6 Payment Account Information**

**Account for payments to Supplier:**

**[Bank]**

**[Bank address]**

Account Name: ●

Account Number: ●

Transit Number: ●

**Account for payments to Buyer:**

**[Bank]**

**[Bank address]**

Account Name: ●  
Account Number: ●  
Transit Number: ●

Either Party may change its account information from time to time by written notice to the other in accordance with Section 14.6.

**4.7 Determination and Audit of DSM Contract Values**

- (a) The Supplier acknowledges and agrees that the values set out in Exhibit B for DSM Project Equivalent Capacity, DSM Project Annual Electricity Savings, Average Cost of Electricity (Proposal), DSM Incremental Capital Costs are derived from the “Economic Bid Statement” of the Proposal. In addition, the Supplier acknowledges and agrees that the value for Actual Incremental Capital Costs to be inserted in Exhibit B as of the Commercial Operation Date shall be calculated by the Supplier and verified by the DSM Verification Consultant as part of the DSM Verification Certificate – Commercial Operation.
- (b) The Buyer shall calculate the Simple Payback Period (Proposal) and NRR(Variable Costs) in accordance with the information provided by the Supplier in the Proposal and the applicable methodology set out in Exhibit Q. In addition, the Buyer shall calculate the Simple Payback Period (COD), NRR and NRR(Simple Payback Period) in accordance with the information provided by the Supplier as of the Commercial Operation Date and the applicable methodology set out in Exhibit Q.
- (c) The Buyer shall have the right, but not the obligation, to conduct audits (i) to confirm any of the values or amounts set out in Exhibit B which have been supplied, determined or calculated by the Supplier, and (ii) no more frequently than on an annual basis to confirm the amount of the Actual DSM Costs incurred by the Supplier, and the Supplier shall provide all required information to the Buyer in accordance with the Buyer’s audit rights set out in Section 14.2.

**4.8 Adjustment to Statement**

- (a) Each Statement shall be subject to adjustment for errors in arithmetic, computation, or other errors, raised by a party during the period of one (1) year following the end of the calendar year in which such Statement was issued. If there are no complaints raised, or if any complaints raised in the time period have been resolved, such Statement shall be final and subject to no further adjustment after the expiration of such period.
- (b) Subject to Section 4.9, any adjustment to a Statement made pursuant to this Section 4.8 shall be made in the next subsequent Statement to be issued.

#### **4.9 Disputed Statement**

If the Supplier disputes a Statement or any portion thereof, the Buyer shall, notwithstanding such dispute, pay the entire amount set forth in the Statement to the Supplier. The Supplier shall provide written notice to the Buyer setting out the portions of the Statement that are in dispute with a brief explanation of the dispute. If it is subsequently determined or agreed that an adjustment to the Statement is appropriate, the Buyer will promptly prepare a revised Statement. Any overpayment or underpayment of a Statement shall bear interest at the Interest Rate, calculated daily, from and including the time of such overpayment or underpayment to the date of the refund or payment thereof. Payment pursuant to the revised Statement shall be made on the tenth (10<sup>th</sup>) Business Day following the date on which the revised Statement is delivered to the Supplier. If a Statement dispute has not been resolved between the Parties within five (5) Business Days after receipt of written notice of such dispute by the Buyer, the dispute may be submitted by either Party to a Senior Conference pursuant to the terms of Section 15.1.

#### **4.10 Statements and Payment Records**

The Parties shall keep all books and records necessary to support the information contained in and with respect to each Statement and Monthly Payment made thereunder, in accordance with Section 14.2.

### **ARTICLE 5 CREDIT AND SECURITY REQUIREMENTS**

#### **5.1 Completion and Performance Security**

- (a) The Supplier shall provide security to the Buyer upon execution of this Agreement for the performance of the Supplier's obligations under this Agreement, in an amount equal to \$50,000 per MW of DSM Project Equivalent Capacity and in the form described in Section 5.2 (the "**Completion and Performance Security**"). Upon the Term Commencement Date, and provided that the Buyer has determined that any liquidated damages payable by the Supplier under Section 2.3 have been paid by the Supplier, then the amount of the Completion and Performance Security shall be reduced to an amount equal to \$25,000 per MW of DSM Project Equivalent Capacity. In the event that the Buyer, in accordance with this Agreement, has recovered monies that were due to it using all or part of the Completion and Performance Security, the Supplier shall forthwith provide replacement security to cover an amount equal to that recovered or paid out of the Completion and Performance Security.
- (b) On each anniversary date of the Equivalent Capacity Benchmark Date, the Buyer will calculate an estimate of the End of Term Payment, and if the estimate is greater than the current amount of the Completion and Performance Security; the Buyer may require the Supplier to increase the amount of the Completion and Performance Security to an amount equal to such estimate of the End of Term Payment.



## 5.2 Composition of Security

- (a) Prior to the Term Commencement Date, where the Commercial Operation Date occurs after the date of this Agreement, the Completion and Performance Security shall be provided in the form of a Letter of Credit, certified cheque, bank draft, or other equivalent form of surety instrument acceptable to the Buyer, acting reasonably, for the full amount, but for certainty, shall not include guarantees.
- (b) From and after the Term Commencement Date, the Completion and Performance Security shall be provided as set out in (i) or (ii) below:
  - (i) a Letter of Credit, certified cheque, bank draft, or other equivalent form of surety instrument acceptable to the Buyer, for the full amount of the Completion and Performance Security; or
  - (ii) subject to Section 5.2(c), a Guarantee, up to a maximum amount determined pursuant to Section 5.4, but not to exceed 90% of the amount of the Completion and Performance Security, together with a Letter of Credit, certified cheque, bank draft, or other equivalent form of surety instrument acceptable to the Buyer, for the balance of the amount of the Completion and Performance Security.

To the extent that the amount of the Guarantee requirement increases or decreases from time to time in accordance with this Article 5, the amount of the Letter of Credit shall correspondingly be required to be decreased or increased, respectively, so that the total amount of the Completion and Performance Security held by the Buyer at all times from and after the Term Commencement Date remains in an aggregate amount equal to \$25,000 per MW of DSM Project Equivalent Capacity.

- (c) If the aggregate of the Supplier's Creditworthiness Value, determined pursuant to Section 5.4(b) and the principal amount of the Letter of Credit, certified cheque, bank draft, or other equivalent form of surety instrument acceptable to the Buyer described in Section 5.2(b)(ii) is equal to or greater than the amount of the Completion and Performance Security, then no Guarantee is required.
- (d) If a Guarantee forms part of the Completion and Performance Security and:
  - (i) the Creditworthiness Value of the Supplier determined pursuant to Section 5.4(b) is equal to or greater than the Creditworthiness Value of the Guarantor determined pursuant to Section 5.4(b), provided the Guarantor has a Credit Rating required of a guarantor as set out in Section 5.4, or
  - (ii) the aggregate of the Supplier's Creditworthiness Value and the principal amount of the Letter of Credit, certified cheque, bank draft, or other equivalent form of surety instrument acceptable to the Buyer described in

Section 5.2(b)(ii) is equal to or greater than the amount of the Completion and Performance Security,

then, provided the Supplier is not then in default under this Agreement, the Buyer shall, upon request by the Supplier, return the Guarantee to the Supplier.

### **5.3 Letter of Credit Provisions**

Any Letter of Credit delivered hereunder shall be subject to the following provisions:

- (a) The Supplier shall (i) renew or cause the renewal of each outstanding Letter of Credit on a timely basis as provided in the relevant Letter of Credit, (ii) if the financial institution that issued an outstanding Letter of Credit has indicated its intent not to renew such Letter of Credit, provide a substitute Letter of Credit or other equivalent form of surety instrument satisfactory to the Buyer at least ten (10) Business Days prior to the expiration of the outstanding Letter of Credit, and (iii) if a financial institution issuing a Letter of Credit fails to honour the Buyer's properly documented request to draw on an outstanding Letter of Credit (other than a failure to honour as a result of a request to draw that does not conform to the requirements of such Letter of Credit), provide for the benefit of the Buyer (A) a substitute Letter of Credit that is issued by another financial institution, or (B) other surety instrument satisfactory to the Buyer in an amount equal to such outstanding Letter of Credit, in either case within five (5) Business Days after the Supplier receives notice of such refusal.
- (b) A Letter of Credit shall provide that the Buyer may draw upon the Letter of Credit in an amount (up to the face amount for which the Letter of Credit has been issued) that is equal to all amounts that are due and owing from the Supplier but that have not been paid to the Buyer within the time allowed for such payments under this Agreement (including any related notice or grace period or both). A Letter of Credit shall provide that a drawing may be made on the Letter of Credit upon submission to the financial institution issuing the Letter of Credit of one or more certificates specifying the amounts due and owing to the Buyer in accordance with the specific requirements of the Letter of Credit.
- (c) If the Supplier shall fail to renew, substitute, or sufficiently increase the amount of an outstanding Letter of Credit (as the case may be), or establish one or more additional Letters of Credit or other equivalent form of surety instrument satisfactory to the Buyer when required hereunder, then the Buyer may draw on the entire, undrawn portion of any outstanding Letter of Credit upon submission to the financial institution issuing such Letter of Credit of one or more certificates specifying the amounts due and owing to the Buyer in accordance with the specific requirements of the Letter of Credit. If the amounts due and owing are less than the amount drawn under such Letter of Credit, then such excess amount shall be held as Completion and Performance Security. The Supplier shall remain liable for any amounts due and owing to the Buyer and remaining unpaid after the application of the amounts so drawn by the Buyer.

- (d) The costs and expenses of establishing, renewing, substituting, cancelling, increasing and reducing the amount of (as the case may be) one or more Letters of Credit shall be borne by the Supplier.
- (e) The Buyer shall return a Letter of Credit held by the Buyer to the Supplier if the Supplier is substituting a Letter of Credit of a greater or lesser amount pursuant to Section 5.3(a), within five (5) Business Days from the Buyer's receipt of such substituted Letter of Credit.

#### 5.4 Guarantee Provisions

- (a) The Buyer shall accept a guarantee in the form attached hereto as Exhibit D (the "**Guarantee**") from a guarantor of the Supplier (with the applicable party providing the Guarantee being referred to as the "**Guarantor**"), provided however that the Guarantor shall have a Credit Rating as listed in any of the four rows contained in the table below. Notwithstanding the foregoing, in the event the Guarantor has a Negative Outlook, then its Credit Rating, for purposes of calculating the Creditworthiness Value of the Guarantor in Section 5.4(b), will be automatically be demoted by one level as set forth below. For greater certainty, a Guarantor with a Credit Rating in the 4<sup>th</sup> level set forth below without a Negative Outlook will no longer be able to provide a Guarantee if it subsequently receives a Negative Outlook. In such event, the Supplier shall be required to provide alternative acceptable security as provided in Section 5.2(b) so as to remain in compliance with the Completion and Performance Security requirements set out in Section 5.1.
- (b) A Person's Creditworthiness Value (the "**Creditworthiness Value**") shall be determined by the following formula:

$$S \times T$$

where S represents the Tangible Net Worth of the Person, expressed in Dollars, and T is a figure, used for weighting purposes, taken from the 4<sup>th</sup> column of the table below of the appropriate row corresponding to the Person's Credit Rating as adjusted by any Negative Outlook, provided that where the Person has Credit Ratings from more than one rating agency set out in the table below, then the lowest of such Credit Ratings, as adjusted by any Negative Outlook, shall be used:

Credit Rating of Person				
	S & P	DBRS	Moody's	Value of T
1.	At least A-	At least A low	At least A3	0.10
2.	At least BBB+	At least BBB high	At least Baa1	0.08
3.	At least BBB	At least BBB	At least Baa2	0.06

Credit Rating of Person				
	S & P	DBRS	Moody's	Value of T
4.	At least BBB-	At least BBB low	At least Baa3	0.05

Subject to Section 5.2(b)(ii), the amount of the Guarantee shall be equal to or less than the Creditworthiness Value of the Guarantor as determined by the foregoing, failing which the Supplier shall be required to provide alternative acceptable security as provided in Section 5.2(b) so as to remain in compliance with the Completion and Performance Security requirements set out in Section 5.1.

- (c) Upon the consent of the Buyer, which consent shall not be unreasonably withheld, the Guarantor may substitute its Guarantee with a guarantee from an Affiliate or from any other Person who would qualify as a guarantor for an amount equivalent to the amount of the Guarantee (the “**Replacement Guarantee**”). The Replacement Guarantee shall be in the form of the Guarantee. Upon delivery of the Replacement Guarantee, (i) such Replacement Guarantee shall be deemed to be the “**Guarantee**” and such Affiliate or other Person providing such guarantee, as the case may be, shall be deemed to be the “**Guarantor**” for all purposes of this Agreement and (ii) the Buyer shall return the original Guarantee to the original Guarantor within five (5) Business Days of such delivery.
- (d) For greater clarity, all provisions of the Agreement that refer to (1) the Guarantor or similar references, or (2) the Creditworthiness Value of the Guarantor or similar references, shall:
  - (i) only apply in respect of the Guarantor if that Guarantor has, at the applicable time, issued a Guarantee in favour of the Buyer and that Guarantee remains in effect at that time (otherwise, the reference to Guarantor shall be excluded when interpreting the provision until such time as a Guarantee is provided); and
  - (ii) only refer to the Creditworthiness Value of the Supplier (and not the Creditworthiness Value of its Guarantor) when and for so long as its Guarantor has not provided a Guarantee that remains in effect at the applicable time.

## 5.5 Financial Statements

The Supplier shall, on a quarterly basis, provide to the Buyer (i) as soon as available and in no event later than sixty (60) days after the end of each fiscal quarter of the Guarantor, unaudited consolidated financial statements of the Guarantor, for such fiscal quarter prepared in accordance with GAAP, and (ii) as soon as possible and in no event later than 120 days after the end of each fiscal year, audited consolidated financial statements of the Guarantor for such fiscal year prepared in accordance with GAAP. Notwithstanding the foregoing, if any such financial statements are not available in a timely manner due to a delay in preparation or auditing, such

delay shall not be considered a breach of this Section 5.5 so long as the Guarantor is diligently pursuing the preparation, audit and delivery of such financial statements. Quarterly financial statements may be delivered electronically to the Buyer in PDF form. Upon each delivery of the Guarantor's financial statements to the Buyer, the Guarantor providing such financial statements shall be deemed to represent to the Buyer that its financial statements were prepared in accordance with GAAP and present fairly the financial position of the Guarantor for the relevant period then ended. In the event that the Guarantor does not publish financial statements on a quarterly basis, then unaudited consolidated financial statements shall be provided by the Guarantor, at a minimum, on a semi-annual basis. To the extent that the Supplier's Creditworthiness Value is such that the Guarantee is not required or it is returned to the Guarantor and cancelled pursuant to Section 5.2(d), then the obligations to provide financial statements under this Section 5.5 shall apply in full to the Supplier instead of the Guarantor.

## **5.6 Notice of Deterioration in Financial Indicators**

The Supplier shall provide notice to the Buyer of any material deterioration of any of the Financial Indicators of the Supplier or the Guarantor immediately upon the Supplier becoming aware of such deterioration.

# **ARTICLE 6 REPRESENTATIONS**

## **6.1 Representations of the Supplier**

The Supplier represents to the Buyer as follows, and acknowledges that the Buyer is relying on such representations in entering into this Agreement:

- (a) The Supplier is a ●, [**incorporated**] [*Note to Finalization: Set forth legal form of the Supplier*] under the laws of ●, is registered or otherwise qualified to carry on business in the Province of Ontario and has the requisite power to enter into this Agreement and to perform its obligations hereunder.
- (b) This Agreement has been duly authorized, executed, and delivered by the Supplier and is a valid and binding obligation of the Supplier enforceable in accordance with its terms except as such enforcement may be limited by bankruptcy, insolvency and other laws affecting the rights of creditors generally and except that equitable remedies may only be granted in the discretion of a court of competent jurisdiction.
- (c) The execution and delivery of this Agreement by the Supplier and the consummation of the transactions contemplated by this Agreement will not result in the breach or violation of any of the provisions of, or constitute a default under, or conflict with or cause the termination, cancellation or acceleration of any material obligation of the Supplier under:
  - (i) any contract or obligation to which the Supplier is a party or by which it or its assets may be bound, except for such defaults or conflicts as to which requisite waivers or consents have been obtained;

- (ii) the articles, by-laws or other constating documents, or resolutions of the directors or shareholders of the Supplier;
- (iii) any judgment, decree, order or award of any Governmental Authority or arbitrator;
- (iv) any licence, permit, approval, consent or authorization held by the Supplier; or
- (v) any Laws and Regulations,

that could have a Material Adverse Effect on the Supplier.

- (d) There are no bankruptcy, insolvency, reorganization, receivership, seizure, realization, arrangement or other similar proceedings pending against or being contemplated by the Supplier or, to the knowledge of the Supplier, threatened against the Supplier.
- (e) There are no actions, suits, proceedings, judgments, rulings or orders by or before any Governmental Authority or arbitrator, or, to the knowledge of the Supplier, threatened against the Supplier, that could have a Material Adverse Effect on the Supplier.
- (f) All requirements for the Supplier to make any filing, declaration or registration with, give any notice to or obtain any licence, permit, certificate, registration, authorization, consent or approval of, any Governmental Authority as a condition to entering into this Agreement have been satisfied.
- (g) All statements, specifications, data, confirmations, and information that have been set out in the Proposal are complete and accurate in all material respects and are hereby restated and reaffirmed by the Supplier as representations made to the Buyer under this DSM Contract and there is no material information omitted from the Proposal which makes the information in the Proposal misleading or inaccurate.
- (h) The Supplier has no reason to believe, acting reasonably, that any one or more of the Milestone Events may not be achieved by the corresponding Milestone Dates.
- (i) The Supplier is [not] [*Note to Finalization: Delete if inapplicable.*] a non-resident of Canada for the purposes of the ITA.
- (j) The Supplier is in compliance with all tax statutes administered by the Ontario Ministry of Finance.

## **6.2 Representations of the Buyer**

The Buyer represents to the Supplier as follows, and acknowledges that the Supplier is relying on such representations in entering into this Agreement:

- (a) The Buyer is a corporation continued under the *Electricity Act* (Ontario) and has the requisite power to enter into this Agreement and to perform its obligations hereunder.
- (b) This Agreement has been duly authorized, executed, and delivered by the Buyer and is a valid and binding obligation of the Buyer enforceable in accordance with its terms, except as enforcement may be limited by bankruptcy, insolvency and other laws affecting the rights of creditors generally and except that equitable remedies may be granted solely in the discretion of a court of competent jurisdiction.
- (c) The execution and delivery of this Agreement by the Buyer and the consummation of the transactions contemplated by this Agreement will not result in the breach or violation of any of the provisions of, or constitute a default under, or conflict with or cause the termination, cancellation or acceleration of any material obligation of the Buyer under:
  - (i) any contract or obligation to which the Buyer is a party or by which it or its assets may be bound, except for such defaults or conflicts as to which requisite waivers or consents have been obtained;
  - (ii) the by-laws or resolutions of the directors (or any committee thereof) or shareholder of the Buyer;
  - (iii) any judgment, decree, order or award of any Governmental Authority or arbitrator;
  - (iv) any licence, permit, approval, consent or authorization held by the Buyer; or
  - (v) any Laws and Regulations,that could have a Material Adverse Effect on the Buyer.
- (d) There are no bankruptcy, insolvency, reorganization, receivership, seizure, realization, arrangement or other similar proceedings pending against, or being contemplated by the Buyer or, to the knowledge of the Buyer, threatened against the Buyer.
- (e) There are no actions, suits, proceedings, judgments, rulings or orders by or before any Governmental Authority or arbitrator, or, to the knowledge of the Buyer, threatened against the Buyer, that could have a Material Adverse Effect on the Buyer.
- (f) All requirements for the Buyer to make any declaration, filing or registration with, give any notice to or obtain any licence, permit, certificate, registration, authorization, consent or approval of, any Governmental Authority as a condition to entering into this Agreement have been satisfied.

