

CHILLED WATER SERVICE AGREEMENT

This Chilled Water Service Agreement, dated as of _____, 20____, (Effective Date), is by and between the City of Austin, a Texas home-rule municipal corporation d/b/a Austin Energy (Supplier) and [CUSTOMER NAME], a _____ corporation/limited partnership (Customer). Supplier and Customer are hereafter referred to individually as a Party and collectively as the Parties.

WHEREAS, Supplier owns and operates chilled water systems in Austin, Texas (District Chilled Water System) and engages in the business of generating and providing chilled water to buildings and other facilities in the Austin area; and

WHEREAS, Customer owns or plans to construct and own one or more building(s) identified on Exhibit A (such property, buildings and other fixtures thereon hereafter referred to as Premises); and

WHEREAS, Customer desires to purchase from Supplier and Supplier desires to provide to Customer chilled water service at the Premises under the terms of this Agreement and the *Austin Energy Chilled Water Customer Connection Requirements* (Customer Connection Requirements) dated _____, 20____ previously provided to Customer. This Agreement and exhibits control and supersede the Customer Connection Requirements in the event of any conflict, ambiguity or inconsistency between them.

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

1. DEFINITIONS.

As used in this Agreement, the following terms have the 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 that billing period, excluding any non-recurring short-term peaks the result of Supplier’s operating error, Supplier’s equipment malfunction or accident affecting the District Chilled Water System or other equipment maintained by Supplier.

“Additional Capacity” means if Customer requires Service above the Contract Capacity.

“Agreement” means this Chilled Water Service Agreement and all Exhibits attached thereto, as amended from time-to-time.

“BTU” means British Thermal Unit.

“Chilled Water System” means Supplier’s equipment and facilities to deliver chilled water in the Austin area, as applicable to the Premises.

“Contract Capacity” means the capacity set forth in Exhibit A, as adjusted per this Agreement’s terms.

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

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

“Force Majeure Event” means any event or circumstance beyond the control or reasonable advance planning of a Party preventing or delaying performance of any obligation of that 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 dispute, default by third-party contractor, 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 (other than the City acting in a proprietary capacity) or person for any of the facilities or equipment necessary to provide or receive Service so long as the party claiming the Force Majeure Event 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.

“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” means 17 days from the date of an invoice.

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

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

“Projected Operation Date” means _____. The Projected Operation Date shall be extended day-for-day if a Party cannot commence supply or receipt of Service due to a Force Majeure Event.

“Repeated Overage” means if Customer’s Actual Capacity requirement exceeds the Contract Capacity three times in any six-month period.

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

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

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

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“Ton” means a rate of heat removal equivalent to 12,000 BTU per hour, measured as a function of the quantity of chilled water 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, respectively.

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

The capitalized terms from this Section 1. the recitals or 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 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 amended from time-to-time. The word “day” means a calendar day. The phrase “business day” means a day 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 remain in effect for a period of _____ years from the earlier of the Projected Operation Date or the Operation Date, unless earlier terminated per this Agreement’s terms. If Customer wishes to extend the term upon expiration, Customer shall provide written notice to Supplier no later than one year prior to the expiration of the current term to allow for renegotiation of terms and conditions.

3. CHILLED WATER SERVICE.

3.1 Purchase and Sale.

Beginning on the Operation Date, Supplier agrees to provide and Customer agrees to purchase Customer’s total Service requirements for the Premises up to the Contract Capacity, subject to this Agreement’s terms.

3.2 Operation Date and Temporary Service.

The Operation Date shall be no earlier than the Projected Operation Date unless Supplier and Customer agree in writing. Supplier may agree to extend the Projected Operation Date for no more than 60 days upon Customer’s written request made at least 30 days prior to the Projected Operation Date. If the Operation Date does not occur on or before the Projected Operation Date due to a delay caused by Customer, Supplier will arrange for temporary chillers. Customer shall reimburse Supplier for all costs associated with providing the temporary chilled water service plus an administration fee of ten percent.

If the Operation Date does not occur on or before the Projected Operation Date due to a delay caused by Supplier, Supplier shall provide Customer with temporary chillers within ten business days after the Projected Operation Date. Customer shall begin paying the *Charges for Service* as of the date Supplier provides temporary cooling.

