

OPERATING AGREEMENT

THIS AGREEMENT (this “**Agreement**”) made as of <*>, 2020

BETWEEN:

THE CITY OF KAWARTHA LAKES,
having its principal offices at 26 Francis Street, Lindsay, ON K9V 5R8

(the “**Municipality**”)

- and -

SHAMAN POWER CORPORATION,
having its principal offices at 611 Tradewind Drive, Ancaster, ON L9G 4V5

 (“**Shaman**” and together with the Municipality each a “**Party**” and collectively the “**Parties**”)

WHEREAS the Municipality (by one of its predecessor municipalities) at one time did operate a hydro-electric generating facility at Fenelon Falls which utility was subsequently acquired by Ontario Hydro and was de-commissioned a number of years ago;

AND WHEREAS, pursuant to a development agreement dated September 15, 1994 (the “**Predecessor Agreement**”), Consolidated Hydro Limited (“**Consolidated**”) agreed to, *inter alia*, develop, construct, operate and maintain a hydro-electric generating facility at Fenelon Falls (the “**Generating Facility**”) and to provide the Municipality with certain payments and rights in relation thereto, in exchange for certain cooperation and actions on the part of the Municipality in relation to the Generating Facility;

AND WHEREAS Shaman has acquired all of Consolidated’s right, title and interest in and to the Generating Facility including without limitation all of Consolidated’s rights and obligations pursuant to the Predecessor Agreement;

AND WHEREAS Shaman has entered into a long-term agreement to sell electricity generated by the Generating Facility to the Independent Electricity System Operator (the “**PPA**”);

AND WHEREAS the parties hereto now wish to amend and restate their arrangements in relation to the Generating Facility and to evidence the same by entering into this Agreement.

NOW THEREFORE THIS AGREEMENT WITNESSETH that in consideration of the premises and for other good and valuable consideration and the sum of Two Dollars (\$2.00) of lawful money of Canada now paid by Shaman to the Municipality (the receipt whereof is hereby acknowledged), Shaman and the Municipality hereby covenant and agree with one another as follows:

1. TERM

The term of this Agreement (the “**Term**”) shall commence on the date first written above, which for greater certainty shall be the date that this Agreement shall have been executed and delivered by each Party to the other Party (the “**Effective Date**”) and shall terminate effective as of the close of business on December 31, 2038 (the “**End Date**”).

2. MUNICIPAL OBLIGATIONS

The Municipality agrees to cooperate and support Shaman’s ownership and operation of the Generating Facility, provided that such cooperation and support shall not be construed to bind or fetter in the Municipality’s jurisdiction over the activities taken or to be taken by Shaman in relation to the Generating Facility, or the issuance by the Municipality of any permit or other approval that may be required by Shaman.

3. SHAMAN OBLIGATIONS

During the term, Shaman shall use commercially reasonable efforts to:

- (a) own and operate the Generating Facility materially in accordance with all applicable laws;
- (b) maintain the Generating Facility in good operating condition; and
- (c) maintain all ancillary contracts and agreements necessary for operation of the Generating Facility in good standing.

4. PAYMENTS TO THE MUNICIPALITY

4.1 In consideration of the Municipality’s obligations hereunder, Shaman agrees to make payments to the Municipality as follows:

- (a) subject to Section 4.2, during each year of the Term, a sum, equal to twenty percent (20%) of Revenue (as defined below), which will be paid in installments not more than 30 days following the date on which Shaman has received the Revenue on which such payment is based, and had a reasonable opportunity to process the information required to perform the calculation of the payment due to the Municipality in respect thereof; and
- (b) if the Effective Date is on or before June 30, 2020:
 - (i) an amount equal to \$200,000, which will be paid not more than 30 days following the Effective Date; and
 - (ii) an amount equal to twenty percent (20%) of the Revenue earned by Shaman during the period commencing on January 1, 2020 and ending on the Effective Date (less any payments made by Shaman to the Municipality for the same period pursuant to the Predecessor Agreement),

which will be calculated and paid promptly following the Effective Date Shaman has received the Revenue on which such payment is based, and had a reasonable opportunity to process the information required to perform the calculation of the payment due to the Municipality in respect thereof.

4.2 If the Revenue for a given calendar year shall be less than \$200,000 and either:

(a) in relation to such calendar year:

- (i) Shaman shall have suffered a major mechanical failure at the Generating Facility; or
- (ii) other circumstances shall have caused the Generating Facility to be operated at a level that is insufficient to generate at least \$200,000 in Revenue during such calendar year;

in either such case other than a Force Majeure Event (as defined below); or

(b) Shaman shall have decided, of its own volition, not to operate the Generating Facility at a level sufficient to generate at least \$200,000 in Revenue during such calendar year;

then in either such circumstance Shaman shall, subject to Section 4.4(c), pay the Municipality, in respect of the applicable calendar year, an amount equal to \$40,000.

