

## CHILLED WATER SERVICE AGREEMENT

This Chilled Water Service Agreement (this “Agreement”), dated as of [date] (the “Effective Date”), is by and between the City of Austin, a Texas home-rule municipal corporation d/b/a Austin Energy (“Supplier”), and [name], a [state] [entity] (“Customer”). Supplier and Customer are hereinafter referred to individually as a “Party” and collectively as the “Parties”.

WHEREAS, Supplier owns and operates a district chilled water system in Austin, Texas (the “District Chilled Water System”) and is engaged in the business of generating and providing chilled water service to owners and operators of buildings and other facilities in the Austin area; and

WHEREAS, Customer owns real property in Austin on which it owns or plans to construct and own certain buildings, each identified on Exhibit A (such real property, buildings and other fixtures thereon, the “Premises”); and

WHEREAS, Customer desires to purchase from Supplier, and Supplier desires to provide to Customer, chilled water service to cool building interior space at the Premises under the terms of this Agreement and *Austin Energy’s On-Site Resources Customer Connection Requirements*.

NOW THEREFORE, in consideration of the mutual covenants herein contained, the sufficiency and adequacy of which are hereby acknowledged, the Parties agree to the following:

### 1. DEFINITIONS.

1.1 As used in this Agreement, the following terms shall have the respective meanings set forth below.

“Actual Capacity Requirement” means the maximum demand for Service over a monthly billing period, measured as the maximum of the hourly average Tons of Service supplied to Customer during such billing period, excluding any non-recurring short term peaks that are the result of Supplier’s operating error, Supplier’s equipment malfunction or accident affecting the District Chilled Water System or other equipment being maintained by Supplier.

“Appropriation” has the meaning set forth in Section 19.1.

“BTU” means British thermal unit.

“Contract Capacity” means the Service capacity set forth on Exhibit A, as may be adjusted under the terms of this Agreement.

“Customer Easements” has the meaning set forth in Section 18.1.

“Customer Event of Default” has the meaning set forth in Section 14.2.

“Excess Capacity” has the meaning set forth in Section 3.4.

“Force Majeure Event” means any event or circumstance beyond the control or reasonable advance planning of a Party that prevents or delays the performance of any obligation of such Party arising under this Agreement, including: failure of equipment or facilities due to drought, flood, earthquake, storm, fire, explosion, lightning, epidemic, war, riot, civil disturbance, sabotage, vandalism, terrorism, strike, or labor difficulty, accident or curtailment of supply or equipment, casualty to equipment or other unavailability of equipment or replacement equipment; inability to obtain and maintain rights-of-way, permits, licenses and other required authorizations from any federal, state or local agency or person for any of the facilities or equipment necessary to provide or receive Service so long as the party claiming same diligently uses reasonable effort to obtain and maintain such rights-of-way, permits, licenses and other required authorizations; and restraint, order or decree by any court or governmental authority.

“Indemnified Party” has the meaning set forth in Section 11.1.

“Late Charge” has the meaning set forth in Section 4.2.

“Operation Date” means the date Customer first accepts Service at the Premises in accordance with the terms of this Agreement.

“Payment Due Date” has the meaning set forth in Section 4.2.

“Point of Delivery” means the point where Service is delivered to Customer on the load side of the heat exchanger, as shown on Exhibit D.

“Point of Return” means the point where Service is returned to Supplier on the load side of the heat exchanger, as shown on Exhibit D.

“Projected Operation Date” means [*date*]. The Projected Operation Date shall be extended day-for-day if a Party’s ability to commence the supply or receipt of Service is delayed by a Force Majeure Event.

“Repeated Overage” has the meaning set forth in Section 3.4.

“Required Licenses” has the meaning set forth in Section 18.1.

“Service” means supplying chilled water at the Point of Delivery for the purpose of cooling building interior space at the Premises and receiving used chilled water at the Point of Return.

“Spending Obligation” has the meaning set forth in Section 19.1.

“Supplier Event of Default” has the meaning set forth in Section 14.1.

“Ton” means a rate of heat removal equivalent to 12,000 BTU per hour, measured as a function of the quantity of chilled water which is measured by the Service meter and the temperature differential between the chilled water supply and return at the Point of Delivery and the Point of Return.

“Ton-Hour” means the average Tons delivered over a period of one hour.

- 1.2 The capitalized terms that appear in this Section 1, in the recitals or in the Exhibits shall have the meanings set forth herein and therein whenever the terms appear in this Agreement, whether in the singular or the plural or in the present or past tense. The titles and headings in this Agreement are inserted for convenience only and shall not be used for purposes of interpreting this Agreement. The words “include,” “includes” and “including” are not limiting. Unless otherwise specified, references to “Sections” or “Exhibits” are to sections or exhibits of this Agreement. Unless otherwise specified herein, reference to a law, statute, regulation or document shall mean such law, statute, regulation or document as it may be amended from time to time. The word “day” means a calendar day. The phrase “business day” means a day that is not a Saturday, Sunday or legal holiday in the United States.
2. **TERM OF AGREEMENT.** This Agreement will be effective as of the Effective Date and will remain in effect for a period of [ ] years from the earlier of the Projected Operation Date or the Operation Date, unless earlier terminated in accordance with the terms of this Agreement. Customer shall have the option of extending the term of this Agreement for up to [ ] additional [ ]-year renewal terms by providing written notice to Supplier no later than one year prior to the expiration of the current term.
3. **CHILLED WATER SERVICE.**
  - 3.1 Purchase and Sale. Beginning on the Operation Date, Supplier agrees to provide and Customer agrees to purchase, at the Point of Delivery, Customer’s total Service requirements for the Premises up to the Contract Capacity, subject to the terms and conditions of this Agreement, including all attached Exhibits, which are specifically referenced and incorporated in their entirety herein.
  - 3.2 Operation Date. The Operation Date shall not be earlier than the Projected Operation Date unless otherwise agreed in writing by Supplier and Customer. If the Operation Date does not occur on or before the Projected Operation Date due to a delay caused by Customer, then Customer shall begin paying the Interconnection Charge as of the Projected Operation Date notwithstanding such delay. If the Operation Date does not occur on or before the Projected Operation Date due to a delay caused by Supplier, then Supplier shall provide Customer with temporary substitute cooling reasonably acceptable to Customer within 10 business days after the Projected Operation Date, and Customer shall begin paying the Interconnection Charge and Capacity Charge as of the date such temporary cooling is provided.
  - 3.3 Service Specifications. The specifications for Service provided to Customer under this Agreement, including chilled water temperature and pressure, are set forth in Exhibit A. Customer shall not use the chilled water provided pursuant to this Agreement to cool space within properties other than the Premises. Customer shall not resell the Service provided under this Agreement to any person other than a co-owner, manager or tenant of the Premises. Supplier shall have no responsibility for temperature comfort levels within the Premises, which are controlled and determined by Customer. Customer shall

promptly notify Supplier of any concerns about the quantity or quality of Service after Customer becomes aware of such concerns.