3.3 Service Specifications.

The specifications for Service provided to Customer under this Agreement (including chilled water temperature and pressure) appear 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 chilled water provided pursuant to 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 controlled and determined by Customer. Customer shall promptly notify Supplier of any concerns about Service after Customer becomes aware of concerns.

3.4 Contract Capacity Increase.

The Contract Capacity appears in Exhibit A. Customer shall provide Supplier reasonable advance notice of any intent to increase its requirements for Service. If Customer requires Additional Capacity, Supplier has no obligation to provide the Additional Capacity but may make a reasonable effort to do so. Inability to deliver Additional Capacity shall **not** constitute a breach of Supplier's obligations and Supplier has the right to limit Customer to the Contract Capacity. Customer may request in writing for Supplier to provide Additional Capacity and Supplier may, at its sole discretion, grant the request. The Parties will adjust the Maximum Customer-Side Flow Rate (in Exhibit A) with any Additional Capacity granted by Supplier.

If a Repeated Overage occurs, Supplier may, at its sole discretion, increase the Contract Capacity to the average of the three highest Actual Capacity values measured during the six-month Repeated Overage period. Supplier will notify Customer in writing of such increase.

4. BILLING.

4.1 Service Charges.

Subject to the provisions of Section 3.2 above, 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 (one calendar month). Customer shall pay Supplier the charges and fees for Service set forth in Exhibit B. Customer shall pay Supplier for all charges associated with temporary alternate cooling service provided pursuant to this Agreement.

4.2 Invoices.

Customer shall pay the amount of each invoice on or before the Payment Due Date. If Customer does not make full payment of all amounts on or before the Payment Due Date, Supplier shall charge an administrative late charge of five percent of the delinquent balance (Late Charge) on the next invoice and each subsequent invoice while the amount remains delinquent. Supplier will apply payments 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 uniform and non-discriminatory billing practices for all of the customers of Austin Energy's district cooling business; **provided**, Supplier gives Customer written notice of any such change not less than 30 days prior to the effective date of such change.

4.3 Taxes.

Customer shall pay all taxes, including taxes imposed on Customer's purchase of Service, which Supplier must collect from Customer. Should Supplier be required to pay any tax or license, occupation, use, franchise or similar fee imposed by any federal, state or governmental authority (other than the City unless a tax of general applicability) on the Service, Customer shall pay a surcharge representing its *pro rata* portion of that tax or fee. Supplier shall take reasonable efforts to inform Customer in writing before any potential tax liability may be imposed on Customer.

4.4 Changes in Law.

The charges and fees for Service under this Agreement assume a continuation of present laws and regulations in effect on the Effective Date. Supplier has the right to adjust the charges and fees on an equitable, uniform, non-discriminatory and *pro rata* basis for all customers receiving similar Service to reflect any increase in Supplier's cost of providing Service resulting from the adoption or modification of any applicable law, regulation, rule, order or ordinance of any governmental authority (other than the City) or any change in the interpretation thereof by any court, tribunal or regulatory agency and such adjustment shall become effective 30 calendar days after Supplier gives Customer written notice of the adjustment.

4.5 Disputes.

If Customer fails to notify Supplier in writing of any dispute or alleged inaccuracy involving an invoice within 60 calendar days after delivery of the invoice, Customer shall be deemed to have irrevocably waived its right to raise the dispute or inaccuracy. The Parties shall handle billing disputes 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 but does not guarantee uninterrupted Service. Supplier shall have the right to interrupt Service:

(i) for a reasonable duration upon providing prior written notice to Customer (as reasonably practicable) for performing maintenance, repairs, replacements or adjustments to the District Chilled Water System, including any Supplier Equipment (defined in Exhibit C) installed on the Premises; ***provided that*** Supplier shall exercise diligence in completing the maintenance, repair, replacement or adjustment and, to the extent practical, 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 sole 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 presenting an imminent threat to property or personal safety.

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 Customer is able and willing to receive Service and the outage exceeds five consecutive calendar days, Supplier shall

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provide, not later than the expiration of the five-day period, portable chillers with sufficient capacity to provide the Contract Capacity and the Capacity Charge shall be reduced proportionally to reflect the period of interruption.

6. LIMITATION OF LIABILITY.

SUPPLIER SHALL NOT BE RESPONSIBLE TO CUSTOMER 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, ONE HUNDRED AND FIFTY THOUSAND DOLLARS (\$250,000).

