**2018 EMERGENCY AND ECONOMIC COMMERCIAL**



**AND INDUSTRIAL DEMAND RESPONSE**

**CUSTOMER AGREEMENT**

Customer and Consumers Energy are referred to herein collectively as the “Parties” and each individually as a “Party” to this Agreement.

Effective Date of Agreement:

(Month/Day/Year)

Company: Customer:

**CONSUMERS ENERGY COMPANY**

a Michigan Corporation (Legal Name)

ONE ENERGY PLAZA

JACKSON MI 49201-2357 (Street & Number)

(City, State & Zip Code)

1. **Term.** This Agreement shall commence on the Effective Date and continue until May 31, 2019.
2. **Program Description.** Participants in the Consumers Energy 2018 Demand Response Program (“Program”) help reduce peak demand when energy use is the highest and maintain a ready supply of energy for Michigan. The Program is offered to Consumers Energy customers with an energy demand greater than 100 kilowatts. Participants will receive monetary incentives after the load control season is complete, and the incentives will vary based on actual energy reductions.
3. **Administration Solutions.** In connection with this Agreement, Consumers Energy has engaged a third party contractor (“Contractor”) to manage the Program. Customer agrees to work with Consumers Energy and/or Contractor (i) to develop an appropriate energy curtailment plan for Customer’s business; and (ii) to provide or cause to be provided by Consumers Energy access and use of contact, billing and energy usage data, and facility information concerning each Site Address (as defined below) (Customer Data). Consumers Energy or Contractor shall manage Customer’s curtailable electrical capacity in the Program and upon notification by Consumers Energy or Contractor and acceptance by Customer, provide real-time support to Customer during demand response events (“Demand Response Events”); and enable data transfer, monitoring and reporting of meter data through the Contractor system (“System”) and provide technical assistance, maintenance, repair and hosting of the System. In addition, as necessary, Consumers Energy or Contractor will coordinate with Customer to capture kilowatt-hour (“kWh”) pulses from Customer’s primary utility meter to provide Customer near real-time, Internet-enabled power monitoring.
4. **System.** Contractor or Consumers Energy may equip one or more of Customer facility addresses (each address is referred to as a “Site Address”) as identified on the Site Address Attachment attached hereto with the System, which includes site devices owned by Consumers Energy that can enable direct load management, power metering, data collection, near real-time data communication, and Internet-based reporting and analytics. There shall be no cost to the Customer associated with the System equipment or installation of the System equipment.
5. **Customer Support Requirements.**
6. **Representations and Warranties.** Customer holds all applicable licenses and/or permits pursuant to the Agreement that are required for the proper participation in the Program.
7. **Demand Response Performance.** Customer has the intent and ability to generate and/or reduce electrical demand to achieve Accepted Capacity (as defined below) at each Site Address when notified by Consumers Energy or Contractor during Demand Response Events. Customer understands that the curtailable electrical capacity identified in the Site Address Attachment does not represent Accepted Capacity and is solely Contractor’s and Customer’s best estimate of performance and that Accepted Capacity may vary.
8. **Acceptance Testing.** At each Site Address where the site devices are installed, Customer agrees to collaborate with Contractor and Consumers Energy in a timely manner in testing, enabling and maintaining the System.
9. **Energy Reduction Plan**. Customer must provide to Consumers Energy their Energy Reduction Plan describing the equipment and steps that will be taken to meet their curtailment nomination.
10. **Program Rules.** The terms of this Agreement reflect the current Program terms and conditions, which may be amended from time to time by Consumers Energy. The current terms are summarized below:

