

**RESIDENTIAL AND HARD-TO-REACH STANDARD OFFER  
PROGRAMS AGREEMENT**

BETWEEN

**XCEL ENERGY**

AND

---

January 2022

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## **2022 RESIDENTIAL AND HARD-TO-REACH STANDARD OFFER PROGRAMS AGREEMENT**

This Residential and Hard-to-Reach Standard Offer Program Standard Contract (the "Agreement") is made and entered into by and between SOUTHWESTERN PUBLIC SERVICE COMPANY d/b/a Xcel Energy, a New Mexico corporation (hereinafter "Xcel Energy") and \_\_\_\_\_, (hereinafter "Market Actor") for the purpose of obtaining demand and energy savings from efficiency measures installed at \_\_\_\_\_ (the "Project").

**WHEREAS**, XCEL ENERGY has developed a demand-side Residential and Hard-to-Reach Standard Offer Programs for its residential and hard-to-reach customer classes (the "SOP"); and

**WHEREAS**, the SOP seeks to procure energy and peak demand savings through the installation and operation of energy efficiency measures at residential and hard -to-reach customer sites; and

**WHEREAS**, Market Actor has developed a plan for participation in the SOP through a set of proposed energy efficiency measures and other improvements necessary to produce energy savings and peak demand savings (the "Project");

**NOW, THEREFORE**, in consideration of the mutual covenants and agreements hereinafter set forth, the adequacy and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

### **1. ARTICLE I – DEFINITIONS**

- 1.1 "Baseline" is generally defined, for the purposes of determining estimated and measured energy savings, as the energy consumed by equipment with efficiency levels that meet the applicable current federal standards and reflects current market conditions. The baseline may be determined by the equipment or conditions currently in place under the following conditions: a) when federal energy efficiency standards do not apply, or b) when the existing equipment can be shown by the Market Actor to have a remaining service life of at least ten years.

- 1.2 "Contract Documents" shall mean i) Market Actor's approved Project Application, attached hereto and incorporated herein as Exhibit A; ii) Market Actor's approved Supplemental Project Information dated\_, attached hereto and incorporated herein as Exhibit B; iii) the SOP Manual, attached hereto
- 1.3 and incorporated herein as Exhibit C; and v) this Agreement together with any and all other exhibits, addenda, or amendments referenced herein or made a part hereof in accordance with this Agreement.
- 1.4 "Deemed Energy Savings" shall mean a pre-determined, validated estimate of Energy Savings attributable to a Measure in a particular type of application.
- 1.5 "Deemed Peak Demand Savings" shall mean a pre-determined, validated estimate of Peak Demand Savings attributable to a Measure in a particular type of application.
- 1.6 "Energy Savings" shall mean a quantifiable reduction in a customer's consumption of energy, or the amount by which energy consumption is reduced, as a result of the installation of qualifying energy-efficient equipment. Energy Savings will be determined by comparing the efficiency of the installed equipment to that of an appropriate baseline.
- 1.7 "Host Customer" shall mean a residential customer of XCEL ENERGY that owns or leases facilities at a Project Site or Sites and that has either entered into a Host Customer Agreement with Market Actor or is acting as its own Market Actor for the installation of Measures as a part of the Project.
- 1.8 "Host Customer Agreement" shall mean the agreement between Host Customer and Market Actor that specifies the rights and obligations of each party with respect to the installation of the Measures and other related and/or unrelated matters at the Project Site.
- 1.9 "Measure" shall mean equipment, materials, and practices that when installed and used at a customer site result in a measurable and verifiable reduction in either purchased electric energy consumption, measured in kilowatt-hours (kWh), or peak demand, measured in kilowatts (kW), or both.
- 1.10 "Peak Demand" shall mean electrical demand at the time of highest annual demand on the utility's system, measured in 15 minute intervals.
- 1.11 "Peak Demand Savings" shall mean, for purposes of the XCEL ENERGY Standard Offer Program, the maximum average load reduction occurring during any one-hour period

between 1 PM and 7 PM CDT weekdays, from May 1 through September 30 (holidays excluded). Peak Demand Savings will be determined by comparing the efficiency of the installed equipment to that of an appropriate baseline.

