

# MICHIGAN RENEWABLE ENERGY CERTIFICATION SYSTEM REGISTRY

## TERMS OF USE

*Last modified August 5, 2010*

The following are the Terms of Use for using the Michigan Renewable Energy Certification System Registry (“MIRECS” or the “Registry”) operated and administered by APX, Inc. (“APX”). These Terms of Use are in addition to the APX General Terms of Use (the “General Terms of Use”) applicable to your use of the Registry Site (as defined below). In the event these Terms of Use conflict or are inconsistent with the General Terms of Use, the provisions of these Terms of Use shall control for the services referenced herein.

### **1. CAPITALIZED TERMS; DEFINITIONS.**

Any capitalized terms contained herein that are not otherwise defined herein shall have the meanings as such terms are defined in the Operative Documents (as defined below).

“APX Entities” means APX, any of its subsidiaries or other affiliates and their respective successors and assigns.

“Bank” means any of the following:

- (i) any banking institution chartered by the Office of the Comptroller of the Currency;
- (ii) any banking institution organized under the laws of any State, territory, or the District of Columbia, the business of which is substantially confined to banking and is supervised by the State or territorial banking commission or similar official; or
- (iii) any savings and loan association, building and loan association, cooperative bank, homestead association, or similar institution, which is supervised and examined by State or federal authority having supervision over any such institution.

“Beneficial Ownership Rights,” with respect to any Certificate (as defined below), means any contractual or other right to direct or control the sale or other disposition of, or the retirement of, such Certificate.

“PA 295” or “the Act” means Michigan’s Clean, Renewable, and Efficient Energy Act, 2008 PA295, MCL 460.1001 et seq.

“Regulated Person” means any of the following:

- (i) Any Bank;
- (ii) Any broker or dealer that (A) is registered pursuant to Section 15 of the Securities Exchange Act of 1934, as amended; and (B) is a member of all requisite self-regulatory organizations;
- (iii) Any member of the National Futures Association that is registered under the Commodity Exchange Act, as amended, as a futures commission merchant, introducing broker, commodity pool operator, commodity trading advisor or floor broker;
- (iv) (A) any investment company registered under the Investment Company Act of 1940, as amended; (B) any investment adviser registered under the Investment Advisers

Act of 1940, as amended; or (C) any fund that has assets under management with an aggregate market value of no less than \$100 million and that is advised or managed by an investment adviser registered under the Investment Advisers Act of 1940, as amended;

(v) Any "business development company" as defined in (A) Section 2(a)(13) of the Investment Company Act of 1940, as amended, or (B) Section 202(a)(22) of the Investment Advisers Act of 1940, as amended;

(vi) (A) any plan established and maintained by a state, its political subdivisions, or any agency or instrumentality of a state or its political subdivisions, for the benefit of its employees; (B) any employee benefit plan within the meaning of title I of the Employee Retirement Income Security Act of 1974, as amended; or (C) any trust fund whose trustee is a Bank and whose participants are exclusively plans of the types identified in the above clause (A) or (B), except trust funds that include as participants individual retirement accounts or H.R. 10 plans; or

(vii) any seller that has been granted authorization to engage in sales for resale of electric energy, capacity or ancillary services from the Federal Energy Regulatory Commission pursuant to Section 205 of the Federal Power Act, as amended, and the requirements of 18 C.F.R. § 35.

“SOM” means State of Michigan.

## **2. ACCEPTANCE OF TERMS.**

The use by you and your authorized employees, agents or representatives (your “Users”) of the Registry and the Registry website located online at <http://www.mirecs.org> (or such other website as APX may notify you is the location of the Registry) (the “Registry Site”) is subject to the following Terms of Use, which constitute a binding contract between you (“Account Holder”) and APX as administrator and owner of the Registry (Account Holder and APX, are individually referred to herein as a “Party”, and collectively referred to herein as “the Parties”). BY USING OR ACCESSING THE REGISTRY, YOU ACCEPT AND AGREE TO BE BOUND BY THESE TERMS OF USE, AS MODIFIED FROM TIME TO TIME IN ACCORDANCE WITH THE TERMS HEREOF, AND YOU AGREE TO TAKE AFFIRMATIVE RESPONSIBILITY FOR THE COMPLIANCE OF YOUR USERS WITH THESE TERMS OF USE. You can review the current version of the Terms of Use at any time at the Registry Site. CONTINUED USE AND ACCESS OF THE REGISTRY BY YOU AND/OR YOUR USERS AFTER MODIFICATION OF THE TERMS OF USE SIGNIFIES YOUR AGREEMENT TO BE BOUND BY THE MODIFIED TERMS OF USE, AND YOUR AGREEMENT TO TAKE AFFIRMATIVE RESPONSIBILITY FOR THE COMPLIANCE OF YOUR USERS WITH THESE MODIFIED TERMS OF USE. In addition, when using the Registry, you shall be subject to any rules, guidelines and/or operating procedures, including but not limited to the MIRECS Operating Procedures (the “Operating Procedures”), the MIRECS Registry Fee Schedule, the General Terms of Use and such other rules, guidelines and/or operating procedures, each as modified or restated from time to time (collectively with the Operating Procedures, the “Operative Documents”) applicable to such use which may be posted at the Registry Site from time to time. All such rules, guidelines and operating procedures are incorporated by reference into these Terms of Use. If you do not agree to these Terms of Use, you and/or your Users may not access or otherwise use the Registry.