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| **Program Availability** | During the Program period of June 1 – September 30 (“Program Period”), Demand Response Events may be called between the hours of 11 am – 7 pm, excluding nationally recognized holidays (Fourth of July and Labor Day). |
| **Event Frequency and Duration** | **Emergency Events** – Up to five (5) events during the Program Period, each with duration of four hours.  **Economic Events** – Up to ten (10) events during the Program Period, each with duration of four hours. |
| **Advanced Notification** | **Emergency Events** – Customer will receive at least a thirty (30) minute but no more than a twelve (12) hour notice in advance of an Emergency Event.  **Economic Events** – Customer will receive “day-ahead” notice of an Economic Event. |
| **Dispatch Readiness Test** | After Customer’s Energy Reduction Plan has been reviewed by the Consumers Energy and Customer’s site installation has been completed, Customer will receive an email from Consumers Energy asking Customer to select a date to participate in a Dispatch Readiness Test of Customer’s Energy Reduction Plan. The duration of the Dispatch Readiness Test will be 30 minutes. The Dispatch Readiness Test is optional to the Customer but recommended by Consumers Energy. |
| **Audit** | Consumers Energy may call one (1), one-hour audit (“Audit”) per Program Period to confirm Accepted Capacity. (as defined below). This audit is required as the Customer’s program payment will be determined by performance. |
| **Economic Events** | Consumers Energy may, in its sole discretion, initiate certain Economic Demand Response Events under the Program (“Economic Event(s)”). Such Economic Events shall have no impact on Delivered Capacity or Capacity Payments (each, as defined below). |
| **Emergency Events** | Consumers Energy may call certain emergency Demand Response Events under the Program in response to Midcontinent Independent System Operator, Inc. (“MISO”) grid operator reliability triggers (“Emergency Event(s)”). |

1. **Customer capacity.**

**a. Accepted Capacity*.*** For purposes of this Agreement, Accepted Capacity shall represent the best estimate of Customer’s performance (in kilowatts (“kW”)) based on analysis of consumption data and pre-enrollment testing.

**b. Delivered Capacity*.***

i. For purposes of this Agreement, an event’s Delivered Capacity shall be defined as the average of the Delivered Capacity for each hour in a Demand Response Event. Delivered Capacity for each event hour is the difference between the measured energy demand and the baseline energy demand, factoring in the performance thresholds described in section 7(b)(ii) below. Consumers Energy will use approved MISO methods of determining baseline energy usage. MISO’s default measurement and verification method (“M&V Method”) is to use the 10-days prior to the event to establish the baseline. Consumers Energy, at its discretion, can make an adjustment to the baseline determined by the M&V Method of plus or minus 20% based on the energy usage three hours prior to the beginning of the Emergency Event.

ii. Delivered Capacity is capped at 120% of Accepted Capacity for each Demand Response Event hour. If Delivered Capacity is less than 70% of Accepted Capacity in a single Demand Response Event hour, then the Delivered Capacity for that Demand Response Event hour will equal zero (0) kW. Consumers or Contractor may, at their sole discretion, remove minimum and maximum caps on a case-by-case basis. If there is more than one (1) Emergency Event during the Program Period, then Delivered Capacity for that Program Period will equal the average of the Delivered Capacity from each Emergency Event hour in the Program Period. If there are no Emergency Event during the Program Period, then Delivered Capacity for that Program Period will equal the performance during the Audit. If an Audit is not called during the Program Period, then Delivered Capacity for that Program Period will equal Customers Accepted Capacity.

iii. For Economic Events, Delivered Capacity is not capped. For each Economic Event called during a Program Period, the Delivered Capacity for that event will equal the average of the Delivered Capacity from each Economic Event hour. If Delivered Capacity is less than 100 kW in a single Demand Response Event hour, then the Delivered Capacity for that Demand Response Event hour will equal zero (0) kW. Consumers or Contractor may, at their sole discretion, remove the minimum 100 kW threshold on a case-by-case basis.