- 1.12 "Project" shall mean an energy efficiency measure or combination of measures installed under this Agreement that results in both a reduction in customers' electric energy consumption and peak demand, and energy costs.
- 1.13 "Project Site" shall mean one or more adjacent buildings on a single meter owned or operated by a single Xcel Energy customer.
- 1.14 "Market Actor" shall mean any organization, group, or individual who contracts with XCEL ENERGY to provide Energy Savings and Peak Demand Savings under the Standard Offer Program.
- 1.15 "Prudent Electrical Practices" shall mean those practices, methods, standards and equipment commonly used in prudent electrical engineering and operations to operate electrical equipment lawfully and with safety, dependability and efficiency and in accordance with the National Electrical Safety Code, the National Electrical Code and any other applicable federal, state and local codes provided, however, that in the event of a conflict, the applicable federal, state or local code shall govern.

## **2. ARTICLE II - TERM AND TERMINATION**

- 2.1 The term of this Agreement shall commence on the date of execution by XCEL ENERGY (the "Effective Date") and, unless otherwise terminated as set forth herein, shall continue in force and effect for a period of 18 months from the Effective Date.

## **3. ARTICLE III - COMPLIANCE WITH SOP MANUAL**

- 3.1 By executing this Agreement, Market Actor acknowledges that it reviewed the SOP Manual (Exhibit C) prior to submission of its Project Application. Market Actor represents and affirms that its participation in the SOP has at all times been in compliance with the procedures and conditions set forth in the SOP Manual and that any failure to comply therewith may be treated as a breach of this Agreement notwithstanding the fact that such failure occurred prior to the execution of this Agreement. Market Actor also acknowledges that it meets or exceeds all of the qualifications required to participate in the SOP as described in the SOP Manual and that failure to meet the qualifications therein may be

treated as a breach of this Agreement.

- 3.2 Procedures or conditions set forth in the SOP Manual may only be waived or modified by written agreement of the parties. Any such agreement shall be attached hereto and incorporated herein for all purposes.

#### **4. ARTICLE IV - HOST CUSTOMER AGREEMENT AND CUSTOMER CERTIFICATION**

- 4.1 Market Actor will be solely responsible for entering into a Host Customer Agreement(s) with the Host Customer(s) as appropriate for implementation of the Project. Before any marketing activities are begun at a Project Site, the Market Actor shall submit a copy of its proposed Host Customer Agreement template to XCEL ENERGY for approval. The approved Host Customer Agreement must be executed

by the Host Customer prior to Market Actor beginning installation of Measures at the Project Site. XCEL ENERGY will not award incentive payments without proper completion of the Host Customer Agreement as provided for in the Contract Documents. To the extent possible, Host Customer Agreements will be kept confidential.

- 4.2 Market Actor agrees to disclose to Host Customer any potential adverse environmental or health effects associated with the Measures to be installed at the Project Site. Market Actor further agrees to include in the Host Customer Agreement all consumer protection provisions and disclosures contained in Article XII of this Agreement as well as the following provisions:

(a) Host Customer agrees, upon three (3) days' prior oral notice, to provide XCEL ENERGY and the independent measurement and verification expert selected by the Public Utility Commission of Texas (PUCT) with full and complete access to the Project Site for any purpose related to the SOP. The right of access will be subject to Host Customer's reasonable access requirements and, unless otherwise agreed, must occur within the normal business hours of the Host Customer.

(b) Host Customer acknowledges that any view, inspection, or acceptance by XCEL ENERGY of the Project Site or of the design, construction, installation, operation or maintenance of the Measures is solely for the information of XCEL ENERGY and that, in performing any such inspection or review or in accepting the Measures, XCEL ENERGY makes no representation or warranty whatsoever as to the

economic or technical feasibility, capability, safety or reliability of the Measures, their installation by Market Actor or their compatibility with the Host Customer's facilities.