### 3. DESCRIPTION OF SERVICE.

(a) The Registry provides an electronic tracking system to create, certify, transfer, track, manage, and retire renewable energy credits, including (i) Michigan Renewable Energy Credits, (ii) Advanced Cleaner Energy Credits, (iii) Michigan Incentive Renewable Energy Credits and (iv) when implemented by the State of Michigan, Energy Optimization Credits (collectively, “Credits”). If its registration is accepted by APX, Account Holder will have an Account in the Registry in which it can hold Credits. Account Holder will have the option to import renewable energy credits from, and export Credits to, other registries. As further described in the Operating Procedures, the data comprising the Registry include, but are not limited to:

(i) generation information from Balancing Authority settlement data polled from a Revenue-Quality Meter provided to APX by a Qualified Reporting Entity;

(ii) self-reported generation information;

(iii) verified energy efficiency data provided to APX; and

(iv) static information provided by Account Holder, its related Users or other participants in the Registry and their related Users (collectively, the “Registry Participants”) such as fuel source and location.

(b) The Registry is an assembly of data regarding renewable energy and energy efficiency projects (“Projects”) and serves only for informational purposes. Any issues or disputes that may arise between the Account Holder, other Registry Participants and third parties from the use of the Registry or the data contained therein (including, without limitation, in connection with the validity of Project data, with the purchase and sale of Credits or whether an ownership interest, Beneficial Ownership Rights, security interest or other proprietary interest is created in any Credit) shall be addressed between the Account Holder and such Registry Participant or third party. Neither the Registry nor APX will address any such issues and neither shall have any liability with respect to any such issues. APX reserves the right to dispose of any disputed Credit by interpleader or other suitable action in the event of controversy and to deposit any Credits or other items subject of the interpleader action with the relevant court or arbitral panel.

(c) APX reserves the further right, in its sole discretion, to modify, augment, segment, reformat, reconfigure or otherwise alter at any time the content or methods of transmission of the Registry, the Operative Documents or these Terms of Use and create new types or versions of the Registry, the Operative Documents or these Terms of Use. APX shall not be required to comply with any provision of any Operative Document to the extent that APX determines in its reasonable discretion, after consultation with and approval by SOM, that such compliance would have a material adverse effect on the Registry; provided that APX shall report any such non-compliance to Account Holders within thirty (30) days after such non-compliance first occurs. APX shall provide Account Holder with at least seven (7) days’ prior notice of material changes to the Registry or these Terms of Use, and such changes shall be effective upon the date set forth in the notice, which may be given by any means including, without limitation, posting on the Registry Site, or by electronic or conventional mail. All other changes shall be effective upon

their being posted on the Registry Site. Any use of the Registry by Account Holder after a change has gone into effect shall be deemed to constitute acceptance of such change.

#### **4. AUTHORIZED USER**

(a) The rights and obligations of these Terms of Use shall run to the named Parties and their successors in interest and authorized assigns. Account Holder shall ensure that any of its owners, trustees, partners, members, officers, directors, employees, agents appointed as Account Holder's agent ("Agents") and/or any other agents to whom it has provided access to the Registry (collectively, the "Representatives") agree to comply with the Operative Documents and these Terms of Use, and Account Holder agrees to take affirmative responsibility for its Representatives' compliance and to be bound by the Operative Documents and these Terms of Use on behalf of its Representatives.

(b) Account Holder shall execute and return to APX a Declaration of Agency ("Declaration") for any third-party agent it desires to hire and/or contract with to access the Registry on its behalf. A form of Declaration, including the level of access to be granted, will be available on the Registry Site. Account Holder understands and agrees that only one entity may be granted access to an Account, and that accordingly if Account Holder grants Account access to an Agent, Account Holder shall not have access to that Account unless and until Account Holder revokes the applicable Declaration of Agency.

(c) Account Holder acknowledges and agrees that the rights and licenses provided under these Terms of Use and the Operative Documents are solely for the benefit of Account Holder and are to be exercised only in connection with Account Holder's and its Representatives', if any, use of the Registry. Without limiting the generality of the foregoing, except as set forth in this Section 4 and Section 19, Account Holder may not transfer or sublicense its rights, licenses or Account, or any portion thereof, to any third party.

#### **5. OWNERSHIP AND USE OF DATA AND THE REGISTRY.**

(a) Account Holder acknowledges that (i) SOM is, and shall remain, the sole owner of all data comprising the Registry and (ii) APX is, and shall remain, the sole owner of the Registry operating system, including any components, modifications, adaptations and copies thereof. Without limiting any of the foregoing, Account Holder further acknowledges and agrees that any and all software used in providing, accessing (other than commercially available third party internet browsers) or using the Registry ("Software") is proprietary software of APX. Except as provided herein, Account Holder shall not obtain, have or retain any right, title or interest in or to the Registry or the Software or any part thereof. Account Holder acknowledges and agrees that SOM is, and shall remain, the sole owner of any registration data required to access or use the Registry, including without limitation any and all intellectual property rights therein. The rights granted to Account Holder are solely defined by these Terms of Use and the Operative Documents as in effect from time to time and include, but are not limited to, permission to use the Registry as set forth herein and therein. Account Holder's rights under these Terms of Use do not include a transfer of title or any other ownership interest in the Registry, its content or any part thereof to Account Holder. Account Holder agrees not to contest or challenge APX's or

SOM's ownership of the data comprising the Registry, the Registry, the Software and associated intellectual property rights and not to take any action that would infringe, misappropriate, constitute unfair competition with respect to, or otherwise violate APX's or SOM's rights in the data comprising the Registry, the Registry, the Software or associated intellectual property rights.

(b) Except as otherwise provided in the Operating Procedures and Section 14(d) hereof, Account Holder acknowledges that once Account Holder transmits data to the Registry, such data becomes the property of SOM and, except in accordance with APX's normal operating procedures, cannot and will not be deleted, removed, or otherwise expunged or segregated, including in the event Account Holder terminates its use of the Registry or any Account or Sub-account in the Registry or is terminated pursuant to Section 10 hereof.