1. **Payments to Customer.**
   * 1. **Emergency Capacity Payments.** Consumers Energy will pay Customer a capacity rate of $25/kW (“Capacity Rate”) of Delivered Capacity per Program Period as defined in section 7(b)(ii) above. If there are multiple Emergency Events, the Delivered Capacity is averaged between all Emergency Events. If there are no Emergency Events, Consumers Energy will pay Customer the Capacity Rate multiplied by the Accepted Capacity, unless an audit takes place, in which case the Customer’s Delivered Capacity would be determined by the audit. The Capacity Payment will be made at the end of the Program Period.
     2. **Emergency Event Energy Payments.** In Program Periods when one or more Emergency Events are called, Consumers Energy will pay to Customer an Emergency Event energy payment for Customer participation during any Emergency Event equal to $50/MWh multiplied by the event’s Delivered Capacity multiplied by the hours for each such event as defined in section 7(b)(ii) above.
     3. **Economic Event Energy Payments.** Consumers Energy will pay to Customer an Economic Event energy payment for Customer participation during any Economic Event equal to $300/MWh multiplied by the event’s Delivered Capacity multiplied by the hours for each such event as defined in section 7(b)(iii) above.
     4. **Underperformance.** Customer will be assessed a surcharge in the event that the Customer’s Delivered Capacity for an Emergency Event does not meet 100% of their Accepted Capacity as described in Section 10 below. Customer may also have future Accepted Capacity and/or payments reduced to reflect Delivered Capacity as described in Section 7(b) above. Notwithstanding the above, in no event shall Accepted Capacity and/or payments be reduced due to Customer’s underperformance or non-performance resulting from Consumers Energy’s non-compliance with the Advanced Notification provisions hereunder or the Program System’s malfunction.
2. **Payment Timing.** After the Program Period is over and the Delivered Capacity has been verified, Consumers Energy shall make all payments associated with Customer’s participation in the Program and such payments shall be made by the issuance of credits to the Customer’s bill.
3. **Surcharge for Failure to Perform.** If Customer fails to deliver 100% of their total nominated kW for an Emergency Event ordered by Consumer Energy or Contractor, as provided for in this Agreement, the following shall occur: (i) Customer shall forego all payments if the average delivered capacity for the event is less than 70% and (ii) Customer shall be assessed the real time commodity price ($/MWh), as determined by the MISO Midwest Energy Market, for the kW curtailment which was underperformed per event. The real time commodity price is capped at $1,000 / MWh.
4. **Confidentiality.**
5. **Nondisclosure to Third Parties.** In performing under the Agreement, each Party to this Agreement will be exposed to certain Confidential Information (as hereinafter defined) of the other Party. Each Party on its own behalf and on behalf of its employees, contractors and agents (collectively, “Representatives”) agrees not to, except as required by applicable law or regulation, use or disclose such Confidential Information without the prior written consent of the other Party, either during or after the Term. To protect Confidential Information, each Party agrees to: (i) limit dissemination of Confidential Information to only those Representatives having a “need to know”; (ii) advise each Representative who receives Confidential Information of the confidential nature of such information; and (iii) have appropriate agreements, policies and/or procedures in place with such Representatives sufficient to enable compliance with the confidentiality obligations contained herein. The term “Confidential Information” means all information which is disclosed, either orally or in written form, by either Party or its Representatives and shall be deemed to include: (w) any notes, analyses, compilations, studies, interpretations, memoranda or other documents prepared by either Party or its Representatives which contain, reflect or are based upon, in whole or in part, any Confidential Information furnished to a receiving Party or its Representatives pursuant hereto; (x) any information concerning the business relationship between the Parties; and (y) Customer Data.
6. **Exclusions from Confidential Information**. Notwithstanding the obligations in Section 12(a) above, Confidential Information does not include an information that:
7. is or becomes generally known to the public without breach of any obligation owed to the disclosing Party;
8. was known to the receiving Party prior to its disclosure by the disclosing Party without breach of any obligation owed to the disclosing Party;
9. is received from a third party without the receiving party having any knowledge of any breach by such third party of any obligation owed to the disclosing Party; or
10. was independently developed by the receiving Party without reference to or reliance upon the disclosing Party’s Confidential Information.
11. **Limitation of Liability.** Consumers Energy’s and its contractors’ and subcontractors’ liability hereunder is limited to direct actual damages as the sole and exclusive remedy, and total damages under the Agreement shall not exceed $100,000 or the total amounts paid to Consumers under the Agreement, whichever is less. In no event shall either Party, its parent, officers, directors, partners, shareholders, employees or affiliates, or any contractor or subcontractor or its employees or affiliates, be liable to the other Party for special, indirect, exemplary, punitive, incidental or consequential damages of any nature whatsoever connected with or resulting from performance or non-performance of obligations under the Agreement, including without limitation, damages or claims in the nature of lost revenue, income or profits, loss of use, or cost of capital, irrespective of whether such damages are reasonably foreseeable and irrespective of whether such claims are based upon negligence, strict liability contract, operation of law or otherwise.
12. **Additional Terms.**
13. Customer also agrees, with respect to Contractor’s management of the System, it:

