



## Non-Wires Solutions Energy Storage Program Agreement

**Participant Eligibility** The Consolidated Edison Company of New York, Inc. (“Con Edison” or the “Company”) customer (“Customer”) identified in this Non-Wires Solutions Energy Storage Program Agreement (as amended and in effect from time to time, this “Agreement” or the “Program Agreement”) is a Con Edison electric account holder or a customer whose basis of eligibility to participate in the Company’s Non-Wires Solutions Program (hereinafter, “Program”) is provided for hereunder, including as specified in the Customer and Facilities Information box below. Con Edison will determine Customer’s Program eligibility at Con Edison’s sole discretion in connection with Con Edison’s review process. The application portion of this Agreement (*i.e.*, the portion requiring the completion of information) may be completed by Customer, as applicant, or by an aggregator or other third party acting on Customer’s behalf, as applicant. (The party completing the application portion of this Agreement is referred to herein as “Applicant” or the “Applicant”.) If the Applicant is a third party that has not provided Customer information below, then Con Edison will determine Program eligibility based upon the eligibility of the Customer(s) identified on Addendum 1 (the Multiple Facilities Template, available at [www.coned.com/nonwires](http://www.coned.com/nonwires)).

### Project Requirements

The project or portfolio of projects referred to in the Non-Wires Solution Details box immediately below intended to meet the requirements of the Program hereunder (hereinafter, “Project”) shall be eligible for Program incentives only if the Project adheres to all Program requirements, including the following, unless otherwise specified in Addendum 2:

1. A Project may not commence, and existing equipment to be replaced or made unnecessary by a Project may not be removed or disconnected, until after such Project is accepted by Con Edison, baseline conditions are confirmed, and pre-installation inspections (if required) have been completed.
2. Agreements may be approved for Projects that are (i) single Customer projects in which Customer’s load and project load reduction are clearly identified in the Project plan, or (ii) a portfolio of projects, the Project plans for which identify an aggregate load reduction target and provide detailed analyses thereof to be evaluated and approved by Con Edison.
3. A Project must be installed and operational prior to the applicable Operational Date identified in this Agreement, and must also meet any other milestones and deadlines (including, as specified in Addendum 2).
4. All other requirements set forth in this Agreement, including those contained in the Terms and Conditions section hereof, must be satisfied.

For questions regarding projects related to the Program, please contact Con Edison at [dsm@coned.com](mailto:dsm@coned.com).

### Non-Wires Solution Details

<b>Project Name</b>	
<b>Network</b>	
<b>Network Peak Hour</b>	
<b>Network Overload Period</b>	
<b>Reduction Load Year(s)</b>	
<b>Quantity of Summer Capability Periods</b> (normally ten (10) periods, each defined as a period from May 1 <sup>st</sup> through September 30 <sup>th</sup> )	

### Customer and Facilities Information

**If not currently provided, must be submitted within 30 days after the date this Agreement is executed fully by the parties unless otherwise agreed at the time that this Agreement is proposed for acceptance by Con Edison, and when submitted may be attached as Addendum 1.**

Account Name <i>(as shown on your Con Edison bill)</i>	Con Edison Account Number (15 Digits) <table style="width: 100%; height: 20px; border: none;"><tr><td style="border: 1px solid black; width: 20px;"></td><td style="border: 1px solid black; width: 20px;"></td></tr></table>																		
Contact Name	Day Phone																		

Service Address:		Email:		
Address 2:		Fax		
City:	State:	Zip:	Square Footage	Annual Hours of Operation
Year Built	Building Type (e.g., Office, Hospital)		Multifamily # of Units	Number of Floors
<input type="checkbox"/> <b>Multiple Facilities</b> - This box should be checked for any Project comprised of project portfolios consisting of more than one building, and the Multiple Facilities Template (Addendum 1) must be completed and submitted with this Agreement.				

<b>Applicant Information</b>				
The Applicant may be a Customer or a third-party authorized to apply for the Program on behalf of a Customer. Whether the Applicant is a Customer on its own behalf or an authorized third-party, information for the Applicant is required immediately below.				
Applicant/Company Name:				
Contact Name:		Day Phone:		
Service Address:		Email:		
Address 2:		Fax		
City:	State:	Zip Code:		
Federal Tax ID				
Check appropriate box:				
<input type="checkbox"/> Individual/Sole Proprietor		<input type="checkbox"/> Corporation		<input type="checkbox"/> Exempt Payee (Provide Tax Documentation)
<input type="checkbox"/> Limited Liability Company		<input type="checkbox"/> Other		<input type="checkbox"/> Partnership
<b>Payee Mailing Address Information</b>				
Any incentive payments should be sent to:				
Attention				
Payee Name:				
Mailing Address:				
City:	State:	Zip Code:		
<b>Proposed Project Information</b>				
Proposed Project Summary (Project Details/ Scope of Work Information):				
Demand Reduction (kW) (See Terms and Conditions below for definition)	Dispatchable Energy Capacity (kWh) (See Terms and Conditions below for definition)	Total Project Cost (\$)	Con Edison Contribution Requested (\$)	
<b>Project Start and Operational Date</b>				
Project Start Date:		Operational Date:		

## Terms and Conditions

**ELIGIBILITY:** Unless otherwise approved by the Company, incentives are available only for energy storage systems (ESS) (e.g., batteries) that provide permanent and temporary "Demand Reduction" measures installed at facilities of Customers in good standing. "Demand Reduction" is measured in kW and defined as energy load reduction to the electric grid served by Con Edison and achieved by Customers through demand reduction measures installed or implemented in connection with any Project, and satisfied by a satisfactory response to the calling of a "NWS Event" by Con Edison. A "NWS Event" is called by Con Edison when a determination is made by Con Edison that Demand Reduction is needed to help provide load relief capacity during peak times of demand on the grid, and which results in a request by Con Edison of a participant hereunder (Customer and/or Applicant, and a failure to mention expressly one or the other shall not be a barrier to effect the intent of any provision) to meet its Demand Reduction obligation, and as more particularly provided for by the NON WIRES SOLUTIONS (NWS) EVENT section below. Demand Reduction may also be achieved by an equivalent in "Dispatchable Energy Capacity" and as more particularly provided for by the DISPATCHABLE ENERGY CAPACITY section below.

### **AGREEMENT AND REQUIRED DOCUMENTATION:**

Eligible Customers seeking to participate in the Program must submit a completed, signed Agreement, together with all relevant Project documents, and also post security in accordance with the requirements set forth herein.

### **AGREEMENT PACKAGE REVIEW AND INSPECTION:**

The Company will review an Agreement and accompanying information for eligibility, completeness, and accuracy. The Company may conduct an on-site inspection or pre-installation metering of the applicable facility's existing equipment and systems. If a proposed Project does not meet Program criteria, then the Company will so notify Applicant and the Agreement will be rejected. Any necessary, pre-installation inspection and measurement and verification (M&V) must be completed to validate baseline conditions before Applicant installs qualifying equipment in order to qualify for incentives. Any failure by Customer/Applicant to allow Con Edison or its authorized representative timely access for such purpose will result in Program ineligibility and non-payment of incentives. The Company reserves the right to reject any estimate of energy savings, peak Demand Reduction, energy capacity, or Project cost submitted by Applicant. Applicant acknowledges that the estimated incentive amount included in any incentive offer is an estimate only; the actual incentive amount payable upon Project completion will depend upon the performance of Project verified (kW) savings actually achieved. The Company has the right to withhold any incentive payments, should the Project not be operational by the Operational Date (identified in the application portion of this Agreement) or should the Project be deemed not

available during the Summer Capability Period (defined as May 1<sup>st</sup> through September 30<sup>th</sup> at all times under this Agreement, and as also provided for above in the application portion of this Agreement) even if operational by the Operational Date. Further, the Company shall be entitled to seek a full or partial refund of incentives paid (1) if, on account of erroneous representations or misrepresentations on the part of the Applicant and/or Customer, at any time prior to the September 30<sup>th</sup> of the final Reduction Load Year (identified as part of the Non-Wires Solution Details box on page 1) the Company learns that any portion of the Project was not actually or properly installed, or that any portion of the Project no longer meets the Demand Reduction stated in this Agreement (subject to normal degradation, equipment failure unrelated to any act or omission on the part of the Applicant and/or Customer, or Force Majeure conditions), (2) if during the term any portion of the Project is moved without the prior written consent of the Company, (3) if during the term any portion of the Project is moved outside the Company's network, or (4) on account of any intentional decision on the part of Applicant to not provide load reduction during a NWS Event, including to pay any part of the Liquidated Damages Amount in lieu of providing load reduction during a NWS Event.