(c) Account Holder acknowledges that the data transmitted by the Registry is derived from proprietary and public third-party sources, including but not limited to data from other Registry Participants, Balancing Authorities and Qualified Reporting Entities. Account Holder will not use the Registry for any unlawful purpose or in an unlawful manner. Account Holder shall prevent the use or copying of the Registry and any other supporting materials by Account Holder's Representatives except as permitted by the terms of these Terms of Use.

(d) APX grants Account Holder non-exclusive permission to access, retrieve and download data from the Registry subject to these Terms of Use and the Operative Documents, which grant shall not be effective until (i) Account Holder has: (1) accepted these Terms of Use on the Registry Site, (2) paid all applicable fees due under the Operative Documents, and (3) completed and submitted to APX the online registration available on the Registry Site, and (ii) APX, in its sole discretion, has accepted Account Holder's registration. Account Holder will take all appropriate steps and precautions to safeguard and protect the access, use and security of the Registry and Account Holder's user access information from unauthorized users.

(e) APX and SOM reserve all rights in the Registry not expressly granted to Account Holder in these Terms of Use.

(f) To APX's actual knowledge, the Software does not infringe any intellectual property rights of third parties.

## **6. OWNERSHIP OF CREDITS; ACTION WITH RESPECT TO CREDITS ON BEHALF OF THIRD PARTIES.**

(a) General Prohibition on 3<sup>rd</sup> Party Ownership. Except as otherwise permitted under Sections 6(b) or 6(c), (A) Account Holder will only hold or retire in its Account Credits for which it is the sole holder of all legal title and all Beneficial Ownership Rights, and (B) Account Holder may not hold any Account, or hold or retire in its Account, any Credits, on behalf of one or more third parties. Account Holder acknowledges that, for purposes of compliance with PA295, it will need to retire Credits to its Account.

(b) Retail Aggregator Exception. Account Holder may retire Credits on behalf of one or more third parties (though not for purposes of such third party's compliance with PA 295), provided that any such retirement may be effected only in a specialized type of subaccount, referred to herein as a "Group Retirement Subaccount," and that Account Holder shall comply with the following requirements applicable to such subaccounts:

(i) All legal title to and all Beneficial Ownership Rights in any Credit retired in a Group Retirement Subaccount must be held by one or more individuals or organizations (collectively, a "Credit Owner") that have authorized Account Holder in writing to retire such Credit on their behalf and to provide any data or other information relating to such Credit to MIRECS (except to the extent that Account Holder may be deemed to hold or share with the applicable Credit Owner any legal title to or Beneficial Ownership Rights in such Credit).

(ii) Any retirement of any Credit in a Group Retirement Subaccount shall be effected solely on behalf of the applicable Credit Owner.

(c) Optional Omnibus Account. Account Holder may hold Credits in its Account(s) on behalf of one or more third parties, provided that:

(i) Account Holder is a Regulated Person and has provided MIRECS a signed Regulated Person Attestation, available at <http://www.mirecs.org>; provided, however, that APX may, after consulting with SOM, waive the requirements set forth in this paragraph (i) with respect to Account Holder by providing Account Holder with written notice of such waiver;

(ii) All legal title to and all Beneficial Ownership Rights in any Credit so held by Account Holder is held by one or more Credit Owners that have authorized Account Holder in writing to hold Credits on their behalf and to provide any data or other information relating to such Credit to MIRECS (except to the extent that Account Holder may be deemed to hold or share with the applicable Credit Owner any legal title to or Beneficial Ownership Rights in such Credit);

(iii) Account Holder complies with all applicable laws, regulations or other legally enforceable requirements, including without limitation applicable provisions of the USA PATRIOT Act and the regulations of the Office of Foreign Assets Control of the U.S. Department of the Treasury;

(iv) Account Holder maintains a customer identification program that contains reasonable procedures to verify the identity of any individual or organization on whose behalf Account Holder is holding Credits and maintains records of the information used to verify such identity, which records will be made available to MIRECS and SOM upon request; and

(v) Account Holder complies with the requirements of Section 6(b) in connection with any retirement of Credits it holds on behalf of one or more third parties.

(d) Account Holder acknowledges that none of APX, MIRECS or SOM shall have any liability in connection with any misrepresentation by Account Holder relating to the ownership

of any Credit in any Account or subaccount held by Account Holder (including without limitation the identity of the person(s) holding any legal title thereto or Beneficial Ownership Rights or other proprietary rights therein).

#### **7. FEES.**

Account Holder agrees to pay the fees and costs, when due, that APX may charge from time to time for the use of the service provided in accordance with these Terms of Use, as set forth in the Fee Schedule located at <http://www.mirecs.org> (collectively referred to herein as the "Fees"). APX may, upon thirty (30) days' notice to Account Holder and in its sole discretion, increase or decrease any or all of the Fees at any time, subject to any provisions of the MIRECS Services Contract providing for approval of the Fees thereunder by the State of Michigan, provided that these Terms of Use are not intended to create any rights of Account Holder or any other party with respect to such provisions. In no event shall any portion of the Fees be refunded to Account Holder upon termination of the Terms of Use or of any Account or Sub-account.

#### **8. PAYMENTS AND TAXES.**

Invoices for Fees will be sent electronically and will be posted on a secure page on the Registry Site. If requested, APX will mail a copy of Account Holder's invoices to the address provided at the time of registration, as updated by Account Holder from time-to-time. Account Holder shall pay any Fees charged hereunder by wire transfer of immediately available funds in United States dollars on the date and to the account identified by APX from time to time on the invoice, or if no date is indicated, no later than thirty (30) days from the date of the invoice (the "Due Date"), without offset or reduction of any kind. The Fees shall be non-refundable. Account Holder will pay all wire transfer fees and all sales, use, value added taxes, and other consumption taxes, personal property taxes and other taxes and charges imposed by any governmental entity (other than those based on APX's net income) (collectively, "Taxes") related to the use of the Registry unless Account Holder furnishes satisfactory proof of exemption. Taxes, if any, are not included in the Fees and, to the extent that APX is required to pay those Taxes, those Taxes will be added to Account Holder's invoices. If not so added, such Taxes are the exclusive responsibility of Account Holder.

