

APPENDIX C - SERVICE AGREEMENT

RETAIL SETTLEMENT CODE

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SERVICE AGREEMENT

This Service Agreement made this _____ day of _____, _____

BETWEEN _____, a distributor licensed by the Ontario Energy Board (the “Distributor”)

AND _____, a retailer licensed by the Ontario Energy Board (the “Retailer”)

From time to time, the Retailer and the Distributor shall be individually referred to in this Agreement as a “Party” and collectively as the “Parties.”

WHEREAS the Retailer wishes to retail electricity to consumers in the service area of the Distributor and utilise retail settlement services offered by the Distributor; and

WHEREAS the Distributor is required by Chapter 12 of the Retail Settlement Code to enter into a Service Agreement with each retailer licensed by the Ontario Energy Board (the “Board”) who wishes to retail electricity to consumers in the service area of the Distributor and utilise retail settlement services offered by the Distributor; and

WHEREAS the form of this Agreement is an Appendix to the Retail Settlement Code, has been approved by the Board, and may not be waived, altered, amended or modified, except as provided herein or as authorized by the Board,

NOW THEREFORE for and in consideration of the covenants and conditions hereinafter set forth, and other good and valuable consideration (the receipt and sufficiency of which are hereby acknowledged), the Parties mutually agree as follows:

Article 1 - Interpretation

1.1 Definitions

Unless otherwise defined in this Agreement, words and phrases shall have the meaning ascribed to them in the *Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, Schedule B, the *Electricity Act*, 1998, S.O. 1998, c.15, Schedule A, or the Retail Settlement Code as the case may be.

In this Agreement:

“Act” means the *Ontario Energy Board Act*, 1998, S.O. 1998, c.15, Schedule B;

“Agreement” means this agreement, all appendices referenced herein and attached hereto and all other documents incorporated by reference pursuant to the terms hereof;

“Business Day” means any day that is not a Saturday, Sunday or statutory holiday as defined in the Province of Ontario;

“Confidential Information” means all confidential information concerning the business, operations, financing and affairs of the Parties, including without limiting the generality of the foregoing, the following:

- (a) all trade secrets and know-how of either Party;
- (b) all information relating to either Party or to any person with which either Party does business and which is not generally known;
- (c) a Party’s customer’s list and records;
- (d) a Party’s marketing, pricing and sales policies, techniques and concepts;
- (e) the habits and preferences of a Party’s customers and prospective customers; and
- (f) a Party’s financial records;

“Electricity Act” means the *Electricity Act*, 1998, S.O. 1998, c.15, Schedule A;

“person” means an individual, partnership, corporation, association, or other incorporated or unincorporated organization or legal entity;

“Retail Settlement Code” or “Code” means the Retail Settlement Code approved by the Board.

1.2 Sections and Headings

The division of this Agreement into Articles, sections and other subdivisions and the insertion of headings are for convenience of reference only and shall not affect the construction or interpretation of this Agreement.

1.3 Number and Gender

Words importing the singular include the plural and vice versa.

Article 2 - Scope and Term

2.1 Entire Agreement

- (a) This Agreement constitutes the entire agreement between the Parties with respect to the subject matter of this Agreement and cancels and supersedes any prior understanding and agreements between the Parties with respect to the same.
- (b) A reference to a document or a provision of a document includes any amendment or supplement to, or any replacement of, that document or that provision of that document.
- (c) Notwithstanding any provision or agreement to the contrary, the Parties agree that they are bound by the terms of the Retail Settlement Code and agree that the Retail Settlement Code forms part of this Agreement.

2.2 Relationship of the Parties

- (a) Nothing in this Agreement shall be construed to establish a partnership, joint venture, group, pool or syndicate between the parties. No provision contained herein shall be construed as authorizing or empowering either Party to assume or create any obligation or responsibility whatsoever, express or implied, on behalf, or in the name, of the other Party in any manner, or to make any representation, warranty or commitment on behalf of the other Party, except as shall be provided for herein.
- (b) Each Party, by agreeing to undertake specific activities and responsibilities for or on behalf of customers, acknowledges that each Party shall relieve and discharge the other Party of the responsibility for said activities and responsibilities with respect to those customers.

2.3 Effective Date

The term of this Agreement shall commence on the date of execution of this Agreement by the last Party to execute the Agreement (the “Effective Date”).