- (c) Host Customer acknowledges that Market Actor is an independent contractor with respect to XCEL ENERGY and the SOP and that Market Actor is not authorized to make representations or incur obligations on behalf of XCEL ENERGY. Host Customer further acknowledges that XCEL ENERGY is not a party to the Host Customer Agreement and that Market Actor is solely responsible for performance thereunder.
- (d) Host Customer agrees to provide XCEL ENERGY with access to Host Customer's utility bills, project documentation, contractor invoices, and technical and cost information directly related to the Project.

4.3 Market Actor must obtain a certification from each Host Customer indicating that the Measures contracted for were installed at the Project Site. The certification should be in the form of the Customer Certification form available from the official program website. The Customer Certification form(s) should be submitted to XCEL ENERGY with the Project Implementation Report described in Section 5.4 below. If a Host Customer refuses to sign the Customer Certification form, Market Actor may request, at Market Actor's expense, that XCEL ENERGY perform an inspection of the Project Site. Final payment of incentives will not be made unless and until a Customer Certification or inspection has been completed in accordance with the terms of the Contract Documents.

## **5. ARTICLE V - PROJECT IMPLEMENTATION**

5.1 Market Actor agrees on and after the Effective Date to use all reasonable efforts to implement the Project without undue delay and otherwise in accordance with the terms of the Contract Documents. Measures shall be designed, constructed and installed in a good and workmanlike manner only with materials and equipment of appropriate quality, and, in any event, in accordance with Prudent Electrical Practices. To the extent of any conflict between this Agreement and other Contract Documents, the terms of this Agreement shall prevail.

- 5.2 The minimum amount of installations that may be performed at a non-HTR Host Customer Site is \$200. Market Actors treating Hard-to-Reach project sites have no minimum but must install, at minimum, one of the primary measures, as described in the SOP Manual, per site. The maximum Market Actor incentive limit is as follows:

Hard-to-Reach – Large Component-\$70,000.00

Residential – Large Component-\$65,000

- 5.3 Market Actors will not have to complete a reservation process to perform installations. Projects can be submitted until the Market Actor cap is reached or all program funds have been used. Funds will be taken out of the program budget upon the submission of a project. Please note that when funds have run out in the program, there is no guarantee that Utility will be able to pay incentives on non-submitted projects. It is the sponsor's responsibility to monitor the program budget and their Market Actor budget to determine if there are ample funds before implementing installations.

Within thirty (30) days of receipt an invoice, XCEL ENERGY shall (may) complete a random sample inspection a statistically significant sample of the Measure installations at the Project Site(s). This inspection shall be used to determine whether the Measures were installed and are capable of performing their intended function of producing Energy Savings and Peak Demand Savings. If XCEL ENERGY reasonably determines that the Measures at the Project Site(s) have been installed, tested and inspected to the extent required by XCEL ENERGY and found to be capable of providing Peak Demand Savings and/or Energy Savings in material compliance with the Contract Documents, the installations will be approved as submitted. The Estimated Savings attributable to the Measures documented in the approved Project Implementation Report will be used for purposes of calculating the Incentive Payment in Section 7.2.

- 5.4 If XCEL ENERGY determines that the Measures installed at the Project Site(s) are not capable of providing Peak Demand Savings and/or Energy Savings in material compliance with the Contract Documents, all installations may be evaluated on a measure-by-measure basis to calculate an adjustment factor for energy savings and incentives. This adjustment factor may consider the ratio of savings of the measures that pass the inspection to the total incentive specified in the Measure Inspection Report. The adjustment factor may then be applied to the incentive amount for payment. The algorithm for calculating the adjustment factor is described below:

**Adjustment Factor = Total incentives per measure that pass inspection ÷  
Total incentives per measure on inspection report-**



This assumes all figures on the implementation report are correct. Any errors will be corrected prior to finalizing the adjustment factor.

- 5.5 Within thirty (30) days of the conclusion of the Performance Period, the Market Actor shall submit a report to XCEL ENERGY documenting the Measured Peak Demand Savings and/or Measured Energy Savings for the Performance Period (the "Performance Report"). If the Performance Report is deficient, XCEL ENERGY will provide written notice of the deficiency to the Market Actor which notice shall specify the nature of the deficiency. Upon receipt of the notice of deficiency, Market Actor shall revise the Performance Report to correct the deficiency. The revised Performance Report shall be resubmitted to XCEL ENERGY within the time period specified by XCEL ENERGY in the notice of deficiency.
  