- 3.4 Contract Capacity. The Contract Capacity is set forth on Exhibit A. Customer shall provide Supplier reasonable advance notice of any intention to materially increase its requirements for Service. If Customer requires Service in excess of the Contract Capacity (“Excess Capacity”), Supplier shall not be obligated to provide such Excess Capacity, but shall make a reasonable effort to do so from the District Chilled Water System. Inability to deliver Excess Capacity shall not be a breach of Supplier’s obligations and Supplier shall have the right to limit Customer to its Contract Capacity. If Customer’s Actual Capacity Requirement is greater than 110% of the Contract Capacity three times in any six-month period (a “Repeated Overage”), Supplier shall have the right to increase the Contract Capacity to the average of the three highest Actual Capacity Requirement values measured during such six-month period; *provided* that Supplier shall exercise its right to increase the Contract Capacity within 60 days following the occurrence of a Repeated Overage and notify Customer in writing of such increase.

**4. BILLING.**

- 4.1 Service Charges. Beginning on the earlier of the Operation Date or the Projected Operation Date, Supplier shall bill Customer for Service provided during the most recent billing period, which shall be a period of one calendar month. Customer shall pay Supplier the charges and fees for Service set forth in Exhibit B. Customer shall pay Supplier for any temporary alternate cooling service provided pursuant to this Agreement in the same manner as Customer would pay for permanent Service.
- 4.2 Invoices. Customer shall pay the undisputed amount of each invoice on or before the payment due date, which is 17 days from the date of the invoice (“Payment Due Date”). If Customer does not make full payment of all undisputed amounts on or before the Payment Due Date, an administrative late charge will be billed and payable at the rate of five percent of the amount of the delinquent balance during the next billing period (“Late Charge”). Payments will be applied sequentially based on the earliest outstanding Payment Due Date. Supplier shall have the right to change the Payment Due Date and Late Charge as necessary to conform to the billing practices of Austin Energy’s electric utility business.
- 4.3 Taxes. Customer shall pay all taxes, including all taxes imposed upon Customer’s purchase of Service, which Supplier is required to collect from Customer. Should Supplier be required to pay any tax, or any license, occupation, use, franchise or similar fee imposed by any federal, state or governmental authority on the Service provided by Supplier to its customers, Customer shall pay a surcharge representing its pro rata portion of such tax or fee.
- 4.4 Changes in Law. The charges and fees for Service under this Agreement assume a continuation of present laws and regulations in substantially the same manner as on the Effective Date. Supplier shall have the right to adjust the charges and fees on an

equitable pro rata basis to reflect any increase in Supplier's cost of providing Service that results from the adoption or modification of any applicable law, regulation, rule, order or ordinance of any governmental authority, or any change in the interpretation thereof by any court, tribunal or regulatory agency, and such adjustment shall become effective immediately upon notice of the adjustment to Customer.

- 4.5 Disputes. If Customer fails to notify Supplier in writing of any dispute or alleged inaccuracy involving an invoice within 90 days after delivery of such invoice, Customer shall be deemed to have irrevocably waived its right to raise such dispute or inaccuracy. Billing disputes shall be handled in accordance with the dispute resolution procedures set forth in Section 16.
5. **SERVICE INTERRUPTION**. Supplier shall use reasonable efforts to provide regular and uninterrupted Service 24 hours per day in accordance with this Agreement, but does not guarantee uninterrupted Service to Customer. Supplier shall have the right to interrupt Service: (i) for a reasonable duration upon providing such notice to Customer as is reasonably practicable, for the purpose of performing maintenance, repairs, replacements or adjustments to the District Chilled Water System, including any Supplier equipment installed on the Premises; *provided* that Supplier shall exercise diligence in completing the maintenance, repair, replacement or adjustment, and, to the extent practicable, Supplier shall coordinate the scheduling of interruptions with Customer to minimize interference with the normal operations of the Premises, (ii) for a duration determined by Supplier, with reasonable advance notice to Customer, if, in Supplier's reasonable judgment, any of Customer's chilled water equipment has become dangerous or defective, or if necessary to comply with an order of any governmental authority, (iii) during a Customer Event of Default, or (iv) as necessary to address an emergency situation that presents an imminent and material threat to property or the safety of persons. If Service is interrupted for any reason other than the condition of Customer's equipment or a Customer Event of Default and the interruption occurs during a time when Customer is able and willing to receive Service, and the outage is in excess of 15 calendar days the Capacity Charge shall be reduced proportionally to reflect such interruption.
6. **LIMITATION OF LIABILITY**. SUPPLIER SHALL NOT BE RESPONSIBLE TO CUSTOMER UNDER THIS AGREEMENT FOR ANY CLAIMS, LOSSES, COSTS, EXPENSES OR DAMAGES OF ANY NATURE WHATSOEVER (INCLUDING REASONABLE FEES AND COSTS OF ATTORNEYS AND EXPERT WITNESSES) FROM ANY CAUSE OR CAUSES ARISING UNDER OR RELATED TO THIS AGREEMENT EXCEEDING, IN THE AGGREGATE, TWO-HUNDRED AND FIFTY THOUSAND DOLLARS (\$250,000).
7. **DISCLAIMER OF WARRANTIES**. Service provided under this Agreement is intended for typical commercial HVAC applications. Except as expressly stated in this Agreement, Service is provided and sold to Customer under this Agreement "**as is**", and no warranties or guarantees are given regarding the quality of the chilled water, either statutory, express or implied. **SUPPLIER SPECIFICALLY DISCLAIMS ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE**. Supplier makes no warranty or guarantee, express or implied, regarding the quality of the equipment

and facilities installed by Supplier or the quality of Supplier's or its contractor's installation. No other warranties are applicable to this Agreement other than those expressly provided above and in Section 10.1.