#### **9. LATE PAYMENTS.**

If Account Holder fails to pay any Fees, Taxes or other amounts or charges which Account Holder is obligated to pay under the Operative Documents or these Terms of Use when due, then Account Holder shall be responsible to pay interest thereon accruing at a rate of 1½ % per month, or the highest rate permitted by any applicable local, state, national, or international law, statute, regulations, ordinance or other means of establishing legal rights and obligations ("Applicable Law"), whichever is lower, together with any additional costs or expenses incurred by APX in connection with the collection of such overdue amounts. Acceptance of any interest, cost or expenses shall not constitute a waiver of Account Holder's default with respect to such late payment by, nor prevent APX from exercising any other rights or remedies available to APX under the Operative Documents, these Terms of Use or any Applicable Law.

## **10. TERM AND TERMINATION.**

(a) Term. These Terms of Use become operative on the date on which Account Holder indicates on the Registry Site that Account Holder agrees with and accepts the Terms of Use and shall continue in effect until APX or Account Holder terminates access to the Registry pursuant to Section 10(b), (c) or (d) hereof.

(b) Termination by APX.

(i) Prior to accepting your registration to become an Account Holder, APX may in its sole discretion reject your registration and terminate your access to the Registry immediately.

(ii) APX may terminate Account Holder's access to the Registry upon giving five (5) days notice to Account Holder if Account Holder is in Default pursuant to Section 11(a)(i) hereof.

(ii) APX may terminate Account Holder's access to the Registry immediately in the event of any Default pursuant to Sections 11(a)(ii) through (a)(ix) hereof.

(iv) APX may terminate Account Holder's access to the Registry, for any reason, by providing at least sixty (60) days written notice to Account Holder. Account Holder's obligation to pay any and all Fees due under the Operative Documents and these Terms of Use at the time of termination of use shall survive such termination of use.

(v) Prospective Account Holders and Holders of terminated accounts who wish to dispute a termination by APX are directed to Section 26, "Governing Law and Dispute Resolution".

(c) Termination by Account Holder. Account Holder may terminate use of the Registry, for any reason, by providing at least sixty (60) days written notice to APX. Account Holder's obligation to pay any and all Fees due under the Operative Documents and these Terms of Use at the time of termination of use shall survive such termination of use.

(d) Termination Required by Law. APX shall terminate access to, or Account Holder shall cease use of, the Registry if required to do so by any Applicable Law, or by any order or other decision of a court of law, arbitral panel or governmental agency. At least sixty (60) days notice of said termination of access or cessation of use of the Registry shall be given by the Party terminating the access to, or ceasing the use of, the Registry under this subsection, unless a shorter notice period is required by Applicable Law or the relevant order or decision.

(e) Effect of Termination.

(i) The terms of Sections 1 (Capitalized Terms), 5 (Ownership and Use of Data and the Registry), 7 (Fees), 8 (Payments and Taxes), 9 (Late Payments), 10 (Term and Termination), 11(b) (Default; Remedies), 14 (Confidentiality), 16 (Limitation of Liability), 18 (Indemnification), 19 through 27 and any other provisions meant to survive termination or expiration of these Terms of Use, shall survive termination of the Terms of Use.

(ii) Upon termination of access to the Registry, any Credits held in Account Holder's Accounts shall be forfeited. Prior to such termination being effective, Account Holder may retire such Credits or transfer them to another Registry Participant's Account, in a manner consistent with the Operative Documents and these Terms of Use.

(f) Reinstatement.

(i) Upon the request of Account Holder, APX, in its sole discretion, may reinstate Account Holder's access to the Registry after termination for Account Holder's Default, upon APX's determination that Account Holder has resolved such Default and upon receipt of Account Holder's full payment of all Fees due prior to the termination. Account Holder agrees to pay a reinstatement fee equal to the Fees which would have been due during the period in which Account Holder's Account(s) were terminated ("Reinstatement Fee"). The Reinstatement Fee shall be due prior to reinstatement of Account Holders' access to the Registry.

(ii) APX shall reinstate an Account Holder's access to the Registry after termination for Account Holder's Default if directed to do so as a result of the outcome of a dispute resolution proceeding under these Terms of Use. Whether payment of a Reinstatement Fee is required in such an instance shall be determined as part of such dispute resolution proceeding.

**11. DEFAULT; REMEDIES.**

(a) Default. The occurrence of any of the following shall be considered a "Default":

(i) Account Holder fails to abide by the Operative Documents or fails to perform any of its duties or obligations under these Terms of Use, other than those set forth below in Sections 11(a)(ii) through (a)(ix), which default is not cured to the satisfaction of APX in its sole discretion within five (5) days after notice is given to Account Holder specifying such default.

(ii) Account Holder fails to pay any of the Fees, Taxes or other charges due in accordance with the procedures set forth in Sections 7, 8 and 9 above within twenty (20) days of their Due Date.

(iii) Account Holder or its Representatives alter, tamper with, damage or destroy (1) the Registry or any portion thereof, or (2) the data of other Registry Participants.

(iv) Account Holder uses the Registry in any manner that, directly or indirectly, violates any Applicable Law.