hereby releases Contractor from any obligations with respect to monies owed Customer in connection with its participation in the Program and further agrees to defend and indemnify Contractor, its affiliates, directors, employees and agents from any and all claims that arise or may arise out of the Agreement;

* + - * 1. receives a limited, revocable, non-transferrable and non-exclusive right to use and access during the Term the System and shall use the System solely for its internal use subject to the terms of the Agreement and not for the benefit of any third party. Except as expressly permitted in the Agreement, Customer agrees that it shall not receive any right, title or interest in, or any license or right to use or access, the System or any patent, copyright, trade secret, trademark or other intellectual property rights therein by implication or otherwise;
        2. shall use the System in accordance with all applicable law;
        3. shall not and shall prohibit causing or permitting, the copying, reverse engineering, disassembly, decompilation or attempting to derive the source code of the System, or other intellectual property of Contractor or creation of any derivative work thereof;
        4. expressly disclaims any passing of title to the System, any trade names, trade dress, trademarks, service marks, commercial symbols, copyrightable material, designs, logos and/or any other intellectual property of Contractor to Customer;
        5. disclaims any and all direct warranties, express or implied, or liabilities of Contractor to Customer for all damages, whether direct or indirect, incidental or consequential, arising from the use of the System or participation in the Program;
        6. disclaims any liability of Contractor for delays, limitations or other problems inherent in the use of the Internet to which the System may be subject;
        7. shall protect Contractor’s Confidential Information as though Contractor and Customer are the Parties in Section 12 of the Agreement; and
        8. shall not delete, alter, cover, or distort any copyright or other proprietary notices or trademarks from the System and to use reasonable care to prevent the System and Contractor’s intellectual property rights contained in the software from damage and unauthorized use.
        9. authorizes Consumers Energy to share Customer Data collected by any equipment with Contractor for purposes of providing the System to Customer and Consumers Energy, and further authorizes Contractor to use, copy, store, modify and display Customer Data for purposes of providing the System to Consumers and Customer.