8. **NO CONSEQUENTIAL DAMAGES.** NEITHER PARTY SHALL BE RESPONSIBLE TO THE OTHER FOR ANY INDIRECT, SPECIAL, PUNITIVE, INCIDENTAL OR CONSEQUENTIAL DAMAGE OR LOSS WHATSOEVER (INCLUDING LOST PROFITS AND OPPORTUNITY COSTS) ARISING OUT OF THIS AGREEMENT OR ANY ACT OR OMISSION IN CONNECTION HEREWITH. THIS SECTION SHALL APPLY WHETHER ANY INDIRECT, SPECIAL, PUNITIVE, INCIDENTAL OR CONSEQUENTIAL DAMAGE OR LOSS IS BASED ON A CLAIM BROUGHT OR MADE IN CONTRACT OR IN TORT (INCLUDING NEGLIGENCE AND STRICT LIABILITY), UNDER ANY WARRANTY, OR OTHERWISE.
9. **NO LIABILITY FOR INJURY OR DAMAGE.** SUPPLIER SHALL NOT BE LIABLE FOR ANY INJURY OR DAMAGE RESULTING FROM (1) THE USE OF SERVICE BY CUSTOMER OR BY THIRD PARTIES, OR (2) INTERRUPTION OR FAILURE OF SERVICE. NEITHER BY INSPECTION OR NON-REJECTION, NOR BY GIVING APPROVAL OR CONSENTS, NOR IN ANY OTHER WAY DOES SUPPLIER GIVE ANY WARRANTY, EXPRESS OR IMPLIED, AS TO THE ADEQUACY, SAFETY, OR OTHER CHARACTERISTICS OF ANY DESIGNS, STRUCTURES, EQUIPMENT, WIRES, MAINS, PIPES, APPLIANCES OR DEVICES OWNED, LEASED, INSTALLED OR MAINTAINED BY CUSTOMER AND TENANTS.

## **10. REPRESENTATIONS AND WARRANTIES.**

10.1 Supplier's Representations. Supplier represents and warrants that (i) it is authorized to enter into this Agreement and to perform all of its obligations hereunder and has secured all necessary approvals, including any necessary Austin City Council approvals, to enter into this Agreement and to perform all of its obligations hereunder, subject to appropriation of funds by the Austin City Council as described in Section 19.1 below, (ii) the person signing this Agreement on behalf of Supplier has all requisite authority and capacity to bind Supplier to this Agreement, and (iii) the District Chilled Water System has available capacity sufficient to provide the Contract Capacity to the Premises.

10.2 Customer's Representations. Customer represents and warrants that (i) it is authorized to enter into this Agreement, to permit all necessary System equipment to be installed at the Premises, and to perform its obligations under this Agreement and has secured all necessary approvals, including corporate or governing board approvals, to enter into this Agreement and perform its obligations hereunder, and (ii) the person signing this Agreement on behalf of Customer has all requisite authority and capacity to bind Customer to this Agreement.

## **11. INDEMNIFICATION.**

11.1 Customer's Indemnification Obligations. Customer hereby assumes all risk of and responsibility for, and agrees to indemnify, defend and hold harmless Supplier, its governing body, affiliates, directors, officers, employees and agents (each, an "Indemnified Party") from

and against, all claims, demands, suits, actions, recoveries, judgments, costs and expenses (including reasonable attorneys' fees and court costs), including claims for personal injury and property damage, which arise or result from (i) Customer's breach of this Agreement or any representation or warranty made herein, (ii) violation of any applicable law or regulation by Customer, its employees or agents, or (iii) the negligent or willful misconduct of Customer, its employees or agents related to the subject matter of this Agreement, except to the extent, and only to the extent, that such loss, injury, damage, cost, expense or claim is caused by the negligence or willful misconduct of any Indemnified Party.

11.2 Supplier's Liability as a Government Entity. Supplier agrees that it is responsible to the exclusion of such responsibility of Customer for its own proportionate share of liability for its negligent acts and omissions for claims, suits and causes of action, including claims for property damage, personal injury and death, arising out of or connected to this Agreement and as determined by a court of competent jurisdiction, provided that the execution of this Agreement will not be deemed a negligent act.

12. **INSURANCE**. Customer shall maintain insurance coverage as set forth in Exhibit E. If any insurance required to be maintained by Customer hereunder ceases to be available in the commercial insurance market, Customer shall provide written notice to Supplier and Customer shall use commercially reasonable efforts to obtain other insurance that would provide comparable coverages and protection against the risk to be insured.

13. **FORCE MAJEURE**. Neither Party shall be responsible or liable for any delay or failure in its performance under this Agreement, nor shall such delay or failure become an event of default, to the extent such delay or failure is caused by a Force Majeure Event, *provided that*: (i) the suspension of performance is of no greater scope and of no longer duration than is required by the Force Majeure Event; and (ii) the non-performing Party proceeds with reasonable diligence to remedy its inability to perform and provides weekly progress reports to the other Party describing actions taken to end the Force Majeure Event. Nothing herein shall be construed to obligate a Party to settle or resolve a labor difficulty or to hire substitute labor on terms unacceptable to that Party.

14. **DEFAULT**.

14.1 Supplier Event of Default. Any one of the following shall constitute an event of default on the part of Supplier ("Supplier Event of Default") under this Agreement:

- a) The failure of Supplier to provide Service to the Premises following the Operation Date if (i) the failure continues for more than five consecutive days, (ii) Supplier has not provided reasonably acceptable alternate cooling service, such as portable chillers, and (ii) the failure is not an interruption of Service that is otherwise permitted or excused by this Agreement.
- b) The failure of Supplier to comply with any other material provision of this Agreement within 30 days after written notice and demand to cure are provided by Customer, or such longer period not to exceed 90 days in the aggregate if

such default is not reasonably susceptible of being cured within 30 days so long as Supplier diligently pursues cure of such default.