**PROJECT SITES:** The Applicant shall secure Project sites that endure for the Summer Capability Periods provided for in accordance with the terms and conditions of this Agreement, or for another timeframe identified and agreed to as part of Addendum 2 hereof. The terms and conditions of the agreements secured by Applicant with third parties and/or Customers with respect to Project sites are independent of the Company, and the Company shall not have any responsibility or incur any liability pursuant to such agreements. At any time during this Agreement and outside of any Summer Capability Period hereunder, Applicant may remove, replace, or add any unit (*i.e.*, any whole or part of an ESS solution) associated with a Project site or Customer, provided that any such change shall not modify the Load Reduction Guaranty (as hereinafter defined), and provided further that any such change shall be made in accordance with any applicable safety requirements. Prior to the Operational Date, Applicant shall provide to the Company a list identifying all sites and Customers of ESS Projects installed or to be installed by Applicant. For each such site or Customer, Applicant must meet the applicable M&V requirements. The Company will verify with Applicant which sites and Customers are eligible under this Agreement. Any and all marketing materials developed by either Party that reference the other Party will be subject to approval by both Parties. Applicant is responsible for all marketing activities to Customers.

**FINANCING ACCOMMODATIONS:** The Company acknowledges that Applicant may finance the acquisition and installation of a Project by entering into financing agreements with one or more financing parties. The Company agrees to:

1. Execute any related consents to assignments or acknowledgements or estoppel certificates reasonably acceptable to the Company; and
2. Provide such opinions of counsel as may be reasonably requested by Applicant or the financing party in connection with the financing or sale of the ESS solution at Applicant's cost and expense.

**ASSET OWNERSHIP AND OPERATIONAL CONTROL:**

As between Applicant/ Customer, and Applicant's/ Customer's financiers, on the one hand, and Con Edison, on the other hand, Applicant/ Customer, or Applicant's/ Customer's financiers will be the legal owner of any ESS solution. Con Edison will be entitled to call upon the asset(s) to provide Demand Reduction during the term of this Agreement, and as more particularly provided for hereunder.

**INSTALLATION REQUIREMENTS:**

The Applicant and/or Customer assume sole responsibility for all installation work. Applicant and/or Customer acknowledge that all work must comply fully with all applicable laws, rules, and regulations. Without limitation, Applicant shall interconnect the Project in accordance with the requirements and terms and conditions set forth in the New York State Standardized Interconnection Requirements (SIR) in order to safely and reliably deliver the Project, and subject at all times to the obligations of Con Edison to support such efforts in accordance with the SIR. Interconnection upgrades necessary to accommodate the ESS solution on Con Edison's distribution system must also be done in a manner consistent with the local reliability standard for new load in that Con Edison service territory. For example only, if the service territory requires new load to be interconnected at an "N-2" reliability standard, then the ESS solution must be interconnected at the N-2 reliability standard. If the Applicant fails to interconnect the ESS Solution at a location to meet reliability for what the Company would install to service new load at that location, then, the Company shall be entitled to seek a full or partial refund of incentives paid or require Applicant to make necessary upgrades within a reasonable time of the request, at no additional cost or expense to the Company, and in order to meet the required reliability standard. The parties understand and agree that the Company may elect to withhold any incentive payments until such time as the necessary interconnection upgrades are completed. Subject to the limitations set forth in the Underperformance; Breach of Load Guaranty and Liability Limitation sections hereof, and subject also to such requirements of and full liability associated with any failures in connection with a "Permission to Operate" and associated interconnection agreement referred to herein, the Applicant shall be responsible under this Agreement for all delays, costs and expenses associated with such interconnection, except to the extent the interconnection delays are caused or contributed by an act or omission of the Company reasonably related to the Applicant satisfying the Applicant's interconnection obligations (including, but not limited to, delays in excess of the timeline dictated in the New York State SIR), and any such delay on the part of the Company

shall be an excusable period of delay on the part of the Applicant, including as may apply to a shifting of Operational Date for a period of time equal to the duration of the excusable period of delay.

**INSTALLATION TIME LIMITS:** All Projects must be installed and operational before the Operational Date specified in the application section of this Agreement, as such Operational Date may be extended hereunder at the mutual discretion of the parties, and subject at all times to the terms and conditions otherwise provided for by the terms and conditions hereof. Failure to meet the Operational Date or any other milestone deadlines as may be indicated as part of Addendum 2 will result in the forfeiture of payments pursuant to the milestone payment schedule agreed to between the parties in the Project plan, normally prior to Project commencement or the payment by Applicant (or Customer, if different) to Con Edison of certain Liquidated Damages (as defined below in the UNDERPERFORMANCE; BREACH OF LOAD REDUCTION GUARANTY section below).

**OPERATIONAL DATE REQUIREMENTS:** The Operational Date shall not occur until Applicant has met the following requirements, and at such time the Company will deem a Project operational and available for Demand Reduction for any upcoming Summer Capability Period:

- (i) provided the Company with a list of Project site(s) and Customers and the Company has verified that such sites and Customers are eligible for the Program;
- (ii) constructed the Project in accordance with all current applicable requirements including such requirements as relates to zoning, permitting, reliability, environmental, and safety, and can provide evidence of such requirements having been met, including evidence comprised of documentation of completed permits and evidence comprised of written approval to operate the energy storage system from the authorities having jurisdiction (e.g., the Fire Department of New York (FDNY) and the NYC Department of Buildings), and the parties understand and agree that specific permits and approvals required by the aforementioned authorities having jurisdiction are subject to change, and, in such instances, the aforementioned requirements must be met consistent with law;
- (iii) received Permission to Operate (and enters into an associated interconnection agreement) or other documentation from Con Edison indicating the Project has met all requirements to operate as intended, and with regard to the receipt by the Applicant of a Permission to Operate by Con Edison, the parties understand and agree that other requirements hereunder are not avoided (including as provided for by (ii) above), and, so, requirements imposed by authorities having jurisdiction exist independent and apart and must be satisfied in all events hereunder;
- (iv) met Con Edison's M&V requirements, including Project

monitoring requirements, as may be provided for by the Company's Performance Verification Plan (see INCENTIVE AMOUNTS below) or otherwise;

(v) submitted a "Certificate of Completion" or other notification to the Company that the Project is installed and ready for Performance Testing (as defined and more particularly described as part of the PERFORMANCE TESTING section below); and

(vi) completed Performance Testing.

After Operational Date requirements are met, or on or about such time as the Company may determine reasonably that the Operational Date requirements are substantially met (and still pending Operational Date requirements being met fully), Applicant may submit an invoice for the Operational Payment (as defined in the INCENTIVE PAYMENT SCHEDULE section below) to Con Edison.