(v) All or substantially all of Account Holder's assets are attached or levied under execution (and Account Holder does not discharge the same within sixty (60) days thereafter); a petition in bankruptcy, insolvency, for reorganization or a similar arrangement is filed by or against Account Holder (and Account Holder fails to secure a stay or discharge thereof within sixty (60) days thereafter); Account Holder is insolvent and unable to pay its debts as they become due; Account Holder makes a general assignment for the benefit of creditors; Account Holder takes the benefit of any insolvency action or law; the appointment of a receiver or trustee in bankruptcy for

Account Holder or its assets if such receivership has not been vacated or set aside within thirty (30) days thereafter; or, dissolution or other failure to exist of Account Holder if Account Holder is an entity.

(vi) Account Holder falsifies or misrepresents any data or other information input into the Registry by Account Holder or otherwise provides incorrect data or other information to the Registry in contravention of these Terms of Use.

(vii) Account Holder makes any false or inaccurate representations in these Terms of Use.

(viii) Account Holder violates its confidentiality obligations set forth in Section 14.

(ix) Account Holder receives written notice of a violation of the performance of any particular material term or condition of the Operative Documents or these Terms of Use three (3) or more times during any twelve (12) month period, regardless of whether such violations are ultimately cured.

(b) Remedies. Upon the occurrence of any Default, APX shall have the following rights and remedies, in addition to those stated elsewhere in the Operative Documents and these Terms of Use and those allowed by Applicable Law or in equity, any one or more of which may be exercised without further notice to Account Holder:

(i) Account Holder acknowledges that money damages would not adequately compensate APX in the event of a breach by Account Holder of its obligations hereunder and that injunctive relief may be essential for APX to adequately protect itself hereunder. Accordingly, Account Holder agrees that, in addition to any other remedies available to APX, including but not limited to any monetary damages, APX shall be entitled to seek injunctive relief in the event Account Holder is in breach of any covenant or agreement contained herein.

(ii) Upon termination of the use of the Registry, Account Holder shall be obligated to pay to APX all monies due to it, which in the case of a termination as a result of a Default shall include attorneys' fees incurred to enforce APX's rights under the Operative Documents and these Terms of Use, and which in any event shall include any interest and costs and expenses due hereunder.

(iii) Account Holder acknowledges that APX may notify purchasers of any erroneous Credits, suspend Account Holder's account in the Registry, levy an administrative fine or prohibit Account Holder's participation in the Registry.

(c) Nonwaiver of Defaults. The failure or delay of APX in exercising any of their rights or remedies or other provisions of the Operative Documents or these Terms of Use shall not constitute a waiver thereof or affect APX's right thereafter to exercise or enforce such right or remedy or other provision. No waiver of any Default shall be deemed to be a waiver of any other Default. APX's receipt of less than the full amount of Fees, Taxes, Reinstatement Fees or other amounts due shall not be construed to be other than a payment on account then due, nor shall any statement on Account Holder's check or any letter accompanying Account Holder's check be deemed an accord and satisfaction.

## **12. INTELLECTUAL PROPERTY.**

The Michigan Renewable Energy Certification System (MIRECS) name and brand, the Registry and any and all content of the Registry are protected by copyright and/or other intellectual property laws and any unauthorized use of such intellectual property or information or the Registry may violate such laws related to their protection. Except as expressly provided herein and in the Operative Documents, neither APX nor SOM grants any express or implied right or license of any kind to Account Holder under any patents, copyrights, trademarks, or trade secret information with respect to such intellectual property and/or information and/or the Registry. Except as expressly provided by copyright law, the Operative Documents or these Terms of Use, Account Holder may not copy, distribute, modify, publish, sell, transfer, license, transmit, display, participate in the transfer or sale of, or create derivative works of, any of such intellectual property or information or the Registry, either in whole or in part, other than (a) reports created for use by or dissemination to Account Holder (including authorized Representatives of Account Holder) under the Operating Procedures, (b) as may be required or compelled by Applicable Law, or (c) as APX may agree in its sole discretion. Any authorized use of the Registry's logo and APX's trademarks shall be precisely as described in the Operative Documents, and Account Holder shall not alter such logo or trademarks in any respect (including without limiting changing the color scheme thereof). Account Holder acknowledges that Account Holder does not acquire any ownership rights by downloading copyrighted material.

## **13. REPRESENTATIONS AND WARRANTIES.**

Throughout the term of these Terms of Use, including without limitation upon each creation, transfer or retirement of a Credit by Account Holder, Account Holder represents and warrants to APX as follows:

- (a) If other than a natural person, Account Holder is duly organized, validly existing, and in good standing under the laws of the jurisdiction of its formation;
- (b) Account Holder has all corporate and other authority and all regulatory and other consents, approvals and authorizations necessary for it to legally (i) enter into and perform its obligations under these Terms of Use and the Operative Documents and (ii) engage in all of its activity (including the creation, receipt and transfer of Credits) on or relating to the Registry;
- (c) The signatory of these Terms of Use has the authority to execute these Terms of Use on behalf of Account Holder, and these Terms of Use are binding on and enforceable against Account Holder in accordance with their terms;
- (d) Account Holder will only use the Registry for creating, importing, transferring and retiring Credits for the Assets included in the Registry and specifically acknowledges that it shall not maintain the same Assets in any other database or registry at the same time as such Assets are registered in the Registry.
- (e) Account Holder has not registered and will not register any Assets simultaneously both in the Registry and in any other system that tracks the environmental attributes related to such Assets nor will any transaction of an Asset's environmental attributes be conducted outside of the Registry if the Credits associated with that Asset are maintained within the Registry.