14.2 Customer Event of Default. Any one of the following shall constitute an event of default on the part of Customer (“Customer Event of Default”) under this Agreement:

- a) The failure of Customer to pay any undisputed amount due under this Agreement on or before the Payment Due Date, if the failure is not cured within five business days after Supplier provides written notice of such failure to Customer.
- b) The failure of Customer to comply with any other material provision of this Agreement within 30 days after written notice and demand to cure are provided by Supplier, or such longer period not to exceed 90 days in the aggregate if such default is not reasonably susceptible of being cured within 30 days so long as Customer diligently pursues cure of such default.

## 15. **TERMINATION.**

15.1 Early Termination for Default. This Agreement may be terminated (i) by Customer, if a Supplier Event of Default has occurred and is continuing, or (ii) by Supplier, if a Customer Event of Default has occurred and is continuing. The terminating Party shall exercise its early termination right by providing no less than 30 days’ prior written notice to the defaulting Party. In the event this Agreement is terminated as a result of a Customer Event of Default, in addition to any other amounts due under this Agreement, Customer shall reimburse Supplier the remaining unamortized portion of all actual costs incurred by Supplier in connecting Customer to the District Chilled Water System, including the costs of all labor, supplies, equipment, permits and regulatory fees, real property rights and professional engineering services.

15.2 Effect of Termination. Upon the expiration or termination of this Agreement, Supplier shall have the right to (i) abandon in place all or part of its equipment and property on the Premises, and shall have no further liability or responsibility for any equipment or property so abandoned, or (ii) remove all or part of its equipment and property within 30 days following the expiration or termination of this Agreement. Should Supplier exercise its right to remove all or part of its equipment and property following termination for a Customer Event of Default, Customer shall pay Supplier the reasonable costs of such removal.

15.3 Survival. The provisions of this Section 15 shall survive the termination or expiration of this Agreement.

## 16. **DISPUTE RESOLUTION.**

16.1 Consultation. In the event of any dispute arising under this Agreement, within 10 days following the receipt of a written request by either Party, each Party shall appoint a representative from its senior officers or managers and the Parties’ representatives shall meet, negotiate and attempt in good faith to resolve the dispute quickly, informally and inexpensively. Nothing in this Section shall limit a Party’s ability to pursue any other remedy that may be available to it at law or in equity.

16.2 Performance During Dispute. While any controversy, dispute or claim arising out of or relating to this Agreement is pending, Supplier and Customer shall continue to perform their obligations hereunder to the extent possible notwithstanding such controversy, dispute or claim, and to the extent such performance is not otherwise excused under this Agreement.

## **17. CONFIDENTIALITY.**

17.1 Non-Disclosure. Neither Party shall disclose Confidential Information to a third party (other than the Parties' employees, agents, public officials of the City of Austin, Texas, direct or indirect lenders, direct or indirect investors, potential direct or indirect lenders and potential direct or indirect investors, and their respective counsel, accountants or advisors, who have a need to know such information and have agreed to keep such terms confidential) except in order to comply with any applicable law, including the Texas Public Information Act, or in connection with any court or regulatory proceeding; provided, however, that each Party shall, to the extent practicable, use reasonable efforts to prevent or limit the disclosure.

17.2 Confidential Information. For purposes of this Section 17, "Confidential Information" means (A) information that has been or is disclosed by a Party to the other Party that relates to matters such as patents, trade secrets, draft or final contracts or other business arrangements, chilled water data and analysis, budgets, cost estimates, pro forma calculations, engineering work product, energy consumption, pricing information, and other similar information, (B) information that has been or is disclosed by a Party to the other Party that the disclosing Party expressly designates in writing to be confidential, or (C) information regarding the terms of this Agreement, including the pricing and other commercial terms hereof, provided that either Party may disclose the existence of this Agreement, the identity of the Parties, the estimated annual and aggregate amounts each Party will spend fulfilling its obligations hereunder, the term of this Agreement and the location of the Premises. "Confidential Information" shall not include information that (i) is in the public domain, other than information that entered the public domain by breach of this Agreement; (ii) was obtained by a Party from a third party who is not known by the Party to be bound by a confidentiality agreement with respect to such information; (iii) is available through independent research without use of or access to the Confidential Information; or (iv) was already in a Party's possession prior to disclosure hereunder, either without limitation on disclosure to others or subsequently becoming free of such limitation.

## **18. PERMITS, EASEMENTS AND REGULATORY AUTHORITY**

18.1 Permits, Licenses and Easements. Supplier shall use reasonable efforts to secure and maintain all necessary permits, easements and licenses over private and public property (other than the Customer Easements) and any other approvals that may be required to operate the District Chilled Water System ("Required Licenses"). The Parties agree that all obligations of Supplier to perform under this Agreement are contingent upon and subject to securing and maintaining all Required Licenses. Supplier shall have the right to terminate this Agreement in the event any such Required License is terminated. Customer shall allow the running of Service lines and installation of chilled water equipment within and on Customer's property, subject to Customer's prior review of plans, drawings and specifications for such lines and equipment. Supplier shall provide advance notice and coordinate the installation of the Service lines, valve

pits and other equipment with Customer. Customer agrees to grant Supplier, at no cost, all rights-of-way, access rights, easements and licenses that are necessary for Supplier to install and access its facilities on Customer's property or to provide Service to the Premises from the District Chilled Water System ("Customer Easements") during the Term of this Agreement. Additionally, Customer shall be responsible for acquiring any Customer Easements on adjacent property of third parties. The Customer Easements will be on forms prepared by Supplier and must be executed and returned to Supplier before the installation of Service lines or equipment will begin. Customer also agrees to provide all surveys and legal descriptions for the Customer Easements at no cost to Supplier and to pay all necessary recording fees.

18.2 Regulatory Authority. This Agreement is made in all aspects subject to applicable federal, state and local laws, regulations, ordinances and franchises, as amended from time to time. Nothing in this Agreement shall be construed as divesting any regulatory body of its rights, jurisdiction, power or authority conferred by law. The Agreement is expressly conditioned upon Supplier's receipt of such regulatory approvals or authorizations as may be required, if any. Supplier shall use its best efforts to obtain any required regulatory approvals or authorizations; if any such approvals or authorizations are not obtained or cannot be obtained in a timely manner, this Agreement shall terminate automatically.