- 5.6 Any view, inspection, or acceptance by XCEL ENERGY of any Project Site or of the design, construction, installation, operation and maintenance of the Measures is solely for the information of XCEL ENERGY. In performing any such inspection or review or in accepting the Measures, XCEL ENERGY makes no representation or warranty whatsoever as to the economic or technical feasibility, capability, safety or reliability of the Measures, their installation by Market Actor or their compatibility with the Host Customer's facilities.

## **6. ARTICLE VI - MEASUREMENT AND VERIFICATION**

- 6.1 For multifamily residential projects, the Market Actor may choose either the Deemed Savings or Measured Savings method of measurement and verification as set forth in the SOP Manual. HTR and single-family residential projects must use deemed savings.

If the Market Actor intends to utilize the measured savings either as an alternative, or in addition to the deemed savings option, then a detailed M&V plan must be provided.

In these cases the monitoring and measurement of the Energy Savings and Peak Demand Savings that result from the Measures installed as a part of the Project shall be as set forth in the Measurement and Verification Plan which is attached hereto as Exhibit C. The measurement and verification activities shall be performed by the Market Actor.

## **7. ARTICLE VII - INCENTIVE PAYMENTS**

- 7.1 XCEL ENERGY agrees to make an "Incentive Payment" to the Market Actor based upon the sum of the Deemed Savings and Simplified M&V savings derived from the Project. No more than sixty five percent (65%) of the total savings may be derived from lighting Measures. If a project consists of lighting Measures only, compensation shall be calculated in accordance with Appendix C of the SOP Manual.

- 7.2 The total Incentive Payment due to Market Actor will be calculated by multiplying the Deemed Savings and Simplified M&V Procedure Savings associated with the Measures installed at the Project Site by the applicable "Incentive Rate" specified in Section 7.3. The Incentive Payment for Deemed Savings and Simplified M&V Procedure Savings shall be payable in one installment. Regardless of the actual calculated Incentive Payment for the Project, the total Incentive Payment for a single-family project shall not exceed \$5,000. The total Incentive Payment for single family and multi-family projects shall not exceed the following maximum cumulative payments.

The maximum cumulative Incentive Payments for all Market Actors, regardless of the number of individual Projects completed in 2022:

Hard-to-Reach – Large Component \$500,000

Residential – Large Component \$500,000

- 7.3 This agreement is from the SOP Program. The applicable Incentive Rates are as follows for savings derived from Measures installed at eligible non-Hard-to-Reach Residential Project Sites:

- (a) Peak Demand Savings Incentive Rate = \$358/kW (coincident with system peak)
- (b) Energy Savings Incentive Rate = \$0.12/kWh

The applicable Incentive Rates are as follows for savings derived from Measures installed at eligible Hard-to-Reach Residential Project Sites:

- (a) Peak Demand Savings Incentive Rate = \$420/kW (coincident with system peak)
- (b) Energy Savings Incentive Rate = \$0.14/kWh

- 7.4 Upon completion of Measure installation and approval of the installations, XCEL ENERGY will make the Incentive Payment within forty-five (45) days of its receipt and approval of the invoice. The Incentive Payment will be one hundred percent (100%) of the payment due for Deemed Savings Measures and Simplified M&V Measures.

Incentive Payments are subject to load factor adjustments in accordance with the following:

For non-HTR residential projects, the maximum total payment (kWh and kW payments combined) is \$650 per kW of peak summer demand savings.

For Hard-to-Reach projects, the maximum total payment (kWh and kW payments combined) is \$1,394 per kW of peak summer demand savings.

Projects Utilizing Measured Savings: At the conclusion of the Performance Period and upon final approval of the Performance Report, Market Actor will submit an invoice to XCEL ENERGY for the second installment of the Incentive Payment (the "Performance Payment"). XCEL ENERGY will make the Performance Payment within forty-five (45) days of its receipt and approval of the invoice. The Performance Payment will be the remaining amount of the total Incentive Payment due based upon the Measured Savings.