- (f) Account Holder meets all of the requirements for participation in the Registry, as set forth in the Operative Documents.
- (g) Account Holder has not retired, sold, claimed, represented elsewhere or used, or will retire, sell, claim or represent elsewhere or use, any of its Credits to satisfy obligations in any jurisdiction or otherwise without reporting such disposition within the Registry.
- (h) No person or entity, other than Account Holder can claim the right to the Credits for which the Account Holder is seeking issuance.
- (i) All data and other information provided to the Registry or APX by Account Holder and/or its Representatives are owned legally and beneficially by Account Holder and all such data and other information are true and correct in all material respects.

#### **14. CONFIDENTIALITY.**

(a) The Registry, including the selection, arrangement and compilation of data, may be comprised of confidential, market sensitive and trade secret information of the Account Holder and other Registry Participants. APX agrees (i) to use and maintain information provided by Account Holder in accordance with the Registry's Privacy Policy and (ii) not to knowingly use or disclose Confidential Information (as defined below) provided by Account Holder except as authorized by Account Holder or these Terms of Use, or when Account Holder requests and authorizes the transfer of Credits to another registry. Account Holder understands that the data contained in the Registry is the property of SOM. Therefore, notwithstanding the Registry's Privacy Policy and the obligations set forth in this Section 14(a), the data may be subject to disclosure in response to a request filed under Michigan's Freedom of Information Act (MCL 15.231 et seq.) ("FOIA"). Account Holder agrees not to use or disclose the information contained in the Registry, including any other Registry Participant's Confidential Information, except as authorized by the Operative Documents and these Terms of Use. The obligations of confidentiality in these Terms of Use shall survive its termination without limitation in duration for so long as information continues to meet the definition of Confidential Information.

(b) As used in these Terms of Use, the following information is deemed "Confidential Information":

- (i) Gross generation (MWhs) of each electricity generating Project;
- (ii) Net generation (MWhs) of each electricity generating Project;
- (iii) Net electricity savings from a Project;
- (iv) Electricity (MWhs) consumed on site by the Project owner or other on site customer, other than for Project use (monthly);
- (v) Street address of the Project;
- (vi) Total number of Credits in Account Holder's Account and any sub-account thereof (other than sub-accounts made public).
- (vii) The amount and timing of specific Credit transfers, including transfers from one Account Holder to another and transfers among the sub-accounts of an Account Holder; and

(viii) Those portions of communications between Account Holder and APX regarding the Registry that contain any of the aforementioned information that would be treated as Confidential Information.

*Provided, however,* that Confidential Information does not include any information which can be established by written documentation: (i) to have been publicly known prior to disclosure of such information by the disclosing Party (the “Disclosing Party”) to the receiving Party (the “Receiving Party”); (ii) to have become publicly known, without fault on the part of the Receiving Party, subsequent to disclosure of such information by the Disclosing Party to the Receiving Party; (iii) to have been received by the Receiving Party at any time from a source, other than the Disclosing Party, rightfully having possession of and the right to publicly disclose such information; (iv) to have been independently developed by employees or agents of the Receiving Party without access to or use of such information disclosed by the Disclosing Party to the Receiving Party; (v) to be common technical information or know-how readily available in literature; (vi) to be required to be disclosed by Applicable Law (such as, without limitation, FOIA), including but not limited to information that must be provided to any governmental entity to confirm compliance with any statute or regulation, administrative proceeding, administrative or court order or discovery, provided that both Parties take such reasonable actions as necessary to ensure that such information is disclosed in as limited a manner possible; (vii) to be already within the knowledge of the Receiving Party at the time of disclosure, which information is not subject to a confidentiality agreement; and (viii) to be information APX is otherwise permitted to disclose under the Operating Procedures.

(c) Confidential Information may be aggregated with other information in the Registry and included in public reports as described more fully in the Operating Procedures, so long as it is sufficiently aggregated such that a third-party reviewer could not determine the portion of such aggregated information that is Confidential Information of a particular Account Holder.

(d) Confidential Information is the sole and exclusive property of the Registry Participant who provided the information to the Registry and shall not be used by Account Holder for any purpose other than the purposes set forth in the Operative Documents and these Terms of Use.

(e) If Account Holder obtains access to data in the Registry that: (i) is not data provided or owned by Account Holder; (ii) is not part of a publicly available Registry report; and (iii) Account Holder is not otherwise authorized to use, then, regardless of whether such data is otherwise considered Confidential Information under these Terms of Use, Account Holder shall:

- (A) immediately notify APX that Account Holder has obtained such access; and
- (B) not disclose, disseminate, copy, or use any such information.

(f) Except as specifically set forth in this Section 14, APX shall have no obligation to protect or maintain the confidentiality of any information provided by Account Holder to APX or to the Registry, and Account Holder expressly consents to the disclosure of any such information that is not Confidential Information hereunder.

**15. DISCLAIMER OF WARRANTY.**

(a) The data contained in the Registry has been gathered by APX from sources believed by it to be reliable, including but not limited to Balancing Authorities, Qualified Reporting Entities, Self-Reporting Entities, Registry Participants, Account Holder and Account Holder's Representatives. APX does not warrant that the information in the Registry is correct, complete, current or accurate, nor does APX warrant that the Software will be error-free or bug-free. APX has no obligation to audit, validate or otherwise verify any information that it receives and which is in the Registry.

(b) THE REGISTRY IS PROVIDED "AS IS," AND APX MAKES NO REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED, WITH RESPECT TO THESE TERMS OF USE, THE OPERATIVE DOCUMENTS OR THE ADEQUACY OR PERFORMANCE OF THE REGISTRY, AND APX HEREBY DISCLAIMS TO THE EXTENT PERMITTED BY LAW ANY SUCH WARRANTIES, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY, NON-INFRINGEMENT, TITLE OR FITNESS FOR A PARTICULAR PURPOSE OR ANY IMPLIED WARRANTIES ARISING FROM ANY COURSE OF DEALING, USAGE OR TRADE PRACTICE. APX DOES NOT WARRANT THAT THE SERVICES PROVIDED HEREUNDER SHALL BE UNINTERRUPTED, ERROR-FREE, OR COMPLETELY SECURE, OR THAT THE PROVISION OF SUCH SERVICES SHALL ALWAYS BE EXECUTED WITHOUT ERRORS OR OMISSIONS.