**DISPATCHABLE ENERGY CAPACITY:** Consistent with Applicant's commitment to the Demand Reduction to be achieved by a Project, and the Load Reduction Guaranty associated therewith, Applicant also commits to make best efforts to provide a flexible guarantee of "Dispatchable Energy Capacity" for the ESS solution to deliver Demand Reduction power and energy capacity for the duration of the Summer Capability Periods in accordance with the terms and conditions of this Agreement. The Company may request from Applicant to dispatch any amount of power during the Network Overload Period hours if the power requested, measured in kW, does not exceed the contracted Demand Reduction (kW), and that the energy dispatch, measured in kWh, over the course of one continuous Network Overload Period does not exceed the contracted Dispatchable Energy Capacity (kWh). For example only, if the agreed to Demand Reduction requires that the ESS solution should be able to generate X kW over an eight-hour period, then it is anticipated that Con Edison may require by way of an NWS Event that the Demand Reduction requirement can be met by 2X kW over a four-hour period. The parties agree that no Liquidated Damages, underperformance or other penalties will be assessed on Applicant's inability to dispatch or discharge energy above the minimum energy (kWh) required by the calling of an NWS Event.

**DISPATCH:** In order to achieve the objectives hereunder including with respect to the Load Reduction Guaranty, Applicant hereby agrees to respond to requests for dispatch related to the Project in accordance with Con Edison's notifications during the Summer Capability Periods hereunder, or for such other timeframe as agreed to between the parties, including as may be identified in Addendum 2, with day-ahead notification of twenty-one (21) hours in each case of any dispatch. Con Edison reserves the right to request that the ESS solution dispatch at different times of the Network Overload Period (identified in the Non-Wires Solution box as part of the application portion

of this Agreement on page 1) and at different power levels with day-ahead notification throughout each Summer Capability Period. The parties understand and agree that the Company may establish the Network Overload Period and NWS Event Day call window dependent on the Company's system needs, and the Company will notify the applicant in writing of any changes in this regard at least ninety (90) days, or as soon thereafter as practicable with engagement between the parties as to this issue but in no event less than thirty (30) days, prior to the beginning of each Summer Capability Period. Notwithstanding anything to the contrary in this Agreement, nothing in this Agreement shall give Company the right to physical control over the operation and/or dispatch of the Project.

#### **COMMUNICATION SYSTEMS AND EQUIPMENT:**

Applicant shall at Applicant's own cost and expense install communications systems and equipment with respect to a Project i) to enable the Company to monitor remotely the status of a Project at all times over the contract term on an aggregate and individual unit basis, and which permits the Company to have real time information access to Project operations, including the ability to measure the real time charge and discharge of the ESS unit(s), and ii) and which is otherwise necessary to implement and respond to Con Edison's dispatch instruction. Such communications systems and equipment must be installed and operational prior to any Operational Date for a Project.

If during the term of this Agreement Con Edison develops Con Edison's own system that allows Con Edison to exercise greater monitoring or more efficient dispatch of a Project, then Applicant will provide a reasonable cost estimate for Applicant's systems to upgrade its equipment and enable interface with Con Edison's system.

Con Edison will review and may agree to pay communication system upgrades deemed reasonable, and especially in such events as upgrades are necessitated by regulatory requirements and material upgrades in technology, including upgrades necessary for compatibility with upgrades to the Con Edison system and infrastructure. If Con Edison declines to pay for communication upgrades, then Applicant is not required to make upgrades and Con Edison agrees to cooperate with Applicant in identifying appropriate alternatives. Nothing herein shall obligate Applicant to make any upgrades pursuant to this section in the normal course; and, provided however, that if upgrades are necessitated by regulatory requirements or material upgrades in technology then the parties hereunder shall be required to engage and to respond appropriately to any such needed upgrades.

**EXCLUSION FROM FUTURE PROGRAMS:** Applicant shall not be eligible to participate (and Applicant agrees not to participate) in future Con Edison or other programs if such programs interfere with Applicant's ability to deliver the Load Reduction Guaranty in accordance with the terms and conditions of this Agreement.

**QUALIFICATION FOR INCENTIVES FROM MULTIPLE**

**PROGRAMS:** If a Project under the Program also qualifies for incentives under any other Con Edison incentive program, or any New York Independent System Operator (NYISO) program or other programs operated by Con Edison or other agencies, then the Customer/Applicant may receive funds from all sources, excluding Con Edison's Demand Response programs (e.g., Commercial System Relief Program and Distribution Load Relief Program), unless with the prior written consent of Con Edison. Among other things, prior written consent of Con Edison for participation in excluded Con Edison Demand Response Programs as provided for above may include considerations focused on whether or not (i) the Project is meeting test event requirements for a given Summer Capability Period (as defined and more particularly described as part of MEASUREMENT AND VERIFICATION section below) and (ii) Customer/Applicant meets the Program's performance criteria and does not, if applicable, receive greater funds than the Customer/Applicant actually expended for the Project. Without intending to limit the obligations of the parties as otherwise provided for, it is specifically emphasized that both Customer and Applicant are responsible for adherence to the requirements of this section.

**QUALIFYING PROJECTS:** Projects eligible for Program incentives under this Agreement include ESS solutions identified as eligible and approved by the Company. To qualify, Projects must achieve contracted Demand Reductions in order to reduce the identified networks' demand at critical times in relation to the networks' coincident peak demand. Projects must meet the requirements defined in this Agreement before providing dispatch or discharge services to host-sites, applicable markets or any other obligation or arrangement. Each Project's Demand Reduction must be operational by the Operational Date referred to above, or as agreed upon and specified, including as part of Addendum 2. The identified networks' coincident peak demand typically, although not always, occurs on hot summer days and typically, although not always, near or during the hours identified in the Non-Wires Solution Details box on page 1 of this Agreement. The Program will run through the September 30<sup>th</sup> of the final Reduction Load Year identified in the Non-Wires Solution Details box on page 1. The Project must remain operationally available until the final Reduction Load Year or as specified in Addendum 2. Planned maintenance or down times are required to be scheduled for times that occur outside the Summer Capability Period for the duration of this Agreement. Many of the measures approved for use in this Program achieve Demand Reductions, permanent or temporary, on an ongoing basis and/or for hours beyond the Demand Reduction periods required by this Agreement. Such additional Demand Reduction benefits customers and the electric distribution system generally. Nevertheless, the primary purpose of this Agreement is to achieve the required Demand Reduction centered on network coincident peak demand periods. As a consequence, Projects must achieve the required Demand Reduction during the applicable time periods. Impact analyses for individual measures or Projects

will be calculated based upon the expected load relief provided during the hours specified in the Non-Wires Solution Details or in Addendum 2. Such impact analysis will give consideration to (i) load curves relevant to, and which indicate typical electric usage patterns for, a Customer's facility type, (ii) measures involved in a Project, and (iii) approved metering and baseline calculations. Required measurement and verification for Demand Reductions will be specified in a Project's M&V plan or any applicable Program rules. The Company will work with Applicant (and Customer, if different) to determine and deploy the appropriate required verification process. Operations and maintenance measures are not eligible for incentives.

**INCENTIVE AMOUNTS:** The basis for determining the amount of incentives for which qualifying Projects are eligible may involve an engagement by the Company and Applicant, with due consideration being given to the established Demand Reduction goals of a Project. The Company's Performance Verification Plan shall at all times hereunder be the basis for calculating performance and any Load Reduction Guaranty Breach. (The Performance Verification Plan that includes the applicable M&V calculations is attached hereto as Exhibit A and incorporated herein by this reference.)