The Performance Payment can be negative if the Measured Savings are less than forty percent (40%) of the Estimated Savings upon which the Implementation Payment was based. In the event that the above formula results in a negative Performance Payment, then Market Actor will refund that amount to XCEL ENERGY within forty-five (45) days of the end of the Performance Period.

## **8. ARTICLE VIII - AUDIT AND RECORDS**

- 8.1 Market Actor or its assignee shall keep and maintain accurate and detailed records and documentation relating to the Project and its associated Energy Savings and Peak Demand

Savings under this Agreement for a period of not less than three (3) years beyond the termination of this Agreement. During the retention period, such records shall be made available, upon reasonable notice, for inspection during normal business hours by XCEL ENERGY or any governmental agency having jurisdiction over the SOP or any portion of the Project.

## **9. ARTICLE IX - INSURANCE**

- 9.1 Market Actor represents and agrees that it and its subcontractors will carry all statutorily required insurance for the protection of its employees and that each of its subcontractors will carry such insurance for the protection of their respective employees. Market Actor further represents and agrees that it will carry all insurance required by Exhibit D, which is attached hereto and incorporated herein for all purposes. Prior to commencement of installation, Market Actor shall furnish to XCEL ENERGY a certificate or certificates of insurance indicating Market Actor's compliance with this paragraph and stating that the insurance described therein shall not be canceled or terminated except on thirty (30) days written notice to:

Xcel Energy  
Attn: Bryan Whitson  
790 South Buchanan St.  
Amarillo TX 79101  
Email: [bryan.j.whitson@xcelenergy.com](mailto:bryan.j.whitson@xcelenergy.com)

Additionally, Market Actor warrants that such policies include a waiver of subrogation naming XCEL ENERGY. Market Actor shall furnish evidence that such policies have been issued in accordance with the requirements of this paragraph by furnishing copies of such for XCEL ENERGY's inspection.

## **10. ARTICLE X – INDEMNITY**

- 10.1 Each party agrees to and shall defend, indemnify and hold harmless the other party, that indemnified party's parent company and all related or affiliated companies, and all affiliates, officers, directors, shareholders, associates, employees, servants and agents of each, from and against all claims, damages, expenses, including reasonable attorneys' fees and costs, losses, causes of action or suits which arise out of or relate to this Agreement,

the negligent act or omission or willful misconduct of the indemnifying party, its employees, agents, servants or subcontractors, excepting only the proportional share of such liability, if any, due to the fault or negligence of the indemnified party, its employees, agents, servants or subcontractors.

## **11. ARTICLE XI – PERMITS, LICENSES AND COMPLIANCE WITH LAWS**

P.O Market Actor represents and warrants that prior to beginning installation of Measures, Market Actor will, at its own cost and expense, obtain all permits and other authorizations from governmental authorities as then may be required to install, construct, operate and maintain the Measures in question and to perform its obligations hereunder. During the term hereof, Market Actor will obtain all such additional governmental permits, licenses, and other authorizations when required with respect to any of the Measures under this Agreement. If requested by XCEL ENERGY, Market Actor shall furnish to XCEL ENERGY copies of each such permit, license or other approval promptly following receipt thereof. Market Actor shall maintain in full force and effect all such governmental permits, licenses and other authorizations as may be necessary for the construction, operation or maintenance of the Measures in accordance herewith.

P.O Market Actor shall be responsible for all royalties, fees, or claims for any licensed, copyrighted or similarly protected intellectual property, device, process or procedure used, installed, or provided by it. Market Actor shall defend any suit that may be brought against XCEL ENERGY and shall hold XCEL ENERGY harmless from any liability or infringement of any such intellectual property used by Market Actor in the implementation of the Project.