## **ARTICLE 7 CONFIDENTIALITY AND FIPPA**

### **7.1 OPS Confidential Information**

From the date of this Agreement to and following the expiry of the Term, the Supplier shall:

- (a) keep all OPS Confidential Information confidential and secure;
- (b) limit the disclosure of OPS Confidential Information to the Supplier, and any member of the Proponent Team (as that term is defined in the 2,500 MW RFP) who has a need to know it and who has been specifically authorized by the Supplier to have such disclosure;
- (c) not directly or indirectly disclose, destroy, exploit or use any OPS Confidential Information (except for the purpose of achieving verifiable Electricity savings under the terms of this Agreement, or except if required by order of a court or tribunal), without first obtaining: (i) the written consent of the Buyer and (ii) in respect of any OPS Confidential Information about any third-party, the written consent of such third-party;
- (d) provide OPS Confidential Information to the Buyer on demand; and
- (e) destroy, or return all OPS Confidential Information to the Buyer on or before the expiry of the Term, with no copy or portion kept by the Supplier without the consent of the Buyer.

### **7.2 Supplier Restrictions on Copying**

The Supplier shall not copy any OPS Confidential Information, in whole or in part, unless copying is essential to achieve verifiable Electricity savings as a direct result of the operation of the Operating Equipment under the terms of this Agreement. On each copy made by the Supplier, the Supplier must reproduce all notices which appear on the original.

### **7.3 Buyer Injunctive and Other Relief**

The Supplier acknowledges that breach of any provisions of this Article may cause irreparable harm to the Buyer or to any third-party to whom the Buyer owes a duty of confidence, and that the injury to the Buyer or to any third-party may be difficult to calculate and inadequately compensable in damages. The Supplier agrees that the Buyer is entitled to obtain injunctive relief (without proving any damage sustained by it or by any third-party) or any other remedy against any actual or potential breach of the provisions of this Article.

### **7.4 Notice and Buyer Protective Order**

If the Supplier, any Affiliate of the Supplier, the Guarantor, or any of their respective directors, officers, employees, agents, representatives or advisors, become legally compelled to disclose any OPS Confidential Information, the Supplier will provide the Buyer with prompt notice to that effect in order to allow the Buyer to seek one or more protective orders or other appropriate remedies to prevent or limit such disclosure, and it shall co-operate with the Buyer and its legal



counsel to the fullest extent. If such protective orders or other remedies are not obtained, the Supplier will disclose only that portion of OPS Confidential Information which the Supplier is legally compelled to disclose, only to such person or persons to which the Supplier is legally compelled to disclose, and the Supplier shall provide notice to each such recipient (in cooperation with legal counsel for the Buyer) that such OPS Confidential Information is confidential and subject to non-disclosure on terms and conditions equal to those contained in the Agreement and, if possible, shall obtain each recipient's written agreement to receive and use such OPS Confidential Information subject to those terms and conditions.

## **7.5 FIPPA Records and Compliance**

The Supplier and the Buyer acknowledge and agree that the Buyer is subject to FIPPA and that FIPPA applies to and governs all Records in the custody or control of the Buyer (“**FIPPA Records**”) and may require the disclosure of such Records to third parties. Furthermore, the Supplier agrees:

- (a) to keep FIPPA Records secure;
- (b) to provide FIPPA Records to the Buyer within seven (7) calendar days of being directed to do so by the Buyer for any reason including an access request or privacy issue; and
- (c) to implement other specific security measures that in the reasonable opinion of the Buyer would improve the adequacy and effectiveness of the Supplier's measures to ensure the security and integrity of FIPPA Records,

and the provisions of this Section shall survive any termination or expiry of this Agreement and shall prevail over any inconsistent provisions in this Agreement.

## **7.6 Responsibility of Buyer**

Subject to the provisions of this Agreement and all Laws and Regulations (including FIPPA), from the date of the Agreement to and following the expiry of the Term, the Buyer shall (a) keep the Supplier's Confidential Information confidential and secure; (b) limit the disclosure of Supplier's Confidential Information to only those employees, agents, representatives, or advisors of the Ontario Power Authority (if created), Ontario Electricity Financial Corporation, the OPS, the IMO, and their respective Affiliates who have a need to know it and who have been authorized by the Buyer to have such disclosure; (c) not directly or indirectly disclose, destroy, exploit or use any Supplier's Confidential Information (except in the course of complying with its obligations under this Agreement and except if required by order of a court or tribunal), without first obtaining: (i) the written consent of the Supplier and (ii) in respect of any Supplier's Confidential Information about any third-party, the written consent of such third-party; and (d) provide the Supplier's Confidential Information to the Supplier on demand.

## ARTICLE 8 TERM

### 8.1 Term

- (a) The DSM Contract shall become effective upon the date hereof.
- (b) The “**Term**” means that period of time commencing upon the later of the Commercial Operation Date and the date of this Agreement and ending at 24:00 hours (EST) on the day before the [5]<sup>th</sup> anniversary date thereafter, subject to earlier termination in accordance with the provisions hereof. *[Note to Finalization: Insert the anniversary date that reflects the term specified in the Proposal, provided that no Term shall be less than five years and more than twenty years.]* Neither Party shall have any right to extend or renew the Term except as agreed in writing by the Parties.

## ARTICLE 9 TERMINATION AND DEFAULT

### 9.1 Events of Default by the Supplier

Each of the following will constitute an Event of Default by the Supplier (each, a “**Supplier Event of Default**”):

- (a) The Supplier or the Guarantor fails to make any payment, or deliver and/or maintain the Completion and Performance Security under this Agreement when due, if such failure is not remedied within five (5) Business Days after written notice of such failure from the Buyer.
- (b) The Supplier fails to perform any material covenant or obligation set forth in this Agreement (other than the covenant set forth in Section 3.1(b) or to the extent that such failure to perform constitutes a separate Supplier Event of Default) if such failure is not remedied within fifteen (15) Business Days after written notice of such failure from the Buyer. For greater certainty, material covenants include Section 2.6(d).
- (c) The Supplier fails or ceases to hold a valid licence, permit, certificate, registration, authorization, consent or approval issued by a Governmental Authority where such failure or cessation results in, or could be reasonably expected to result in, a Material Adverse Effect on the Supplier and is not remedied within thirty (30) Business Days after receipt by the Supplier of written notice of such failure or cessation from the Buyer.
- (d) Any representation made by the Supplier in this Agreement is not true or correct in any material respect when made and is not made true or correct in all material respects within thirty (30) Business Days after receipt by the Supplier of written notice of such fact from the Buyer.

- (e) An effective resolution is passed or documents are filed in an office of public record in respect of, or a judgment or order is issued by a court of competent jurisdiction ordering, the dissolution, termination of existence, liquidation or winding up of the Supplier, unless such filed documents are immediately revoked or otherwise rendered inapplicable, or unless there has been a permitted and valid assignment of this Agreement by the Supplier under this Agreement to a Person which is not dissolving, terminating its existence, liquidating or winding up and such Person has assumed all of the Supplier's obligations under this Agreement.
- (f) The Supplier amalgamates with, or merges with or into, or transfers 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 hereof by the Supplier under this Agreement to the resulting, surviving or transferee Person and such Person has assumed all of the Supplier's obligations under this Agreement.
- (g) A receiver, manager, receiver-manager, liquidator, monitor or trustee in bankruptcy of the Supplier or of any of the Supplier's property is appointed by a Governmental Authority or pursuant to the terms of a debenture or a similar instrument, and such receiver, manager, receiver-manager, liquidator, monitor or trustee in bankruptcy is not discharged or such appointment is not revoked or withdrawn within thirty (30) days of the appointment. By decree, judgment or order of a Governmental Authority, the Supplier is adjudicated bankrupt or insolvent or any substantial part of the Supplier's property is sequestered, and such decree continues undischarged and unstayed for a period of thirty (30) days after the entry thereof. A petition, proceeding or filing is made against the Supplier seeking to have the Supplier declared bankrupt or insolvent, or seeking adjustment or composition of any of their respective debts pursuant to the provisions of any Insolvency Legislation, and such petition, proceeding or filing is not dismissed or withdrawn within thirty (30) days.
- (h) The Supplier makes an assignment for the benefit of its creditors generally under any Insolvency Legislation, 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 provision of any Insolvency Legislation.
- (i) The Supplier has defaulted under one or more obligations for indebtedness to other Persons, resulting in obligations for indebtedness in an aggregate amount of more than the greater of 5% of its Tangible Net Worth and \$2,000,000 becoming immediately due and payable, unless: (A) such default is remedied within fifteen (15) Business Days after written notice of such failure from the Buyer, or (B) the Supplier has satisfied the Buyer that such default does not have a Material Adverse Effect on the Supplier's ability to perform its obligations under this Agreement.
- (j) The Supplier has not disclosed all actual or potential Conflicts of Interest (as that term is defined in the 2,500 MW RFP) in the Proposal and, if any such actual or potential Conflict of Interest is capable of being remedied, it has not been

remedied within fifteen (15) Business Days after written notice of such non-disclosure from the Buyer.

- (k) The Supplier has made a Proposal Amendment that has not first been consented to by the Buyer.
- (l) The Commercial Operation Date has not occurred on or before the date which is one (1) year after the Milestone Date for Commercial Operation, unless the Supplier has, on or prior to such one year date, paid all liquidated damages accruing to such one year date pursuant to Section 2.3 and the full amount of the required Completion and Performance Security is being held by the Buyer in accordance with Section 5.1.
- (m) The Commercial Operation Date has not occurred on or before the date which is eighteen (18) months after the Milestone Date for Commercial Operation.
- (n) The Actual Project Equivalent Capacity, as confirmed by any DSM Capacity Confirmation Verification Certificate, is less than 5 MW
- (o) The Supplier undergoes a change in Control without first obtaining the written approval of the Buyer if required pursuant to Section 15.6.
- (p) The Supplier assigns this Agreement without first obtaining such consent of the Buyer if required pursuant to this Agreement.
- (q) The Supplier amends or modifies the Measurement and Verification Plan without the consent of the Buyer or replaces the DSM Verification Consultant without the consent of the Buyer.
- (r) The Simple Payback Period calculated as of the Commercial Operation Date in accordance with the methodology set out in Exhibit Q is three years or less.

## **9.2 Remedies of the Buyer**

- (a) If any Supplier Event of Default (other than a Supplier Event of Default referred to in Sections 9.1(e), 9.1(g), and 9.1(h)) occurs and is continuing, upon written notice to the Supplier, the Buyer may, subject to Article 11, in accordance with Section 9.5(a), terminate this Agreement and, if applicable, demand the Early Termination Payment.
- (b) If a Supplier Event of Default referred to in Sections 9.1(b) or 9.1(n) occurs and is continuing, in addition to the remedies set out in Section 9.2(a), at the discretion of the Buyer, either:
  - (i) the Supplier will forfeit the entire Contingent Support Payment otherwise payable to the Supplier for the Settlement Month in which such Supplier Event of Default occurs, as liquidated damages and not as a penalty; or
  - (ii) the Buyer may levy a performance assessment set-off, as liquidated damages and not as a penalty, equal to three (3) times the average

Contingent Support Payment payable to the Supplier for the most recent twelve (12) Settlement Months (or the number of Settlement Months that have elapsed from the Term Commencement Date if less than twelve Settlement Months have elapsed), in the event that three (3) or more Supplier Events of Default referred to in Section 9.1(b), have occurred within a Contract Year, regardless of whether such Supplier Events of Default had been subsequently cured,

and which may be satisfied by the Buyer setting off any payments due to the Supplier against any amounts payable by the Supplier to the Buyer including, at the Buyer's option, the amount of any Completion and Performance Security provided to the Buyer pursuant to Article 5, and by drawing on the Completion and Performance Security, or any part thereof, and if the remedy in Section 9.2(a) has not been exercised requiring the Supplier to replace such drawn security with new security.

- (c) If a Supplier Event of Default referred to in Sections 9.1(a), 9.1(l), or 9.1(m) occurs and is continuing, the Buyer may, in addition to the remedies set out in Section 9.2(a):
  - (i) set off any payments due to the Supplier against any amounts payable by the Supplier to the Buyer including, at the Buyer's option, the amount of any Completion and Performance Security provided to the Buyer pursuant to Article 5, and
  - (ii) draw on the Completion and Performance Security, or any part thereof and, if the remedy in Section 9.2(a) has not been exercised, require the Supplier to replace such drawn security with new security.
- (d) Notwithstanding Sections 9.2(a), 9.2(b), and 9.3(c), upon the occurrence of a Supplier Event of Default referred to in Sections 9.1(e), 9.1(g), or 9.1(h), this Agreement shall automatically terminate without notice, act or formality, effective immediately before the occurrence of such Supplier Event of Default, in which case, for certainty, the Secured Lender shall have the rights available to it under Section 11.2(g).
- (e) Termination shall not relieve the Supplier or the Buyer of their respective responsibilities relating to the availability of the DSM Project Equivalent Capacity, or amounts payable under this Agreement, up to and including the Termination Date. The Buyer shall be responsible only for the payment of amounts accruing under this Agreement up to and including the Termination Date. In addition to its other rights of set off available to it pursuant to this Agreement and at law, the Buyer may hold back payment or set off its obligation to make such payment against any payments owed to it if the Supplier fails to comply with its obligations on termination.

### 9.3 Events of Default by the Buyer

Each of the following will constitute an Event of Default by the Buyer (each, a “**Buyer Event of Default**”):

- (a) The Buyer fails to make any payment under this Agreement when due, if such failure is not remedied within five (5) Business Days after written notice of such failure from the Supplier.
- (b) The Buyer fails to perform any material covenant or obligation set forth in this Agreement (except to the extent constituting a separate Buyer Event of Default), if such failure is not remedied within fifteen (15) Business Days after written notice of such failure from the Supplier.
- (c) The Buyer fails or ceases to hold a valid licence, permit, certificate, registration, authorization, consent or approval issued by a Governmental Authority where such failure or cessation results in, or could be reasonably expected to result in, a Material Adverse Effect on the Buyer and is not remedied within thirty (30) Business Days after receipt by the Buyer of written notice of such failure or cessation from the Supplier.
- (d) Any representation made by the Buyer in this Agreement is not materially true or correct in any material respect when made and is not made materially true or correct within thirty (30) Business Days after receipt by the Buyer of written notice of such fact from the Supplier.
- (e) An effective resolution is passed or documents are filed in an office of public record in respect of, or a judgment or order is issued by a court of competent jurisdiction ordering the dissolution, termination of existence, liquidation or winding up of the Buyer unless such filed documents are immediately revoked or otherwise rendered inapplicable, or unless there has been a permitted and valid assignment of this Agreement by the Buyer under this Agreement to a Person which is not dissolving, terminating its existence, liquidating or winding up and such Person has assumed all of the Buyer’s obligations under this Agreement.
- (f) A receiver, manager, receiver-manager, liquidator, monitor or trustee in bankruptcy of the Buyer or of any of the Buyer’s property is appointed by a Governmental Authority or pursuant to the terms of a debenture or a similar instrument, and such receiver, manager, receiver-manager, liquidator, monitor or trustee in bankruptcy is not discharged or such appointment is not revoked or withdrawn within thirty (30) days of the appointment. By decree, judgment or order of Governmental Authority, the Buyer is adjudicated bankrupt or insolvent or any substantial part of the Buyer’s property is sequestered, and such decree continues undischarged and unstayed for a period of thirty (30) days after the entry thereof. A petition, proceeding or filing is made against the Buyer seeking to have it declared bankrupt or insolvent, or seeking adjustment or composition of any of its debts pursuant to the provisions of any Insolvency Legislation, and such petition, proceeding or filing is not dismissed or withdrawn within thirty (30) days.

- (g) The Buyer makes an assignment for the benefit of its creditors generally under any Insolvency Legislation, or consents to the appointment of a receiver, manager, receiver-manager, monitor, trustee in bankruptcy, or liquidator, of it or of all or part of its property or files a petition or proposal to declare bankruptcy or to reorganize pursuant to the provision of any Insolvency Legislation.
- (h) The Buyer assigns this Agreement (other than an assignment made pursuant to Section 15.5(d)), without first obtaining the consent of the Supplier if required pursuant to this Agreement.

#### 9.4 Termination by the Supplier

- (a) If any Buyer Event of Default occurs and is continuing, then upon written notice to the Buyer, the Supplier may: (i) in accordance with Section 9.5(a), terminate this Agreement and, if applicable, demand the Early Termination Payment, and (ii) set off any payments due to the Buyer against any amounts payable by the Buyer to the Supplier.
- (b) Notwithstanding the foregoing, and except for any Early Termination Payment, if applicable, the Buyer shall be responsible for payment of amounts accruing under this Agreement only up to and including the effective date of any termination. The Supplier may hold back payment or set off against any payments owed by it if the Buyer fails to comply with its obligations on termination.

#### 9.5 Liquidated Damages for Early Termination

- (a) If an Event of Default occurs with respect to a Party (the “**Defaulting Party**”) at any time during the term of this Agreement, and is continuing, then the other Party (the “**Terminating Party**”) may:
  - (i) upon two (2) Business Days written notice to the Defaulting Party, which notice shall be given no later than sixty (60) days after the discovery of the occurrence of the Event of Default, establish a date on which this Agreement may be terminated (the “**Early Termination Date**”);
  - (ii) withhold any payments due in respect of this Agreement; and/or suspend performance hereunder; provided, however, upon the occurrence of any Event of Default listed in Section 9.2(d), then this Agreement shall automatically terminate at the time set out therein, without notice, as if an Early Termination Date had been immediately declared at the point in time immediately prior to the occurrence of such Event of Default. If an Early Termination Date occurs, the Terminating Party shall in good faith calculate its damages, including its Costs, resulting from the termination of this Agreement in accordance with this Section 9.5 (the “**Early Termination Payment**”).
- (b) If the Terminating Party is the Supplier, the Early Termination Payment will be an amount equal to:

- (i) the average CSP paid or payable to the Supplier over the most recent three (3) year period of the Term prior to the termination of this Agreement, or if three years of the Term have not elapsed, the period between the Early Termination Date and the Term Commencement Date, multiplied by the number of Settlement Months (or part thereof) remaining in the Term had the Agreement not been terminated and discounted to the Early Termination Date at the Present Value Discount Rate; plus
  - (ii) the Costs of the Supplier.
- (c) If the Terminating Party is the Buyer, then the Early Termination Payment will be an amount equal to:
- (i) The positive excess, if any, of:
    - (A) the aggregate of any Monthly Payments payable to the Supplier pursuant to a replacement contract on the same terms and conditions as this Agreement, for each month that would have been remaining in the Term had this Agreement not been terminated, discounted to the Early Termination Date at the Present Value Discount Rate and calculated using the DSM Project Equivalent Capacity as of the Termination Date and the average values for all variables utilized in Exhibit J over the most recent three (3) year period prior to the Early Termination Date (utilizing historical data to the extent that such period extends prior to the Term Commencement Date), with the exception of the net revenue requirement which shall be estimated as of the Early Termination Date in the manner set out below; less
    - (B) the aggregate of any Monthly Payments payable to the Supplier pursuant to this Agreement, for each month that would have been remaining in the Term had this Agreement not been terminated, discounted to the Early Termination Date at the Present Value Discount Rate, and calculated based on the NRR and the DSM Project Equivalent Capacity at the Early Termination Date, and the same average values for all variables in Exhibit J for purposes of Section 9.5(c)(a)(i)(A) for each Settlement Month; plus
  - (ii) the Costs of the Buyer.
- (d) For purposes of Section 9.5(c), in order to ascertain the market prices of a replacement contract for purposes of calculating the net revenue requirement, the Buyer shall consider, among other valuations, the results of the most recent resource adequacy market auction, or at least two (2) quotations from leading dealers or brokers in demand-side management contracts and other bona fide third party offers, all adjusted for the length of the remaining Term.