**NON-WIRES SOLUTION (NWS) EVENT:** When Operational Date requirements are met and a Project is operational, during a Summer Capability Period Con Edison shall notify Applicant of an NWS Event at least twenty-one (21) hours prior to the requirement by Con Edison that the Project must dispatch available energy capacity and provide the committed to Demand Reduction, or as soon thereafter as practicable, but in no event with less than nineteen (19) hours prior notice. The notification, shall include written electronic notification to the email address listed under "Applicant Information," as may be updated by Applicant from time to time; and, if with less than twenty-one (21) hours prior notice, email notification shall also include notification to Applicant by telephone. Con Edison will define, during the NWS Event notification, the discharge start time, power output, and duration of discharge based on a Project's Dispatchable Energy Capacity available. The time of discharge may include any time between the hours noted in the Network Overload Period identified on page 1 of the application portion of this Agreement. An NWS Event may include a test event. Con Edison is not required to tell Applicant if the NWS Event is a test event or required for system reliability. Whether or not Applicant is provided with prior notification of twenty-one (21) hours of an NWS Event during a Summer Capability Period, on non-NWS Event days Applicant agrees to make reasonable efforts to operate the ESS solution to maximize its use in the general marketplace and with due consideration being given also to maximize revenue streams from other marketplace opportunities. Following prior notification of twenty-one (21) hours of an NWS Event, Con Edison may cancel the request to respond through established communication channels and no longer require Applicant to perform; and, in such an event, Applicant will not be held responsible for

underperformance or Liquidated Damages should Applicant choose to perform in spite of the cancellation.

**CHARGING AND NETWORK OVERLOAD PERIOD:** At all times the Project will charge outside of the Network Overload Period identified in the Non-Wires Solutions Details box on page 1 of this Agreement. The Company may also indicate other reasonable hourly charging requirements for the Project under this Agreement, which are subject to change based on system conditions, and which at times might include grid emergency conditions; provided, however, that, if not an emergency, then the Company will provide to the Applicant thirty (30) days prior written notice in such event; and, if as relates to any emergency condition, then the Company and Applicant will work reasonably together to determine what makes reasonable sense given the requirements of the Company and the ability of the Applicant to respond, with due consideration given to existing requirements and dependencies of the Applicant. The Applicant is expected to follow all charging and discharging restrictions provided for by this Agreement and by Con Edison's Coordinated Electric System Interconnection Review (a comprehensive engineering study to understand the Project's impact to the utility system and determine what upgrades, if any, will be required to the Con Edison system). If there is a conflict between the requirement of charging outside of the Network Overload Period and a charging window approved by the Company (in which the conflict will be presumed to have a negative impact on the pledged Demand Reduction on any given NWS Event Day), then the Applicant must notify the Company immediately and in no event with not less than twenty-one (21) hours' prior to such NWS Event Day. If it is determined that the Project is charging during the Network Overload Period on an NWS Event Day, the Applicant/ Customer is to render payment to Company by check or wire transfer of immediately available funds, as liquidated damages ("Liquidated Damages") and not as penalty, of the amount calculated in accordance with the Company's Performance Verification Plan, at a rate of \$10 per kW.

As part of Applicant's annual invoice for Performance Payment (as more particularly provided as part of Incentive Payment Schedule below), Applicant shall submit to Con Edison an attestation stating that the Project did not charge during the network overload period on an NWS Event Day. For each day that a Project charges during the period of overload on an NWS Event Day, Applicant will be assessed Liquidated Damages at a rate of \$10 per kW. Liquidated Damages will be satisfied from the Security or as an offset against any future incentive payments due to be paid by Con Edison (e.g., annual Performance Payments).

**INCENTIVE PAYMENT SCHEDULE:** Incentive payments from Con Edison to Applicant when due will be made based on the following schedule:

- 50% of the approved incentive shall be paid as an up-front Operational payment ("Operational Payment") at such time as the Project is verified as installed and

meets all requirements in the OPERATIONAL DATE REQUIREMENTS and PERFORMANCE TESTING sections; and

- 5% per year over each year of the (normally ten (10)) Summer Capability Periods of this Agreement shall be paid as an annual performance payment ("Performance Payment") within ninety (90) days (or as soon thereafter as practicable based on the totality of the facts and circumstances (including, without limitation, the availability of M&V reports prepared by or on behalf of Con Edison), with any such extension (subject to prior written notification to Applicant by Con Edison and with a reasonable explanation) not expected to exceed an additional thirty (30) days) following each Summer Capability Period and based on the performance of the Project during such Summer Capability Period, less any Shared Revenue (as defined in the SHARED REVENUE section below) in each case due to Con Edison.

The project can receive the Operational Payment and Performance Payment for its first Summer Capability Period as provided for above; however, the applicant will need to provide OTCR Final Acceptance Letter, FDNY Letter of Approval, and any and all other final permitting approvals to replace any conditional operating approvals previously accepted as per the Operational Date requirements in the OPERATIONAL DATE REQUIREMENTS section of this contract by May 1 of the second Summer Capability Period. If the applicant fails to provide final approvals, performance will continue to be assessed as per this contract, but Performance Payments will be withheld until all required final permits and approvals have been submitted to Con Edison.

**CALCULATIONS OF PERFORMANCE PAYMENTS:** At the conclusion of each Summer Capability Period of the term of this Agreement (normally ten (10) capability periods), Con Edison shall calculate the Performance Payment to be paid by Con Edison to Applicant. At such time, the dollar value equivalent to 5% of the approved incentive amount will be the maximum Performance Payment for the Summer Capability Period.

The Performance Payment will be adjusted based on the Project's performance with respect to each NWS Event relative to the Applicant's response to Con Edison's request.

Accordingly, if the Project is unable to provide a minimum of 90% of the prescribed power output during the call window in response to an NWS Event, then Con Edison will adjust the Performance Payment relative to performance as stipulated in the Performance Verification Plan. In the event of a negative performance factor, the offset will be applied against future incentive payments.

If, following a Performance Payment, a monetary amount is owed to the Company as the result of a negative performance factor, then the Company will apply the same monetary amount as a credit towards the Applicant's next Performance Payment or the Applicant will pay any

monetary amount owed prior to the next Summer Capability Period. Otherwise, Performance Payments shall be paid to the Applicant by the end of the calendar year accrued, following each Summer Capability Period.

If any ESS solution associated with the Project charges during any single hour within the call window of an NWS Event, then Con Edison will not provide any Performance Payment for that ESS solution and that specific NWS Event, and assess Liquidated Damages in accordance with the Performance Verification Plan. Additionally, if the ESS solution is unable to achieve a performance factor of at least 50%, on average during an NWS Event, as measured in the Company's Performance Verification Plan, then Con Edison will not provide any Performance Payment for that ESS solution with respect to that specific NWS Event. No additional incentives will be paid for the Project performing above the requirements of the NWS Event.

Con Edison's portion of any Shared Revenue will be deducted from the Performance Payment due following the performance assessment made after each Summer Capability Period.

**SHARED REVENUE:** At Applicant's sole discretion Applicant may enter into agreements with customer host-sites to provide demand charge savings and/or provide distribution services to applicable markets to maximize current and future revenue streams. Applicant will share revenue streams from wholesale market participation (i.e., NYISO)) as a credit towards Con Edison's Performance Payment. The Shared Revenue split is 20% to Con Edison, 80% to the Applicant. Any Shared Revenue credit carried over after the conclusion of this Agreement is released to Applicant and should be shared with Customer. Revenues associated with Customer's account (e.g., customer demand bill savings and all components of the "Value Stack" as described in Rider R of the Con Edison Tariff including but not limited to LBMP, Capacity, and DRV) and any funds secured from and incentive by NYSERDA (New York State Research and Development Authority) (e.g., NYSERDA's Energy Storage Market Acceleration Bridge Incentive or Retail Energy Storage Incentive) are not subject to revenue sharing with Con Edison. At Con Edison's request, Applicant shall provide supporting information and data necessary to confirm participation of the Project in all available markets and revenue streams. Documentation may include written authorization from Applicant allowing NYISO to share data directly with Con Edison. At the Company's written request and no more than once annually a written letter for market participation and opportunities to maximize mutually beneficial revenue streams available to the Project will be provided to Con Edison.