P.O All work performed by Market Actor in connection with the implementation of the Project and all Measures installed or maintained by Market Actor shall conform to all applicable laws, statutes, ordinances, rules, regulations, and decrees of any governmental or administrative body having jurisdiction over the SOP or any portion of the Project, including without limitation, Occupational Safety and Health Administration (OSHA) regulations, the National Electric Safety Code (NESC), the National Electric Code (NEC) and Sections 752.001 – 752.008 of the Texas Health and Safety Code. Handling of hazardous waste must be in compliance with all applicable Environmental Protection Agency (EPA) and state and local codes.

## **12. ARTICLE XII – CONSUMER PROTECTION**

12.1 Each Market Actor shall provide clear disclosure to the Host Customer of the following:

(P) The customer's right to a cooling-off period of three business days, in which the contract may be cancelled, if applicable under law.

(P) The name, telephone number, and street address of the Market Actor, the contractor, and written disclosure of all warranties.

(P) The fact that incentives are made available to the Market Actor through a ratepayer funded program, manufacturers or other entities.

(P) Notice of provisions that will be included in the Host Customer Agreement as described in Section 12.3 below.

12.2 A form developed and approved by the PUC may be used to satisfy the requirements of Section 12.1 above.

12.3 In addition to those contractual provisions required by Section 4.1 hereinabove, the Host Customer Agreement shall include the following provisions in accordance with P.U.C. Subst. R. 25.181(n)(3):

(P) Information on the Market Actor's or its contractors work activities and completion dates, and the terms and conditions that protect residential Host Customers in the event of non-performance by the Market Actor.

(2) Written and oral disclosure of the financial arrangement between the Market Actor and Host Customer. This includes an explanation of the total Host Customer payments, the total expected interest charged, all possible penalties for non-payment, and whether the Host Customer's installment sales agreement may be sold.

(3) A notice of your cancellation rights and procedures, including a form you can sign and return to cancel the transaction.

- (4) Disclosure of contractor liability insurance to cover property damage.
- (5) An “All Bills Paid” certification be given to the Host Customer to protect against claims of subcontractors.
- (6) Provisions prohibiting the waiver of consumer protection statutes, performance warranties, false claims of energy savings and reductions in energy costs.
- (7) Information on complaint procedures offered by the Market Actor, or by XCEL ENERGY, as required by P.U.C. Subst. R. 25.181(i)(2)(k), and toll free numbers for the Office of Customer Protection of the Public Utility Commission of Texas, and the Office of Attorney General’s Consumer Protection Hotline.
- (8) A statement that the energy efficiency service provider is receiving an incentive paid for through the rates of Southwestern Public Service Company for the electricity saved by the customer’s energy efficiency improvements.
- (9) Disclosure that the Market Actor is not part of, or endorsed by the PUC or XCEL ENERGY.

### **13. ARTICLE XIII – DEFAULT AND REMEDIES**

13.1 Each of the following events will be deemed to be an Event of Default hereunder:

- (P) failure of Market Actor to perform its responsibilities in a timely manner or implement the Project in compliance with the SOP Manual and other Contract Documents;
- (P) failure of Market Actor to provide XCEL ENERGY and/or its contractors with sufficient access to the Project Sites for the purposes of conducting inspections.
- (P) failure of Market Actor to maintain any necessary permits, licenses or insurance required pursuant to the Contract Documents;

(P) Market Actor's assignment or subcontracting of all or part of the duties required under the Contract Documents without the prior written consent of XCEL ENERGY;

€ Market Actor's submission to XCEL ENERGY of any false, misleading or inaccurate information or documentation with respect to implementation of the Project or Market Actor's performance hereunder, when Market Actor knew or reasonably should have known that such information was false, misleading or inaccurate; or

(f) failure of either party in a material fashion to perform or observe any of the material terms, conditions or provisions of this Agreement which failure materially adversely affects the other party and continues after notice and a thirty (30) day period to cure, or, if such failure cannot reasonably be cured within thirty (30) days, after notice and such period to cure in excess of thirty (30) days as may be reasonably required (provided that the non-performing party commences action to cure within an initial period of thirty (30) days after notice and thereafter pursues such cure with reasonable diligence).