- (e) The parties agree that the Terminating Party shall not be required to enter into any replacement contract or transaction in order to determine or be entitled to the Early Termination Payment.
- (f) The Terminating Party shall give the Defaulting Party written notice of the amount of the Early Termination Payment, together with a statement showing its determination of the amount thereof. The Defaulting Party shall pay the Early Termination Payment to the Terminating Party within ten (10) Business Days of receipt of such notice, together with interest at the Interest Rate from and including the Early Termination Date until and including the date the Early Termination Payment is paid in full. Regardless of whether the Defaulting Party is the Buyer or Supplier, there shall be added to the Early Termination Payment an amount equal to the difference between (i) all amounts owed but not yet paid by the Buyer to the Supplier, whether or not such amounts are then due pursuant to this Agreement and (ii) all amounts owed but not yet paid by the Supplier to the Buyer, whether or not such amounts are then due pursuant to this Agreement.
- (g) If the Defaulting Party disputes the Terminating Party's calculation of the Early Termination Payment, in whole or in part, the Defaulting Party shall, within fifteen (15) Business Days of receipt of the Terminating Party's calculation of the Early Termination Payment, provide to the Terminating Party a detailed written explanation of the basis for such dispute; provided, however, that if the Early Termination Payment is due from the Defaulting Party, the Defaulting Party shall first pay into court or deliver security to the Terminating Party, in a form acceptable to the Terminating Party, in an amount equal to the amount of the Early Termination Payment.

## **9.6 Sole Remedies**

If the Agreement is terminated pursuant to Section 9.2(a) or Section 9.4(a), then and subject to the Terminating Party's right to receive the Early Termination Payment pursuant to Section 9.5 and to be paid for all other amounts then due and owing to the Terminating Party, such right of termination shall represent that Terminating Party's sole and exclusive remedy for the Defaulting Party's default that gave rise to the termination but shall not affect any rights that the Indemnitees may have pursuant to any indemnity hereunder.

## **ARTICLE 10 FORCE MAJEURE**

### **10.1 Effect of Invoking Force Majeure**

- (a) If, by reason of Force Majeure:
  - (i) the Supplier is unable to make available all or any part of the DSM Project Equivalent Capacity; or
  - (ii) either Party is unable, wholly or partially, to perform or comply with its other obligations (other than payment obligations) hereunder, including the Supplier being unable to achieve a Milestone Event by the relevant

Milestone Date, or the Supplier not achieving Commercial Operation on or before the date which is one (1) year or eighteen (18) months after the Milestone Date for Commercial Operation, as applicable;

then the Party so affected by Force Majeure shall be excused and relieved from performing or complying with such obligations (other than payment obligations) and shall not be liable for any liabilities, damages, losses, payments, costs, expenses (or Indemnifiable Losses, in the case of the Supplier affected by Force Majeure) to, or incurred by, the other Party in respect of or relating to such Force Majeure and such Party's failure to so perform or comply during the continuance and to the extent of the inability so caused from and after the invocation of Force Majeure. Notwithstanding the foregoing, during such time as the Supplier is so unable to perform or comply as a result of a Force Majeure, no calculations pursuant to Exhibit J shall be made, and no amounts (including Monthly Payments) shall be payable in respect of such time.

- (b) A Party shall be deemed to have invoked Force Majeure with effect from the commencement of the event or circumstances constituting Force Majeure when that Party gives to the other Party prompt notice, written or oral (but if oral, promptly confirmed in writing) of the effect of the Force Majeure and reasonably full particulars of the cause thereof.
- (c) The Party invoking Force Majeure shall use Commercially Reasonable Efforts to remedy the situation and remove, so far as possible and with reasonable dispatch, the Force Majeure, but settlement of strikes, lockouts and other labour disturbances shall be wholly within the discretion of the Party involved.
- (d) The Party invoking Force Majeure shall give prompt notice, written or oral (but if oral, promptly confirmed in writing) of the termination of the event of Force Majeure.
- (e) Nothing in this Section 10.1 shall relieve a Party of its obligations to make payments of any amounts that were due and owing before the occurrence of the Force Majeure or that otherwise may become due and payable during any period of Force Majeure.
- (f) If an event of Force Majeure causes the Supplier to not achieve a Milestone Event by the relevant Milestone Date or to not achieve Commercial Operation on or before the date which is one (1) year after the Milestone Date for Commercial Operation, as applicable, then such Milestone Date shall be extended for such reasonable period of delay directly resulting from such Force Majeure event. After the Term Commencement Date, an event of Force Majeure shall not extend the Term of this Agreement.
- (g) If an event of Force Majeure described in Section 10.3(h) has delayed the Commercial Operation Date by more than 365 days after the original Milestone Date (prior to any extension pursuant to Section 10.1(f)) set out for attaining Commercial Operation of the DSM Project, then notwithstanding anything in this Agreement to the contrary, while the delay that is the result of the event of Force

Majeure is continuing, the Supplier at its sole option may terminate this Agreement upon notice to the Buyer and without any costs or payments of any kind to either Party, and all security shall be returned forthwith.

- (h) If, by reason of Force Majeure, the Supplier is unable to perform or comply with its obligations (other than payment obligations) hereunder for more than three (3) continuous years (including the delay of the Commercial Operation Date by more than three (3) years after the original Milestone Date for Commercial Operation, prior to any extension pursuant to Section 10.1(f)), then notwithstanding anything in this Agreement to the contrary, while the delay that is a result of the event of Force Majeure is continuing, either Party may terminate this Agreement upon notice to the other Party and without any costs or payments of any kind to either Party, and all security shall be returned forthwith.

## 10.2 Exclusions

A Party shall not be entitled to invoke Force Majeure under this Article 10, nor shall it be relieved of its obligations hereunder in any of the following circumstances:

- (a) if and to the extent the Party seeking to invoke Force Majeure has caused the applicable event of Force Majeure by its fault or negligence;
- (b) if and to the extent the Party seeking to invoke Force Majeure has failed to use Commercially Reasonable Efforts to prevent or remedy the event of Force Majeure and remove, so far as possible and within a reasonable time period, the Force Majeure (except in the case of strikes, lockouts and other labour disturbances, the settlement of which shall be wholly within the discretion of the Party involved);
- (c) if and to the extent that the Supplier is unable to achieve verifiable Electricity savings due to a result of a Load Outage, except where such Load Outage is otherwise caused by an event of Force Majeure;
- (d) if and to the extent that the Party seeking to invoke Force Majeure because of arrest or restraint by a Governmental Authority, such arrest or restraint was the result of a breach by such Party of Laws and Regulations; or
- (e) if the Force Majeure was caused by a lack of funds or other financial cause.

## 10.3 Definition of Force Majeure

For the purposes of this Agreement, the term “**Force Majeure**” means any act, event, cause or condition that prevents a Party from performing its obligations (other than payment obligations) hereunder, and that is beyond the affected Party’s reasonable control, and shall include:

- (a) acts of God, including extreme wind, ice, lightning or other storms, earthquakes, tornadoes, hurricanes, cyclones, landslides, drought, floods and washouts;
- (b) fires or explosions;

- (c) local, regional or national states of emergency;
- (d) strikes and other labour disputes (other than legal strikes or labour disputes by employees of such Party or third party invoking Force Majeure, unless such strikes or labour disputes are the result or part of a general industry strike or labour dispute);
- (e) delays or disruptions in electricity supply resulting from a Force Majeure event (whether such event is in respect of a Party or a third party);
- (f) civil disobedience or disturbances, war (whether declared or not), acts of sabotage, blockades, insurrections, terrorism, revolution, riots or epidemics;
- (g) an order, judgment, legislation, ruling or direction by Governmental Authorities restraining a Party, provided that the affected Party has not applied for or assisted in the application for and has used Commercially Reasonable Efforts to oppose said order, judgment, legislation, ruling or direction;
- (h) any inability to obtain, or to secure the renewal or amendment of, any permit, certificate, licence or approval of any Governmental Authority required to perform or comply with any obligation under this Agreement, unless the revocation or modification of any such necessary permit, certificate, licence or approval was caused by the violation of the terms thereof or consented to by the Party invoking Force Majeure; and
- (i) any unanticipated maintenance or outage affecting the DSM Project:
  - (i) which is not identified in the Supplier's then current schedule of Planned Outages submitted to the Buyer in advance of the occurrence of an event of Force Majeure referred to in this Section 10.3, and
  - (ii) which results directly from, or is scheduled or planned directly as a consequence of, an event of Force Majeure referred to in this Section 10.3; provided that:
    - (A) notice of the unanticipated maintenance or outage is provided to the Buyer by the Supplier forthwith, or as soon as reasonably possible;
    - (B) the Supplier provides timely updates to the Buyer of the commencement date of the maintenance or outage and, where possible, provides seven (7) days advance notice of such date;
    - (C) the unanticipated maintenance or outage is commenced within 120 days of the commencement of the occurrence of the relevant event of Force Majeure; and
    - (D) the Supplier schedules the unanticipated maintenance or outage in accordance with Good Engineering and Operating Practices.

For greater certainty, nothing in Section 10.3(i) shall be construed as limiting the duration of an event of Force Majeure. Each Party shall resume its obligations as soon as the event of Force Majeure has been overcome.

## **ARTICLE 11 LENDER'S RIGHTS**

### **11.1 Lender Security**

Notwithstanding Section 15.5, the Supplier, from time to time on or after the date of this Agreement shall have the right, at its cost, to enter into a Secured Lender's Security Agreement. For the avoidance of doubt, in the case of a deed of trust or similar instrument securing bonds or debentures, where the trustee holds security on behalf of, or for the benefit of, other lenders, only the trustee shall be entitled to exercise the rights and remedies under the Secured Lender's Security Agreement as the Secured Lender on behalf of the lenders. A Secured Lender's Security Agreement shall be upon and subject to the following conditions:

- (a) A Secured Lender's Security Agreement may be made for any amounts and upon any terms (including terms of the loans, interest rates, payment terms and prepayment privileges or restrictions) as desired by the Supplier, except as otherwise provided in this Agreement.
- (b) A Secured Lender's Security Agreement may not secure any indebtedness, liability or obligation of the Supplier that is not related to the DSM Project or cover any real or personal property of the Supplier not related to the DSM Project, except in relation to any one or more projects, developed in response to the 2,500 MW RFP, owned by the Supplier and subject to a contract with the Buyer as contemplated in the 2,500 MW RFP. For greater certainty, a Secured Lender's Security Agreement may cover shares in the capital of the Supplier.
- (c) No Secured Lender's Security Agreement shall affect or encumber in any manner the Buyer's title to any government-owned premises. The Buyer shall have no liability whatsoever for payment of the principal sum secured by any Secured Lender's Security Agreement, or any interest accrued thereon or any other sum secured thereby or accruing thereunder; and the Secured Lender shall not be entitled to seek any damages against the Buyer for any or all of the same.
- (d) No Secured Lender's Security Agreement shall be binding upon the Buyer in the enforcement of the Buyer's rights and remedies provided in this Agreement or by Laws and Regulations, unless and until a copy of the original thereof and the registration details, if applicable, together with written notice of the address of the Secured Lender to which notices may be sent have been delivered to the Buyer by the Supplier or the Secured Lender; and in the event of an assignment of such Secured Lender's Security Agreement, such assignment shall not be binding upon the Buyer unless and until a copy thereof and the registration details, if applicable, together with written notice of the address of the assignee thereof to which notices may be sent, have been delivered to the Buyer by the Supplier or the Secured Lender.

- (e) The Secured Lender shall provide reasonable notice, which shall not be less than five (5) Business Days, to the Buyer of a default of the Supplier under such Secured Lender's Security Agreement, which shall be a condition precedent to the Secured Lender exercising any rights afforded to it under this Agreement.
- (f) Any Secured Lender's Security Agreement permitted hereunder may secure two (2) or more separate debts, liabilities or obligations in favour of two (2) or more separate Secured Lenders, provided that such Secured Lender's Security Agreement complies with the provisions of this Article 11.
- (g) Any number of permitted Secured Lender's Security Agreements may be outstanding at any one time, provided that each such Secured Lender's Security Agreement complies with the provisions of this Article 11.
- (h) All rights acquired by a Secured Lender under any Secured Lender's Security Agreement shall be subject to all of the provisions of this Agreement, including the restrictions on assignment contained herein. While any Secured Lender's Security Agreement is outstanding, the Buyer and the Supplier shall not amend or supplement this Agreement or agree to a termination of the Agreement without the consent of the Secured Lender, which consent shall not be unreasonably withheld, conditioned, or delayed. A Secured Lender must respond within a reasonable period of time to any request to amend or supplement this Agreement.
- (i) Despite any enforcement of any Secured Lender's Security Agreement, the Supplier shall remain liable to the Buyer for the payment of all sums owing to the Buyer under this Agreement and for the performance of all of the Supplier's obligations under this Agreement.

## **11.2 Rights and Obligations of Secured Lenders**

While any Secured Lender's Security Agreement remains outstanding, and if the Buyer has received the notice referred to in Section 11.1(d) or the contents thereof are embodied in the agreement entered into by the Buyer in accordance with Section 11.3, the following provisions shall apply:

- (a) No Supplier Event of Default (other than those set out in Section 9.2(d)) shall be grounds for the termination by the Buyer of this Agreement until:
  - (i) any notice required to be given under Section 9.1 and 9.2(a) has been given on the same day to the Supplier and to the Secured Lender; and
  - (ii) the cure period set out in Section 11.2(b) has expired without a cure having been completed and without the Secured Lender having taken the actions therein contemplated.
- (b) In the event the Buyer has given any notice required to be given under Section 9.1, the Secured Lender shall, within the applicable cure period (including any extensions), if any, have the right (but not the obligation) to cure

such default, and the Buyer shall accept such performance by such Secured Lender as if the same had been performed by the Supplier.

- (c) Any payment to be made or action to be taken by a Secured Lender hereunder as a prerequisite to keeping this Agreement in effect shall be deemed properly to have been made or taken by the Secured Lender if such payment is made or action is taken by a nominee or agent of the Secured Lender or a receiver or receiver and manager appointed by or on the application of the Secured Lender.
- (d) A Secured Lender shall be entitled to the Supplier's rights and benefits contained in this Agreement and shall become liable for the Supplier's obligations solely as provided in Section 11.2. A Secured Lender may, subject to the provisions of this Agreement, enforce any Secured Lender's Security Agreement and acquire the Supplier's Interest in any lawful way and, without limitation, a Secured Lender or its nominee or agent or a receiver or receiver and manager appointed by or on the application of the Secured Lender, may take possession of and manage the DSM Project and, upon foreclosure, or without foreclosure upon exercise of any contractual or statutory power of sale under such Secured Lender's Security Agreement, may sell or assign the Supplier's Interest with the consent of the Buyer as required under Section 11.2(f).
- (e) Until a Secured Lender (i) forecloses or has otherwise taken ownership of the Supplier's Interest or (ii) has taken possession or control of the Supplier's Interest, whether directly or by an agent as a mortgagee in possession, or a receiver or receiver and manager has taken possession or control of the Supplier's Interest by reference to the Secured Lender's Security Agreement, the Secured Lender shall not be liable for any of the Supplier's obligations or be entitled to any of the Supplier's rights and benefits contained in this Agreement except by way of security. If the Secured Lender itself or by a nominee or agent, or a receiver or a receiver and manager appointed by or on the application of the Secured Lender, is the owner or is in control or possession of the Supplier's Interest, then the entity that is the owner or is in control or possession of the Supplier's Interest shall be bound by all of the Supplier's obligations. Once the Secured Lender or such other Person goes out of possession or control of the Supplier's Interest or transfers the Supplier's Interest in accordance with this Agreement to another Person who is not at Arms' Length with the Secured Lender, the Secured Lender shall cease to be liable for any of the Supplier's obligations and shall cease to be entitled to any of the Supplier's rights and benefits contained in this Agreement, except, if the Secured Lender's Security Agreement remains outstanding, by way of security.
- (f) Despite anything else contained in this Agreement, any Person to whom the Supplier's Interest is transferred shall take the Supplier's Interest subject to the Supplier's obligations. No transfer shall be effective unless the Buyer:
  - (i) acting reasonably, if such transferee is at Arms' Length with the Secured Lender; or

- (ii) acting in its sole and subjective discretion, if such transferee is not at Arms' Length with the Secured Lender,

has approved of the transferee and the transferee has entered into an agreement with the Buyer in form and substance satisfactory to the Buyer, acting reasonably, wherein the transferee agrees to assume and to perform the obligations of the Supplier in respect of the Supplier's Interest, whether arising before or after the transfer, and including the posting of the Completion and Performance Security required under Article 5.

- (g) In the event of the termination of this Agreement prior to the end of the Term due to a Supplier Event of Default, the Buyer shall, within ten (10) days after the date of such termination, deliver to each Secured Lender which is at Arms' Length with the Supplier a statement of all sums then known to the Buyer that would at that time be due under this Agreement but for the termination and a notice to each such Secured Lender stating that the Buyer is willing to enter into a New Agreement (the "**Buyer Statement**"). Subject to the provisions of this Article 11, each such Secured Lender shall thereupon have the option to obtain from the Buyer a New Agreement in accordance with the following terms:
  - (i) Upon receipt of the written request of the Secured Lender within thirty (30) days after the date on which it received the Buyer Statement, the Buyer shall enter into a New Agreement.
  - (ii) Such New Agreement shall be effective as of the Termination Date and shall be for the remainder of the Term at the time this Agreement was terminated and otherwise upon the terms contained in this Agreement. The Buyer's obligation to enter into a New Agreement is conditional upon the Secured Lender (A) paying all sums that would, at the time of the execution and delivery thereof, be due under this Agreement but for such termination, (B) otherwise fully curing any defaults under this Agreement existing immediately prior to termination of this Agreement that are capable of being cured, and (C) paying all reasonable costs and expenses, including legal fees basis so as to provide a full indemnity (and not only substantial indemnity), incurred by the Buyer in connection with such default and termination, and the preparation, execution and delivery of such New Agreement and related agreements and documents, provided, however, that with respect to any default that could not be cured by such Secured Lender until it obtains possession, such Secured Lender shall have the applicable cure period commencing on the date that it obtains possession to cure such default. For certainty, in entering into such New Agreement, the Secured Lender shall not be required to pay the Early Termination Payment under this Agreement.

When the Secured Lender has appointed an agent, a receiver or a receiver and manager or has obtained a court-appointed receiver or receiver and manager for the purpose of enforcing the Secured Lender's security, that Person may exercise any of the Secured Lender's rights under this Section 11.2(g).