4.3 In the event that Shaman shall, of its own volition, fail to operate the Generating Facility at a level that is sufficient to generate at least \$200,000 in annual Revenue for a period of two consecutive calendar years, the Municipality shall have the option to terminate this Agreement by providing written notice to Shaman, and the Term shall end on the date that is six (6) months after the date such written notice was received by Shaman; provided, however, that following receipt of such written notice, if Shaman diligently commences and continues to use commercially reasonable efforts to operate the Generating Facility to its full commercial capacity, such notice shall automatically be deemed to have been rescinded and be of no further force or effect. For greater certainty, the Municipality's option to terminate would not arise in circumstances where Shaman's reason for failing to operate the Generating Facility at the level necessary to yield at least \$200,000 in revenue is outside Shaman's control, including without limitation a Force Majeure Event.

4.4 For purposes of this Agreement:

- (a) unless otherwise expressly specified herein, all amounts otherwise payable hereunder are exclusive of applicable Sales Taxes (as defined below), if any. The amounts otherwise payable by Shaman to the Municipality hereunder will be increased by the amount of any such applicable Sales Taxes. Notwithstanding the preceding sentence, no amount will be added to the amounts otherwise payable by Shaman to the Municipality on account of such Sales Taxes where the Parties have determined, each acting reasonably, that there is a lawful exemption from

such Sales Taxes or the Municipality has remitted such Sales Taxes directly to the relevant taxation authority as required by applicable law or administrative policy of the relevant taxation authority. For greater certainty, each Party shall be responsible for any taxes that are lawfully payable by such Party to any taxation authority. Notwithstanding anything else contained herein, the Parties shall indemnify, defend and hold each other harmless for any liability for any additional taxes (including for greater certainty any interest, penalties, fines, or other similar charges) arising as a result of or in connection with any delay or failure by the applicable Party, for any reason: (i) to charge, collect and/or remit to the relevant taxation authority any Sales Taxes or other taxes due to be collected by it under or in relation to this Agreement; or (ii) to file any tax or information return with the relevant taxation authority in connection with the charging, collection and/or remittance of such Sales Taxes or other taxes. The Municipality represents and warrants that it is a registrant for the purposes of the *Excise Tax Act* (Canada) and its registration number is <*>, and Shaman represents and warrants that it is a registrant for the purposes of the *Excise Tax Act* (Canada) and its registration number is <*>;

- (b) the Municipality shall, upon reasonable written notice to Shaman, have the right, at its sole expense, to examine the records of Shaman related to revenue received by Shaman for electricity generated at the Generating Facility to verify the calculation of Revenue for purposes of this Agreement, and any adjustments found to be necessary shall be made between the Parties expeditiously thereafter;
- (c) any instalment payments made pursuant to Section 4.1(a) shall be subject to adjustment based on the final reconciliation calculations made by Shaman following the end of the fiscal period to which the instalment payments were applicable. In the event that the amount that was actually payable for a given fiscal period was:
 - (i) less than the amount actually paid in instalments, Shaman may withhold the difference from payments otherwise due pursuant to Section 4.1(a) in relation to a different fiscal period; and
 - (ii) greater than the amount actually paid in instalments, Shaman shall pay the difference together with the next payments due pursuant to Section 4.1(a) in relation to a different fiscal period;
- (d) “**Revenue**” in relation to a given fiscal period shall mean the revenue earned from the sale of electricity generated by the Generating Facility during such fiscal period;
- (e) “**Sales Taxes**” means sales taxes, use taxes, value added taxes, goods and services taxes, harmonized sales taxes, export taxes, import taxes and/or customs duties;
- (f) “**Decommission**” means to close off all water passages only; and
- (g) “**Force Majeure Event**” means either:

- (i) an event or circumstance that constitutes a “force majeure event” under the PPA; or
- (ii) an action taken by the Independent Electricity System Operator, any federal, provincial or municipal government and/or any agent, ministry or administrative body thereof that has the effect of terminating or materially altering the PPA and/or depriving Shaman of the benefits thereof or substantially all of the benefits thereof.

5. OPTION TO PURCHASE

5.1 The Parties agree to meet and negotiate in good faith with an eye to reaching agreement on terms and conditions that would apply to Shaman’s continued ownership and operation of the Generating Facility following the conclusion of the Term (a “**Successor Agreement**”). Subject to Section 5.3, if the Parties fail to enter into a mutually satisfactory Successor Agreement, then upon the expiry of the Term, on the day after the End Date, Shaman shall transfer, convey and assign to the Municipality all of Shaman’s right, title and interest in and to the buildings, equipment and generating units comprising the physical plant of the Generating Facility (collectively, the “**Physical Assets**”) free and clear of encumbrances, for a purchase price of Two Dollars (\$2.00)

5.2 In the event that Shaman’s right, title and interest in the Physical Assets shall automatically be transferred, conveyed and assigned by Shaman to the Municipality as contemplated in Section 5.1:

- (a) Shaman shall use commercially reasonable efforts to transfer its interest in any existing ancillary contracts, agreements or warranties related to its operation of the Generating Facility; and
- (b) if the Municipality intends to continue to operate the Generating Facility itself, or through a third party, Shaman shall cooperate and use commercially reasonable efforts to transition its operation of the Generating Facility to the Municipality or such third party as a going concern in a safe manner.