2.4 Termination

- (a) Mandatory Termination

This Agreement shall terminate on the earlier of:

- (i) the date the Retailer informs the Distributor that it no longer is operating as a retailer in the Distributor's service territory;
- (ii) the date of suspension, revocation, cancellation, or non-renewal of the Retailer's licence.

(b) **Permissive Termination**

Either Party shall have the option to terminate (the "Terminating Party") if either Party materially defaults in the payment or performance of any material obligation provided for in this Agreement ("Event of Default"). Where an Event of Default has occurred, the Terminating Party may give notice, in accordance with section 7.5, setting out details of the Event of Default. The Agreement shall terminate after 10 Business Days have elapsed from the giving of notice by the Terminating Party, unless the other Party gives notice within that time period, in accordance with section 7.5, that the Event of Default has been rectified. If the Terminating Party does not accept the actions taken by the Defaulting Party to rectify the Event of Default, either Party may seek a conclusive determination of the issue in accordance with Article 6 of this Agreement.

- (c) Articles 5 and 6 and section 7.5 survive the termination of this Agreement.

Article 3 - Security Arrangements

3.1 Type of Security

The Distributor shall, in accordance with the Retail Settlement Code, accept any of the type or types of security which the Retailer chooses to provide from the types of security listed in the first paragraph of section 8.3 of the Retail Settlement Code. The Distributor may refuse the security proposed by the Retailer based on the quality of the security which the Retailer proposes to provide. The Distributor may not act unreasonably or in a discriminatory manner in refusing the security proposed by the Retailer.

3.2 Details of Security Arrangements

Appendix B to this Agreement shall contain the following information:

- (a) the frequency with which the Distributor intends to update the amount of security required which, in accordance with the Retail Settlement Code, shall be at least every three months;
- (b) a description of the type or types of security that will be provided by the Retailer;
- (c) contact information for any financial or other institutions involved in the security arrangements;
- (d) a listing of any legal documents such as a surety bond or letter of credit related to the security arrangements; and
- (e) any other terms and conditions related to security arrangements negotiated between the Distributor and the Retailer in addition to the matters referred to in this Agreement.

Article 4 - Financial Arrangements

4.1 Billing

- (a) If the Retailer chooses distributor-consolidated billing and the Distributor is not providing rate-ready billing to the Retailer, the Retailer shall provide bill-ready information to the Distributor within the time period established by the Distributor and set out in Appendix C to this Agreement. If bill-ready information is not provided by the Retailer within the time period set out in Appendix C, the Distributor may send a bill to the Retailer's consumer covering all charges for non-competitive electricity services. A distributor shall continue to issue settlement statements in accordance with section 7.2.1 of the Retail Settlement Code in order to collect the cost of competitive electricity services calculated according to Chapter 3 of the Retail Settlement Code. The Retailer remains liable to the Distributor for all charges for competitive electricity services incurred by the Distributor on behalf of the Retailer.
- (b) Where the Retailer chooses distributor-consolidated billing, the Distributor shall include, with the first bill submitted by the Distributor to the Retailer for monies owed to the Distributor, the following information:
 - (i) a summary of the Distributor's meter reading practices by customer category;
 - (ii) a list of languages in which the distributor provides billing service;
 - (iii) a statement of the number of days following the meter reading date within which an invoice will be issued to the Retailer with respect to those consumers whose meters were read;
 - (iv) a summary of all charges that will be itemized by consumer account on the invoice presented by the Distributor to the Retailer;
 - (v) summary of charges for which the Distributor will bill the Retailer according to a different schedule than that described above or that will not be itemized by consumer account, in accordance with the Rate Handbook and sections 7.1.1, 7.2.1 and 7.3.1 of the Retail Settlement Code.
- (c) Where any of the information described in clause (b) changes, the Distributor shall inform the Retailer of the change with the first bill submitted by the Distributor to the Retailer subsequent to the change.

4.2 Payment

- (a) Payments from each Party to the other Party shall be made in accordance with the Code. The Distributor and the Retailer shall set out the information necessary for payment to each Party in Appendix D to this Agreement.
- (b) The form and details of payment shall be in accordance with the specific arrangements negotiated between the Parties and set out in Appendix E and shall include the number of Business Days following the issuance of an invoice that payment is due.