(c) APX shall not be responsible for the acts or omissions of any Account Holder or any other party who inputs data into the Registry or from whom data is obtained for inclusion on the Registry.

(d) Account Holder is solely responsible for the protection, security and management of usage and security of its computer network. Neither APX nor SOM shall compensate Account Holder for damages incurred due to violations of the security of Account Holder's computer network, nor shall Account Holder make deductions or set-offs of any kind for Fees resulting therefrom.

**16. LIMITATION OF LIABILITY.**

ACCOUNT HOLDER ASSUMES FULL RESPONSIBILITY AND RISK OF LOSS RESULTING FROM ITS USE OF THE REGISTRY AND THE REGISTRY SITE. APX'S SOLE LIABILITY FOR THE REGISTRY, SERVICE DISRUPTION, PERFORMANCE OR NONPERFORMANCE BY APX OR IN ANY WAY RELATED TO THESE TERMS OF USE, REGARDLESS OF WHETHER THE CLAIM FOR DAMAGES IS BASED IN CONTRACT, TORT, STRICT LIABILITY, OR OTHERWISE, IS LIMITED, TO THE EXTENT PERMITTED BY LAW, TO AN AGGREGATE AMOUNT EQUAL TO THE GREATER OF (X) THE FEES PAID BY ACCOUNT HOLDER HEREUNDER DURING THE CALENDAR YEAR IMMEDIATELY PRECEDING THE DATE ANY SUCH CLAIM IS OR CLAIMS ARE MADE BY ACCOUNT HOLDER AND (Y) THE FEES PAID BY ACCOUNT HOLDER HEREUNDER DURING THE CALENDAR YEAR IN WHICH ANY SUCH CLAIM IS OR CLAIMS ARE MADE BY ACCOUNT HOLDER. APX SHALL NOT BE LIABLE FOR CONSEQUENTIAL, INCIDENTAL, SPECIAL, EXEMPLARY OR OTHER INDIRECT

DAMAGES REGARDLESS OF CAUSE, NOR FOR ECONOMIC LOSS, LOSS OF USE, LOSS OF DATA, LOSS OF BUSINESS, PERSONAL INJURIES OR PROPERTY DAMAGES SUSTAINED BY ACCOUNT HOLDER OR ANY THIRD PARTIES, EVEN IF APX HAS BEEN ADVISED BY ACCOUNT HOLDER OR ANY THIRD PARTY OF SUCH DAMAGES. APX DISCLAIMS ANY LIABILITY FOR ERRORS, OMISSIONS OR OTHER INACCURACIES IN ANY PART OF THE REGISTRY, OR THE REPORTS, CREDITS OR OTHER INFORMATION COMPILED OR PRODUCED BY AND FROM OR INPUT INTO THE REGISTRY. TO THE MAXIMUM EXTENT PERMITTED BY LAW, ACCOUNT HOLDER HEREBY RELEASES AND PROTECTS (A) THE APX ENTITIES, (B) SOM, AND (C) EACH OF THE APX ENTITIES' AND SOM'S RESPECTIVE AGENTS, CONTRACTORS, SERVICE PROVIDERS AND VENDORS FROM ANY AND ALL LIABILITY WITH RESPECT TO ANY DAMAGES OR INJURIES INCURRED BY ACCOUNT HOLDER AS RELATES TO THE REGISTRY.

#### **17. LOGINS, PASSWORDS AND REGISTRY IDS.**

Account Holder agrees to assume sole responsibility for the security of any logins, passwords and Registry IDs issued to Account Holder and its Users for accessing the Registry. Account Holder agrees to immediately notify APX of any suspected unauthorized use of Account Holder's login(s), password(s), Registry ID(s) or Account or any other suspected breach of security.

#### **18. INDEMNIFICATION.**

Account Holder agrees to defend, indemnify and hold harmless the APX Entities, SOM, and each of their respective owners, trustees, partners, members, officers, directors, employees, agents and representatives (each an "Indemnified Party") from and against any violations by Account Holder or its Users of any Applicable Law and against any and all claims (including third-party claims), causes of action, whether in contract, tort or any other legal theory (including strict liability), demands, damages, costs, liabilities, losses and expenses (including reasonable attorneys' fees and court costs) of any nature whatsoever ("Losses") arising out of, resulting from, attributable to or related to the use of the Registry by Account Holder or its Users, or Account Holder's or its Users' violation of any of the Operative Documents or these Terms of Use, including, but not limited to, any Losses arising out of or related to: (a) any inaccuracy, error, or delay in or omission of (i) any data, information, or service, or (ii) the transmission or delivery of any data, information, or service; (b) any interruption of any such data, information, or service (whether or not caused by such Indemnified Party); or (c) any financial, business, commercial or other judgment, decision, act or omission based upon or related to the information or the Registry. Notwithstanding the foregoing, Account Holder shall not defend, indemnify or hold harmless an Indemnified Party from and against any Losses to the extent that the Losses are caused by the conduct of such Indemnified Party which a court of law has determined amounted to gross negligence or willful misconduct.

**19. NO ASSIGNMENT, TRANSFER OR ENCUMBRANCE BY ACCOUNT HOLDER.**

Neither any Operative Document nor these Terms of Use nor any rights hereunder or thereunder may be assigned, sublicensed, encumbered, pledged, mortgaged or otherwise transferred by Account Holder, in whole or in part, whether voluntary or by operation of law, without the express prior written consent of APX, which consent shall not be unreasonably withheld, conditioned or delayed.