5.3 Notwithstanding Section 5.1, if the Municipality delivers to Shaman, not less than twelve (12) months prior to the end of the term, a written notice that the Municipality does not intend to continue to operate the Generating Facility itself, or through a third party, then Shaman shall Decommission the Generating Facility promptly following the end of the Term.

6. ARBITRATION

6.1 In the event that the Parties are unable to agree as to the interpretation or implementation of any of the terms of this Agreement, then the matter in dispute shall be determined by binding arbitration.

6.2 The Parties shall agree upon an Arbitrator, and if they are unable to agree within 30 days following written notice from one Party to the other, then each Party shall appoint an arbitrator

within 15 days and the two such arbitrators so appointed shall mutually appoint a third arbitrator within the following 15 days.

6.3 The decision of the arbitrator or arbitrators, as the case may be, shall be final and there shall be no appeals on question of law or mixed fact and law. In all other respects, the provisions of the *Arbitration Act* (Ontario), shall apply.

7. SUCCESSORS AND ASSIGNS

7.1 This Agreement shall be binding upon and enure to the benefit of the Parties and their respective successors and permitted assigns.

7.2 Subject to Section 7.3, any assignment of this Agreement and/or any of its provisions by either Party, other than to an entity that is wholly owned by it, shall first require the approval of the other Party, which approval shall not be unreasonably withheld, conditioned or delayed.

7.3 The Municipality specifically acknowledges, agrees and consents to an assignment by Shaman of its right, title and interest in this Agreement in the following circumstances:

- (a) Shaman is contemporaneously assigning its right, title and interest in and to the Generating Facility; and
- (b) the assignee is either:
 - (i) a bona fide third party lender (or its administrative agent) that is: (A) providing financing to Shaman in relation to the Generating Facility; and (B) is taking the assignment hereof as security for Shaman's obligations in relation to such financing; or
 - (ii) an entity that is acquiring all or substantially all of Shaman's assets and undertakings.

7.4 Upon any permitted assignment of this Agreement, Shaman shall not be released from its obligations hereunder, and shall remain bound to perform all of its obligations hereunder in any event.

7.5 In relation to any assignment to an acquirer pursuant to Section 7.3(b)(ii), the acquirer shall be of sound financial and operational ability and demonstrably capable of operating the Generating Facility in accordance with this Agreement, to the satisfaction of the Municipality, acting reasonably.

8. MISCELLANEOUS

8.1 No supplement, modification, amendment, waiver or termination of this Agreement shall be binding unless executed in writing by each Party.

8.2 This Agreement constitutes the sole and entire agreement between the Parties in relation to the subject matter hereof, and supercedes and replaces all previous oral and/or written

agreements and arrangements made between the Parties in relation to the Generating Facility, including without limitation the Predecessor Agreement, and each and every such agreement and/or arrangement is hereby terminated, revoked and of no further force or effect.

8.3 This Agreement shall be construed and enforced in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein from time to time and shall be treated in all respects as an Ontario agreement.

8.4 Any demand, notice or other communication to be given in connection with this Agreement must be given in writing and shall be given by personal delivery to the address specified on the first page hereof, or such other acceptable address and/or mode of delivery that a Party may, by written notice, specifically advise the other Party from time to time to be the proper address and/or mode, as the case may be, for notices to be received by the notifying Party.

8.5 This Agreement may be executed in any number of counterparts, each of which will be deemed to be an original, and all of which taken together will be deemed to constitute one and the same instrument. Counterparts may be executed either in original or faxed or electronic form, and the Parties may adopt any signatures received by a receiving fax machine or other electronic means as original signatures of the Parties.

8.6 Each Party covenants and agrees to promptly take, execute, acknowledge and deliver all such further acts, documents and assurances as the other Party may reasonably request from time to time in order to carry out the intent and purposes of this Agreement.

8.7 If any provision of this Agreement is determined by an arbitrator or a court of competent jurisdiction to be invalid, illegal or unenforceable in any respect, such determination shall not impair or affect the validity, legality or enforceability of the remaining provisions hereof, and each provision is hereby declared to be separate, severable and distinct.

[the remainder of this page is intentionally left blank and the signature page follows]

IN WITNESS WHEREOF the Parties have executed this Agreement as of the date first written above.

THE CITY OF KAWARTHA LAKES

Per: _____
Name:
Title:

Per: _____
Name:
Title:

I/we have authority to bind the
Municipality

SHAMAN POWER CORPORATION

Per: _____
Name:
Title:
I have authority to bind the corporation

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