**19. MISCELLANEOUS.**

19.1 Governmental Spending Subject to Appropriation. The parties acknowledge that Supplier is a governmental entity. Supplier's performance of any obligation under this Agreement that requires the expenditure of funds (a "Spending Obligation") is dependent upon the availability of funding. Spending Obligations are subject to, and will be performed by Supplier only to the extent of, funds made available by the Austin City Council's adoption of a fiscal year budget that includes amounts to be expended on the Spending Obligations during the respective fiscal year (an "Appropriation"). Supplier shall provide Customer written notice of the City's failure to make an adequate Appropriation for any fiscal year to fund any Spending Obligation under this Agreement, or the reduction of any Appropriation to an amount insufficient to permit Supplier to complete any Spending Obligation.

19.2 Notice. Unless otherwise specified in this Agreement, all notices shall be made in writing and delivered by hand, express courier service, certified U.S. mail or electronic mail (so long as a copy of such electronic mail notice is provided thereafter by hand delivery, express courier or certified U.S. mail). Notices shall be deemed to have been given (i) on the date of receipt if delivered by hand or express courier service (ii) on the date of the time stamp if sent by electronic mail, or (iii) on the date seven days after dispatch if sent by certified mail that is properly addressed; provided that deliveries by electronic mail shall be deemed to have been made upon the next business day if made after the close of business on any business day or on any other day. Notices shall be addressed as follows:

To Supplier:

Austin Energy  
On-Site Energy Resources  
Attn: Product Development Coordinator  
Town Lake Center  
721 Barton Springs Road

Austin, Texas 78704-1194  
sue.arthur@austinenergy.com

With additional notice of events of default to:

City of Austin Law Department  
P.O. Box 1088  
Austin, TX 78767-1088  
Attn: Utilities Division Chief

To Customer:

[REDACTED]

A Party may change its notice information above by providing written notice of such change to the other Party in the manner specified herein.

19.3 Assignment. Except as provided in this Section, neither Party may assign its rights or obligations under this Agreement (except to an affiliate, parent or subsidiary, with advance written notice to the other party) without the prior written consent of the other party, which shall not be unreasonably withheld as long as it is demonstrated that the proposed assignee is reasonably capable, both financially and technically, of carrying out assignor's obligations under this Agreement. Notwithstanding the foregoing, (i) Customer may assign its rights and obligations under this Agreement to a purchaser or lienholder/lender of the Premises without Supplier's consent if Customer notifies Supplier of such sale and/or assignment within 15 business days after closing, and (ii) Supplier may assign its rights and obligations under this Agreement to a purchaser of the District Chilled Water System without Customer's consent if Supplier notifies Customer of such sale and assignment within 15 business days after closing. Each party shall remain primarily liable to the other party for its obligations under this Agreement in the event of any permitted assignment of this Agreement, provided, however, that in the event the assignee assumes in writing the obligations of the assignor hereunder and such assumption is provided to the non-assigning party hereunder, then the assignor will not be responsible for any further obligations hereunder accruing after the date of such assumption. This Agreement is binding on the respective successors and assigns of Customer and Supplier.

19.4 Survival. The termination or expiration of this Agreement shall not relieve the Parties of obligations that expressly survive such termination or expiration, or that arose prior to such termination or expiration, including indemnity obligations and payments for Service received, which obligations shall survive for the period of the applicable statute(s) of limitation.

19.5 Severability. If any provision of this Agreement is ruled invalid by a court of competent jurisdiction, the invalidity of such provision shall not affect any of the remaining provisions.

19.6 Amendments. This Agreement may be amended, modified, changed or altered only by a written agreement duly executed by both Parties.

19.7 Waiver and Remedies. Each remedy under this Agreement shall be cumulative and in addition to any other remedy provided by law, whether at law or in equity. The failure of

either Party to insist on strict performance of any provision of this Agreement or to exercise any right hereunder shall not be construed as a waiver of such provision or right.

19.8 Entire Agreement. This Agreement, including the attached exhibits, constitutes the entire agreement between the Parties with respect to the matters contained in this Agreement. All prior oral or written agreements with respect the subject matter hereof are superseded by this Agreement, and each Party hereby confirms that it is not relying on any oral or written representations of the other Party except as specifically set forth in this Agreement.

19.9 Governing Law. The laws of the State of Texas shall govern the validity, interpretation, construction and performance of this Agreement without regard to their internal principles of conflict of laws.

19.10 Venue. Venue for any action seeking interpretation or enforcement of this Agreement or for damages for a breach thereof shall lie exclusively in the state courts of Travis County, Texas.

19.11 Relationship of the Parties. The parties to this Agreement are independent contractors. Nothing in this Agreement shall be construed as creating an agency, partnership, joint venture, or fiduciary relationship between the parties.

19.12 No Third Party Beneficiaries. This Agreement shall be for the sole benefit of Customer and Supplier, and each of their successors and assigns. Nothing in this Agreement shall be construed to create any duty to, or standard of care with reference to, or any liability to, any person not a party to this Agreement.

19.13 Counterparts. This Agreement may be executed in several counterparts, each of which shall be an original and all of which shall constitute one and the same instrument. The parties agree that this Agreement may be signed and then transmitted by e-mail and such signed Agreement counterparts sent by e-mail shall be deemed to be original signatures.

*[signature page follows]*

IN WITNESS WHEREOF, the Parties have caused this Chilled Water Service Agreement to be executed by their duly authorized representatives as of the date first written above.

**CUSTOMER:**

[name]

By: \_\_\_\_\_  
Name:  
Title:

**SUPPLIER:**

**The City of Austin d/b/a Austin Energy**

By: \_\_\_\_\_  
Name:  
Title:

**EXHIBIT A**

**SERVICE SPECIFICATIONS**

Description of Premises:

Name of Building(s): [ ]

Address: [ ]

Contract Capacity: [ ] Tons

Service Specifications:

Normal plant operating pressure: [ ] PSIG

Normal supply temperature: [ ] Fahrenheit. The supply temperature may vary moderately during plant or Customer transitions.