7. DISCLAIMER OF WARRANTIES.

Service is intended for typical commercial HVAC applications. Except as expressly stated in this Agreement, Supplier provides Service without any warranties or guarantees 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 or the quality of Supplier's or its contractor's installation. No other warranties apply 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 APPLIES 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.

EXCEPT AS OTHERWISE EXPRESSLY PROVIDED IN THIS AGREEMENT, 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: (i) it is authorized to enter into this Agreement and perform all its obligations hereunder and has secured all necessary approvals to enter into this Agreement and perform its obligations hereunder, subject to appropriation of funds by the Austin City Council as described in Section 19.13 below, and (ii) the person signing this Agreement on behalf of Supplier has all requisite authority and capacity to bind Supplier to this Agreement.

10.2 Customer's Representations.

Customer represents and warrants: (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 Customer's behalf has all requisite authority and capacity to bind Customer.

11. CUSTOMER 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 third-party claims, demands, suits, actions, recoveries, judgments, costs and expenses (including reasonable attorneys' fees and court costs), including claims for personal injury and property damage, to the extent they arise or result from: (i) Customer's failure to comply with the Customer Connection Requirements or (2) any condition or defect on Customer's Premises.

12. INSURANCE.

Customer shall maintain insurance coverage as set forth in Exhibit E. If any insurance required hereunder ceases to be reasonably available in the commercial insurance market, Customer shall provide written notice to Supplier and use commercially reasonable efforts to obtain other insurance providing comparable coverage and protection.

13. FORCE MAJEURE.

Neither Party shall be responsible or liable for any delay or failure in its performance under this Agreement, nor shall that delay or failure become an event of default, to the extent a Force Majeure Event causes the delay or failure, *provided that*: (i) the Party claiming delay or failure gives the other Party written notice of the Force Majeure Event no later than 10 business days after the Force Majeure Event commences, (ii) the suspension of performance is of no greater scope and no longer duration than required by the Force Majeure Event; and (iii) 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 obligates a Party to settle or resolve a labor difficulty or hire substitute labor on terms unacceptable to that Party.

14. DEFAULT.

14.1 Supplier Event of Default.

Any of the following constitutes an event of default by Supplier (Supplier Event of Default):

- a) Failure of Supplier to provide Service to the Premises following the Operation Date if:
(i) Supplier has not provided temporary chillers to provide alternate cooling service as provided herein and (ii) the failure is not an interruption of Service otherwise permitted or remedied under Section 5 above.
- b) Failure of Supplier to comply with any other material provision of this Agreement within 30 calendar days after written notice and demand to cure by Customer or longer period not to exceed 90 calendar days in the aggregate if the default is not reasonably susceptible of cure within 30 calendar days so long as Supplier diligently pursues cure of the default.

14.2 Customer Event of Default.

Any one of the following constitutes a Customer event of default (Customer Event of Default) under this Agreement:

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

15. TERMINATION.

15.1 Early Termination for Default.

This Agreement may be terminated: (i) by Customer if a Supplier Event of Default occurs and continues or (ii) by Supplier if a Customer Event of Default occurs and continues. The terminating Party shall exercise its early termination right by providing no less than 30 calendar days' prior written notice to the defaulting Party. In the event this Agreement is terminated due to a Customer Event of Default, in addition to any other amounts due under this Agreement, Customer shall reimburse Supplier the remaining unamortized portion of the amount 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 Survival.

The provisions of this Section 15 survive this Agreement's termination or expiration.

15.3 Effect of Termination.

Upon expiration or termination of this Agreement, Supplier has the right to: (i) abandon in place all or part of its equipment and property on the Premises and has no further liability or responsibility for any equipment or property so abandoned or (ii) remove all or part of its equipment and property within sixty calendar days following this Agreement's expiration or termination. 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.