- (h) Despite anything to the contrary contained in this Agreement, the provisions of this Article 11 shall enure only to the benefit of the holders of a Secured Lender's Security Agreement. If the holders of more than one such Secured Lender's Security Agreement who are at Arms' Length with the Supplier make written requests to the Buyer in accordance with this Section 11.2 to obtain a New Agreement, the Buyer shall accept the request of the holder whose Secured Lender's Security Agreement had priority immediately prior to the termination of this Agreement over the Secured Lender's Security Agreements of the other Secured Lenders making such requests and thereupon the written request of each other Secured Lender shall be deemed to be void. In the event of any dispute or disagreement as to the respective priorities of any such Secured Lender's Security Agreement, the Buyer may rely upon the opinion as to such priorities of any law firm qualified to practise law in the Province of Ontario retained by the Buyer in its unqualified subjective discretion or may apply to a court of competent jurisdiction for a declaration as to such priorities, which opinion or declaration shall be conclusively binding upon all parties concerned.

### **11.3 Cooperation**

The Buyer and the Supplier shall enter into an agreement with any Secured Lender for the purpose of implementing the Secured Lender's Security Agreement protection provisions contained in this Agreement. The Buyer, acting reasonably, shall consider any request jointly made by the Supplier and a Secured Lender or proposed Secured Lender to facilitate a provision of a Secured Lender's Security Agreement or proposed Secured Lender's Security Agreement that may require an amendment to this Agreement, provided that the rights of the Buyer are not adversely affected thereby, the obligations of the Supplier to the Buyer are not altered thereby and the consent of any other Secured Lender to such amendment has been obtained by the Supplier or the Secured Lender making the request for the amendment.

## **ARTICLE 12 DISCRIMINATORY ACTION**

### **12.1 Discriminatory Action**

A "**Discriminatory Action**" shall occur if:

- (a)
- (i) the Legislative Assembly of Ontario causes to come into force any statute that was introduced as a government bill in the Legislative Assembly of Ontario or causes to come into force or makes any order-in-council or regulation first having legal effect on or after the date of the submission of the Proposal; or
  - (ii) the Legislative Assembly of Ontario directly or indirectly amends this Agreement without the agreement of the Supplier;
- (b) the effect of the action referred to in Section 12.1(a):
- (i) is borne principally by the Supplier; or

- (ii) is borne principally by the Supplier and one or more other suppliers who have executed, pursuant to the 2,500 MW RFP, a DSM Contract (as such term is defined in the 2,500 MW RFP) with the Buyer; and
- (c) such action increases the costs that the Supplier would reasonably be expected to incur under this Agreement to achieve verifiable Electricity savings that expressed as capacity as converted in accordance with the methodology specified by the Buyer at a level equal to or greater than the DSM project Equivalent Capacity as a direct result of the operation of the Operating Equipment, except where such action is in response to any act or omission on the part of the Supplier that is contrary to Laws and Regulations (other than an act or omission rendered illegal by virtue of such action) or such action is permitted under this Agreement. Despite the preceding sentence, none of the following shall be a Discriminatory Action:
  - (i) Laws and Regulations of general application, including an increase of Taxes of general application, or any action of the Government of Ontario pursuant thereto;
  - (ii) any such statute that prior to five (5) Business Days prior to the date of the submission of the Proposal:
    - (A) has been introduced as a bill in the Legislative Assembly of Ontario (including Bill 100 being draft legislation entitled the *Electricity Restructuring Act, 2004*) in a similar form as such statute takes when it has legal effect, provided that any amendments made to such Bill in becoming such statute do not have a Material Adverse Effect on the Supplier; or
    - (B) has been made public in a discussion or consultation paper, press release or announcement issued by the Government of Ontario and/or the Ministry of Energy that appeared on the website of the Government of Ontario and/or the Ministry of Energy, provided that any amendments made to such public form, in becoming such statute, do not have a Material Adverse Effect on the Supplier;
  - (iii) any of such regulations that prior to five (5) Business Days prior to the date that the Supplier submitted its Proposal in accordance with the 2,500 MW RFP:
    - (A) have been published but by the terms of such regulations come into force on or after five (5) Business Days prior to date that the Supplier submitted its Proposal in accordance with the 2,500 MW RFP, or
    - (B) have been referred to in a press release issued by the Government of Ontario and/or the Ministry of Energy that appeared on the website of the Government of Ontario or the Ministry of Energy,

provided that any amendments made to such regulations in coming into force do not have a Material Adverse Effect on the Supplier.

## 12.2 Consequences of Discriminatory Action

If a Discriminatory Action occurs, the Supplier shall have the right to obtain, without duplication, compensation (the “**Discriminatory Action Compensation**”) from the Buyer for:

- (a) the amount of the increase in the costs that the Supplier would reasonably be expected to incur to achieve verifiable Electricity savings which converted to capacity using the methodology specified by the Buyer is equal to or greater than the DSM Project Equivalent Capacity as a direct result of the operation of the Operating Equipment as a result of the occurrence of such Discriminatory Action, commencing on the first day of the first calendar month following the date of the Discriminatory Action and ending at the expiry of the Term, but excluding the portion of any costs charged by a Person who does not deal at Arm’s Length with the Supplier that is in excess of the costs that would have been charged had such Person been at Arm’s Length with the Supplier; and
- (b) the amount by which (i) the net present value of the net savings from the Electricity saved as a direct result of the operation of the Operating Equipment in accordance with this Agreement that are forecast to be saved by the Supplier during the period of time commencing on the first day of the first calendar month following the date of the Discriminatory Action and ending at the expiry of the Term, exceeds (ii) the net present value of the net savings from the Electricity saved as a direct result of the operation of the Operating Equipment that are forecast to be saved by the Supplier during the period of time commencing on the first day of the first calendar month following the date of the Discriminatory Action and ending on the expiry of the Term, taking into account the occurrence of the Discriminatory Action and any actions that the Supplier should reasonably be expected to take to mitigate the effect of the Discriminatory Action, such as by mitigating operating expenses and normal capital expenditures of the business of achieving Electricity savings that expressed as capacity using the conversion methodology specified by the Buyer is equal to or greater than the DSM Project Equivalent Capacity as a direct result of the operation of the Operating Equipment.

## 12.3 Notice of Discriminatory Action

- (a) In order to exercise its rights in the event of the occurrence of a Discriminatory Action, the Supplier must give a notice (the “**Preliminary Notice**”) to the Buyer within sixty (60) days after the date on which the Supplier first became aware (or should have been aware, using reasonable due diligence) of the Discriminatory Action stating that a Discriminatory Action has occurred. Within sixty (60) days after the date of receipt of the Preliminary Notice, the Supplier must give another notice (the “**Notice of Discriminatory Action**”). A Notice of Discriminatory Action must include:
  - (i) a statement of the Discriminatory Action that has occurred;

- (ii) details of the effect of the said occurrence that is borne by the Supplier;
- (iii) details of the manner in which the Discriminatory Action increases the costs that the Supplier would reasonably be expected to incur to achieving Electricity savings that expressed as capacity using the conversion methodology specified by the Buyer is equal to or greater than the DSM Project Equivalent Capacity as a direct result of the operation of the Operating Equipment and adversely affects the revenues of the Supplier; and
- (iv) the amount claimed as Discriminatory Action Compensation and details of the computation thereof.

The Buyer shall, after receipt of a Notice of Discriminatory Action, be entitled, by notice given within thirty (30) days after the date of receipt of the Notice of Discriminatory Action, to require the Supplier to provide such further supporting particulars as the Buyer considers necessary, acting reasonably.

- (b) If the Buyer wishes to dispute the occurrence of a Discriminatory Action, the Buyer shall give a notice of dispute (the “**Notice of Dispute**”) to the Supplier, stating the grounds for such dispute, within thirty (30) days after the date of receipt of the Notice of Discriminatory Action or within thirty (30) days after the date of receipt of the further supporting particulars, as applicable.
- (c) If neither the Notice of Discriminatory Action nor the Notice of Dispute has been withdrawn within thirty (30) days after the date of receipt of the Notice of Dispute by the Supplier, the dispute of the occurrence of a Discriminatory Action shall be submitted to mandatory and binding arbitration in accordance with Section 15.2.
- (d) If the Buyer does not dispute the occurrence of a Discriminatory Action or the amount of Discriminatory Action Compensation claimed in the Notice of Discriminatory Action, the Buyer shall pay to the Supplier the amount of Discriminatory Action Compensation claimed within sixty (60) days after the date of receipt of the Notice of Discriminatory Action. If a Notice of Dispute has been given, the Buyer shall pay to the Supplier the Discriminatory Action Compensation Amount determined in accordance with Section 12.3(e) not later than sixty (60) days after the later of the date on which the dispute with respect to the occurrence of a Discriminatory Action is resolved and the date on which the Discriminatory Action Compensation Amount is determined.
- (e)
  - (i) If the Buyer wishes to dispute the amount of the Discriminatory Action Compensation, the Buyer shall give to the Supplier a notice (the “**Discriminatory Action Compensation Notice**”) setting out an amount that the Buyer proposes as the Discriminatory Action Compensation (the “**Discriminatory Action Compensation Amount**”), if any, together with details of the computation. If the Supplier does not give notice (the “**Supplier Non-acceptance Notice**”) to the Buyer stating that it does not

accept the Discriminatory Action Compensation Amount proposed within thirty (30) days after the date of receipt of the Discriminatory Action Compensation Notice, the Supplier shall be deemed to have accepted the Discriminatory Action Compensation Amount so proposed. If the Supplier Non-acceptance Notice is given, the Buyer and the Supplier shall attempt to determine the Discriminatory Action Compensation Amount through negotiation, and any amount so agreed in writing shall be the Discriminatory Action Compensation Amount. If the Buyer and the Supplier do not agree in writing upon the Discriminatory Action Compensation Amount within sixty (60) days after the date of receipt of the Supplier Non-acceptance Notice, the Discriminatory Action Compensation Amount shall be determined in accordance with the procedure set forth in Section 12.3(e)(ii) and Sections 15.1 and 15.2 shall not apply to such determination.

- (ii) If the negotiation described in Section 12.3(e)(i) does not result in an agreement in writing on the Discriminatory Action Compensation Amount, either the Buyer or the Supplier may, after the later of (A) the date on which a dispute with respect to the occurrence of a Discriminatory Action is resolved and (B) the date of the expiry of a period of thirty (30) days after the date of receipt of the Supplier Non-acceptance Notice, by notice to the other require the dispute to be resolved by arbitration as set out below. The Buyer and the Supplier shall, within thirty (30) days after the date of receipt of such notice of arbitration, jointly appoint a valuator to determine the Discriminatory Action Compensation Amount. The valuator so appointed shall be a duly qualified business valuator where the individual responsible for the valuation has not less than ten (10) years' experience in the field of business valuation. If the Buyer and the Supplier are unable to agree upon a valuator within such period, the Buyer and the Supplier shall jointly make application (provided that if a party does not participate in such application, the other party may make application alone) under the *Arbitration Act, 1991* (Ontario) to a judge of the Superior Court of Justice to appoint a valuator, and the provisions of the *Arbitration Act, 1991* (Ontario) shall govern such appointment. The valuator shall determine the Discriminatory Action Compensation Amount within sixty (60) Business Days after the date of his or her appointment. Pending a decision by the valuator, the Buyer and the Supplier shall share equally, and be responsible for their respective shares of, all fees and expenses of the valuator. The fees and expenses of the valuator shall be paid by the non-prevailing party. "Prevailing party" means the party whose determination of the Discriminatory Action Compensation Amount is most nearly equal to that of the valuator's determination. The Supplier's and the Buyer's respective determinations of the Discriminatory Action Compensation Amount shall be based upon the Notice of Discriminatory Action and the Discriminatory Action Compensation Notice, as applicable.

- (iii) In order to facilitate the determination of the Discriminatory Action Compensation Amount by the valuator, each of the Buyer and the Supplier shall provide to the valuator such information as may be requested by the valuator, acting reasonably, and the Supplier shall permit the valuator and the valuator's representatives to have reasonable access during normal business hours to such information and to take extracts therefrom and to make copies thereof.
- (iv) The Discriminatory Action Compensation Amount as determined by the valuator shall be final and conclusive and not subject to any appeal.
- (f) Any amount to be paid under Section 12.3(d) shall bear interest at a variable nominal rate per annum equal on each day to the Interest Rate then in effect from the date of receipt of the Notice of Discriminatory Action to the date of payment.
- (g) Payment of the Discriminatory Action Compensation and interest thereon by the Buyer to the Supplier shall constitute full and final satisfaction of all amounts that may be claimed by the Supplier for and in respect of the occurrence of the Discriminatory Action and, upon such payment, the Buyer shall be released and forever discharged by the Supplier from any and all liability in respect of such Discriminatory Action.

#### **12.4 Right of the Buyer to Remedy or Cause to be Remedied a Discriminatory Action**

If the Buyer wishes to remedy or cause to be remedied the occurrence of a Discriminatory Action, the Buyer must give notice to the Supplier within thirty (30) days after the later of the date of receipt of the Notice of Discriminatory Action and the date of the receipt by the Buyer of the further supporting particulars referred to in Section 12.3(b). If the Buyer gives such notice, the Buyer must remedy or cause to be remedied the Discriminatory Action within one hundred and eighty (180) days after the date of receipt of the Notice of Discriminatory Action or, if a Notice of Dispute has been given, within one hundred and eighty (180) days after the date of the final award pursuant to Section 15.2 to the effect that a Discriminatory Action occurred. If the Buyer remedies or causes to be remedied the Discriminatory Action in accordance with the preceding sentence, the Supplier shall have the right to obtain, without duplication, the amount that the Supplier would have the right to claim in respect of that Discriminatory Action pursuant to Section 12.2, adjusted to apply only to the period commencing on the first day of the first calendar month following the date of the Discriminatory Action and expiring on the day preceding the day on which the Discriminatory Action was remedied.

### **ARTICLE 13 LIABILITY AND INDEMNIFICATION**

#### **13.1 Exclusion of Consequential Damages**

Notwithstanding anything contained herein to the contrary, neither Party will be liable under this Agreement or under any cause of action relating to the subject matter of this Agreement for any special, indirect, incidental, punitive, exemplary or consequential damages, including loss of profits (save and except as provided in Section 9.5 and Section 12.2) loss of use of any property or claims of customers or contractors of the Parties for any such damages.

### **13.2 Liquidated Damages**

Nothing in this Article shall reduce a Party's right to claim for liquidated damages pursuant to Sections 2.3 and 9.2(b), or for an Early Termination Payment pursuant to Section 9.5. The Supplier acknowledges and agrees with the Buyer that the actual damages incurred by the Buyer and Electricity consumers as a result of a failure by the Supplier to meet its obligations under this Agreement are impossible to definitively quantify and the Supplier further agrees that the payment of the liquidated damages set forth in this Agreement constitutes a fair and reasonable means of compensating the Buyer for damages likely to be incurred as a result of such delays and does not constitute a penalty. The Buyer agrees that the payment of liquidated damages pursuant to Section 9.5 constitutes a fair and reasonable means of compensating the Supplier for such damages likely to be incurred and does not constitute a penalty.

### **13.3 Indemnification**

In addition to the indemnity provided by the Supplier in Section 2.6, the Supplier shall indemnify, defend and hold Ontario Electricity Financial Corporation, the Ontario Power Authority (if created), 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, and agents (including contractors and their employees) (collectively, the "**Indemnitees**") harmless from and against any and all claims, demands, suits, 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 Indemnitees relating to, in connection with, resulting from, or arising out of (i) any occurrence or event relating to the DSM Project except to the extent that any injury or damage is attributable to the negligence or wilful misconduct of the Indemnitees or the failure of the Indemnitees to comply with Laws and Regulations and (ii) any breach by the Supplier of any representations and covenants contained in this Agreement, except to the extent that any injury or damage is attributable to the negligence or wilful misconduct of the Indemnitees. For greater certainty, in the event of contributory negligence or other fault of the Indemnitees, then such Indemnitees shall not be indemnified hereunder in the proportion that the Indemnitees' negligence or other fault contributed to any Indemnifiable Loss.

### **13.4 Defence of Claims**

- (a) Promptly after receipt by the Indemnitees of any Claim or notice of the commencement of any action, administrative or legal proceeding, or investigation as to which the indemnity provided for in Section 13.3 may apply, the Buyer shall notify the Supplier in writing of such fact. The Supplier shall assume the defence thereof with counsel designated by the Supplier and satisfactory to the affected Indemnitees, acting reasonably; provided, however, that if the defendants in any such action include both the Indemnitees and the Supplier and the Indemnitees shall have reasonably concluded that there may be legal defences available to them which are different from or additional to, or inconsistent with, those available to the Supplier, the Indemnitees shall have the right to select separate counsel satisfactory to the Supplier acting reasonably (at

no additional cost to the Indemnitees) to participate in the defence of such action on behalf of the Indemnitees. The Supplier shall promptly confirm that it is assuming the defence of the Indemnitees by providing written notice to the Indemnitees. Such notice shall be provided no later than five days prior to the deadline for responding to any Claim relating to any Indemnifiable Loss.

- (b) Should any of the Indemnitees be entitled to indemnification under Section 13.3 as a result of a Claim by a third party, and the Supplier fails to assume the defence of such Claim (which failure shall be assumed if the Supplier fails to provide the notice prescribed by Section 13.4(a)), the Indemnitees shall, at the expense of the Supplier, contest (or, with the prior written consent of the Supplier, settle) such Claim, provided that no such contest need be made and settlement or full payment of any such Claim may be made without consent of the Supplier (with the Supplier remaining obligated to indemnify the Indemnitees under Section 13.3), if, in the written opinion of an independent third party counsel chosen by the Company Representatives, such Claim is meritorious. If the Supplier is obligated to indemnify any Indemnitees under Section 13.3, the amount owing to the Indemnitees will be the amount of such Indemnitees' actual out-of-pocket loss net of any insurance proceeds received or other recovery.

## **ARTICLE 14 CONTRACT OPERATION AND ADMINISTRATION**

### **14.1 Company Representative**

The Supplier and the Buyer shall each appoint, from time to time, a representative (a “**Company Representative**”), who shall be duly authorized to act on behalf of the Party that has made the appointment, and with whom the other Party may consult at all reasonable times, and whose instructions, requests, and decisions, provided the same are in writing signed by the respective Company Representative, shall be binding on the appointing Party as to all matters pertaining to this Agreement. The Company Representatives shall not have the power or authority to amend this Agreement.

### **14.2 Record Retention; Audit Rights**

The Supplier and the Buyer shall both keep complete and accurate records and all other data required by either of them for the purpose of proper administration of this Agreement. All such records shall be maintained as required by Laws and Regulations but for no less than for seven (7) years after the creation of the record or data. The Supplier and the Buyer, on a confidential basis as provided for in Article 7 of this Agreement, shall provide reasonable access to the relevant and appropriate financial and operating records and data kept by it relating to this Agreement reasonably required for the other Party to comply with its obligations to Governmental Authorities or to verify billings or to verify information provided in accordance with this Agreement. A Party may use its own employees for purposes of any such review of records provided that those employees are bound by the confidentiality requirements provided for in Article 7. Alternatively, a Party may at its own expense appoint an auditor to conduct its audit. The Party seeking access to such records in this manner shall pay the fees and expenses associated with use of the third party auditor.