**LOAD REDUCTION GUARANTY:** The Applicant guarantees that the load reduction measures provided for in this Agreement, when installed, will: (1) achieve at least the number of kW's of required Demand Reduction contracted for and at a time and in a manner notified by the Company with the calling of an NWS Event, (2) be located at the physical address specified in the Non-Wires Solution

Details box on page 1 (and as may be more particularly provided for by Addendum 2) or, if not so specified, at the physical address identified in this Agreement as Customer's facility, (3) achieve the required Demand Reductions during the agreed upon operating hours near and around the network coincident peak hours (e.g., between noon and midnight), and (4) be operationally available through the date specified in Addendum 2 and any applicable program rules, or, if not specified, September 30th of the final Reduction Load Year identified as part of the Non-Wires Solution Details box (the foregoing clauses (1) through (4) being collectively referred to herein as the "Load Reduction Guaranty"). Applicant's participation in the Program and receipt of incentive payments is conditioned upon the truth and accuracy of its Load Reduction Guaranty and the performance of its obligations hereunder.

**REPORTING:** The Applicant will submit regular and consistent progress reports to Con Edison. Project progress reports, when provided, shall: (1) detail activities in progress, and identify sold and installed projects, as applicable, (2) specify forecasted load reductions and Dispatchable Energy Capacity, program costs, customer counts, peak hour Demand Reduction impacts achieved, and progress towards goals, and (3) provide other information at such times and in such format as mutually agreed upon, in writing, by Con Edison and Applicant (or its contractor) with respect to a Project, including, without limitation, prior to the a Project's commencement and for the duration of the term of this Agreement.

**MEASUREMENT AND VERIFICATION:** M&V protocols for each Project shall be provided for by the reasonable requirements of the Company (for clarity, including on behalf of the Company by the Company's third-party M&V contractor) consistent with the Performance Verification Plan, the Company's data requirements, and any project-specific M&V plans developed by, on behalf of, or at the request of the Company, and as may be updated from time to time and noticed by the Company; provided however that any material changes to the M&V requirements noticed to Applicant by the Company as of the date hereof may only be implemented with the prior written agreement from Applicant and Company. The parties understand and agree that the Company reserves the right to request additional data from the Project above and beyond the Performance Verification Plan in the course of performing M&V (but only to the extent such data is available to Applicant and supplied by the Site Controller embedded in the Project), and that M&V may be completed by the Company or an independent third party that has no current or prior relationship with the Applicant (or, if different, Customer). At times, a plan for M&V may be included with the Agreement package for review and approval by Con Edison.

**PERFORMANCE TESTING:** The performance of the Project will be subject to performance testing ("Performance Testing") in order to ensure satisfactory performance of the ESS Project solution proposed hereunder prior to any incentive payment.

Applicant will conduct Performance Testing prior to the Operational Date of the Project to provide Con Edison with assurances that the Project is able to perform when called upon. Applicant will perform Performance Testing to demonstrate to Con Edison that the Project is capable of delivering the Load Reduction Guaranty, including, at all times, Dispatchable Energy Capacity.

If the Performance Testing shows the Project is unable to deliver a hundred percent (100%) of the Demand Reduction, based on the most recent Performance Test prior to the Operational Date, then the Load Reduction Guaranty will be reduced automatically to the amount that the Project delivered during Performance Testing. Any unpaid Operational or Performance Payments will be adjusted to compensate for the reduced amount of the Load Reduction Guaranty for the Project.

For example, if the Performance Test demonstrates that the Project can provide ninety percent (90%) of the Demand Reduction prior to the Operational Date, then the Operational and Performance Payments will be reduced to ninety percent (90%) of the contracted incentive amounts and distributed as outlined.

If Applicant's Performance Test shall fail to achieve at least ninety percent (90%) of the kW of required Demand Reduction than the Operational Payment shall be forfeited, and Applicant may not participate in the first Summer Capability Period.

Following the completion of initial Performance Testing, no additional Performance Testing will be performed to readjust Demand Reduction ahead of future Summer Capability Periods.

**INCENTIVE PAYMENTS ARE DEPENDENT UPON MEASUREMENT AND VERIFICATION:** The incentive amount is based upon a Project's actual demand savings as documented by each Project's agreed upon M&V activities. Accordingly, the amount of the incentive payment may be lower than the amount of incentive contribution requested in this Agreement (which is based upon Project estimates). Performance data from the Project will be reviewed and verified as established in the M&V plan for the Project before any incentive payment is determined. Payment amounts will be adjusted based upon the actual Demand Reductions verified by the Company. The Company reserves the right to make a reasonable number of pre- and post-installation visits to Customer's facility, upon reasonable advance notice and at mutually agreeable times. Incentive checks will be issued for each milestone achieved after verification of the performance of all installations specified in the milestone and receipt of all proper invoices related thereto.

**PAYMENT:** The Program is a "pay for performance" program. Con Edison will pay, at the agreed upon payment terms, only for load reductions and discharge of

Dispatchable Energy Capacity that are verified as being in accordance with the notification by the Company, and consistent with the Load Reduction Guaranty contracted for between the parties.

**UNDERPERFORMANCE; BREACH OF LOAD REDUCTION GUARANTY:** The Applicant acknowledges that the Company's agreement to pay Applicant (or Customer, if different) the incentive amounts is contingent upon the Applicant's ability to meet the Applicant's Load Reduction Guaranty, its other representations and warranties herein, and the performance by Applicant (and Customer, if different) of its obligations hereunder. Accordingly, if Applicant/Customer shall fail to achieve at least ninety percent (90%) of the kW of required Demand Reduction contracted for during an NWS Event (in each case, a "Load Reduction Guaranty Breach"), then Con Edison may (without limiting Company's other rights and remedies under this Agreement), immediately upon the occurrence of such Load Reduction Guaranty Breach demand that Applicant/Customer render payment to Company by check or wire transfer of immediately available funds, as liquidated damages ("Liquidated Damages") and not as penalty, of the amount calculated in accordance with the Company's Performance Verification Plan, at a rate of \$10 per kW of Demand Reduction below the ninety percent (90%) of the kW of contracted-for Demand Reduction. Also, a Load Reduction Guaranty Breach shall be deemed to be applicable for each day (or portion thereof) that an NWS Event is called between the Operational Date and the operational availability end date specified for a Project (or September 30<sup>th</sup> of the final Reduction Load Year identified as part of the Non-Wires Solution Details box, if no operational availability end date is specified). The parties acknowledge and agree that the amount of damages that Con Edison would suffer as a result of the occurrence and continuation of a Load Reduction Guaranty Breach would be substantial and difficult to calculate with certainty and that the rate of \$10 per kW and the calculation from the criteria provided for by the Performance Verification Plan reasonably accounts for damages that Con Edison would actually suffer. In addition, in the event of Applicant's material breach and a failure otherwise by Applicant to satisfy Applicant's undisputed Liquidated Damages obligation hereunder, Con Edison shall be entitled to terminate this Agreement in whole or in part, effective upon notice, and shall be relieved of any responsibility to pay further incentive amounts (Applicant hereby releasing and forever discharging the Company from any and all losses, liabilities, claims, costs and expenses resulting from Applicant's failure to receive such incentive payments in accordance with the foregoing). Any changes or exceptions to these underperformance provisions are set forth in Addendum 2. No changes or exceptions from these provisions shall be valid unless documented in Addendum 2, fully executed by both parties.

**EVENTS OF DEFAULT:** Applicant may be considered in default of this Agreement by Con Edison at Con Edison's sole discretion if Applicant is unable to meet the Operational

Date for the Project required by this Agreement, or Applicant otherwise fails to meet Project requirements in accordance with the terms and conditions of this Agreement. As more particularly provided for hereunder, failures can include charging an ESS when indicated by the Company not to do so, or not performing in response to an NWS Event; provided, however, that at all times Con Edison may choose to discuss with Applicant default circumstances relative to the risks to Con Edison's operational and reliability needs. Con Edison may be considered in default of this Agreement by Applicant if Con Edison fails to make a payment when due or Con Edison otherwise fails to satisfy its obligations in accordance with the terms and conditions of this Agreement.