16. DISPUTE RESOLUTION.

16.1 Consultation.

In the event of a dispute arising under this Agreement, within ten business 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 limits a Party's ability to pursue any other remedy 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 Party's employees, agents, contractors, consultants, 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, with a need to know such information) 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***, 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) non-public information disclosed by a Party to the other Party relating 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,

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(B) information 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 pricing and other commercial terms, *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: (i) in the public domain, other than information entered into the public domain by breach of this Agreement; (ii) obtained by a Party from a third-party not known by the Party to be bound by a confidentiality agreement with respect to such information; (iii) available through independent research without use of or access to the Confidential Information; or (iv) 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 required to operate the District Chilled Water System (Required Licenses). The Parties agree all obligations of Supplier to perform under this Agreement are contingent upon and subject to securing all Required Licenses no later than 30 calendar days from the Effective Date and Supplier shall maintain all Required Licenses during this Agreement's term. 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 and reasonable approval 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 over and across the Premises necessary to install and access Supplier's facilities on Customer's property or to provide Service to the Premises from the District Chilled Water System (Customer Easements) during the this Agreement's term. The Customer Easements will be on forms prepared by Supplier and executed and returned to Supplier before the installation of Service lines or equipment will begin. Customer agrees to provide all surveys and legal descriptions for the Customer Easements at no cost to Supplier and pay all necessary recording fees.

18.2 Regulatory Authority.

This Agreement is 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 required regulatory approvals or authorizations, if any. Supplier shall use its best efforts to obtain any required regulatory approvals or authorizations by not later than 30 calendar days after the Effective Date and, if any approvals or authorizations are not obtained or cannot be obtained on or before that 30 calendar day period, Supplier may terminate this Agreement effective upon written notice to Customer on or before the expiration of that 30 calendar day period.

19. MISCELLANEOUS.

19.1 Notice.

Unless otherwise specified, all notices shall be written 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 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 business days after dispatch if sent by certified mail properly addressed; ***provided that*** deliveries by electronic mail are deemed 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 Supplier Events of Default to:

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

To Customer:

Attn: _____

With additional notice of Customer Events of Default to:

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

19.2 Assignment.

Except as provided in this Section 19.2, 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 the proposed assignee is reasonably capable, financially and technically, of carrying out the assignor's obligations. Notwithstanding the foregoing: (i) Customer may assign its rights and obligations 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 to a purchaser of the

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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*, in the event the assignee assumes in writing the obligations of the assignor hereunder and that assumption is provided to the non-assigning Party hereunder, the assignor will not be responsible for any obligations accruing after the date of that assumption; and *provided further*, if the assignee of Customer is the City of Austin, the assignor will not be responsible for any obligations accruing after the date of that assignment. This Agreement binds the respective successors and assigns of Customer and Supplier.

19.3 Survival.

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

19.4 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.

19.5 Amendments.

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

19.6 Waiver and Remedies.

Each remedy under this Agreement is 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 constitute a waiver of that provision or right.

19.7 Entire Agreement.

This Agreement constitutes the entire agreement between the Parties with respect to the matters contained herein. This Agreement supersedes all prior oral or written agreements with respect to the subject matter hereof and each Party confirms it has not relied on any oral or written representations of the other Party except as specifically set forth in this Agreement. In the event of any conflict, ambiguity or inconsistency between this Agreement and the Customer Connection Requirements, this Agreement prevails.

19.8 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.

19.9 Venue.

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

19.10 Relationship of the Parties.

The Parties are independent contractors and nothing in this Agreement shall create an agency, partnership, joint venture or fiduciary relationship between the Parties.

19.11 No Third-Party Beneficiaries.

This Agreement is for the sole benefit of Customer and Supplier and their successors and permitted assigns. Nothing in this Agreement creates any duty to, or standard of care with reference to, or any liability to, any person not a party to this Agreement.

19.12 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 this Agreement may be signed and transmitted by e-mail and signed Agreement counterparts sent by e-mail shall be deemed to be original signatures.

19.13 Source of Funds/Appropriations.

Supplier's obligations under this Agreement are payable solely from the funds of the City of Austin's district cooling system as operating expenses and not from tax revenue of the City or any other revenue of the City not derived from the district cooling system. Neither the faith and credit nor the taxing power of the City of Austin or any other political subdivision of the State of Texas is pledged under this Agreement to the payment obligations of Customer. Customer hereby waives any claim or right of recovery against the City's general tax revenues or funds obtained by taxation, or any claim of default due to the City Council's failure to appropriate any funds from any source other than the current revenues of the district cooling system. This provision survives termination of this Agreement for any reason, including a Supplier Event of Default.