### **14.3 Reports to the Buyer**

- (a) The Supplier agrees to provide to the Buyer a copy of all reports, plans, and notices that the Supplier is required to provide pursuant to the Measurement and Verification Plan with respect to Operating Equipment Outages, within the same timelines prescribed by the Measurement and Verification Plan.
- (b) The Supplier shall promptly notify the Buyer of any Operating Equipment Outage other than a Planned Outage, or any anticipated Operating Equipment Outage other than a Planned Outage. Any notice under this subsection shall include a statement of the cause of the Forced Outage, the proposed corrective action and the Supplier's estimate of the expected duration of such Outage. The Supplier shall use Commercially Reasonable Efforts to promptly remove or mitigate any such Outage.
- (c) The Supplier shall give the Buyer thirty (30) days prior written notice of any Planned Outage of the Operating Equipment. Any notice under this subsection shall include the Supplier's estimate of the expected duration of the Planned Outage.
- (d) The Supplier agrees to provide the Buyer prior written notice, if possible, of any and all Load Outages, or in the event that prior written notice is not possible, written notice forthwith following the Load Outage, which shall specify:
  - (i) the effect, expressed in MW, that the Load Outage will have on the ability of the Supplier to achieve Electricity savings that expressed as capacity using the conversion methodology specified by the Buyer is equal to or greater than the DSM Project Equivalent Capacity as a direct result of the operation of the Operating Equipment.

### **14.4 Inspection of DSM Project**

- (a) The Buyer and its authorized agents and representatives shall, at all times upon two (2) Business Days' prior notice, at any time after execution of this Agreement, have access to the DSM Project and every part thereof during regular business hours and the Supplier shall and shall cause all personnel operating and managing the DSM Project to furnish the Buyer with all reasonable assistance in inspecting the DSM Project for the purpose of ascertaining compliance with this Agreement; provided that such access and assistance shall be carried out in accordance with and subject to the reasonable safety and security requirements of the Supplier and all personnel operating and managing the DSM Project, as applicable.
- (b) The inspection of the DSM Project by or on behalf of the Buyer shall not relieve the Supplier of any of its obligations to comply with the terms of this Agreement. No Supplier Event of Default by the Supplier will be waived or deemed to have been waived by any inspection by or on behalf of the Buyer. In no event will any inspection by the Buyer hereunder be a representation that there has been or will be compliance with this Agreement and Laws and Regulations.

## 14.5 Inspection Not Waiver

- (a) Failure by the Buyer to inspect the DSM Project or any part thereof under Section 14.4, or to exercise its audit rights under Section 14.2, shall not constitute a waiver of any of the rights of the Buyer hereunder. An inspection or audit not followed by a notice of a Supplier Event of Default shall not constitute or be deemed to constitute a waiver of any Supplier Event of Default, nor shall it constitute or be deemed to constitute an acknowledgement that there has been or will be compliance by the Supplier with this Agreement.
- (b) Failure by the Supplier to exercise its audit rights under Section 14.2 shall not constitute or be deemed to constitute a waiver of any of the rights of the Supplier hereunder. An audit not followed by a notice of a Buyer Event of Default shall not constitute or be deemed to constitute a waiver of any Buyer Event of Default, nor shall it constitute or be deemed to constitute an acknowledgement that there has been or will be compliance by the Buyer with this Agreement.

## 14.6 Notices

All notices pertaining to this Agreement not explicitly permitted to be in a form other than writing shall be in writing and shall be given by facsimile or other means of electronic transmission or by hand or courier delivery. Notwithstanding the foregoing, any notices of an Event of Default and termination of this Agreement shall only be given by hand or courier delivery. Any notice shall be addressed to the other Party as follows:

If to the Supplier: ●

Attention: ●

Facsimile: ●

and to: ●

Attention: ●

Facsimile: ●

(which shall not be required to constitute notice)

If to the Buyer: Ontario Electricity Financial Corporation  
1 Dundas Street West  
Suite 1400  
Toronto, ON M5G 1Z3

Attention: ●

Facsimile : ●

and to: ●

Attention: ●

Facsimile: ●

(which shall not be required to constitute notice)

Notice delivered or transmitted as provided above shall be deemed to have been given and received on the day it is delivered or transmitted, provided that it is delivered or transmitted on a Business Day prior to 5:00 p.m. local time in the place of delivery or receipt. However, if a notice is delivered or transmitted after 5:00 p.m. local time or such day is not a Business Day, then such notice shall be deemed to have been given and received on the next Business Day. Either Party may, by written notice to the other, change its respective Company Representative or the address to which notices are to be sent.

## **ARTICLE 15 MISCELLANEOUS**

### **15.1 Informal Dispute Resolution**

If any dispute arises under or in connection with this Agreement that the Parties cannot resolve, each of the Parties shall promptly advise its senior management, in writing, of such dispute. Within ten (10) Business Days following delivery of such notice, a senior executive (Senior Vice-President or higher) from each Party shall meet, either in person or by telephone (the “**Senior Conference**”), to attempt to resolve the dispute. Each senior executive shall be prepared to propose a solution to the dispute. If, following the Senior Conference, the dispute is not resolved, the dispute may be settled by arbitration pursuant to Section 15.2, if agreed to by both Parties.

### **15.2 Arbitration**

Except as otherwise specifically provided for in this Agreement, any matter in issue between the Parties as to their rights under this Agreement may be decided by arbitration provided, however, that the Parties have first completed a Senior Conference pursuant to Section 15.1. Any dispute to be decided by arbitration will be decided by a single arbitrator appointed by the Parties or, if such Parties fail to appoint an arbitrator within fifteen (15) days following the agreement to refer the dispute to arbitration, upon the application of either of the Parties, the arbitrator shall be appointed by a Judge of the Superior Court of Justice (Ontario) sitting in the Judicial District of Toronto Region. The arbitrator shall not have any current or past business or financial relationships with any Party (except prior arbitration). The arbitrator shall provide each of the Parties an opportunity to be heard and shall conduct the arbitration hearing in accordance with the provisions of the *Arbitration Act, 1991* (Ontario). Unless otherwise agreed by the Parties, the arbitrator shall render a decision within ninety (90) days after the end of the arbitration hearing and shall notify the Parties in writing of such decision and the reasons therefor. The arbitrator shall be authorized only to interpret and apply the provisions of this Agreement and shall have no power to modify or change the Agreement in any manner. The decision of the arbitrator shall be conclusive, final and binding upon the Parties. The decision of the arbitrator may be appealed solely 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 the *Arbitration Act, 1991* (Ontario). The *Arbitration Act, 1991* (Ontario) shall govern the procedures to apply in the enforcement of any award made. If it is necessary to enforce such award, all costs of enforcement shall be payable and paid by the Party against whom such award is enforced. Unless otherwise provided in the arbitral award to the contrary, each Party shall bear (and be solely responsible for) its own costs incurred during the arbitration process, and

each Party shall bear (and be solely responsible for) its equal share of the costs of the arbitrator. Each Party shall be otherwise responsible for its own costs incurred during the arbitration process.

### **15.3 Business Relationship**

Each Party shall be solely liable for the payment of all wages, taxes, and other costs related to the employment by such Party of persons who perform this Agreement, including all federal, provincial, and local income, social insurance, health, payroll and employment taxes and statutorily-mandated workers' compensation coverage. None of the persons employed by either Party shall be considered employees of the other Party for any purpose. 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.

### **15.4 Binding Agreement**

Except as otherwise set out in this Agreement, this Agreement shall not confer upon any other Person, except the Parties and their respective successors and permitted assigns, any rights, interests, obligations or remedies under 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.

### **15.5 Assignment**

- (a) Except as set out below and as provided in Article 11, neither this Agreement nor any of the rights, interests or obligations under this Agreement may be assigned by either Party, including by operation of Laws and Regulations, without the prior written consent of the other Party, which consent shall not be unreasonably withheld.
- (b) The Supplier may, subject to compliance with Laws and Regulations and provided that there is not a Supplier Event of Default that has not been remedied, assign this Agreement without the consent of the Buyer to an Affiliate acquiring the DSM Project; provided, however, that no such assignment by the Supplier or any of its successors or permitted assigns hereunder shall be valid or effective unless and until such Affiliate agrees with the Buyer in writing to assume all of the Supplier's obligations and be bound by the terms of this Agreement, and the arrangements and obligations of the Supplier set forth in Article 5 have been met in accordance with the terms of Article 5. If a valid assignment of this Agreement is made by the Supplier in accordance with this Section 15.5, the Buyer acknowledges and agrees that, upon such assignment and assumption and notice thereof by the assignor to the Buyer, the assignor shall be relieved of all its duties, obligations and liabilities hereunder.
- (c) If the Supplier assigns this Agreement to a non-resident of Canada (the "**Assignee**"), as that term is defined in the ITA, and the Buyer incurs any additional Taxes, at any time thereafter, solely as the result of such assignment, then payments under this Agreement by the Buyer shall be reduced by the amount of such additional or withholding Taxes and the Buyer shall remit such

additional or withholding Taxes to the applicable taxing authorities. The Buyer shall within sixty (60) days after remitting such Taxes, notify the Assignee in writing, providing reasonable detail of such payment so that the Assignee may claim any applicable rebates, refunds or credits from the applicable taxing authorities. If after the Buyer has paid such amounts, the Buyer receives a refund, rebate or credit on account of such Taxes, then the Buyer shall promptly remit such refund, rebate or credit amount to the Assignee.

- (d) If the Ontario Power Authority has been established pursuant to legislation, then the Buyer shall have the unilateral right to assign this Agreement and all benefits and obligations thereunder to the Ontario Power Authority, which shall assume the obligations of the Buyer hereunder and be novated into this Agreement in the place and stead of the Buyer, whereupon Ontario Electricity Financial Corporation shall be relieved of all obligations and liability arising pursuant to this Agreement, provided however, that no assignment to the Ontario Power Authority will be valid or effective unless and until the Ontario Power Authority agrees in writing to assume and be bound by the terms and conditions of this Agreement. Upon such assignment and assumption, the representation set forth in Section 6.2(a) shall apply to the Ontario Power Authority with all necessary amendments to reflect the form and the manner in which the Ontario Power Authority was established, and all of the representations set forth in Section 6.2 shall be deemed to be made by the Buyer to the Supplier at the time of such assignment and assumption.

## **15.6 No Change of Control**

- (a) The Supplier shall not permit or allow a change of Control of the Supplier, except with the prior written consent of the Buyer, which consent may not be unreasonably withheld. It shall not be unreasonable to withhold such consent if the change of Control will have or is likely to have a Material Adverse Effect on the Supplier's ability to perform its obligations under this Agreement, in which case such consent may be withheld by the Buyer.
- (b) For the purposes of Section 15.6(a), a change in ownership of any shares or units of ownership that are listed on a recognized stock exchange shall not constitute a change of Control provided that such listed entity does not have its special or sole purpose the ownership of the DSM Project and other demand-side projects under contract with the Buyer pursuant to the 2,500 MW RFP.

## **15.7 Counterparts**

This Agreement may be executed in two or more counterparts, and all such counterparts shall together constitute one and the same Agreement. It shall not be necessary in making proof of the contents of this Agreement to produce or account for more than one such counterpart. Any Party may deliver an executed copy of this Agreement by facsimile but such Party shall promptly deliver to the other Party an originally executed copy of this Agreement.

### **15.8 Use of Insignia**

The Supplier shall not use any insignia or logo of Her Majesty the Queen in right of Ontario except where required to make available the DSM Project Equivalent Capacity, and only if it has received the prior written permission of the Buyer to do so.

### **15.9 Buyer Right to Set Off**

- (a) In addition to its other rights of set-off under this Agreement or otherwise arising in law or equity, the Buyer may set off any amounts owing by the Supplier to the Buyer in connection with Sections 2.3, 2.7(a), 3.3, 9.2, 9.5 and 13.3 against any monies owed by the Buyer to the Supplier in connection with Sections 3.2, 3.4, 3.5, 4.5, 9.5 and 12.3(d).
- (b) In addition to its other rights of set-off under this Agreement or otherwise arising in law or equity, the Supplier may set-off any amounts owing by the Buyer to the Supplier in connection with Sections 3.2, 3.4, 3.5, 4.5, 9.5 and 12.3(d) against any monies owed by the Supplier to the Buyer in connection with Sections 2.3, 2.7(a), 3.3, 9.2, 9.5 and 13.3.

### **15.10 Rights and Remedies Not Limited to Contract**

Unless expressly provided in this Agreement, the express rights and remedies of the Buyer or the Supplier set out in this Agreement are in addition to and shall not limit any other rights and remedies available to the Buyer or the Supplier, respectively, at law or in equity.

### **15.11 Time of Essence**

Time is of the essence in the performance of the Parties' respective obligations under this Agreement.

### **15.12 Further Assurances**

Each of the Parties shall, from time to time on written request of the other Party, do all such further acts and execute and deliver or cause to be done, executed or delivered all such further acts, deeds, documents, assurances and things as may be reasonably required in order to fully perform and to more effectively implement and carry out the terms of this Agreement. The Parties agree to promptly execute and deliver any documentation required by any Governmental Authority in connection with any termination of this Agreement.

**IN WITNESS WHEREOF**, and intending to be legally bound, the Parties have executed this Agreement by the undersigned duly authorized representatives as of the date first stated above.

●

**ONTARIO ELECTRICITY FINANCIAL CORPORATION**

By: \_\_\_\_\_

Name: ●

Title: ●

By: \_\_\_\_\_

Name: ●

Title: ●

I/We have authority to bind the ●

By: \_\_\_\_\_

Name: ●

Title: ●

By: \_\_\_\_\_

Name: ●

Title: ●

We have authority to bind the Corporation.

**EXHIBIT A**  
**SUMMARY OF THE DSM PROJECT**

Project Name: \_\_\_\_\_

The Supplier [**Note to finalization: Insert “is” or “is not”**] aggregating two (2) or more Loads in the DSM Project.

DSM Project Location: \_\_\_\_\_



**EXHIBIT B  
DSM CONTRACT VALUES**

DSM Contract Values	Estimated or Calculated Values
<b>DSM Project Equivalent Capacity</b> <sup>1</sup>	_____MW
<b>DSM Project Annual Electricity Savings</b> <sup>1</sup>	_____kWh/year
<b>Net Revenue Requirement</b> <sup>3</sup>	\$ . /MW-month
<b>NRR(Simple Payback Period) (Proposal)</b> <sup>2</sup>	\$ . /MW-month
<b>NRR(Simple Payback Period) (COD)</b> <sup>3</sup>	\$ . /MW-month
<b>NRR(Variable Costs)</b> <sup>2</sup>	\$ . /MW-month
<b>DSM Incremental Capital Costs</b> <sup>1</sup>	\$ _____
<b>Actual Incremental Capital Costs</b> <sup>3</sup>	\$ _____
<b>Average Cost of Electricity (Proposal)</b> <sup>1</sup>	\$ _____/kWh
<b>Average Cost of Electricity (COD)</b> <sup>3</sup>	\$ _____/kWh
<b>Simple Payback Period (Proposal)</b> <sup>2</sup>	_____(years)
<b>Simple Payback Period (COD)</b> <sup>3</sup>	_____(years)

**Notes:**

<sup>1</sup> As set out by the Supplier in the Proposal.

<sup>2</sup> As calculated based on the information provided by the Supplier in the Proposal.

<sup>3</sup> As calculated in accordance with the Agreement as of the Commercial Operation Date.

**EXHIBIT C**  
**FORM OF IRREVOCABLE STANDBY LETTER OF CREDIT**

DATE OF ISSUE: ●

APPLICANT: ●

BENEFICIARY: Ontario Electricity Financial Corporation (or, Ontario Power Authority, if created)

AMOUNT: ●

EXPIRY DATE: ●

EXPIRY PLACE: Counters of the issuing financial institution

CREDIT RATING: **[Insert credit rating only if the issuer is not a financial institution listed in either Schedule I or II of the Bank Act]**

TYPE: IRREVOCABLE AND UNCONDITIONAL STANDBY LETTER OF CREDIT

Number:

We hereby authorize you to draw on **[insert name of financial institution and financial institution's address]** in respect of irrevocable standby letter of credit No. \_\_\_\_\_ (the “**Credit**”), for the account of the Applicant up to an aggregate amount of \$● (● Canadian dollars) available by your drafts at sight, accompanied by the Beneficiary’s signed certificate stating that:

“The Applicant has defaulted under the DSM Contract between the Beneficiary and **[insert name of Supplier]**, and therefore the Beneficiary is entitled to draw upon the Credit in the amount of the draft attached hereto.”

Drafts drawn hereunder must bear the clause “Drawn under irrevocable and unconditional Standby Letter of Credit No. **[insert number]** issued by **[the financial institution]** dated **[insert date]**”.

Partial drawings are permitted.

This Credit is issued in connection with the Demand-Side Management Contract dated **[insert date]** between the Beneficiary and **[insert name of Supplier]** (the “DSM Contract”).

This Letter of Credit will automatically extend for additional, successive terms of one (1) year each, unless the undersigned provides the Beneficiary with written notice, at least sixty (60) days prior to the expiration date, that it does not wish to extend the Irrevocable Letter of Credit for an additional period.

We engage with you that all drafts drawn under, and in compliance with the terms of this Credit will be duly honoured, if presented at the counters of **[insert the financial institution and financial institution's address, which must be located in Toronto, Ontario]** at or before 5:00 pm (EST) on **[insert the expiry date]**.

This irrevocable standby letter of credit is subject to the International Standby Practices ISP 98, International Chamber of Commerce publication No. 590 and, as to matters not addressed by the ISP 98, shall be governed by the laws of the Province of Ontario and applicable Canadian Federal Law, and the parties hereby irrevocably agree to attorn to the non-exclusive jurisdiction of the courts of the Province of Ontario.

The Beneficiary may transfer this Letter of Credit without the consent of the Applicant or the issuing financial institution.

- END -

**[Insert name of Financial Institution]**

By:

---

Authorized Signatory

## **EXHIBIT D GUARANTEE**

THIS GUARANTEE dated as of ● is made and entered into between ●, a corporation incorporated under the laws of ● (the “Guarantor”), and Ontario Electricity Financial Corporation (the “Buyer”).

### RECITALS:

- A. The Buyer and ●, a ● ● corporation incorporated under the laws of ● (“Supplier”), have entered into a DSM Contract dated as of ● (as extended, amended, replaced and supplemented, collectively, the “Agreement”);
- B. The Guarantor will directly or indirectly benefit from the Agreement;
- C. Pursuant to the terms of the Agreement, the Buyer has required that the Guarantor shall deliver a guarantee of all payment obligations of Supplier under the Agreement to the Buyer; and
- D. Capitalized terms used in this Guarantee but not otherwise defined herein have the meanings ascribed to it in the Agreement.