Article 5 - Confidential Information

5.1 Confidentiality

- (a) Each Party acknowledges and agrees that:
 - (i) all Confidential Information which is furnished to them by or with the concurrence of the other Party or to which they become privy, is furnished to them in confidence;
 - (ii) at all times they shall keep the Confidential Information in the strictest of confidence;
 - (iii) they shall not disclose, directly or indirectly, the Confidential Information to any other person, except as permitted by this Agreement, the Retail Settlement Code or other applicable law;
 - (iv) they shall use the Confidential Information solely to fulfil the rights and obligations of this Agreement;
 - (v) they shall not use, at any time, any Confidential Information for their own benefit or purposes or for the benefit or purposes of any person, other than to further the rights and obligations of this Agreement;
 - (vi) the disclosure of Confidential Information will be highly detrimental to the Party who's information has been disclosed;
 - (vii) they shall indemnify and save harmless the Party from and against any and all Claims occasioned or suffered by the Party as a result of the party disclosing any of the Confidential Information contrary to the provisions of this Article.
- (b) Without prejudice to any other rights of the Parties, the Parties acknowledge and agree that if a Party breaches or otherwise violates, or attempts to breach or otherwise violate, the provisions of this Article, the other Party will likely suffer irreparable harm and an injunction or other like remedy may be the only effective remedy to protect the Party's rights and interests and agree that an interim injunction against such breach or violation may be granted immediately on the commencement of any law suit.
- (c) The provisions of this Article 5 shall apply in addition to, and not in substitution for, all obligations owed by the Parties to each other at law or in equity, including, without limitation, fiduciary duties and duties of confidentiality.
- (d) The restrictions contained in this Article 5 shall not apply to any portion of Confidential Information which becomes generally known to the public, unless the Party in question is responsible for making the Confidential Information known to the public.

Article 6 - Dispute Resolution

6.1 Exclusivity

- (a) Except where this Agreement states otherwise, the dispute resolution procedures set forth in this Article 6 shall apply to all disputes arising between the Distributor and the Retailer regarding this Agreement including the Retail Settlement Code and shall be the only means for resolving any such disputes.
- (b) The dispute resolution procedures set forth in this Agreement do not apply to disputes that have not yet been referred in accordance with paragraph 6.2(a) prior to this Agreement being terminated.

6.2 Duty to Negotiate

- (a) Any dispute between the Distributor and the Retailer over this Agreement shall first be referred to a designated representative chosen by the Distributor and to a designated representative chosen by the Retailer for resolution on an informal basis.
- (b) Such designated representatives shall attempt in good faith to resolve the dispute within thirty days of the date when the dispute was referred to them. The Parties may extend such period by agreement in writing.
- (c) Any resolution of the dispute by the designated representatives shall be in writing and shall be executed by an authorized signing officer of each Party. The resolution shall bind the Parties and their respective successors and assigns, and shall not, except for either Party's subsequent failure to abide by the resolution, from then on be subject to arbitration or challenge in any court or other tribunal.
- (d) If either Party refuses to honour the designated representatives' resolution as executed, the other Party may immediately commence arbitration under this Article to enforce the resolution.

6.3 Referral of Unresolved Disputes

If the designated representatives cannot resolve the dispute within the time period set out in paragraph 6.2(b), either Party may submit the dispute to binding arbitration and resolution in accordance with the arbitration procedures set out below.

6.4 External Arbitration Procedures

- (a) Subject to section 6.5 below, the Parties shall submit any arbitration begun under this section to a single neutral arbitrator.
- (b) In choosing an arbitrator, the Parties shall negotiate in good faith. All arbitrations under this Agreement shall be conducted in accordance with the *Arbitration Act, 1991*, S.O. 1991, c.17 (the "Arbitration Act") as amended from time to time, except as modified herein.
- (c) The arbitrator(s) shall have exclusive authority to hear and decide any dispute between the Parties that is subject to arbitration under this Agreement or the Code.