Designed return temperature: [ ] Fahrenheit

Maximum supply-side flow rate: [ ] gallons per minute

Maximum load-side flow rate: [ ] gallons per minute

Heat Exchanger Specifications: [number] [ ]-Ton heat exchanger(s) with a maximum designed pressure drop of [ ] PSIG.

Electrical Connection: One dedicated 120-volt, 20-amp circuit in a dedicated continuous 1.5” EMT conduit, terminated in a 12x12 metal junction box to the Supplier control cabinet.

**EXHIBIT B**

**CHARGES AND FEES FOR SERVICE**

**I. CHARGES FOR SERVICE**

**A. INTERCONNECTION CHARGE:**

An Interconnection Charge of \$[ ] is due from Customer monthly, until the total amount of Interconnection Charge payments made by Customer equals \$[ ] (the “Total Interconnection Charge”). Customer may prepay any portion of the Total Interconnection Charge.

**B. CAPACITY CHARGE:**

The Capacity Charge is calculated monthly as the Monthly Capacity *multiplied by* the Capacity Rate, *where*

- (i) Monthly Capacity is the sum of the Contract Capacity and any Excess Capacity utilized during the billing period, in Tons;
- (ii) The Capacity Rate as of the Effective Date is \$[ ] per Ton and is adjusted annually each January during the term of this Agreement by multiplying the Capacity Rate then in effect by the CPI Adjustment; and
- (iii) The CPI Adjustment is based on the Consumer Price Index U.S. City Average for All Urban Consumers (“CPI”), published by the U.S. Department of Labor, Bureau of Labor Statistics (or comparable successor index). The CPI Adjustment is calculated by dividing the CPI for the most recent calendar month by the CPI for that calendar month in the previous year, *provided* that the CPI Adjustment shall not be less than 1.0.

**C. CONSUMPTION CHARGE:**

The Consumption Charge is calculated monthly as the Monthly Consumption *multiplied by* the Consumption Rate, *where*

- (i) Monthly Consumption is the quantity (in Ton-Hours) of Service consumed during the billing period;
- (ii) The Consumption Rate as of the Effective Date is \$[ ] per Ton-Hour and is adjusted annually each January during the term of this Agreement by multiplying the Consumption Rate then in effect by the Consumption Charge Adjustment; and

(iii) The Consumption Charge Adjustment is calculated as:

(The CPI Adjustment *multiplied by 0.35*) plus  
(The Electric Adjustment *multiplied by 0.50*) plus  
(The Water Adjustment *multiplied by 0.15*), where

- a. The CPI Adjustment is calculated as described in Section B above;
- b. The Electric Adjustment is based on the increase or decrease in Supplier's production and delivery electric costs (in \$/Ton-Hour) compared to the prior year derived by dividing (i) Supplier's total cost of electric supply for the District Chilled Water System over the calendar year, divided by (ii) the number of Ton-Hours produced by the District Chilled Water System during that year; and
- c. The Water/Waste Water Adjustment is based on the increase or decrease in Supplier's production and delivery of water/waste water (in \$/Ton-Hour) compared to the prior year derived by dividing (i) Supplier's total cost of water/waste water for the District Chilled Water System over the calendar year, divided by (ii) the number of Ton-Hours produced by the District Chilled Water System during that year. **II. OTHER CHARGES**

**A. RETURN TEMPERATURE ADJUSTMENT:** Except as provided below, the Return Temperature Adjustment will be added to customer's invoice in any billing period in which the Weighted Average Return Temperature is less than the Designed Return Temperature. The Return Temperature Adjustment shall be calculated as the Consumption Charge *multiplied by six percent* for each degree, in Fahrenheit, that the Weighted Average Return Temperature falls below the Designed Return Temperature, rounded down to the nearest degree.

For example, if the Weighted Average Return Temperature is 2.75 degrees less than the Designed Return Temperature, the Return Temperature Adjustment will be twelve percent of the Consumption Charge for the applicable billing period.

For purposes of calculating the Return Temperature Adjustment:

- (i) The Weighted Average Return Temperature is the weighted average temperature of chilled water returned by Customer and measured at the Point of Return during the billing period; and
- (ii) The Designed Return Temperature is provided in Exhibit A to this Agreement.

The Return Temperature Adjustment will not be applied during the first three billing periods following the Operation Date.

**B. CUSTOMER DATA LINK FEE:** Upon request, Supplier will install a data link providing real time supply, return and flow information to enable Customer to monitor its Service usage. Customer shall pay \$50 per month for each customer data link or as set in the most recent City of Austin Fee Schedule.

**C. CITY OF AUSTIN FEE SCHEDULE:** Customer shall pay any applicable fees described in the most recent City of Austin Fee Schedule, as adopted by the Austin City Council.

**EXHIBIT C**

GENERAL TERMS AND CONDITIONS FOR SERVICE

1. Chilled Water Service.

- A. *General.* Supplier shall provide chilled water at the Point of Delivery in accordance with Exhibit A. Customer shall return at the Point of Return 100% of the water volume delivered to Customer. Customer shall not tap into, use or otherwise interfere with Service in any way that may diminish the flow or change its chilled water temperature beyond the limits in Exhibit A. Supplier may reduce Service flow or stop Service during any time that Customer's circulating chilled water pump is not activated. Supplier may reset the supply temperature at the Point of Delivery as needed to maintain the 15-minute weighted average return temperature at the Point of Return at or above the Designed Return Temperature indicated on Exhibit A.
- B. *Water Quality.* Supplier shall maintain water quality and shall employ a chemical treatment of its water as it determines in its sole discretion to be adequate for the normal protection of its equipment. Supplier shall advise Customer of the chemical treatment it employs, as well as any changes thereto, and it shall be Customer's responsibility to ensure that Customer's equipment is compatible therewith. Customer shall not perform any treatment or add any chemicals or substances to the water being used in its cooling system without the prior written consent of Supplier. Supplier may interrupt Service if chilled water is contaminated between the Point of Delivery and Point of Return until such contamination is eliminated as determined by Supplier in its sole discretion.