**20. RELATIONSHIP OF PARTIES.**

Each Party is an independent contractor under these Terms of Use. No Party has the authority to execute documents that purport to bind the others, and nothing in these Terms of Use will be construed to constitute a joint venture, fiduciary relationship, partnership or other joint undertaking.

**21. NO THIRD PARTY BENEFICIARIES.**

These Terms of Use and the Operative Documents are for the sole and exclusive benefit of Account Holder, the APX Entities and their respective successors and permitted assigns, and except as set forth in Section 18, no third party, including without limitation a Credit Owner, will have any rights under these Terms of Use or the Operative Documents whatsoever.

**22. FORCE MAJEURE.**

No Party shall be deemed to have breached any provision of these Terms of Use as a result of any delay, failure in performance, or interruption of service resulting directly or indirectly from acts of God, network failures, acts of civil or military authorities, civil disturbances, wars, terrorism, energy crises, fires, floods, strikes or other labor disturbances, riots, embargoes, transportation contingencies, fuel shortages, interruptions in third-party telecommunications or Internet equipment or service, other catastrophes, or any other occurrences which are beyond the claiming Party's reasonable control and which, by the exercise of due diligence, the claiming Party is unable to overcome or avoid or cause to be avoided; *provided, however*, that no such occurrences shall excuse Account Holder's obligation to pay amounts due hereunder by the applicable due date.

**23. SEVERABILITY.**

If any part of these Terms of Use is held to be unenforceable or illegal by a court, arbitration panel or governmental administrative agency, such holding shall not affect the validity of the other parts of the Terms of Use, which shall at all times remain in full force and effect.

**24. WAIVER.**

The waiver of a breach or the failure to require at any time performance of any provision of these Terms of Use will not operate or be interpreted as a waiver of any other or subsequent breach nor in any way affect the ability of any Party to enforce each and every such provision thereafter. The express waiver by any Party of any provision, condition or requirement of these Terms of Use shall not constitute a waiver of any future obligation to comply with such provision, condition or requirement.

**25. NOTICES.**

All notices permitted or required under these Terms of Use shall be in writing and shall be delivered in person, by email, facsimile, or first class, registered or certified mail, postage prepaid, or by overnight courier service to the following addresses or such other address as either Party may specify in writing:

If to APX:  
APX, Inc.  
111 River Street  
Hoboken, NJ 07649  
Attn: APX MIRECS Registry Administrator  
Facsimile: 201.748.7901  
Email: mirecs@apxenv.com

If to Account Holder:  
To the address provided at the time of registration, as updated by Account Holder from time-to-time

Service shall be effective on the earlier of actual receipt or the second business day after the day of mailing via first class mail. For service of notice via facsimile, it shall be deemed received on the day said notice was sent to the other Party. For service of notice via email, it shall be deemed received when acknowledgement of its receipt has been given by the Party due to receive the notice.

**26. GOVERNING LAW AND DISPUTE RESOLUTION.**

(a) These Terms of Use shall be governed exclusively by the federal laws of the United States of America and the laws of the State of Michigan without regard to its rules on conflicts of laws.

(b) In the event of any controversy or claim arising out of or relating to these Terms of Use, or the breach thereof, or any other claim or controversy between the Parties arising out of the Registry (any such claim, a "Dispute"), the Parties shall first attempt in good faith to resolve such Dispute informally. This informal dispute resolution effort may, upon request of either party, include the participation of SOM.

(c) If the informal effort fails to resolve a Dispute, the Parties shall then attempt in good faith to settle the Dispute by mediation administered by the American Arbitration Association (“AAA”) under its Commercial Mediation Procedures then in effect. At least thirty (30) days prior to initiating such mediation, the Party seeking to mediate (“Demanding Party”) shall give the other Party written notice describing the claim and the amount as to which it intends to initiate the action, as well as providing all supporting documentation available to the Demanding Party.

(d) Any Dispute that has not been resolved by mediation as provided herein within forty-five (45) days after initiation of the mediation procedure shall be finally resolved by arbitration administered by the AAA under its Commercial Arbitration Rules and Supplementary Procedures for Online Arbitration then in effect. The arbitrator(s) will have no authority to award punitive damages nor any other damages not measured by a prevailing Party’s actual damages, and may not, in any event, make any ruling, finding or award that does not conform to the terms and conditions of these Terms of Use. Neither any Party nor the arbitrator(s) may disclose the existence or results of any arbitration hereunder without the prior written consent of all Parties.

(e) Each Party shall be responsible for the payment of all of its costs associated with the resolution of said dispute whether in arbitration or before a court of law, including but not limited to any filing fees, arbitrator fees, its attorneys’ fees and other costs incurred in such proceeding, *provided that* if a dispute is initiated in bad faith, as determined by the arbitrator(s), the Party initiating the dispute shall be responsible for all of the other Party’s defense costs, and provided further that APX shall be entitled to payment of its costs and expenses, including without limitation attorneys’ fees, to the extent set forth in Sections 11(b)(ii) and 18.

(f) The Parties agree that neither may bring a claim nor assert a cause of action against the other, in any forum or manner, more than one (1) year after the cause of action accrued, except where the Party could not have reasonably discovered the wrong giving rise to the claim within one (1) year.

## **27. ENTIRE AGREEMENT.**

The Operative Documents, including without limitation the General Terms of Use, and these Terms of Use, including any and all exhibits attached thereto and hereto, represent the entire agreement of the Parties with respect to the subject matter thereof and hereof and supersede any conflicting terms in any other prior or contemporaneous oral or written agreements and any and all other communication.