6.5 Appointment of Arbitrator

- (a) If the Parties cannot agree upon a single arbitrator within fifteen days after referring the dispute to arbitration, each Party shall within five more days choose one individual who shall sit on a three-member arbitration panel.
- (b) The two arbitrators chosen by the Parties shall within twenty business days, in good faith, choose a third person to be the third arbitrator, who shall chair the arbitration panel.
- (c) Neither Party may at any time during the arbitration revoke its choice of arbitrator, unless the other Party consents in writing.
- (d) If the Parties do not choose the two arbitrators within the five day time period set out in paragraph 6.5(a), either Party or both Parties may apply to the court to appoint a single arbitrator.
- (e) The individual(s) chosen as the arbitrator(s) shall be qualified by education and experience to decide the matter. The arbitrator(s) shall be at arm's length from all Parties to the arbitration and shall not be members of the audit or legal firm or firms who advise any Party to the arbitration, nor shall the arbitrator(s) be otherwise regularly retained by any of the Parties to the arbitration.

6.6 Written Statement of Dispute and Response

- (a) Within twenty business days after the individual arbitrator or arbitration panel are named, the applicant shall submit to the arbitrator(s) a written statement. The statement shall set out:

- (i) the nature of the dispute and the applicant's position,
 - (ii) the names of each Party's main contact for the arbitration process along with their addresses, phone numbers and fax numbers,
 - (iii) any claims for relief,
 - (iv) the grounds for that relief,
 - (v) the proposed resolution or relief sought,
 - (vi) the names of any third Parties with material knowledge or information relevant to the dispute, and
 - (vii) any documents that the Party wishes the arbitrator(s) to consider.
- (b) The responding Party shall have twenty business days to respond to the filing, setting forth its position and the information that it deems relevant.

6.7 Discovery of Facts

- (a) There shall be no discovery of facts taken, sought, or otherwise instituted by any means except as approved by the arbitrator(s).
- (b) The arbitrator(s) shall provide a time schedule for any such discovery.
- (c) The arbitrator(s) may at any time retain non-Party technical experts to advise and assist them during the arbitration. The advice of these experts shall be made known to the Parties.

6.8 Confidentiality of Documents

All meetings and hearings shall be in private unless the Parties to the arbitration agree otherwise. The Party providing any document or other information in the arbitration that would not otherwise be available to the other Party may in good faith designate it as confidential, provided that the Parties shall first submit to the arbitrator(s) an agreed upon written statement of procedures for handling and protecting material designated as confidential, which the arbitrator(s) may accept or modify as they may deem appropriate. If the Parties cannot agree upon confidentiality procedures, the arbitrator(s) shall decide them as appropriate.

6.9 Procedural Rules

- (a) The arbitrator(s) may adopt any procedural rules that they, at their sole discretion, deem appropriate to conducting the arbitration and facilitating the resolution of the dispute.
- (b) No procedural rule adopted by the arbitrator(s) shall extend the time period set forth in paragraph 6.10(a); but the arbitrator(s) shall render a final disposition of the dispute within that period, which may not be extended or reduced unless the Parties consent in writing.
- (c) Refusal by either Party to comply with an order of the arbitrator(s) adopting or modifying any procedural rule shall constitute, in the sole discretion of the arbitrator(s), grounds for default and a finding in favour of the other Party.

6.10 Decision Requirements

- (a) Any dispute submitted for arbitration under this Article 6 shall be finally decided by the arbitrator(s) no later than thirty days from the completion of the hearing.
- (b) Unless the Parties agree otherwise in writing, the final decision of the arbitrator(s) shall set forth in writing their findings of fact and any conclusions of law and be based on the evidence before them, the applicable laws of Ontario and Canada, the Market Rules, the licences and Codes issued by the Board and any the Agreement and any relevant decisions of courts, agencies, or earlier arbitrations under this Part.
- (c) A copy of the decision, with any Confidential Information expunged, shall be made available to the public.

6.11 Finality of Decisions

- (a) The decision shall be final and binding on the Parties to the arbitration and shall not be subject to any appeal or review procedure.
- (b) Each Party hereby waives any and all rights or ground it believes that it has, or at any time after may have, to challenge, appeal in any way, or otherwise seek to set aside in any court or other tribunal any decision by the arbitrator(s).
- (c) Notwithstanding anything else in this subsection, if either Party fails to act in accordance with the decision of the arbitrator(s), the other Party may then seek enforcement of the decision in any court of competent jurisdiction.