13.2 If an Event of Default occurs, the non-defaulting party shall be entitled to exercise any and all remedies provided for by law or in equity, including the right to terminate this Agreement upon written notice to the other party. Termination shall be effective upon the receipt of properly served notice. Termination of this Agreement will not relieve the defaulting party of any obligations accruing prior to the event of termination.

## **14. ARTICLE XIV – LIMITATION OF LIABILITY**

14.1 **NEITHER XCEL ENERGY NOR ITS OFFICERS, DIRECTORS, PARTNERS, AGENTS, EMPLOYEES, SUCCESSORS, ASSIGNS, OR AFFILIATES SHALL BE LIABLE TO MARKET ACTOR OR ANY HOST CUSTOMER FOR CLAIMS FOR INCIDENTAL, SPECIAL, INDIRECT OR CONSEQUENTIAL DAMAGES OF ANY NATURE CONNECTED WITH OR RESULTING FROM PERFORMANCE OR NON-PERFORMANCE OF THIS AGREEMENT, INCLUDING WITHOUT LIMITATION, CLAIMS IN THE NATURE OF LOST REVENUES, INCOME OR PROFITS, IRRESPECTIVE OF WHETHER SUCH CLAIMS ARE BASED UPON WARRANTY, NEGLIGENCE, STRICT LIABILITY, CONTRACT, OPERATION OF LAW OR OTHERWISE AND MARKET ACTOR SHALL PROTECT, INDEMNIFY AND HOLD XCEL ENERGY HARMLESS FROM SAME.**



**15. ARTICLE XV – INDEPENDENT CONTRACTOR**

- 15.1 Market Actor will act as and be deemed to be an independent contractor. Market Actor will not act as, nor be deemed to be, an agent or employee of XCEL ENERGY. Market Actor will have the sole right to control and directly supervise the method, manner and details of the Project providing it is in accordance with the Contract Documents.
- 15.2 No part of the work contemplated under this agreement may be performed by subcontractors without the prior written approval of XCEL ENERGY.

**16. ARTICLE XVI – NOTICES**

- 16.1 All notices from one party to the other will be deemed to have been delivered if hand delivered or sent by United States certified mail, return receipt requested, postage prepaid to the following address:

XCEL ENERGY:  
790 S Buchanan St  
Amarillo, TX 79101  
Phone: 806-378-2887  
Attn: Bryan Whitson

Market Actor:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attn \_\_\_\_\_  
\_\_\_\_\_

- 16.2 Either party may change its address by written notice to the other in accordance with this Article XVI.

**17. ARTICLE XVII - AMENDMENT**

- 17.1 No amendment or modification of this Agreement shall be binding on either party unless it is in writing and signed by both parties. Amendments to this Agreement will be attached hereto and made a part hereof for all purposes.

## **18. ARTICLE XVIII - ARBITRATION**

- 18.1 **BOTH PARTIES AGREE TO FIRST ATTEMPT TO RESOLVE DISPUTES ARISING HEREUNDER THROUGH ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES, INCLUDING MEDIATION. IF, HOWEVER, SUCH DISPUTES CANNOT BE RESOLVED THROUGH SUCH MEANS, BOTH PARTIES AGREE TO SUBMIT SUCH DISPUTES FOR RESOLUTION THROUGH BINDING ARBITRATION, TO BE CONDUCTED BY ONE QUALIFIED INDEPENDENT ARBITRATOR, IN ACCORDANCE WITH THE PROVISION OF THE TEXAS GENERAL ARBITRATION ACT (TEXAS CIVIL PRACTICE AND REMEDIES CODE, SECTION 171.001 ET. SEQ.). -**

## **19. ARTICLE XIX – FORCE MAJEURE**

- 19.1 The term “Force Majeure” as used herein means causes beyond the reasonable control of and without the fault or negligence of the Party claiming Force Majeure, including, but not limited to, acts of God,

labor disputes, flood, earthquake, storm, fire, lightning, epidemic, war, riot, civil disturbance, sabotage, change in laws or applicable regulations subsequent to the date hereof and action or inaction by any federal, state or local legislative, executive, administrative or judicial agency or body, which, in any of the foregoing cases, by exercise of due foresight such Party could not reasonably have been expected to avoid, and which, by the exercise of due diligence, it is unable to overcome.