19.14 Anti-Israel Boycott Verification.

Pursuant to Texas Government Code Section 2270.002, Customer verifies it does not boycott Israel and will not boycott Israel during this Agreement's term. For purpose of this Section, "boycott Israel" has the meaning assigned by Texas Government Code Section 2270.001. Customer's obligations under this Section will automatically cease or be reduced to the extent the requirements of Texas Government Code Chapter 2270 are subsequently repealed, reduced, or declared unenforceable or invalid in whole or in part by any court or tribunal of competent jurisdiction or by the Texas Attorney General, without any further impact on the validity or continuity of the contract.

[signature page follows]

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IN WITNESS WHEREOF, the Parties' duly authorized representatives executed this Agreement as of the date first written above.

CUSTOMER:

[LEGAL ENTITY NAME]

By: _____

Name:

Title:

SUPPLIER:

The City of Austin d/b/a Austin Energy

By: _____

Name: Pat Sweeney

Title: Vice President, Power Production

EXHIBIT A

SERVICE SPECIFICATIONS

Description of Premises:

Name of Building:

Address: [Address]

Contract Capacity: XXX Tons

Service Specifications:

Normal plant operating pressure: XX PSIG

Normal supply temperature: XX degrees Fahrenheit.

Designed Return Temperature: XX degrees Fahrenheit

Maximum Supplier-Side Flow Rate: XXX gallons per minute

Maximum Customer-Side Flow Rate: XXX gallons per minute

Heat Exchanger Specifications: [Insert specs here]

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.

Building Square Feet and Uses:

Gross: [INSERT]

Conditioned: [INSERT]

Use: [Office / Hotel / Residential / Retail]

EXHIBIT B

CHARGES AND FEES FOR SERVICE

I. CHARGES FOR SERVICE

A. CAPITAL CHARGE:

The Capital Charge, billed monthly, is calculated as the Contract Capacity multiplied by \$_____.

B. CAPACITY CHARGE:

The Capacity Charge, billed monthly, is calculated as the Monthly Capacity (defined below) multiplied by the Capacity Rate, where:

- (i) Monthly Capacity is the sum of the Contract Capacity and any Excess Capacity during the billing period (in Tons); and
- (ii) The initial Capacity Rate as of the Effective Date is \$_____ per Ton per month, after which the Capacity Rate adjust as of October 1 of each year calculated by multiplying the previous year's Capacity Rate by a CPI Adjustment factor determined using the second quarter (end of June) numbers for the current year. The CPI Adjustment shall not be less than 1.0. The base year is 2018. The CPI Adjustment is based on the Consumer Price Index U.S. City Average for the following:
 - a) Wages: <https://bls.gov/web/eci/ecicois.txt>
Service Occupations or comparable successor index
Weight: 0.38
 - b) Benefits: <https://data.bls.gov/cgi-bin/surveymost?cm>
State and local government, All workers, Total benefits or comparable successor index
Weight: 0.20
 - c) Maintenance: <https://www.bls.gov/web/ppi/ppitable09.pdf>
Commodity code 1148 or comparable successor index
Weight: 0.42

C. CONSUMPTION CHARGE:

The Consumption Charge, billed monthly, is 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; and

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- (ii) The Consumption Rate as of the Effective Date is \$ _____ per Ton-Hour.
- (iii) The Consumption Rate shall be the actual pass-through costs of the total costs for electric, water, waste water and other services (including chemicals) adjusted as of October 1 of each year based on the prior fiscal year actual expenditures including period 13 adjustments.

II. RAMP UP CHARGES: Beginning on the Operation Date (which may occur during construction), Customer and Supplier agree to the following schedule for phasing-in the Capital Charge up to the Contract Capacity. Should the initial date Customer opens its building to the public (Opening Date) occur prior to the final month of the phase-in period below, the phase-in of the Capital Charge shall no longer apply and billing for the Capital Charge will begin in accordance with Exhibit B.