6.12 Arbitration Act

- (a) Nothing in this Code shall be construed as affecting any rights available to the Parties under section 3 of the Arbitration Act.
- (b) If and so far as any provision of section 6.10 is adjudged or otherwise deemed invalid by a court of competent jurisdiction, the provisions of the Arbitration Act shall apply.

6.13 Costs

- (a) The arbitrator(s) shall award costs for an arbitration as if it had been a proceeding in Ontario Superior Court, and the arbitrator(s) shall therefore, in awarding or denying costs to a Party, follow the provisions on costs set out in the *Ontario Courts of Justice Act*, R.S.O. 1990, c. C.43 and the Ontario Rules of Civil Procedure, including without limitation the provisions in those rules concerning settlement offers and case law applicable in Ontario.
- (b) If either Party fails to comply with the decision of the arbitrator(s) and the other Party afterwards seeks relief under section 6.11, the Party seeking the relief shall be entitled to receive from the other Party its costs of seeking the relief from the other Party (including its reasonable legal costs) once a court of competent jurisdiction has issued a final, non-appealable order in its favour.

Article 7 - General

7.1 Waiver

The failure of any Party to exercise any right, power or option or to enforce any remedy or to insist upon the strict compliance with the terms, conditions and covenants of this Agreement shall not constitute a waiver of the terms, conditions and covenants herein with respect to that or any other subsequent breach thereof nor a waiver by the Party at any time thereafter to require strict compliance with all terms, conditions and covenants hereof, including the terms, conditions and covenants with respect to which the Party has failed to exercise such right, power or option. Nothing shall be construed as or have the effect of a waiver except an instrument in writing signed by a duly authorized officer of the Party which expressly or impliedly waives a right, power or option under this Agreement.

7.2 Amendments and Modifications to this Agreement

- (a) Other than the Appendices to this Agreement, the amendment or modification of any part of this Agreement or the addition of any provision to this Agreement, including a new appendix, must be approved by the Board.
- (b) The Board may require amendments to this Agreement or to the requirements for the content of the Appendices attached to this Agreement.
- (c) The Parties to this Agreement agree to forthwith, upon receipt of notice from the Board, do all things and take all actions necessary to amend this Agreement as specified by the Board, and where necessary, to give retroactive effect to such amendments.
- (d) The information related to the Distributor set out in Appendix A and Appendix D to this Agreement may be amended by the Distributor giving notice to the Retailer and the information related to the Retailer set out in Appendix A and Appendix D to this Agreement may be amended by the Retailer giving notice to the Distributor. The amendment shall take effect when notice of the amendment is deemed to have been given and received in accordance with section 7.5.
- (e) The provisions of Appendix B referred to in paragraphs 3.2(a) and 3.2(b) may be amended by the Distributor giving notice to the Retailer and the provisions of Appendix B referred to in paragraphs 3.2(c) and 3.2(d) may be amended by the Retailer giving notice to the Distributor. The amendment shall take effect when notice of the amendment is deemed to have been given and received in accordance with section 7.5.

- (f) The other provisions of Appendix B and the other Appendices to this Agreement may be modified or amended only by an instrument in writing, signed by both Parties. Once the amendment or modification has been accepted it shall be attached to this Agreement.

7.3 Assignment and Delegation

- (a) Neither Party to this Agreement shall assign any of its rights or obligations under this Agreement without the prior written consent of the other Party, which consent shall not be unreasonably withheld.
- (b) Notwithstanding subsection (a), either Party may subcontract its duties under this Agreement to a subcontractor, provided that the Party that subcontracts its responsibility shall:
 - (i) remain fully responsible as a principal and not as a guarantor for performance of any subcontracted obligations and,
 - (ii) cause its subcontractors to perform in a manner which is in conformity with that Party's obligations under this Agreement.

7.4 Severability

- (a) If any provision of this Agreement or application thereof is determined to be invalid or unenforceable in whole or in part, such invalidity or unenforceability shall attach only to such provision or part thereof and the remaining part of such provision and all other provisions shall continue in full force and effect.
- (b) If a court of competent jurisdiction finds any restrictive covenant contained in this Agreement to be unenforceable in whole or in part, including without limitation as to duration and/or territory, the Parties hereby direct the court to reduce the scope of such provision to that which is reasonable and enforceable in the circumstances.