**FORCE MAJEURE:** The Applicant shall be excused from any performance related to the Program Agreement arising from a cause beyond its control which it could not with the exercise of due diligence have either foreseen or avoided, including but not limited to act of governmental authority (other than the FDNY to the extent addressed in the Agreement), act of God, extraordinary weather conditions, flood, future pandemic or epidemic, accident such as fire or explosion not due to the negligence of the Applicant, strike which is not the result of an unfair labor practice or other unlawful activity by the Applicant, riot, and failure of public transportation facilities. Delay in the Applicant's receipt of subcontracted supplies or services for reasons beyond the control of the Applicant shall not be excusable delay hereunder to the extent that the supplies or services are available to the Applicant from another source and would not result in a breach under any existing warranty or agreement. The unavailability of sufficient, qualified labor to perform under the Program Agreement shall not be excusable delay hereunder unless the unavailability is caused by a strike which is not the result of an unfair labor practice or other unlawful activity by the Applicant. The Applicant shall give written notice and full particulars of the cause of any delay within 48 hours after its occurrence and thereafter shall update the Company on a bi-weekly basis, subject at all times to such legal privileges as might apply. The time for performance in any such instance shall be extended by a period equal to the time lost by reason of the excusable delay. Such extension shall be the Applicant's sole and exclusive remedy for such delay and the Company shall not be liable for any damages or additional costs incurred as a result of such delay.

#### **SECURITY AGAINST UNDERPERFORMANCE:**

Applicants/Customers will be required to furnish security to Con Edison within ninety (90) days of execution of this Agreement that demonstrates, among other things, Applicant's/Customer's financial capability to pay Liquidated Damages in the event the Applicant/Customer fails to satisfy its Load Reduction Guaranty during the period required by this Agreement, and to include Addendum 2 hereof. The security provided shall be in an amount equal to (i) 30% of the total incentive to be paid to the Applicant/Customer and (ii) \$150 per kW of Demand Reduction contracted for, whichever is less. Unless a Guarantee is permitted to be and

is provided hereunder (meeting the requirements set forth herein), such security shall be in the form of cash collateral or an irrevocable standby letter of credit in form and substance acceptable to Con Edison (the "Letter of Credit"), from an issuing U.S. commercial bank or U.S. branch of a foreign bank ("Issuer") that, in either case, (i) has counters for presentment and payment located in the City of New York or accepts requests to draw via fax, and (ii) has a rating assigned to its senior unsecured long term debt obligations not supported by third party credit enhancement or a rating assigned to it as an issuer rating (a "Credit Rating") of at least (x) "A-" by Standard & Poor's Rating Services ("S&P") and "A3" by Moody's Investors Service, Inc. ("Moody's"), if rated by both S&P and Moody's or (y) "A-" by S&P or "A3" by Moody's, if rated by either S&P or Moody's, but not both ("Minimum Credit Rating"). The Letter of Credit shall permit drawings upon a statement from Con Edison certifying that the amount of the drawing is owed to Con Edison pursuant to this Agreement, shall require the Issuer to honor requests to draw within two (2) Business Days, and shall have an expiration date no earlier than sixty (60) days after XX (the "Required LC Expiration Date"). Should the Letter of Credit have an expiration date prior to the Required LC Expiration Date, and Applicant/Customer shall fail to cause a substitute Letter of Credit to be furnished to Con Edison at least thirty (30) days prior to the expiration date of the initial Letter of Credit, such failure shall constitute a default under this Agreement and shall permit Con Edison to draw thereupon. Similarly, if the Issuer should fail to maintain the Minimum Credit Rating at any time during which the Letter of Credit is required to be posted (i.e., a "Downgrade Event") and Applicant/Customer fails to cause a substitute Letter of Credit to be furnished to Con Edison within ten (10) Business Days (or, if the Issuer still has a Creditworthy Rating despite suffering a Downgrade Event, within fifteen (15) Business Days) after Con Edison has provided written notice to Applicant/Customer demanding such substitute Letter of Credit, such failure shall constitute a default under this Agreement and shall permit Con Edison to draw thereupon. For purposes hereof, "Creditworthy Rating" means a Credit Rating of at least (i) "BBB- (not on Credit Watch)" by S&P and "Baa3 (not on Credit Watch)" by Moody's, if such entity is rated by both S&P and Moody's or (ii) "BBB- (not on Credit Watch)" by S&P and "Baa3 (not on Credit Watch)" by Moody's, if such entity is rated by either S&P or Moody's, but not both. "Credit Watch" means a negative ratings outlook by S&P or Moody's, sometimes referred to as "Negative Watch", "Credit Watch", "Negative, for Potential Downgrade" or "Negative Outlook". The parties recognize that the nature of each Project and the circumstances of each Applicant/Customer will vary. Any further provisions concerning the security to be posted by Applicant/Customer hereunder are set forth in Addendum 2, as mutually executed by the parties.

**USE AND RETURN OF SECURITY:** Con Edison may draw upon the security and/or exercise any and all rights in respect of such security as provided in this Agreement and in the security instrument. If Con Edison does not draw upon the security and/or exercise any and all rights in respect of such security as provided for in this Agreement and in the

security instrument, then Con Edison shall return the security to the Applicant following verification of performance during the first Summer Capability Period following the Operational Date of the Project.

**TAX LIABILITY AND CREDITS:** The Company is not responsible for any taxes that may be imposed on Customer (or Applicant, if different) as a result of projects installed or incentives received under the Program. Applicants may wish to consult a tax advisor regarding any tax consequences of this offer. Each Applicant (and Customer, if different) must provide to Con Edison its valid Federal Tax Identification Number and a W-9 form. The party receiving the incentive payment will be issued an appropriate Federal Tax Form concerning the incentive payment.

**REMOVAL OF EQUIPMENT:** As a condition of participation in the Program, Applicant agrees that any and all project-related removal and disposal of equipment or materials will be conducted at its sole cost and expense and in accordance with all applicable laws, rules, and regulations.

**DISPUTES:** In the event of any dispute, controversy, or claim arising out of or relating to this Agreement (a "Dispute"), within ten (10) Business Days following the delivered date of a written request by either Party, the Parties shall meet, negotiate, and attempt in good faith to resolve the Dispute quickly, informally, and inexpensively. In the event that the Parties have not resolved the Dispute within thirty (30) days after the delivery date of the original written request by either Party or such longer period as the Parties may mutually agree is necessary to achieve resolution of the Dispute, within ten (10) Business Days following any request by either Party at any time thereafter, each Party shall submit the Dispute to a senior officer, and the senior officers for both Parties shall meet, negotiate and attempt in good faith to resolve the Dispute. If the Parties have not resolved the Dispute within ten (10) Business Days following the meeting of the senior officers of each Party or such longer period as the Parties may mutually agree is necessary to achieve resolution of the Dispute, either Party may only then seek available legal and equitable remedies in a court or administrative body of competent jurisdiction.

**PROGRAM CHANGES:** The Company reserves the right to modify or terminate this Program at any time, with or without notice, and without any liability to Applicant or Customer except as expressly stated herein, provided, however, that any such modification or termination shall only be implemented following a change in applicable law or regulatory requirement that modifies, restricts or prevents the Company from performing the Agreement, and with the requirement of a reasonable relationship between the change in applicable law or regulatory requirement and the Con Edison decision to modify or terminate the Program. The Company will honor all written commitments made prior to the date of any such modification or termination, provided that a Project is fully completed by the time required hereby or thereby and all other requirements specified herein or therein are satisfied.

**PROGRAM EXPIRATION:** Unless otherwise provided for hereunder, this Agreement will end at the conclusion of ten (10) Summer Capability Periods, when funds are depleted, or when the Program is terminated, whichever occurs first. For clarity and the avoidance of doubt, at such time as this Agreement is no longer in effect, the Applicant has the right to maintain Project interconnection and allow continued Project use to provide other services to customers or to the distribution system.