**NOW THEREFORE** for good and valuable consideration (the receipt and sufficiency of which are hereby acknowledged) the Guarantor hereby agrees as follows:

### **1. Guarantee**

Subject to the terms and conditions hereof, the Guarantor absolutely, irrevocably and unconditionally guarantees to the Buyer the full and timely payment when due, whether at stated maturity, by acceleration or otherwise, of the payment obligations of Supplier set forth in the Agreement from time to time and interest thereon accrued as provided in the Agreement, irrespective of when such obligations were incurred (the “Guaranteed Obligations”); provided, however, that the applicable rate of interest shall never exceed the maximum rate permitted by law. The aggregate amount of the Guarantor’s liability under this Guarantee shall not exceed ● CANADIAN DOLLARS (Cdn. \$●) (the “Maximum Guarantee Amount”), plus reasonable legal fees and expenses payable by the Guarantor as provided herein. To the extent that Supplier fails to pay any Guaranteed Obligation, the Guarantor shall promptly pay to the Buyer the amount due. The Guarantor shall also be liable for all reasonable out-of-pocket expenses (including the legal fees and expenses of the Buyer) incurred to collect or enforce any of the Guaranteed Obligations; provided however, that such legal fees and expenses shall be payable by the Guarantor only to the extent that the Buyer is successful in enforcing the Guaranteed Obligations. This Guarantee shall be a continuing guarantee effective during the term of the Agreement and until fulfillment of, including payment in full of, the Guaranteed Obligations.

### **2. Demand**

The Guarantor’s obligation to make payment under this Guarantee shall arise forthwith after demand for payment has been received by the Guarantor from the Buyer in writing in accordance with Section 11 hereof and the Guarantor’s liability for the Guaranteed Obligations shall bear

interest in accordance with the terms and conditions set forth in the Agreement. The only condition (and no other document, proof or action other than as specifically provided in this Guarantee is necessary as a condition) of the Guarantor honouring its obligations under this Guarantee shall be such demand for payment. No notice of the Guaranteed Obligations need be given in any form to the Guarantor at any time and the Guarantor waives any such notice and the right to consent to the Guaranteed Obligations. In the event that any payment to the Buyer in respect to any Guaranteed Obligations is rescinded or must otherwise be returned for any reason whatsoever, including the insolvency or bankruptcy of Supplier or otherwise, the Guarantor shall remain liable hereunder in respect to such Guaranteed Obligations as if such payment had not been made.

### **3. Waivers**

- (a) The Guarantor waives any right to require as a condition to its obligations hereunder that:
  - (i) collateral be applied to the Guaranteed Obligations;
  - (ii) an action be brought against Supplier or any Person other than the Guarantor should the Buyer seek to enforce the obligations of the Guarantor;
  - (iii) a judgment be rendered against Supplier or any Person other than the Guarantor;
  - (iv) Supplier or any other Person be joined in any action against the Guarantor;
  - (v) an action separate from one against the Guarantor be brought against Supplier or any other Person or under any other security or guarantee held by the Buyer; and
  - (vi) any Supplier Event of Default under the Agreement has occurred.
- (b) The Guarantor further waives:
  - (i) all defenses, set-offs, counterclaims, estoppels or privileges which might but for this provision exonerate or discharge it from its obligations hereunder; and
  - (ii) notice of acceptance of this Guarantee, notice of any liability to which it may apply, presentment, demand, protest and notice of dishonour, non-payment or non-performance and marshalling of assets.
- (c) The obligations of the Guarantor hereunder shall in no way be affected or impaired by reason, and the Guarantor waives its right to prior notice, of the happening from time to time of any of the following:
  - (i) any invalidity or unenforceability of all or any part of the Guaranteed Obligations or any agreement or instrument relating to or securing the Guaranteed Obligations;

- (ii) any insolvency, bankruptcy, reorganization, or dissolution, or any proceeding of Supplier or any other guarantor, including without limitation, rejection of the Guaranteed Obligations in such bankruptcy;
- (iii) extensions (whether or not material) of the time for payment or performance of all or any portion of the Guaranteed Obligations;
- (iv) the modification or amendment in any manner (whether or not material) of the Agreement or the Guaranteed Obligations;
- (v) subject to applicable statutes of limitations, any failure, delay or lack of diligence on the part of the Buyer or any other Person to enforce, assert or exercise any right, privilege, power or remedy conferred on the Buyer or any Person in the Agreement or at law, or any action on the part of the Buyer or such other Person granting an indulgence or extension of any kind;
- (vi) the settlement or compromise of any Guaranteed Obligations;
- (vii) the change of status, composition, structure or name of Supplier, including by reason of merger, amalgamation, continuance, dissolution; reorganization or consolidation with or into another legal entity;
- (viii) the release or waiver, by operation of law or otherwise, of the performance or observance by Supplier of any express or implied covenant, term or condition in the Agreement or the enforceability of any covenant, term or condition thereof;
- (ix) the release or waiver, by operation of law or otherwise, of the performance or observance by any co-guarantor, surety, endorser or other obligor of any express or implied covenant, term or condition to be performed or observed by it under the Agreement or any related document;
- (x) the failure to acquire, perfect or maintain perfection of any lien on, or security interest in, any collateral provided by Supplier to the Buyer or the release of any such collateral or the release, modification or waiver of, or failure to enforce, any pledge, security, guarantee, surety or other indemnity agreement in respect of such collateral;
- (xi) the assignment of the Agreement and/or any rights thereunder from or by Supplier to any other Person; and
- (xii) any other circumstance similar, or having a similar effect, as those set out in subsections 3(c)(i) through (xi) inclusive, which might constitute in whole or in part a defence available to the release and discharge of this Guarantee.

#### **4. Limitation of Liability**

The Guarantor shall not be liable hereunder for any special, consequential, incidental, punitive, exemplary or indirect damages, including loss of use of any property or claims of customers of Supplier or the Buyer, except to the extent specifically provided in the Agreement to be due from Supplier.

#### **5. Indemnity**

The Guarantor hereby indemnifies and saves the Buyer harmless from and against any and all damages, losses, costs and expenses of any nature whatsoever resulting from or in consequence of any default, non-payment or non-performance by Supplier of its payment obligations under the Agreement, irrespective of when such obligations were incurred, including its obligations to pay interest as provided in the Agreement and all reasonable out-of-pocket expenses (including legal fees and expenses incurred to collect or enforce the Agreement); provided however, that the maximum amount recoverable under the foregoing indemnity and otherwise under this Guarantee shall be an amount equal to the Maximum Guarantee Amount. In addition, the Guarantor shall also be liable to the Buyer for all reasonable out-of-pocket expenses (including legal fees and expenses of the Buyer) incurred to collect or enforce this indemnity; provided however, that such legal fees and expenses shall be payable by the Guarantor only to the extent that the Buyer is successful in enforcing the indemnity provided herein. Any payment made pursuant to this section 5 shall be reduced by any amount that is fully and indefeasibly paid by the Guarantor to the Buyer pursuant to its obligations under section 1 hereof.

#### **6. Release of Guarantee**

If Section 5.2(d) of the Agreement is applicable, then upon request by the Supplier, the Buyer shall promptly return this Guarantee to the Guarantor and the Guarantor shall be released and discharged of its obligations hereunder with respect to any Guaranteed Obligations existing or arising after the date that Section 5.2(d) of the Agreement is applicable.

#### **7. Defences**

The Guarantor reserves the right to assert all rights, setoffs, counterclaims and other defences of Supplier relating to the Guaranteed Obligations, other than defences arising out of the bankruptcy, insolvency, dissolution or liquidation of Supplier.

#### **8. Subrogation**

The Guarantor shall not be or claim to be subrogated, in whole or in part, to the rights of the Buyer against Supplier under the Agreement or otherwise, until (a) the Buyer shall have received full and indefeasible payment of all Guaranteed Obligations; and (b) either the Agreement has been terminated or this Guarantee has been terminated pursuant to the terms hereof and the terms and conditions of the Agreement as applicable. Except as set out in this section 8, nothing contained in this Guarantee shall limit the rights at law and in equity of the Guarantor to subrogation.

## 9. Representations

The Guarantor represents that:

- (a) it is a [**corporation duly incorporated**] and existing under the laws of the Province of [**Ontario**] [*Note to Finalization: Reflect form and jurisdiction of Guarantor*] and has the corporate power and capacity to enter into this Guarantee and to perform its obligations hereunder;
- (b) this Guarantee has been duly authorized, executed and delivered by the Guarantor and is a valid and binding obligation of the Guarantor enforceable in accordance with its terms;
- (c) no declaration, filing or registration with, or notice to, or licence, permit, certificate, registration, authorization, consent or approval of or from, any Governmental Authority is necessary or required for the consummation by the Guarantor of the transaction contemplated by this Guarantee; and
- (d) the execution and delivery of this Guarantee and performance of its obligations hereunder do not conflict with or result in a breach of its constating documents or by-laws, any applicable law, rule or regulation, any judgment, order, contractual restriction or agreement binding on it or affecting its properties.

## 10. No Waiver by the Buyer

No failure on the part of the Buyer to exercise, and no delay in exercising, any right, remedy or power hereunder shall operate as a waiver thereof, nor shall any single or partial exercise by the Buyer of any right, remedy or power hereby granted to the Buyer or allowed it by law or other agreement shall be cumulative and not exclusive of any other, and may be exercised by the Buyer from time to time. No term, condition or provision hereof or any right hereunder or in respect hereof shall be, or shall be deemed to have been, waived by the Buyer except by express written waiver signed by the Buyer, all such waivers to extend only to the particular circumstances therein specified.

## 11. Notices

Any notice or other communication required or permitted to be given hereunder shall be in writing and shall be sufficiently given if transmitted by facsimile or delivered by hand or courier delivery:

- (a) if to the Buyer, to:

Ontario Electricity Financial Corporation  
1 Dundas Street West  
Suite 1400  
Toronto, ON M5G 1Z3

Attention: ●  
Facsimile: ●



(b) if to the Guarantor, to:

●

Attention: ●

Facsimile: ●

Notice delivered or transmitted as provided above shall be deemed to have been given and received on the day it is delivered or transmitted, provided that it is delivered or transmitted on a Business Day prior to 5:00 p.m. local time in the place of delivery or receipt. However, if a notice is delivered or transmitted after 5:00 p.m. local time or such day is not a Business Day, then such notice shall be deemed to have been given and received on the next Business Day. Either Party may, by written notice to the other, change its address to which notices are to be sent.

## **12. Governing Law**

This Guarantee shall be governed by the laws of the Province of Ontario and the laws of Canada applicable therein. The Guarantor agrees that any suit, action or proceeding against the Guarantor arising out of or relating to this Guarantee against it may be brought in any court in the Province of Ontario and the Guarantor irrevocably and unconditionally attorns and submits to the non-exclusive jurisdiction of such courts. The Guarantor irrevocably waives and agrees not to raise any objection it might now or hereafter have to the bringing of any such suit, action or proceeding in any such court, including any objection that the place where such court is located is an inconvenient forum or that there is any other suit, action or proceeding in any other place relating in whole or in part to the same subject matter. The Guarantor agrees that any judgment or order in any such suit, action or proceeding brought in such a court shall be conclusive and binding upon it and consents to any such judgment or order being recognized and enforced in the courts of its jurisdiction of incorporation or any other courts, by registration of such judgment or order, by a suit, action or proceeding upon such judgment or order, or any other means available for enforcement of judgments or orders, at the option of the Buyer, provided that service of any required process is effected upon it as permitted by applicable law. Nothing in this paragraph shall restrict the bringing of any such suit, action or proceeding in the courts of any other jurisdiction.

## **13. Severability**

Each of the provisions contained in this Guarantee is distinct and severable and a declaration of invalidity or unenforceability of any such provision or part thereof by a court of competent jurisdiction shall not affect the validity or enforceability of any other provision of this Guarantee.

## **14. Entire Agreement**

This Guarantee constitutes the entire agreement between the parties pertaining to the subject matter of this Guarantee. There are no warranties, conditions, representations or agreements in connection with such subject matter except as specifically set forth or referred to in this Guarantee.

**15. Binding and Assignment**

- (a) This Guarantee and all of the provisions hereof shall be binding upon and ensure to the benefit of the parties and their respective successors and permitted assigns. This Guarantee is not intended to confer upon any other Person, except the parties and their respective successors and permitted assigns, any rights, interests, obligations or remedies under this Guarantee.
- (b) Neither this Guarantee nor any of the rights, interests or obligations under this Guarantee shall be assigned by either party without the prior written consent of the other party. Notwithstanding the foregoing, if the Ontario Power Authority has been established pursuant to legislation and assigns the Agreement to the Ontario Power Authority, the Buyer may assign this Guarantee to the Ontario Power Authority without the consent of the Guarantor.

**16. Facsimile and Counterparts**

The parties may deliver an executed copy of this Guarantee by facsimile and this Guarantee may be executed and delivered by the parties in counterparts. All such facsimiles and counterparts shall together constitute one and the same agreement.

**IN WITNESS WHEREOF**, the parties hereto have duly executed this Guarantee as of the day and year first above written.

**[GUARANTOR]**

**ONTARIO ELECTRICITY FINANCIAL CORPORATION**

By: \_\_\_\_\_

Name: ●

Title: ●

By: \_\_\_\_\_

Name: ●

Title: ●

By: \_\_\_\_\_

Name: ●

Title: ●

By: \_\_\_\_\_

Name: ●

Title: ●

I/We have the authority to bind the Guarantor.

I/We have the authority to bind the Corporation.

**EXHIBIT E  
FORM OF CERTIFICATE OF INCUMBENCY**

**CERTIFICATE OF INCUMBENCY**

I, the undersigned, do hereby certify for and on behalf of ● (the “Supplier”) [*Note to Finalization: Amend to suit legal form of Supplier, if necessary.*] in my capacity as an officer of the Supplier, and not in my personal capacity, that the following persons are duly appointed directors or officers of the Supplier holding the respective offices set opposite their names and that the signatures set forth opposite their names are their genuine signatures:

*[Note to Finalization: Add additional rows as necessary]*

Name	Office	Signature
●	●	●
●	●	●

and [*Note to Finalization: Insert the appropriate name(s) from the above list*] has/have the authority to execute the DSM Contract dated as of ● 200● (the “Agreement”) between the Supplier and the Buyer and any other related document under the Agreement.

DATED this ● day of ●, 200●

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Name: ●  
Title: Secretary

I, ● [*insert name*], being the ● [*President*] of the Supplier hereby certify that ● is the duly appointed Secretary of the Supplier and that the signature appearing beside his or her name above is his or her genuine signature.

DATED this ● day of ●, 200●

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●  
●

**EXHIBIT F**  
**MILESTONE EVENTS AND MILESTONE DATES FOR THE DSM PROJECT**

NO.	MILESTONE EVENT	MILESTONE DATE (dd/mm/yyyy)
1.	Equipment Ordered	
2.	Equipment Delivered	
3.	If the DSM Project requires the participation of third party loads, delivery to the Buyer of a certificate addressed to it from the DSM Verification Consultant, stating that the Supplier has executed DSM Third Party Agreements as collectively represent 80% of the DSM Project Equivalent Capacity, which shall occur no later than one year prior to the milestone for Commercial Operation.	
4.	Commercial Operation, which must be on or before December 31, 2007	

Note: Only the dates corresponding to those Milestone Events numbered 1 and 2 are subject to revision by the Supplier in writing from time to time.

**EXHIBIT G  
RECORDS UNDER FIPPA**

<b>Specific Inclusions to and Exclusions from the Definition of “Records” under FIPPA</b>
The following shall be included in the definition of Records under the Agreement: <ul style="list-style-type: none"><li>●</li></ul>
The following shall not be included in the definition of Records under the Agreement: <ul style="list-style-type: none"><li>●</li></ul>

**EXHIBIT H**  
**2,500 MW RFP**

*[Attach 2,500 MW RFP]*

**EXHIBIT I  
PROPOSAL**

*[Attach Proposal]*

## **EXHIBIT J CALCULATION OF CSP**

This Exhibit J sets out the methodology for determining the Contingent Support Payment to be paid in respect of Settlement Months commencing at various points in time during the Term.

**Section A.** For each Settlement Month that commences during the Stub Period, the calculation of CSP will be based on the values submitted by the Supplier in Exhibit B, subject to any applicable adjustment to NRR(Simple Payback Period) pursuant to Section A.1.1.1 below. The calculation of CSP for all such Settlement Months involves two stages, which are described in greater detail in Section A below:

**(Stage I)** Determine the NRR(Simple Payback Period)

**(Stage II)** Determine the CSP for the Settlement Month

**Section B.** For each Settlement Month that commences on or after the Equivalent Capacity Benchmark Date, but prior to the Initial Capacity Confirmation Date, the CSP will be calculated based on the NRR(Simple Payback Period) determined in accordance with Section A. and the values submitted by the Supplier in Exhibit B, subject to any applicable adjustments for Actual Variable Costs pursuant to Section B.1.1.1 below. The calculation of CSP for all such Settlement Months involves two stages, which are described in greater detail in Section B below:

**(Stage I)** Determine the amount of any applicable Payment Adjustments

**(Stage II)** Determine the CSP for the Settlement Month

**Section C.** For each Settlement Month that commences on or after the Initial Capacity Confirmation Date, the determination of the Contingent Support Payment will be calculated based on the NRR(Simple Payback Period) determined in accordance with Section A. and the values submitted by the Supplier in Exhibit B, subject to any applicable adjustment for Actual Variable Costs determined in accordance with Section C.2.2.1 below and any applicable adjustment for Actual Project Equivalent Capacity pursuant to Section C.2.2.2 below. The calculation of CSP for all such Settlement Months involves three stages, which are described in greater detail in Section C below:

**(Stage I)** Determine the Actual Project Equivalent Capacity

**(Stage II)** Determine the amount of any applicable Payment Adjustments

**(Stage III)** Determine the CSP for the Settlement Month

Notwithstanding the foregoing, during such time as the Supplier is unable to perform or comply with all or a portion of its obligations under this Agreement as a result of a Force Majeure (as set out in Article 10), no calculations pursuant to this Exhibit J shall be made, and no amounts shall be payable in respect of such time.



**A. ALL SETTLEMENT MONTHS THAT COMMENCE DURING THE STUB PERIOD**

**1. STAGE I - DETERMINE THE NRR(SIMPLE PAYBACK PERIOD)**

NRR is comprised of two components: (1) the NRR(Simple Payback Period), which is intended to be the monthly payment amount that is required by the Supplier to reduce the Simple Payback Period to three years, and (2) the NRR(Variable Costs), which is intended to be the average monthly amount required by the Supplier to cover the Variable Costs of the DSM Project over the Term. The NRR(Simple Payback Period), which will be fixed in accordance with Section A.1.1.1 below, may be subject to audit by the Buyer in accordance with the terms of this Agreement.

The NRR (Variable Costs) will be fixed at the amount set out in Exhibit B, and during the Stub Period, no Payment Adjustment shall be made in respect of Actual Variable Costs.

**1.1 Determine the Simple Payback Period and NRR(Simple Payback Period)**

The Supplier acknowledges that each of the Simple Payback Period (Proposal) and the NRR(Simple Payback Period) (Proposal) as calculated using the methodology set out in Section 1 of Exhibit Q based on the information provided by the Supplier in the Proposal has been transcribed into Exhibit B as of the date of this Agreement.

Each of the Simple Payback Period (COD) and the NRR(Simple Payback Period) (COD) shall be calculated as of the Commercial Operation Date using the methodology set out in Section 2 of Exhibit Q based on the Actual Incremental Capital Costs as set out in the DSM Verification Certificate – Commercial Operation delivered by the Supplier.

If the calculation of the Simple Payback Period (COD) results in a Simple Payback Period (COD) of three years or less, then the Buyer shall have the right to terminate this Agreement.