2. Supplier Property.

- A. *General.* Supplier shall provide, install, operate and maintain: (1) Service lines connecting the Premises to the District Chilled Water System, in locations that are determined by Supplier to be convenient and practicable, up to supply side of the heat exchanger(s); (2) heat exchanger(s) meeting the specifications set forth on Exhibit A; and (3) all chilled water control and monitoring equipment as is reasonably necessary to measure and control Service to the Premises, including an energy management station (control panel), control valves, flow meter, temperature and pressure sensors, and associated wire and conduit (collectively, the "Supplier Equipment").
- B. *Location and Ownership.* Supplier reserves the right to determine the location of any Supplier Equipment on the Premises, subject to Customer's approval, which approval shall not be unreasonably withheld or delayed. Supplier shall act reasonably in consultation with Customer with respect to any future relocation of Supplier Equipment. Should Customer request a change in the location of any Supplier Equipment after initial installation, any such change will be subject to Supplier's approval and will be made at the expense of Customer. Although Service will normally be supplied to the Premises through a single supply line and single return line, Supplier may install more than one Service line. All Service lines, heat

exchangers and other Supplier Equipment shall remain the property of Supplier and shall not be considered a fixture on the property. Upon delivery of the heat exchanger(s) to the Premises, Customer shall cause the heat exchanger(s) to be unloaded and placed in the mechanical room at a location determined by Supplier.

- C. *Operation and Tampering.* The Service valves, meters and electrical switches shall be operated only by personnel authorized by Supplier, except when necessary due to emergency circumstances that require immediate shutoff of Service; Customer shall notify Supplier immediately of any such emergency shutoff. Customer, its agents and employees shall not authorize or knowingly permit any person, except Supplier's authorized personnel, to operate Supplier's equipment, break or replace any Supplier seal or lock, or to alter or interfere with the operation of Supplier's meters or connections, or any item of Supplier's Service equipment installed on Customer's property. Customer shall be liable for any loss or damage caused by any equipment tampering or vandalism, unauthorized re-energization of Service lines or any other or unauthorized operation of Supplier's equipment on the Premises.

3. Customer Property.

- A. *General.* Customer shall comply with the applicable requirements set forth in *Austin Energy's On-Site Resources Customer Connection Requirements*, as the same have been provided to Customer. Customer shall provide, install, operate and maintain all piping and other chilled water equipment, excluding the Supplier Equipment, that is necessary to receive Service at the Point of Delivery, utilize Service for cooling the building, and return Service at the Point of Return. Supplier shall have no responsibility for any Service interruption that results from a defect, leak, breakage, malfunction or other condition of Customer-owned Service lines and equipment. Customer shall provide adequate space and clearance for the maintenance and safety of Supplier's facilities and equipment on the Premises, and shall provide any necessary safety signage.

- B. *Mechanical Room.* Customer shall provide and maintain a mechanical room on the Premises located against an exterior wall of the building at the basement or foundation level. The mechanical room shall include: (1) adequate clearance, unobstructed space, lighting and HVAC to protect all Service equipment and provide for safe maintenance and operation thereof; and (2) electrical connections meeting the specifications set forth on Exhibit A, which shall be provided and maintained in service at no cost to Supplier. Customer shall provide Supplier with shop drawings of the mechanical room upon completion. Customer shall complete construction of the mechanical room no later than 45 days prior to the Operation Date.

4. Construction Design. The Parties shall cooperate and coordinate in the accurate depiction of all chilled water facilities on the Premises during Customer's development of construction documents and the preparation of final shop drawings for the chilled water facilities. A final engineering design plan for the chilled water facilities to be installed on the Premises (the "Design Plan") is included in Exhibit D. The Parties shall construct and install their respective chilled water facilities in accordance with the Design Plan.

Supplier acknowledges that it has had the opportunity to review and approve the Design Plan and will not request any further changes thereto. If Customer requests any changes to the Design Plan, the revised Design Plan is subject to Supplier's advance approval, which approval shall not be unreasonably withheld. Customer shall pay 100% of the actual increased cost (including labor, supply and equipment) that Supplier incurs as a result of any changes to the Design Plan or Customer's failure to follow the Design Plan, promptly upon receipt of an invoice from Supplier detailing such costs.

5. Construction Timing and Progress Reporting. Customer shall involve Supplier in planning discussions in order to coordinate construction and installation of the chilled water facilities with any other construction activities on the Premises. During construction and installation of the chilled water facilities, Customer shall provide Supplier (i) a detailed monthly progress report describing the status of Customer's construction and installation activities, including any system testing results, and estimating the date that Customer will be ready to receive Service and (ii) a detailed construction schedule including the dates and times scheduled for Supplier's construction work on the Customer's site.
6. Environmental Conditions. Prior to commencement of construction of Supplier's chilled water facilities on the Premises, Customer shall provide a geotechnical engineering report for the Premises and shall disclose in writing any known or suspected environmental contamination of the Premises to Supplier. Supplier shall have no obligation to perform any work on the Premises if environmental contamination is present, or to incur any additional costs as a result of such contamination.
7. Approval of Customer's System. Upon request, Customer shall provide mechanical plans and specifications for its chilled water system and equipment to Supplier for review prior to interconnection of Customer's equipment to the District Chilled Water System. Additionally, Customer shall permit Supplier to inspect Customer's system and equipment to determine whether Customer's system and equipment are compatible with Supplier's District Chilled Water System, including Supplier's facilities on the Premises. Supplier shall not be required to commence Service (i) if it makes a determination of unsuitability or incompatibility, unless Customer makes such changes in its system or equipment as Supplier deems reasonably necessary, (ii) prior to substantial completion of Customer's mechanical room construction and installation responsibilities, as determined by Supplier, and (iii) until Customer's installation has been thoroughly cleaned and flushed as determined and approved by Supplier. Supplier shall review Customer's chilled water system and equipment solely for the purpose of determining compatibility, which review and approval is provided solely for the benefit of Supplier, and Supplier shall have no liability whatsoever in connection therewith. Supplier's review and approval of Customer's system and equipment shall not relieve Customer of its obligation to accept Service under this Agreement. Once Supplier has determined Customer's compatibility, Supplier will make no subsequent changes to Customer's Service except as permitted by this Agreement. Customer shall not modify its approved chilled water system and equipment without the prior written consent of Supplier, which consent shall not be unreasonably withheld.