**NOTICE OF RELEASE:** If Con Edison no longer needs the Applicant's ESS solution for load relief before the conclusion of the agreed to Summer Capability Periods, then Con Edison will provide written notice to the Applicant by April 1 prior to the next Summer Capability Period. In such circumstances the Applicant is required to take commercially reasonable efforts to maximize market revenue streams throughout the Summer Capability Period to buy-down Con Edison's remaining Performance Payments. Con Edison shall continue making the remaining Performance Payments for the Agreement less 20% of Shared Revenues (i.e., Revenue Sharing).

**CONTRACT EXTENSION:** Unless otherwise terminated, this Agreement may be renewed for successive one-year periods at the mutual agreement of the parties. Either party (Applicant/ Customer, on the one hand, and Con Edison, on the other hand) may provide to the other party a written notice of extension at least ninety (90) days prior to the scheduled termination, and the other party may accept or decline such written notice of extension.

**DISCLAIMER:** Applicant and Customer each acknowledge and agree that their submission of this Agreement and, if applicable, participation in the Program, are completely voluntary. Applicant and Customer further acknowledge and agree that neither the Company's, nor its affiliated entities, respective trustees, directors, officers, shareholders, employees, contractors, agents or representatives shall be liable to Customer or Applicant or to any other person or entity for any claim, charge, complaint, cause of action, damage, loss, agreement or liability of any kind or nature whatsoever, whether known or unknown and whether at law or in equity, arising out of, related to or in connection with (a) any Project undertaken or attempted to be undertaken by Customer, including, without limitation, the removal of, installation of, or use of any equipment, load reduction or demand response measures in connection with the Program, (b) the review, rejection or approval of this Agreement, any worksheets, attachments or addendums by the Company or its contractors or representatives, or (c) the determination of the total incentive amounts due to Customer or Applicant.

**CONFIDENTIALITY; PUBLICITY:**

(a) The parties hereto (the party disclosing Confidential Information (as defined below), the "Disclosing Party", and the party receiving Confidential Information, the "Receiving Party") agree that neither party shall disclose to any person

or entity this Agreement or the terms or conditions hereof, any information concerning other's pricing, or any other non-public information ("Confidential Information"); provided, however, that Confidential Information shall not be deemed to include any such information (i) independently developed by a Receiving Party without breach of this Agreement or any legal, ethical or fiduciary obligation (ii) which was already in possession prior to disclosure to Receiving Party by the Disclosing Party, (iii) becomes generally available to the public other than as a result of disclosure of such information by the Receiving Party in breach of this section or (iv) becomes available to the Receiving Party on a non-confidential basis from a source not known by the Receiving Party to be prohibited from disclosing such information by legal, contractual or fiduciary obligation. Notwithstanding the foregoing, the Receiving Party may disclose Confidential Information to (i) members, managers, directors, officers, employees of the Receiving Party and its affiliates whose duties and responsibilities require knowledge of such information; (ii) to accountants and counsel for the Receiving Party and its affiliates whose duties and responsibilities require knowledge of such information; (iii) to other agents of the Receiving Party, financing partners or its or their affiliates whose duties and responsibilities require knowledge of such information; (iv) as required by law, regulation or legal process or by any governmental or regulatory authority; (v) in order to comply with the lawful request or demands of any regulatory authority with authority over the Receiving Party receiving such request or demand; or (vi) in connection with any action by either the Disclosing Party or the Receiving Party to enforce rights and obligations under this Agreement. The Receiving Party assumes responsibility for compliance with, and any breach of, this section by any person or entity with whom the Receiving Party shares Confidential Information pursuant to clauses (i) – (iii) above. Without limiting the foregoing, with respect to Confidential Information that constitutes "personally identifiable information" (howsoever defined under applicable law) with respect to any customer received by the Receiving Party from the Disclosing Party, the Receiving Party shall take all steps reasonably necessary to protect against unauthorized access, use, modification, disclosure or other misuse of such information.

(b) In the event the Receiving Party is requested or required by any government agency, or in a legal proceeding or any similar process to disclose any Confidential Information, it will, if permitted by applicable law, notify the Disclosing Party promptly of the request or requirement so that the Disclosing Party may seek an appropriate protective order or waive compliance with this section. If, in the absence of a protective order or the receipt of a waiver hereunder, the Receiving Party is, on the advice of counsel, compelled to disclose any Confidential Information to any tribunal or else stand liable for contempt, the Receiving Party may disclose the Confidential Information to the tribunal; provided, that it shall use all reasonable efforts to obtain, at the reasonable request of the Disclosing Party, an order or other assurance that confidential treatment will be accorded to such portion of the Confidential Information required to be disclosed as the Disclosing Party shall reasonably designate.

(c) The Receiving Party agrees that, upon the request of the Disclosing Party, the Receiving Party will promptly return to the Disclosing Party (or, at Receiving Party's option, destroy) all Confidential Information in its possession. In the event of such a request or decision, any other material(s) containing or reflecting the Confidential Information (whether prepared by the Receiving Party, its representatives, or otherwise) shall be destroyed (with such destruction certified in writing by the Receiving Party at the request of the Disclosing Party). Notwithstanding anything contained herein to the contrary, the Receiving Party may retain a copy of the Confidential Information to the extent required by law or bona fide document retention policy, and the Receiving Party shall not be required to destroy any computer records or files containing Confidential Information which have been created pursuant to automatic archiving and back-up procedures where destruction would place a commercially unreasonable burden on the Receiving Party; provided, however, that any such copy retained shall (i) be held in compliance with the terms of this Agreement and (ii) not accessed, used or disclosed by the Disclosing Party other than to the extent required by such law or document retention policy.

(d) The terms and conditions of this section shall survive for a period of three (3) years following the expiration or termination of this Agreement.

(e) The direct, reasonable and actual costs and expenses incurred by a party in connection with the enforcement of this section, including, without limitation, reasonable attorneys' and paralegals' fees and disbursements and court costs incurred in such dispute, shall be reimbursed to the prevailing party by the other party.

(f) The parties shall mutually agree in writing upon the content of any proposed press releases related to this Agreement.

**NO REPRESENTATIONS OR WARRANTIES: EXCEPT AS PROVIDED FOR EXPRESSLY HEREUNDER, NEITHER THE COMPANY, APPLICANT, CUSTOMER, NOR ANY OF ITS RESPECTIVE CONTRACTORS, REPRESENTATIVES OR AGENTS MAKE ANY REPRESENTATION OR WARRANTY OF ANY KIND (WHETHER ARISING BY IMPLICATION OR BY OPERATION OF LAW) WITH RESPECT TO THE PROGRAM, ANY PROJECT, THE ADEQUACY OF ANY PROJECT DESIGN OR PLAN OR ENERGY EFFICIENCY OR DEMAND MANAGEMENT MEASURE OR ANY EQUIPMENT, CONSTRUCTION OR INSTALLATION OF EQUIPMENT OR THE AMOUNT OF INCENTIVES TO BE PAID WITH RESPECT TO A PROJECT, INCLUDING, WITHOUT LIMITATION, ANY WARRANTIES OR REPRESENTATIONS AS TO MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR ANY OTHER MATTER. THIS PROVISION SHALL SURVIVE THE EXPIRATION, TERMINATION OR CANCELLATION OF THIS AGREEMENT AND THE PROGRAM AND ANY PARTICIPATION THEREIN BY APPLICANT (AND CUSTOMER, IF DIFFERENT).**

**LIABILITY LIMITATION: IN NO EVENT IS EITHER PARTY (INCLUDING BY OR THROUGH ANY OF ITS CONTRACTORS, REPRESENTATIVES OR AGENTS) RESPONSIBLE TO THE OTHER PARTY FOR ANY INDIRECT, INCIDENTAL, SPECIAL, EXEMPLARY OR CONSEQUENTIAL DAMAGES, INCLUDING, BUT NOT LIMITED TO, LOST PROFITS, REGARDLESS OF WHETHER THOSE DAMAGES WERE FORESEEABLE.**