If the DSM Project has a Simple Payback Period (COD) greater than three years, but the calculation of NRR(Simple Payback Period) (COD) results in an NRR(Simple Payback Period) (COD) that is less than the NRR(Simple Payback Period) (Proposal) set out in Exhibit B, then the NRR(Simple Payback Period) that will be used for any calculations during the Term shall be fixed at the lesser amount. If the calculation of NRR(Simple Payback Period) (COD) results in an NRR(Simple Payback Period) (COD) that is greater than or equal to the NRR(Simple Payback Period) (Proposal) set out in Exhibit B, then the NRR(Simple Payback Period) that will be used for any calculations during the Term shall be fixed at the NRR(Simple Payback Period) (Proposal).

**2. STAGE II – DETERMINE THE CSP FOR A SETTLEMENT MONTH**

For each Settlement Month that commences during the Stub Period, the CSP shall be calculated as follows:

<b><math>CSP = CSP_{SPP} + CSP_{VC}</math></b>	
where:	
<b>CSP</b>	is the Contingent Support Payment (in \$-month).
<b><math>CSP_{SPP}</math></b>	is the portion of the Contingent Support Payment that relates to $NRR_{SPP(T)}$ and is calculated as follows: $CSP_{SPP} = DSMPEC \times NRR_{SPP(T)}$ (in \$-month).
<b><math>CSP_{VC}</math></b>	is the portion of the Contingent Support Payment that relates to $NRR_{VC}$ and is calculated as follows: $CSP_{VC} = DSMPEC \times NRR_{VC}$ (in \$-month).
<b>DSMPEC</b>	is the DSM Project Equivalent Capacity as set out in Exhibit B (in MW).
<b><math>NRR_{SPP(T)}</math></b>	is the NRR(Simple Payback Period) to be applied during the Term, as calculated in accordance with Section A.1.1.1 above. The $NRR_{SPP(T)}$ shall not be greater than the NRR(Simple Payback Period) set out in Exhibit B (in \$/MW-month).
<b><math>NRR_{VC}</math></b>	is the NRR(Variable Costs) set out in Exhibit B (in \$/MW-month).

**NOTE:** If the first Settlement Month of the Stub Period is a partial month, then the CSP payable for such partial month shall be determined by multiplying the CSP calculated in accordance with the above methodology by the following fraction:

$$\frac{\# \text{ of days from Commercial Operation Date to last day of first Settlement Month}}{\# \text{ of days in the first Settlement Month}}$$

**B. ALL SETTLEMENT MONTHS THAT COMMENCE ON OR AFTER THE EQUIVALENT CAPACITY BENCHMARK DATE, BUT PRIOR TO THE INITIAL CAPACITY CONFIRMATION DATE**

**1. STAGE I - DETERMINE THE AMOUNT OF ANY APPLICABLE PAYMENT ADJUSTMENT**

For each Settlement Month that commences on or after the Equivalent Capacity Benchmark Date, an adjustment shall be made to the calculation of CSP (the “Total Payment Adjustment”) to account for any payments during each Settlement Month in the immediately preceding Settlement Period (being Settlement Period (x-1)) that were either greater than or less than the payments that would have been made during each Settlement Month in such Settlement Period had the payments been based on the Actual Variable Costs for the Settlement Period (x-1) (with the variance for such Settlement Months being a “Payment Variation”). The Total Payment Adjustment to be made to the calculation of CSP for Settlement Months that commence on or after the Equivalent Capacity Benchmark Date, but prior to the Initial Capacity Confirmation Date, shall relate to the Actual Variable Costs incurred by the Supplier and is intended to enable: (i) the Buyer to recover from the Supplier all prior CSP amounts that exceeded the amount that the Supplier would have received had the calculation of CSP been based on Actual Variable Costs for the Settlement Period (x-1), and (ii) to compensate the Supplier for any underpayment, subject to restrictions described below, by the Buyer had the calculation of CSP been based on the Actual Variable Costs for the Settlement Period (x-1).

**1.1 Determine the amount of the Payment Variation for Actual Variable Costs in the Settlement Period (x-1)**

An adjustment to CSP in respect of Actual Variable Costs shall be made if there is a Payment Variation between the payments made by the Buyer in respect of Variable Costs during the Settlement Period (x-1) and the Actual Variable Costs incurred by the Supplier during such Settlement Period. If the Actual Variable Costs for the Settlement Period (x-1) as verified by the DSM Verification Consultant demonstrate that the amount paid to the Supplier on account of  $CSP_{vc}$  during the Settlement Period (x-1) was not equal to the amount that the Supplier would have received had the calculation on CSP been based on Actual Variable Costs, the CSP for Settlement Months in the Settlement Period (x) will be adjusted by the amount of the variance in the Settlement Period (x-1), subject to certain restrictions set out below.

The amount of the Payment Variation relating to Variable Costs for the Settlement Period (x-1) to be used in the calculation of CSP for Settlement Months in the Settlement Period (x) shall be determined pursuant to the following methodology:

<b><math>PV_{SPx-1(VC)} = (DSMPEC \times NRR_{VC}) - (AVC_{SPx-1} / M_{SPx-1})</math></b>	
where:	
$PV_{SPx-1(VC)}$	is the Payment Variation based on review of the Actual Variable Costs incurred by the Supplier during Settlement Period (x-1), which shall be expressed in Dollars, and represents, for each of the Settlement Months commencing in Settlement Period (x-1): (i) if it is a positive number, the overpayment by the Buyer to the Supplier, or (ii) if it is a negative number, the underpayment by the Buyer to the Supplier.
$DSMPEC$	is the DSM Project Equivalent Capacity set out in Exhibit B (in MW).
$NRR_{VC}$	is the NRR(Variable Costs) set out in Exhibit B (in \$/MW-month).
$AVC_{SPx-1}$	is the total Actual Variable Costs incurred by the Supplier during the Settlement Period (x-1), which shall be expressed in Dollars.
$M_{SPx-1}$	is the number of Settlement Months in the Settlement Period (x-1).

**1.2 Determine the amount of any Residual Payment Adjustment**

It may be necessary to apply a further adjustment to the CSP in order to capture any Residual Payment Adjustments from the Settlement Period (x-1) that remain outstanding at the commencement of Settlement Period (x) given that the Total Payment Adjustment cannot be applied so as to reduce CSP below zero within any Settlement Month. The amount of the Residual Payment Adjustment to be carried forward from Settlement Period (x-1), is defined as follows:

$RPA_{SPx-1}$	is the Residual Payment Adjustment for each Settlement Month commencing in Settlement Period (x-1) and will be set in Section B.2 (in \$).
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**1.3 Determine the Total Payment Adjustment Including Compound Interest**

The Total Payment Adjustment to be applied to the CSP for Settlement Months in the Settlement Period (x) shall be determined as follows:

<b><math>TPA_{SPx} = (PV_{SPx-1(VC)} + RPA_{SPx-1}) \times IM</math></b>	
where:	
$TPA_{SPx}$	is the Total Payment Adjustment to be applied to the CSP for all Settlement Months commencing during the Settlement Period (x) to account for any outstanding Payment Variations in respect of any prior period during the Term (in \$).

$PV_{SPx-1(VC)}$	is the Payment Variation determined in accordance with Section B.1.1.1 above (in \$/month).
$RPA_{SPx-1}$	is the Residual Payment Adjustment determined in accordance with Section B.1.1.2 above (in \$).
$M_{SPx}$	is the number of Settlement Months in the Settlement Period (x).
$M_{SPx-1}$	is the number of Settlement Months in the Settlement Period (x-1).
<b>IM</b>	<p>is the Interest Multiplier, being the factor to convert the amount of overpayment or underpayment made during each Settlement Month of the Settlement Period (x-1) into the amount of adjustment to be made during each Settlement Month of the Settlement Period (x), on the basis that interest shall accrue on such overpayment or underpayment at the Interest Rate in effect as of the first day of the Settlement Period (x) and shall be compounded monthly, in arrears. The Interest Multiplier is based on formulae for calculating present values and future values of annuities, and is calculated as follows:</p> $IM = \frac{(1 + \text{Interest Rate}/12)^{M_{SPx-1}} - 1}{1 - (1 + \text{Interest Rate}/12)^{-M_{SPx}}}$

**2. STAGE II – DETERMINE THE CSP FOR A SETTLEMENT MONTH**

For each Settlement Month that commences on or after the Equivalent Capacity Benchmark Date, but prior to Initial Capacity Confirmation Date, the CSP shall be calculated as follows:

<p><b>If <math>(CSP_{SPP} + CSP_{VC}) - TPA_{SPx} &gt; 0</math>, then: <math>CSP = (CSP_{SPP} + CSP_{VC}) - TPA_{SPx}</math>, and <math>RPA_{SPx} = 0</math></b></p>	
<p><b>If <math>(CSP_{SPP} + CSP_{VC}) - TPA_{SPx} &lt; 0</math>, then: <math>CSP = 0</math> and <math>RPA_{SPx} = TPA_{SPx} - (CSP_{SPP} + CSP_{VC})</math></b></p>	
<p>where:</p>	
CSP	is the Contingent Support Payment (in \$-month).
$CSP_{SPP}$	is the portion of the Contingent Support Payment attributable to $NRR_{SPP(T)}$ , which shall be calculated as follows: $CSP_{SPP} = DSMPEC \times NRR_{SPP(T)}$ (in \$-month).
$CSP_{VC}$	is the portion of the Contingent Support Payment attributable to $NRR_{VC}$ , which shall be calculated as follows: $CSP_{VC} = DSMPEC \times NRR_{VC}$ (in \$-month).
$TPA_{SPx}$	is the Total Payment Adjustment for the Settlement Month (x) (in \$).
DSMPEC	is the DSM Project Equivalent Capacity set out in Exhibit B (in MW).
$NRR_{SPP(T)}$	is the NRR(Simple Payback Period) determined pursuant to Section A.1.1.1 above (in \$/MW-month).
$NRR_{VC}$	is the NRR(Variable Costs) set out in Exhibit B (in \$/MW-month).
$PV_{SPx-1(VC)}$	is the Payment Variation determined pursuant to Section B.1.1.1 above.
$RPA_{SPx}$	is the Residual Payment Adjustment for each Settlement Month in Settlement Period (x) (in \$).

**C. ALL SETTLEMENT MONTHS THAT COMMENCE ON OR AFTER THE INITIAL CAPACITY CONFIRMATION DATE**

**1. STAGE I – DETERMINE THE ACTUAL PROJECT EQUIVALENT CAPACITY**

Using the Measurement and Verification Data for the immediately preceding Savings Period, the Buyer shall determine the Actual Project Equivalent Capacity of the DSM Project by applying the methodology set out in Exhibit K. If such calculation results in an Actual Project Equivalent Capacity that is not equal to the equivalent capacity amount that was used to calculate CSP for Settlement Months commencing during the Settlement Period (x-1), then the Actual Project Equivalent Capacity that will be used to calculate CSP during the Settlement Period (x) shall be fixed at the amount determined in

accordance with this Section, provided that such amount shall never be greater than the DSMPEC set out in Exhibit B.

**2. STAGE II – DETERMINE THE AMOUNT OF ANY APPLICABLE PAYMENT ADJUSTMENT**

For each Settlement Month that commences after the Initial Capacity Confirmation Date, an adjustment shall be made to the calculation of CSP (the “Total Payment Adjustment”) to account for any payments during the Settlement Months in the Settlement Period (x-1) that were either greater than or less than the payments that would have been made during each such Settlement Month had payments been based on the Actual Variable Costs and the Actual Project Equivalent Capacity for the Settlement Period (x-1) (a “Total Payment Adjustment”). The Total Payment Adjustment described in this Section C.2. are intended to enable: (i) the Buyer to recover from the Supplier all prior payment amounts that exceeded the amount that the Supplier would have received had payments been based on the Supplier’s Actual Variable Costs and Actual Project Equivalent Capacity of the DSM Project, and (ii) to compensate the Supplier for any underpayments by the Buyer based on the Supplier’s Actual Variable Costs and Actual Project Equivalent Capacity of the DSM Project.

**2.1 Determine the Payment Variation to be applied in respect of the Actual Variable Costs incurred by the Supplier during the Settlement Period (x-1)**

Determine the amount of the Payment Variation relating to Variable Costs for the Settlement Period (x-1) to be used in the calculation of CSP for Settlement Months in the Settlement Period (x), pursuant to the following methodology:

<b><math>PV_{SPx-1(VC)} = (APEC_{SPx-1} \times NRR_{VC}) - (AVC_{SPx-1} / M_{SPx-1})</math></b>	
where:	
$PV_{SPx-1(VC)}$	is the Payment Variation based on review of the Actual Variable Costs incurred by the Supplier during Settlement Period (x-1), which shall be expressed in Dollars, and represents, for each of the Settlement Months commencing in Settlement Period (x-1): (i) if it is a positive number, the overpayment by the Buyer to the Supplier, or (ii) if it is a negative number, the underpayment by the Buyer to the Supplier.
$APEC_{SPx-1}$	is the Actual Project Equivalent Capacity that was applied for the purposes of determining the CSP during Settlement Period (x-1).
$NRR_{VC}$	is the NRR(Variable Costs) set out in Exhibit B (in \$/MW-month).
$AVC_{SPx-1}$	is the total Actual Variable Costs incurred by the Supplier during the Settlement Period (x-1), which shall be expressed in Dollars.
$M_{SPx-1}$	is the number of Settlement Months in the Settlement Period (x-1).

**2.2 Determine whether a Payment Adjustment applies in respect of the Actual Project Equivalent Capacity achieved by the Supplier during the immediately prior Savings Period**

Using the Actual Project Equivalent Capacity determined pursuant to Section C.1 above, determine the amount of the Payment Adjustment relating to Actual Project Equivalent Capacity for the Settlement Period (x-1) to be used in the calculation of CSP for Settlement Months in the Settlement Period (x), pursuant to the following methodology:

<b><math>PV_{SPx-1(APEC)} = (APEC_{SPx-1} - APEC_{SPx}) \times (NRR_{SPP(T)} + NRR_{VC}) \times M_{SPx-1}</math></b>	
where:	
$PV_{SPx-1(APEC)}$	is the Payment Variation, based on review of the Actual Variable Costs incurred by the Supplier during Settlement Period (x-1), which shall be expressed in Dollars, and represents, for each of the Settlement Months commencing in Settlement Period (x-1): (i) if it is a positive number, the overpayment by the Buyer to the Supplier, or (ii) if it is a negative number, the underpayment by the Buyer to the Supplier.
$APEC_{SPx-1}$	is the Actual Project Equivalent Capacity that was applicable during the Settlement Period (x-1). For greater certainty, the $APEC_{SPx-1}$ for the initial Settlement Period that commences on or after the Initial Capacity Confirmation Date will be equal to DSMPEC (in MW).
$APEC_{SPx}$	is the Actual Project Equivalent Capacity for the Settlement Period (x) expressed in MW as determined in accordance with Section C.1 (in MW).
$NRR_{SPP(T)}$	is the NRR(Simple Payback Period) to be applied during the Term, as determined in accordance with Section A.1.1.1 above. The $NRR_{SPP(T)}$ shall not be greater than the NRR(Simple Payback Period) set out in Exhibit B (in \$/MW-month).
$NRR_{VC}$	is the NRR(Variable Costs) set out in Exhibit B (in \$/MW-month).
$M_{SPx-1}$	is the number of Settlement Months in the Settlement Period (x-1).

**2.3 Determine the amount of any Residual Payment Adjustment that applies**

Using the methodology described in Section B.1.1.2 above, determine the amount of the Residual Payment Adjustment, if any, that applies.

**2.4 Determine the Total Payment Adjustment**

The Total Payment Adjustment to be applied to the CSP for Settlement Months in the Settlement Period (x) shall be determined as follows:

<b><math>TPA_{SPx} = (PV_{SPx-1(VC)} + PV_{SPx-1(APEC)} + RPA_{SPx-1}) \times IM</math></b>
---



where:	
$TPA_{SPx}$	is the Total Payment Adjustment to be applied to the CSP for all Settlement Months commencing during the Settlement Period (x) to account for any outstanding Payment Variations in respect of any prior period during the Term (in \$).
$PV_{SPx-1(VC)}$	is the Payment Variation determined in accordance with Section C.2.2.1 above (in \$-month).
$PV_{SPx-1(APEC)}$	is the Payment Variation determined in accordance with Section C.2.2.2 above (in \$-month).
$RPA_{SPx-1}$	is the Residual Payment Adjustment determined in accordance with Section B.3.3 above (in \$).
$M_{SPx}$	is the number of Settlement Months in the Settlement Period (x).
$M_{SPx-1}$	is the number of Settlement Months in the Settlement Period (x-1).
IM	<p>is the Interest Multiplier, being the factor to convert the amount of overpayment or underpayment made during each Settlement Month of the prior Settlement Period into the amount of adjustment to be made during each Settlement Month of the Settlement Period (x), on the basis that interest shall accrue on such overpayment or underpayment at the Interest Rate in effect as of the first day of the Settlement Period (x) and shall be compounded monthly, in arrears. The Interest Multiplier is based on formulae for calculating present values and future values of annuities, and is calculated as follows:</p> $IM = \frac{(1 + \text{Interest Rate}/12)^{M_{SPx-1}} - 1}{1 - (1 + \text{Interest Rate}/12)^{-M_{SPx}}}$

**3. STAGE III - DETERMINE THE CSP AND OVERPAYMENT ADJUSTMENT, IF ANY, FOR THE RELEVANT SETTLEMENT PERIOD**

**3.1 Calculating CSP for each Settlement Month that commences on or after the Initial Capacity Confirmation Date, but prior to the Final Settlement Period**

For each Settlement Month that commences on or after the Initial Capacity Confirmation Date, but prior to the Final Settlement Period, the CSP shall be calculated as follows:

<p><b>If <math>(CSP_{SPP} + CSP_{VC}) - TPA_{SPx} &gt; 0</math>, then: <math>CSP = (CSP_{SPP} + CSP_{VC}) - TPA_{SPx}</math>, and <math>RPA_{SPx} = 0</math></b></p> <p><b>If <math>(CSP_{SPP} + CSP_{VC}) - TPA_{SPx} &lt; 0</math>, then: <math>CSP = 0</math> and <math>RPA_{SPx} = TPA_{SPx} - (CSP_{SPP} + CSP_{VC})</math></b></p> <p>where:</p>
--

CSP	is the Contingent Support Payment (in \$-month).
CSP <sub>SPP</sub>	is the portion of the Contingent Support Payment attributable to NRR <sub>SPP(T)</sub> , which shall be calculated as follows: $CSP_{SPP} = APEC_{SPx-1} \times NRR_{SPP(T)}$ (in \$-month)
CSP <sub>VC</sub>	is the portion of the Contingent Support Payment attributable to NRR <sub>VC</sub> , which shall be calculated as follows: $CSP_{VC} = APEC_{SPx-1} \times NRR_{VC}$ (in \$-month).
TPA <sub>SPx</sub>	is the Total Payment Adjustment for the Settlement Month (x) (in \$).
APEC <sub>SPx-1</sub>	is the Actual Project Equivalent Capacity applicable during Settlement Period (x-1) (in MW).
NRR <sub>SPP(T)</sub>	is the NRR(Simple Payback Period) determined pursuant to Section A.1.1.1 above (in \$/MW-month).
NRR <sub>VC</sub>	is the NRR(Variable Costs) set out in Exhibit B (in \$/MW-month).
RPA <sub>SPx</sub>	is the Residual Payment Adjustment for each Settlement Month in Settlement Period (x) (in \$).