1. **Miscellaneous.** Customer may not assign any of its rights or delegate any of its performance obligations hereunder without the prior written consent of Consumers Energy. The Agreement, including all attachments, constitutes the entire agreement between Customer and Consumers Energy and may only be amended in writing signed by each of the Parties. If any of its provisions shall be held invalid or unenforceable, this Agreement shall be construed as if not containing those provisions and the rights and obligations of the Parties hereto shall be construed and enforced accordingly. This Agreement shall be binding upon the Parties together with their successors and permitted assigns. Each Party shall be responsible for its Representatives’ compliance with the Agreement. Customer shall promptly notify Consumers Energy in writing of any changes occurring during the Term to the Customer address(es) set forth in this Agreement. The parties agree Contractor is a third party beneficiary to this Agreement.
2. **Force Majeure.** The Parties to this Agreement shall be excused from any failure or delay in the performance of their obligations if such obligations are prevented from being fulfilled due to Force Majeure. A Party unable to fulfill any obligation hereunder (other than an obligation to pay money when due) by reason of Force Majeure, shall give notice and the full particulars of such Force Majeure to the other Party in writing or by telephone as soon as reasonably possible after the occurrence of the cause relied upon. Telephone notices given pursuant to this article shall be confirmed in writing as soon as reasonably possible and shall specifically state full particulars of the Force Majeure, the time and date when the Force Majeure occurred and when the Force Majeure is reasonably expected to cease. The Party affected shall exercise due diligence to remove such disability with reasonable dispatch, but shall not be required to accede or agree to any provision not satisfactory to it in order to settle and terminate a strike or other labor disturbance. The Contractor, as identified in this Agreement, shall be consider a Party to this Agreement for purposes of this Force Majeure provision and shall be excused from any failure or delay in the performance of its obligations if such obligations are prevented from being fulfilled due to Force Majeure. In such Contractor Force Majeure situations, Consumers Energy shall not be liable to Customer for any damages incurred due to Contractor Force Majeure beyond those provided for in Section 13 of this Agreement. A “Force Majeure” shall include any act, event, or occurrence beyond the Party’s reasonable control, which the Party, despite its best efforts, is unable to prevent, avoid, overcome, delay or mitigate, including but not limited to: floods, epidemics, earthquakes, quarantine, blockade, war, insurrection or civil strife or terrorism, provided, however, that Force Majeure shall in no event include (i) failure of Subcontractors or Suppliers to deliver services, materials or components or receipt from any Subcontractor or Supplier of defective services, material or components unless same were themselves caused by a Force Majeure Event; (ii) technological impossibility; (iii) a governmental act or failure to act, or order or injunction, caused by any act or failure to act of the Seller or any Subcontractor or Supplier; (iv) strikes or work stoppages; or (v) inclement weather.
3. **Warranty Limitations.** THE SYSTEM (AND ANY SOFTWARE, HARDWARE, OR OTHER COMPONENT THEREOF) AND ALL SERVICES HEREUNDER ARE PROVIDED AS IS BY CONSUMERS ENERGY AND THE CONTRACTOR WITHOUT ANY WARRANTY OF ANY KIND. ALL WARRANTIES, WHETHER EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ALL WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, ARE EXPRESSLY DISCLAIMED TO THE FULLEST EXTENT PERMISSIBLE UNDER APPLICABLE LAW.
4. **Governing Law; Actions; Etc.**: This Agreement shall be deemed a Michigan contract and shall be governed by and interpreted in accordance with the laws of the State of Michigan; excluding any conflicts of laws principles that would result in this Agreement being interpreted in accordance with any different law. Venue for any lawsuit arising out of or in connection with this Agreement shall be exclusively in the courts of the State of Michigan or a Federal court sitting in the State of Michigan. Any legal action against Consumers Energy relating to this Agreement or the breach thereof shall be commenced within one year from the date on which the claimed breach, default or other cause of action arose (and, without limiting the foregoing, in all events not later than one year after the date of completion or other cessation of performance of the work hereunder). This Agreement is intended for the benefit of the parties herein only and does not grant any rights to any third parties unless otherwise specifically stated herein. If Customer defaults in the timely performance of any of its obligations hereunder, then Consumers Energy may, at its option, and in addition to any and all other rights or remedies it may have hereunder or at law or equity, terminate this Contract by written notice to Customer.

**IN WITNESS WHEREOF, and intending to be legally bound, the Parties have duly executed this Agreement by their authorized representatives as of the Effective Date.**

CONSUMERS ENERGY COMPANY

(Customer)

By: By:

(Signature) (Signature)

(Print or Type Name) (Print or Type Name)

(Date) (Date)

**SITE ADDRESS ATTACHMENT**

**SITE ADDRESSES**

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| **SITE NAME** | **SITE ADDRESS** | **CONTRACT ACCOUNT NUMBER** | **METER NUMBER** | **ESTIMATED CAPACITY (kW)** |
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