8. Access to Premises. Supplier's duly authorized representatives shall be provided access to the mechanical room and Customer's vehicle parking facilities, if any, on a 24-hour-per-day basis, and to all other portions of the Premises at reasonable times for the purposes of installing, inspecting, testing, adjusting, maintaining, replacing and removing Supplier's equipment and other property, or for any other proper purpose related to this Agreement. Supplier's duly authorized representatives shall comply with Customer's reasonable security requirements for access to the Premises.
9. Sales to Other Customers. Supplier may tap any Service line or pipeline on the Premises for the purpose of extending chilled water service to other customers. Customer shall have the right to review and approve the location of such extended lines, which approval shall not be unreasonably withheld. The extended lines may be carried through Customer's wall or floor for this purpose, provided that no damage is caused to the Premises or Customer's operations and Supplier's installation and construction activities will be performed at reasonable times after notice in a manner that will not substantially interfere with the normal operation of the Premises.
10. Resale. As provided in Section 3.3 of the main body of the Agreement, Service supplied by Supplier hereunder may be resold by Customer only to a co-owner, manager or tenant of the Premises; provided that such resale does not subject Supplier to any governmental rules, regulation, laws or taxes to which it was not otherwise subject. Regardless of any such resale, Customer will remain primarily liable to Supplier for all costs and charges payable under this Agreement. Customer will be responsible for any taxes or governmental charges arising from its resale of Service. Supplier will not provide any submetering of Service under this Agreement.
11. Metering.
  - A. *Meters.* Supplier shall furnish, install and maintain meters and associated equipment appropriate (at the time of installation) to provide the Service required under this Agreement. Supplier shall have the right to install and remove test meters on Customer's equipment at Supplier's expense and in a manner that does not interfere with or damage Customer's equipment and operation. If Customer requests installation of any meter in addition to those determined appropriate by Supplier, Customer shall pay all related installation and equipment expenses, and Supplier will assess a monthly charge for each such meter as provided in Exhibit B.
  - B. *Testing.* Meters shall have accuracy established by manufacturers' written recommendations and shall conform to generally accepted engineering practices and standards applicable to utility metering. Supplier's meters shall be tested for accuracy in accordance with manufacturers' recommendations. If a test establishes the meter is not performing as required, Supplier shall repair or replace the meter and make an appropriate adjustment in Customer's billing as described below. Customer may request additional meter tests at any time, provided that if the meter is found to be accurate, Customer will bear the cost of such meter tests.

- C. *Bill Adjustments Based on Estimated Use.* If a meter is proven inaccurate, a billing adjustment shall be made from the date the meter inaccuracy began. If the date any proven meter inaccuracy began cannot be determined, a billing adjustment shall be made (excluding any period of outage or other non-use of Service and taking into account price changes during the period) for one-half of the period between the date of the last prior successful meter test or recalibration and the date of the test disclosing the inaccuracy, but not for a period greater than six months. If a meter fails to provide usable readings, the quantities of Service to be billed for such period will be estimated by Supplier based on best engineering practices, including one or more of the following: previous usage history, 30-calendar-day system average, comparable metered usage of other buildings, or average daily use. Customer shall pay for Service during such periods based on the estimated amount. All billings based on estimated usage shall be indicated on the bill as such. Customer may dispute such determination in accordance with the dispute resolution procedure provided in this Agreement.

**EXHIBIT D**

**DESIGN PLANS AND MECHANICAL ROOM DRAWINGS**

**EXHIBIT E**

**INSURANCE**

**Insurance Coverage**

Customer shall carry insurance in the following types and amounts for the duration of this Agreement, and furnish certificates of insurance and policy endorsements as evidence thereof:

1. Commercial General Liability with a minimum combined single limit of \$1,000,000 per occurrence for bodily injury and property damage, including:

- a. Blanket Contractual Liability coverage for liability assumed under this Agreement and all contracts relative to this project
- b. Products/Completed Operations Liability
- c. Explosion, Collapse and Underground (XC&U) coverage
- d. Independent Contractors coverage
- e. City of Austin listed as Additional Insured, endorsement CG 2010
- f. Thirty (30) Day Notice of Cancellation in favor of AE, endorsement CG 0205
- g. Waiver of Transfer of Recovery Against Others in favor of the City of Austin endorsement CG 2404

2. All risk property coverage including but not limited to fire, wind, hail, flood or rising water, theft, vandalism and malicious mischief for all real and personal property placed in the care, custody, and control of Customer, including all Supplier Equipment on the Premises. The limit of liability shall be determined by Supplier. The City of Austin shall be a loss payee on the policy as Its Interest May Appear.

**General Requirements**

Customer shall be responsible for deductibles and self-insured retention, if any, stated in policies. All deductibles or self-insured retention shall be disclosed on the certificates of insurance required above.

If coverage is underwritten on a claims made basis, the retroactive date shall be prior to or coincident with the Effective Date and the certificate of insurance shall state that the coverage is claims made and the retroactive date. Customer shall maintain coverage for the duration of this Agreement and for such additional period as is required to remove Supplier's equipment from the Premises in accordance with this Agreement. Customer shall provide Supplier annually with a certificate of insurance as evidence of such insurance.

If insurance policies are not written for amounts specified above, Customer shall carry Umbrella or Excess Liability Insurance for any differences in amounts specified. If Excess Liability Insurance is provided, it shall follow the form of the primary coverage.

Supplier will not commence work under this Agreement until proof of the required insurance has been supplied to and accepted by Supplier. Approval of insurance by Supplier shall not relieve or decrease the liability of Customer under this Agreement.

Insurance shall be written by a company licensed to do business in the State of Texas at the time the policy is issued and shall be written by a company with an A.M. Best rating of A- VII or better or otherwise reasonably acceptable to Supplier. The "other" insurance clause shall not apply to Supplier where Supplier is an additional insured shown on the policy. It is intended that policies required in this Agreement, covering both Supplier and Customer shall be considered primary coverage as applicable.

Customer shall not cause any insurance to be canceled nor permit any insurance to lapse during the term of this Agreement or as required in this Agreement.

Customer shall provide Supplier 45 calendar days written notice of erosion of the per occurrence limits outlined above.

Actual losses not covered due to the failure of Customer to provide the insurance that Customer is required to provide under this Agreement shall be paid by the Customer.