- 19.2 The term “Force Majeure” shall not include any of the following:

- (a) Any removal, reduction, curtailment or interruption of operation of any or all Measures whether in whole, or in part, which removal, reduction, curtailment or interruption is caused by or arises from the action or inaction of the Host Customer or any third party, including without limitation, any vendor or supplier to the Market Actor or XCEL ENERGY, unless, and then only to the extent that, any such action or inaction was beyond the reasonable control of, and occurred without the fault or negligence of such third party, and such third party, by exercise of due foresight, could not reasonably have been expected to avoid;
- (b) Any outage, whether or not due to the fault or negligence of XCEL ENERGY or Market Actor, of the Measures or XCEL ENERGY’s system attributable to a defect or inadequacy in the manufacture, design or installation of the Measures that prevents, curtails, interrupts or reduces the ability of the Measures to provide Peak Demand and/or

Energy Savings; or

- (c) Any reduction in Measured Peak Demand Savings and/or Measured Energy Savings caused by or resulting from a Host Customer's termination or reduction of electrical distribution service received from XCEL ENERGY and the substitution therefore of electric service from any other source.

19.3 The Parties shall be excused from performing their respective obligations under this Agreement and shall not be liable in damages or otherwise if, and to the extent that, they are unable to so perform or are prevented from performing by an event of Force Majeure, provided that:

- (a) The non-performing party, as promptly as practicable after the occurrence of the Force Majeure, but in no event later than fourteen (14) days thereafter, gives the other party written notice describing the particulars of the occurrence;
- (b) The suspension of performance is of no greater scope and of no longer duration than is reasonably required by the Force Majeure;
- (c) The non-performing party uses its best efforts to remedy its inability to perform; and
- (d) As soon as the non-performing party is able to resume performance of its obligations excused as a result of the occurrence, it shall give prompt written notification thereof to the other party.

## **20. ARTICLE XX - MISCELLANEOUS**

20.1 Market Actor will not assign, transfer or otherwise dispose of any of its obligations or duties without the prior written approval of XCEL ENERGY. Any assignment or transfer made without the express written approval of XCEL ENERGY will be null and void.

20.2 The rights and remedies provided by this Agreement are cumulative and the use of any one right or remedy by either party shall not preclude or waive its right to use any or all other remedies. Said rights and remedies are given in addition to any other rights the parties may have by law, statute, ordinance or otherwise. No waiver by the parties hereto of any default or breach of any term, condition or covenant of this Agreement shall be deemed to be a waiver of any other breach of the same or any other term, condition or covenant contained

herein.

- 20.3 The Contract Documents constitute the entire Agreement between the parties with respect to the subject matter hereof and there are no express or implied warranties or representations upon which any party may rely beyond those set forth therein. The execution of this Agreement supersedes all previous agreements, discussions, communications and correspondence with respect to such subject matter.
- 20.4 In the event any provision of this Agreement is held to be void, unlawful, or otherwise unenforceable, that provision will be severed from the remainder of the Agreement and replaced automatically by a provision containing terms as nearly like the void, unlawful, or unenforceable provision as possible; and the Agreement, as so modified, will continue to be in full force and effect.
- 20.5 This Agreement will be governed by, construed and enforced in accordance with the laws of the State of Texas. The parties agree that the proper venue and jurisdiction for any cause of action relating to the Agreement will be in Potter County, Texas.
- 20.6 Market Actor shall not use SPS' or XCEL ENERGY's corporate name, trademark, trade name, logo, identity or any affiliation for any reason, including soliciting customers for participation in its project.
- 20.7 *The undersigned and Xcel Energy agree that Xcel Energy may make agreements with you by electronic means and that such agreements have the same legal effect as agreements entered into on paper and are authentic and valid.*

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their duly authorized representatives.

XCEL ENERGY

[Market Actor name here; same as first

paragraph]

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

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

Title: \_\_\_\_\_

Date: \_\_\_\_\_

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

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

Title: \_\_\_\_\_

Date: \_\_\_\_\_