**RELEASE; INDEMNIFICATION:** To the fullest extent permitted by law, Customer and Applicant each, on behalf of themselves and any other person or entity claiming by and through either of them, hereby irrevocably and unconditionally releases and forever discharges, and agrees to defend, indemnify, and hold harmless the Company, its affiliated entities, and their respective contractors, past, present and future officers, directors, trustees, shareholders, employees, agents, representatives, successors and assigns (collectively, the "Indemnified Parties"), from and against, any and all claims, charges, complaints, causes of action, damages, losses, costs, interest, and liabilities of any kind or nature whatsoever, including reasonable attorney's fees, court costs, costs of experts and costs of investigation, whether known or unknown and whether at law or in equity arising from, related to or in any way connected with the (a) Applicant's or Customer's participation in the Program, including, without limitation, the removal of any equipment or the design, installation or performance of any energy efficiency or demand management measure or equipment, or (b) Customer's or Applicant's Agreement to participate in the Program (whether accepted or rejected). Accordingly, the Company recommends that all Applicants (and Customers, if different) consider engaging qualified engineers or other qualified consultants to evaluate the risks and benefits of participation in the Program and the implementation, operation or use of any project or measure on energy consumption, cost savings, or the operation of Customers' facilities. Applicant (and Customer, if different) understands that this Agreement may not be approved if the Company determines that the proposed project does not meet the requirements of the Program. Applicant (and Customer, if different) understands that final payment of any incentive amounts is contingent on satisfaction of all terms and conditions of the Program.

**GOVERNING LAW - JURISDICTION AND VENUE:** The validity construction and performance of these terms and conditions shall be governed by and construed and enforced in accordance with the law of the State of New York, without regard to its conflicts of law provisions. Customer and Applicant irrevocably submit and agree to the jurisdiction of the state and federal courts of the State of New York situated in New York County in any action, suit or proceeding related to, or arising out of this Agreement and, to the extent permitted by applicable law, Customer and Applicant and Company each waives and agrees not to assert as a defense in any such action, suit or proceeding any claim (a) that Customer or Applicant or Company are not personally subject to the jurisdiction of such courts of the

State of New York, (b) that the venue of the action, suit or proceeding is improper, (c) that the action, suit or proceeding is brought in an inconvenient forum; or (d) that the subject matter of these terms and conditions may not be enforced in or by such courts of the State of New York. Without prejudice to any other mode of service or process, Applicant and Customer and Company each consents to service of process relating to any such proceedings by personal or prepaid mailing in registered or certified form of a copy of the process to Company, Customer and/or Applicant at its address set forth in this Agreement.

**SEPARATE COUNSEL: THIS AGREEMENT IS A LEGAL DOCUMENT.** Before submitting this Agreement and participating in the Program, Applicant (and Customer, if different) is encouraged to retain legal counsel to review the terms and conditions of this Agreement and to advise it regarding its rights and obligations hereunder and under the Program.

**SEVERABILITY:** If any provision of this Agreement is held to be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions are in no way affected or impaired. The remaining provisions remain in full force and effect and the invalid, illegal or unenforceable provision will be deemed stricken from the agreement. If necessary to effectuate the intent of the agreement, the parties will cooperate to reach a mutually acceptable provision which is valid, legal, and enforceable to replace the stricken provision.

**NOTICES:** For coordination purposes, any notice or other communication, including a change of address or of the person to be notified (but not including invoices or routine correspondence relating to performance of the Services) given under this Agreement to any party must be in writing and must be sent by hand or overnight mail service, or by electronic mail with acknowledgement (by telephone or otherwise), or registered or certified United States mail, return receipt requested, to the attention of the parties at the respective addresses set forth below:

to the Company:  
Consolidated Edison Company of New York, Inc.  
4 Irving Place, 10th Floor NW New York, NY 10003  
Attn: Director of Distribution Planning  
E-mail: [dsm@coned.com](mailto:dsm@coned.com)

with a copy to:  
Consolidated Edison Company of New York, Inc.  
4 Irving Place, Room 1800 New York, NY 10003  
Attn: General Counsel

to the Applicant/Customer:  
E-mail:

**HEADINGS:** The descriptive headings used in this Agreement are for purposes of convenience only and do not constitute a part of this Agreement.

**MODIFICATION; AMENDMENT OR SUPPLEMENT:** This Agreement, together with all documents and other materials delivered pursuant hereto, constitutes the entire agreement between the parties with respect to the subject matter hereof and supersedes all prior agreements or understandings, written or oral, with respect to such subject matter. Any modification, amendment or supplement to this Agreement shall not be valid or enforceable against either party unless it is in writing and signed on behalf of both parties by their respective duly authorized representatives. In the event of a conflict between the terms of this Agreement and the terms of any Addendum hereto, the terms of the Addendum shall control.

**NON ASSIGNMENT:** Neither this Agreement, nor any part or the whole of any project arising hereunder, and to include no part or the whole of any work associated with any project, may be assigned, delegated, subcontracted, or otherwise transferred by Applicant and/or Customer without the prior written approval of the Company in each case. Applicant and/or Customer shall be entitled to utilize subcontractors for the construction, operation, and/or maintenance of the Project, provided however that nothing shall relieve Applicant and/or Customer of its obligations to the Company under this Agreement.

**INDEPENDENT CONTRACTORS:** The parties acknowledge that as between the Company, on the one hand, and Applicant and Customer, on the other hand, that the parties are independent contractors hereunder, and that nothing in this Agreement shall be construed so as to create any partnership, joint venture, or employee-employer relationship among or between any and all of the Company and Applicant and Customer, including, without limitation, any revenue sharing arrangement hereunder. Neither party shall represent itself as having the authority or power to bind, or act on behalf of, the other party. Each party will be solely responsible for payment of all compensation owed to its employees and employment-related taxes, as well as maintenance of appropriate worker's compensation for its employees and general liability insurance.

**COUNTERPARTS:** This Agreement may be executed in two (2) or more counterparts, each of which, taken together, shall be deemed to be an original, but all of which shall constitute one and the same Agreement. In the event that any signature is delivered by facsimile transmission, or by e-mail delivery of a ".pdf" format data file, or by a mutually acceptable means of electronic signatures, then such signature shall create a valid and binding obligation of the party executing (or on whose behalf such signature is executed) with the same force and effect as if such facsimile or ".pdf" signature page were an original thereof.

### Agreement Requirements (Please Check Both)

Yes, I have provided a detailed Scope of Work document (SOW).

Yes, I have signed the Program Agreement.

To ensure that your Agreement package is processed in a timely manner, please make sure that you submit all of the documentation below:

1. Completed Program Agreement
2. Exhibit A – Performance Verification Plan
3. Signed Addendum 2 – If no changes check box on top of Addendum 2.
4. Scope of Work, including all relevant information.
  - Cut Sheets for all equipment, including technical data and testing laboratory information
  - Project Schedule (Including estimated Start/Operational Dates on Page 2)
  - W-9 Form
  - Proposed Cost Estimates
  - Completed Addendum 1/Multiple Facilities Template (if applicable)

### Agreement and Signature (Required for all Agreements)

I certify that all statements made in this Agreement and required documents provided are true and correct to the best of my knowledge. I agree to the terms and conditions of the Program set forth in this Agreement. **A signature is required from the Customer (Account Holder) or Applicant, if different. (An Applicant may be a Customer or a third-party authorized to apply for the Program on behalf of the Customer or Customers identified on Page 1 of, or in Addendum 1 to, this Agreement.)**

Account Holder Name <i>(please print)</i>	Account Holder Signature	Date
Applicant Name <i>(please print)</i>	Applicant Signature	Date
Con Edison Authorized Representative	Signature	Date