### 3.2 Calculating CSP for each Settlement Month of the Final Settlement Period

For each Settlement Month that commences during the Final Settlement Period, the CSP shall be calculated as follows:

<p><b>If <math>(CSP_{SPP} + CSP_{VC}) - TPA_{SPx} + TPV_{VC} &gt; 0</math>, then: <math>CSP = (CSP_{SPP} + CSP_{VC}) - TPA_{SPx} + TPV_{VC}</math>, and <math>RPA_{FSP} = 0</math></b></p>	
<p><b>If <math>(CSP_{SPP} + CSP_{VC}) - TPA_{SPx} + TPV_{VC} &lt; 0</math>, then: <math>CSP = 0</math> and <math>RPA_{FSP} = TPA_{SPx} - TPV_{VC} - (CSP_{SPP} + CSP_{VC})</math></b></p>	
where:	
CSP	is the Contingent Support Payment (in \$-month).
CSP <sub>SPP</sub>	is the portion of the Contingent Support Payment attributable to NRR <sub>SPP(T)</sub> , which shall be calculated as follows: $CSP_{SPP} = APEC_{FSP-1} \times NRR_{SPP(T)}$ (in \$-month)
CSP <sub>VC</sub>	is the portion of the Contingent Support Payment attributable to NRR <sub>VC</sub> , which shall be calculated as follows: $CSP_{VC} = APEC_{FSP-1} \times NRR_{VC}$ (in \$-month).
TPA <sub>SPx</sub>	is the Total Payment Adjustment for the Settlement Month (x) (in \$).
TPV <sub>VC</sub>	is the Total Payment Variation in respect of Variable Costs (in \$-month), which shall be calculated over all Settlement Periods (other than the Stub Period and the Final Settlement Period) as follows: (FSP-1)

	$\sum_{i=2} [6 \times PV_{SPX-1(VC)_i}] = X$ <p>If <math>X \geq 0</math>, then <math>TPV_{VC} = 0</math>                  If <math>X &lt; 0</math>, then <math>TPV_{VC} = X / M_{SP(FSP)}</math></p>
FSP	is the Final Settlement Period.
$PV_{SPX-1(VC)_i}$	is the Payment Variation calculated in each Settlement Period (i) (excluding the Stub Period and the Final Settlement Period) in respect of Actual Variable Costs incurred in Settlement Period (i-1) (in \$).
$M_{SP(FSP)}$	is the number of months in the Final Settlement Period.
$APEC_{FSP-1}$	is the Actual Project Equivalent Capacity applicable during the Settlement Period immediately prior to the Final Settlement Period (in MW).
$NRR_{SPP(T)}$	is the NRR(Simple Payback Period) determined pursuant to Section A.1.1.1 above (in \$/MW-month).
$NRR_{VC}$	is the NRR(Variable Costs) set out in Exhibit B (in \$/MW-month).
$RPA_{FSP}$	is the Residual Payment Adjustment for each Settlement Month in the Final Settlement Period (in \$).

**NOTE:** If the last Settlement Month of the Final Settlement Period is a partial month, then the CSP payable for such partial month shall be determined by multiplying CSP, calculated in accordance with the above methodology, by the following fraction:

$$\frac{\# \text{ of days from the first day of the last Settlement Month to the end of the Term}}{\# \text{ of days in the last Settlement Month}}$$

#### 4. END OF TERM STATEMENT AND END OF TERM PAYMENT

The Buyer shall prepare and deliver a settlement statement (the “End of Term Statement”) to the Supplier, within twenty (20) Business Days following receipt of a DSM Verification Certificate - Capacity Confirmation (on account of Actual Variable Costs incurred during the Final Settlement Period), setting out the amount of any payment owing by the Supplier to the Buyer (the “End of Term Payment”). The End of Term Payment shall be calculated as follows:

<b><math>ETP = RPA_{FSP} \times M_{SP(FSP)} + AVCOP</math></b>	
where:	
ETP	is the End of Term Payment (in \$).
$RPA_{FSP}$	is the Residual Payment Adjustment for each Settlement Month in the Final Settlement Period (in \$) as determined in Section C.3.3.2.
$M_{SP(FSP)}$	is the number of months in the Final Settlement Period.
AVCOP	is the Actual Variable Cost Overpayment (in \$), which shall be calculated

	as follows: $X = APEC_{FSP-1} \times NRR_{VC} \times M_{SP(FSP)} - AVC_{FSP}$ If $X \leq 0$ , then $AVCOP = 0$ If $X > 0$ , then $AVCOP = X$
$APEC_{FSP-1}$	is the Actual Project Equivalent Capacity applicable during the Settlement Period immediately prior to the Final Settlement Period (in MW).
$NRR_{VC}$	is the NRR(Variable Costs) set out in Exhibit B (in \$/MW-month).
$AVC_{FSP}$	is the total Actual Variable Costs incurred by the Supplier during the Final Settlement Period (in \$).

The End of Term Statement may be delivered by the Buyer to the Supplier by facsimile or electronic means, and shall include the reference number assigned to this Agreement by the Buyer. The Supplier shall remit to the Buyer the full amount of the End of Term Payment no later than ten (10) Business Days after delivery of the End of Term Statement. Payment shall be made by wire transfer to the account of the Buyer as set forth in Section 4.6 of this Agreement.

**EXHIBIT K**  
**METHODOLOGY FOR CONVERTING ELECTRICITY SAVINGS INTO ACTUAL PROJECT EQUIVALENT CAPACITY**

**1. METHODOLOGY FOR CONVERTING ELECTRICITY SAVINGS INTO ACTUAL PROJECT EQUIVALENT CAPACITY**

For each Settlement Period the supplier will calculate the Actual Project Equivalent Capacity using the Measurement and Verification Data for the immediately prior Savings Period and the methodology described below.

**1.1 Determine the Actual Hourly Electricity Savings Profile for a Typical Peak Day of each Season**

For each Season in the immediately prior Savings Period, using Measurement and Verifications Data for such Savings Period and the methodologies outlined in the Measurement and Verification Plan, the Supplier will determine the Actual Hourly Electricity Savings Profiles for the Typical Peak Day of the DSM Project during each Season.

**1.2 Determine the Actual Peak Electricity Savings for a Typical Peak Day of each Season**

Using the Actual Hourly Electricity Savings Profile determined pursuant to section 1.1 above, the Supplier shall calculate the total MWh saved during the On-peak Hours for a Typical Peak Day in each Season. The total MWh saved in any Season shall be the Actual Peak Electricity Savings for such Season.

**1.3 Determine the Seasonal Capacity**

For each Season, the Supplier shall determine the Actual Seasonal Capacity of the DSM Project by dividing the Actual Peak Electricity Savings as determined pursuant to section 2.2 above, by the number of On-Peak Hours (16hrs). For example, to determine the Actual Seasonal Capacity Summer the following formula will be used:

$$\begin{aligned} &\text{Actual Peak Electricity Savings Summer (MWh)} / 16\text{hrs} \\ &= \text{Actual Seasonal Capacity Summer (MW)} \end{aligned}$$

**1.4 Determine the Actual Project Equivalent Capacity**

Once the Actual Seasonal Capacity has been determined for each Season the Supplier shall calculate the Actual Project Equivalent Capacity for the DSM Project for the immediately prior Savings Period as follows:

$$\begin{aligned} &\text{Actual Seasonal Capacity Summer (MW)} && \times 40\% \\ + &\text{Actual Seasonal Capacity Winter (MW)} && \times 40\% \\ + &\underline{\text{Actual Seasonal Capacity Other (MW)}} && \times 20\% \\ = &\text{Actual Project Equivalent Capacity (MW)} \end{aligned}$$

**EXHIBIT L-1**  
**DSM VERIFICATION CERTIFICATE - COMMERCIAL OPERATION**

**TO:** Ontario Electricity Financial Corporation or, Ontario Power Authority, if established

**FROM:** [Insert name of DSM Verification Consultant]

**SUPPLIER:** [Insert name of Supplier]

**DSM PROJECT:** [Insert name of DSM Project]

**RE:** COMMERCIAL OPERATION

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THIS UNDERSIGNED HEREBY CERTIFIES AS FOLLOWS:

1. The DSM Project has been completed in all material respects excepting punch list items that do not materially and adversely affect the ability of the DSM Project to operate in accordance with this Agreement. In the alternative, the statement set out in this Section 2.5(d)(i) may be provided to the Buyer from an independent professional engineer duly qualified to practice engineering in Ontario;
2. The attached schedule, which lists and describes all of the Operating Equipment that has been installed in connection with the DSM Project, is complete and accurate. All of the Operating Equipment listed has been properly installed and commissioned according to standard industry practice.
3. The attached schedule of Actual Incremental Capital Costs is a complete and accurate representation of the Actual Incremental Capital Costs incurred by the Supplier as of the date of this DSM Verification Certificate.
4. **[Note to finalization: the following statement is to be included for DSM Projects Located within a Priority Zone.]** “The [Load/Loads] associated with the DSM Project are within Priority Electrical Zone [1/2].
5. **[Note to finalization: the following statement is to be included for DSM Projects providing Automatic System Voltage Support.]** “The DSM Project has, on two (2) separate occasions, has provided Automatic System Voltage Support for six (6) continuous hours.”

Capitalized terms used in this Certificate and not otherwise defined herein shall have the meanings assigned to such terms in the DSM Contract.

**IN WITNESS WHEREOF**, the undersigned has executed this certificate this ● day of ● , 20●

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**[Witness]**

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**[insert name and title of  
Authorized Person]**

**[Note: Amend signature line as  
appropriate to reflect the identity  
of the third party.]**

**EXHIBIT L-2**  
**DSM VERIFICATION CERTIFICATE - MONTHLY**

**TO:** Ontario Electricity Financial Corporation or, Ontario Power Authority, if established

**FROM:** [Insert name of DSM Verification Consultant]

**SUPPLIER:** [Insert name of Supplier]

**DSM PROJECT:** [Insert name of DSM Project]

**MONTH:** [Insert Month to which this Certificate pertains] (“Month”)

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THIS UNDERSIGNED HEREBY CERTIFIES AS FOLLOWS:

1. All of the terms of the Measurement and Verification Plan have been complied with.
2. The Operating Equipment was installed and operating during the Month and there [were/were no] Operating Equipment Outages during the Month.
3. There [were/were no] Load Outages during the Month.

*[Note to finalization:* If there were any Outages during the Month, the DSM Verification Consultant shall confirm and provide the following additional information:

4. The Outage Factor for the Month was: \_\_\_\_\_ .

The attached schedules set out: (1) a description of all Operating Equipment Outages that occurred during On-Peak Hours in the Month, including a description of each unit of Operating Equipment that was affected by such Operating Equipment Outages and a description of the reason why such unit(s) [was/were] in an Operating Equipment Outage and the number of On-Peak Hours during the Month that the unit(s) [was/were] ] in an Operating Equipment Outage; and (2) a description of all Load Outages that occurred during On-Peak Hours in the Month, including description of the Loads which were affected by such Load Outages and a statement regarding the magnitude (expressed as a percentage of the total Load of the DSM Project) and the duration (expressed as a total number of On-Peak Hours) of each such Load Outage.]

Capitalized terms used in this Certificate and not otherwise defined herein shall have the meanings assigned to such terms in the DSM Contract.



**IN WITNESS WHEREOF**, the undersigned has executed this certificate this ● day of ● , 20●

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Witness

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**[insert name and title of Authorized Person]**

**[Note: Amend signature line as appropriate to reflect the identity of the third party.]**

**EXHIBIT L-3**  
**DSM VERIFICATION CERTIFICATE - CAPACITY CONFIRMATION**

**TO:** Ontario Electricity Financial Corporation or, Ontario Power Authority, if established

**FROM:** [Insert name of DSM Verification Consultant]

**SUPPLIER:** [Insert name of Supplier]

**DSM PROJECT:** [Insert name of DSM Project]

**SAVINGS PERIOD:** [Insert Savings Period to which this Certificate pertains]

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THIS UNDERSIGNED HEREBY CERTIFIES AS FOLLOWS:

*[Note to finalization: complete certificate and attach the necessary documentation in the form required by the Measurement and Verification Plan.]*

1. The attached Actual Variable Costs for the Savings Period are accurate.
2. The attached Actual Peak Electricity Savings are accurate.
3. The attached Actual Incremental Electricity Savings are accurate.
4. All of the terms of the Measurement and Verification Plan have been complied with throughout the Savings Period.

Capitalized terms used in this Certificate and not otherwise defined herein shall have the meanings assigned to such terms in the DSM Contract.

**IN WITNESS WHEREOF**, the undersigned has executed this certificate this ● day of ●, 20●

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Witness

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**[insert name and title of Authorized Person]**  
**[Note: Amend signature line as appropriate to reflect the identity of the third party.]**

**EXHIBIT M**  
**REQUIRED MINIMUM ELEMENTS FOR A**  
**MEASUREMENT AND VERIFICATION PLAN**

The Measurement and Verification Plan must be consistent with the Measurement and Verification Guidelines for DSM, where applicable, and must contain the following minimum elements:

- (a) A detailed description of:
  - (i) how the Efficiency Baseline will be measured;
  - (ii) how the DSM Project will be monitored, including measurement techniques and data collection frequency;
  - (iii) the electrical location(s) of the DSM Project Equivalent Capacity will be determined;
  - (iv) how the DSM Costs will be monitored and reported;
  - (v) how the installation, commissioning and continuing operation of the Operating Equipment will be monitored and verified;
  - (vi) how Planned Outages will be scheduled for the DSM Project.
- (b) Clearly demonstrates the use and effectiveness of the Operating Equipment in achieving the DSM Project Equivalent Capacity.

**EXHIBIT N**  
**MEASUREMENT AND VERIFICATION GUIDELINES FOR DSM**

*[Attach a copy of the Measurement and Verification Guidelines for DSM]*

**EXHIBIT O**  
**GUIDE TO THE *ENERGY EFFICIENCY ACT* (ONTARIO)**

*[To be posted to the 2,500 MW section of the website: [www.ontarioelectricityrfp.ca](http://www.ontarioelectricityrfp.ca)]*

**EXHIBIT P  
EFFICIENCY BASELINE**

*[Note to Finalization: Attach the Supplier's Efficiency Baseline and completed verification certificate]*

**TO:** Ontario Electricity Financial Corporation or, Ontario Power Authority, if established

**FROM:** [Insert name of DSM Verification Consultant]

**SUPPLIER:** [Insert name of Supplier]

**DSM PROJECT:** [Insert name of DSM Project]

**RE:** Efficiency Baseline

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THIS UNDERSIGNED HEREBY CERTIFIES AS FOLLOWS:

**1. The Efficiency Baseline submitted by the Supplier:**

- (a) reflects the Supplier's actual Electricity consumption in the absence of the DSM Project;
- (b) takes into account all efficiency improvements that would have been made by the Supplier in the absence of the DSM Project and the historical consumption patterns of the Supplier; and
- (c) for each class of Operating Equipment that was used for the purposes of deriving the Efficiency Baseline, the Operating Equipment exceeds the Minimum Equipment Efficiency Standards.

Capitalized terms used in this Certificate and not otherwise defined herein shall have the meanings assigned to such terms in the DSM Contract.

**IN WITNESS WHEREOF**, the undersigned has executed this certificate this ● day of ●, 20●

---

Witness

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**[insert name and title of Authorized Person]**  
**[Note: Amend signature line as appropriate to reflect the identity of the third party.]**

**EXHIBIT Q**  
**CALCULATING DSM CONTRACT VALUES**

- 1. Methodology for determining the DSM Incremental Capital Costs, the DSM Project Annual Electricity Savings, the Simple Payback Period (Proposal) and the NRR(Simple Payback Period) (Proposal)**
  - 1.1** Determine the costs (including the cost of installation), expressed in Dollars, of the Operating Equipment to be installed.
  - 1.2** Determine the costs (including the cost of installation), expressed in Dollars, of comparable equipment that would have met, but not exceeded, the Minimum Equipment Efficiency Standard.
  - 1.3** Subtract the costs determined in Section 1.1 above from the costs determined in Section 1.2 above. The resulting amount is the DSM Incremental Capital Costs of the DSM Project.
  - 1.4** Calculate an estimate of the annual Electricity consumption of the DSM Project using the Efficiency Baseline.
  - 1.5** Calculate an estimate of the annual Post-Installation Consumption of the DSM Project.
  - 1.6** Subtract the amount determined in Section 1.5 above from the amount determined in Section 1.4 above. The resulting amount is the DSM Project Annual Electricity Savings.
  - 1.7** Multiply the DSM Project Annual Electricity Savings by the Average Cost of Electricity (Proposal) to determine the estimated annual Incremental Electricity Cost Savings.
  - 1.8** Divide DSM Incremental Capital Costs by the annual Incremental Electricity Cost Savings determined in Section 1.7 above to determine the Simple Payback Period (Proposal).
  - 1.9** Calculate the total Dollar amount that would be required to reduce the Simple Payback Period (Proposal) to three years by subtracting an amount equal to three times the annual Incremental Electricity Cost Savings determined in Section 1.7 above from the DSM Incremental Capital Costs. The resulting figure is the Payback Reduction Amount.
  - 1.10** Amortize the Payback Reduction Amount over the Term of the Agreement assuming an interest rate equal to ten percent (10%) to determine a monthly amount; divide this monthly amount by the DSM Project Equivalent Capacity to determine the amount, expressed in Dollars per MW-month. The resulting amount is the monthly amount required to reduce the Simple Payback Period (Proposal) to three years and represents the NRR(Simple Payback Period) (Proposal).

**2. METHODOLOGY FOR DETERMINING THE SIMPLE PAYBACK PERIOD (COD) AND THE NRR(SIMPLE PAYBACK PERIOD) (COD)**

- 2.1** Determine the actual costs (including the cost of installation), expressed in Dollars, of installing the Operating Equipment.
- 2.2** Subtract the actual costs determined in Section 2.1 above from the costs determined in Section 1.2 above. The resulting amount is the Actual Incremental Capital Costs of the DSM Project.
- 2.3** Multiply the DSM Project Annual Electricity Savings by the Average Cost of Electricity (COD) to determine the estimated annual Incremental Electricity Cost Savings.
- 2.4** Divide Actual Incremental Capital Costs by the annual Incremental Electricity Cost Savings determined in Section 2.4 above to determine the Simple Payback Period (COD).
- 2.5** Calculate the total Dollar amount that would be required to reduce the Simple Payback Period (COD) to three years by subtracting an amount equal to three times the annual Incremental Electricity Cost Savings determined in Section 2.4 above from the Actual Incremental Capital Costs. The resulting figure is the Payback Reduction Amount.
- 2.6** Amortize the Payback Reduction Amount over the Term of the Agreement assuming an interest rate equal to ten percent (10%) to determine a monthly amount; divide this monthly amount by the DSM Project Equivalent Capacity to determine the amount, expressed in Dollars per MW-month. The resulting amount is the monthly amount required to reduce the Simple Payback Period (COD) to three years and represents the NRR(Simple Payback Period) (COD).



**EXHIBIT R**  
**DSM THIRD PARTY AGREEMENT REQUIRED PROVISION**

The DSM Third Party Agreement shall contain the following agreement:

“The Load hereby agrees to permit the installation of the Operating Equipment that enables the Supplier to achieve verifiable Electricity savings in accordance with the terms of the DSM Contract. The Load understands that the installation of the Operating Equipment requires inspections, monitoring and measurement of the performance of the measures and agrees to provide access to the project site to the Supplier, the Buyer, and their respective agents during the term of the DSM Contract. Unless otherwise defined herein, capitalized terms used herein shall have the respective meanings given to them in the DSM Contract.”