7.5 Notices

Any demand, notice or other communication ("Notice") to be given in connection with this Agreement shall be given in writing and shall be sufficiently given if:

- (a) delivered personally;

- (b) sent by registered mail;
- (c) sent by facsimile, with confirmation of receipt by the Party;
- (d) delivered by courier with confirmation of receipt by the Party; or,
- (e) other means of electronic communication with confirmation of receipt by the Party,

to the contact person set out at Appendix A to this Agreement or to such other person as the Party to whom such Notice is to be given shall have advised the Party giving the same in the manner provided in this section. Any Notice delivered personally shall be deemed to have been given and received on the day it is so delivered at such address, provided that if such day is not a Business Day such Notice shall be deemed to have been given and received on the next following Business Day. Any Notice sent by registered mail shall be mailed in Ontario, and if so mailed, shall be deemed to have been given and received on the fourth Business Day following the date of mailing. Any Notice transmitted by electronic communication shall be deemed given and received on the day of its transmission provided that such day is a Business Day and such transmission is completed before 5:00 p.m. on such day, failing which such Notice shall be deemed given and received on the first Business Day after its transmission.

7.6 Statutes

Any reference to a statute in this Agreement includes a reference to all regulations made pursuant to such statute, all amendments made to such statute and regulations in force from time to time and to any statute or regulation which may be passed and which has the effect of supplementing or superseding such statute or regulations.

7.7 Applicable Law

This Agreement shall be construed in accordance with the laws of Ontario including, in particular, the Electricity Act and the Act, and the laws of Canada applicable in Ontario and shall be treated in all respects as an Ontario contract. Each of the Parties irrevocably attorns to the non-exclusive jurisdiction of the courts of Ontario.

7.8 Time

Time shall be of the essence of this Agreement and no extension or variation of this Agreement shall operate as a waiver of this provision.

7.9 Calculation of Time

When calculating the period of time within which or following which any act is to be done or step taken pursuant to this Agreement, the date which is the reference date in calculating such period shall be excluded. If the last day of such period is not a Business Day, the period in question shall end on the next following Business Day.

7.10 Further Assurances

The Parties shall with reasonable diligence do all such things and provide all such reasonable assurances as may be required to consummate the transactions contemplated by this Agreement. Each Party shall provide and execute such further documents or instruments as may be reasonably required by any other Party, exercise its influence and do and perform or cause to be done or performed such further and other acts as may be reasonably necessary or desirable to effect the purpose of and to carry out the provisions of this Agreement.

7.11 Counterparts and Execution by Fax

This Agreement may be executed by the Parties in separate counterparts each of which when so executed and delivered to each of the Parties shall be deemed to be and shall be read as a single agreement among the Parties. In addition, execution of this Agreement by any of the Parties may be evidenced by way of a faxed transmission of such Party's signature (which signature may be by separate counterpart), or a photocopy of such faxed transmission, and such faxed signature, or photocopy of such faxed signature, shall be deemed to constitute the original signature of such Party to this Agreement.

7.12 Binding Effect

This Agreement shall enure to the benefit of and shall be binding upon the Parties and their respective heirs, executors, administrators, successors and permitted assigns.

IN WITNESS WHEREOF this Agreement has been executed.

Per: _____
Distributor
Title

Per: _____
Retailer
Title

APPENDIX B

Security Arrangements

The information described in section 3.2 of this Agreement shall be contained in this Appendix.

APPENDIX C

Billing Services

If the Retailer chooses distributor-consolidated billing and the Distributor is not providing rate ready billing to the Retailer, the Retailer shall provide bill-ready information to the Distributor within (to be specified) business days from the date that the Distributor posts consumption data on the EBT System for the Retailer's customer.

APPENDIX D

Payment Arrangements

Payment shall be made according to the following instructions:

PAYMENT TO THE DISTRIBUTOR

Electronic Business Transfer

Other:

Legal Name

Contact Information (if different than Exhibit A)

Banking Institution

Account Number:

Address:

City

Province

Postal Code

E-mail Address

Phone Number

FAX Number

PAYMENT TO THE RETAILER

Electronic Business Transfer

Other:

Legal Name

Contact Information (if different than Exhibit A)

Banking Institution

Account
Number:

Address:

City

Province

Postal Code

E-mail Address

Phone Number

FAX Number

APPENDIX E

Details of Payment

This Appendix shall set out the form and details of payment negotiated between the Parties.