- Month 1 (Operation Date): 10% of the Contract Capacity, Capital Charge (or actual usage if more than 10%),
- Month 2: 20% of the Contract Capacity, Capital Charge (or actual usage if more than 20%)
- Month 3: 30% of the Contract Capacity, Capital Charge (or actual usage if more than 30%)
- Month 4: 40% of the Contract Capacity, Capital Charge (or actual usage if more than 40%)
- Month 5: 50% of the Contract Capacity, Capital Charge (or actual usage if more than 50%)
- Month 6: 60% of the Contract Capacity, Capital Charge (or actual usage if more than 60%)
- Month 7: 70% of the Contract Capacity, Capital Charge (or actual usage if more than 70%)
- Month 8: 80% of the Contract Capacity, Capital Charge (or actual usage if more than 80%)
- Month 9: 90% of the Contract Capacity, Capital Charge (or actual usage if more than 90%)
- Month 10: 100% of the Contract Capacity, Capital Charge

III. OTHER CHARGES

- A. RETURN TEMPERATURE ADJUSTMENT: Except as provided below, Supplier shall add the Return Temperature Adjustment 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 22 percent for each degree, in Fahrenheit, the Weighted Average Return Temperature falls below the Designed Return Temperature, calculated to the one-tenth of one degree.

For example, if the Weighted Average Return Temperature is 2.7 degrees less than the Designed Return Temperature, the Return Temperature Adjustment will be 59.4 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 the returned chilled water measured at the Point of Return during the billing period; and
- (ii) The Designed Return Temperature is provided in Exhibit A.

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- (iii) Supplier will not apply the Return Temperature Adjustment during the first three billing periods following the end of the Ramp Up period described in Section II, above.

B. **CUSTOMER DATA LINK FEE**: Upon Customer's request, Supplier will install a data link providing real time supply, return and flow information to Customer. Customer shall pay a fee of \$50 per month for each customer data link (or other amount set forth 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.

D. **LOW RETURN WATER TEMPERATURE RESPONSE**. In addition to charging the Return Temperature Adjustment set forth above, should Customer provide return water at a temperature less than the Design Return Temperature, Supplier has the right to: (a) reset the chilled water supply temperature set point at the point of delivery to maintain the 15 minute average of Customer return water temperature at the Designed Return Temperature; and/or (b) vary the chilled water flow to achieve the Design Return Temperature.

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 diminishing 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 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 in Exhibit A.
- B. *Water Quality.* Supplier shall maintain water quality and employ a chemical treatment of its water as it determines - in its sole discretion - 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 Customer shall ensure its equipment is compatible therewith. Customer shall not perform any treatment or add any chemicals or substances to the water used in its cooling system without Supplier's prior written consent. Supplier may interrupt Service if chilled water is contaminated between the Point of Delivery and Point of Return until that 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 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 in Exhibit A; and (3) all chilled water control and monitoring equipment 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 Customer shall not unreasonably withhold or delay. The location of Supplier Equipment will conform to the Customer Connection Requirements. Supplier shall act reasonably in consultation with Customer with respect to any relocation of Supplier Equipment. Should Customer request a change in the location of any Supplier Equipment after initial installation, the change will be subject to Supplier's approval and made at the expense of Customer. Although Supplier will normally provide Service 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 Supplier's property and not be considered a fixture on the property. Upon

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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.* Only personnel authorized by Supplier may operate the Service valves, meters and electrical switches except when an emergency requires 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 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 Customer Connection Requirements. Customer shall provide, install, operate and maintain all piping and other chilled water equipment, excluding the Supplier Equipment, 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 resulting 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 and provide any necessary safety signage.
 - B. *Mechanical Room.* Customer shall provide and maintain a mechanical room on the Premises located against an exterior wall 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 in Exhibit A, which shall be provided and maintained in service at no cost to Supplier. Customer shall provide Supplier with isometric shop drawings of the mechanical room upon completion. Customer shall complete construction of the mechanical room no later than 45 calendar days prior to the Operation Date. The mechanical room shall be deemed acceptable to Supplier if constructed in accordance with the Design Plan included in Exhibit D and the Customer Connection Requirements.
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 (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 it has had the opportunity to review and approve the Design Plan and will not request further changes thereto. If Customer requests any changes to the Design Plan, the revised Design Plan is

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subject to Supplier's advance approval, which approval Supplier shall not unreasonably withhold. Customer shall promptly pay 100% of the actual increased cost (including labor, supply and equipment) Supplier incurs as a result of any changes to the Design Plan or Customer's failure to follow the Design Plan, upon receipt of an invoice from Supplier detailing those costs.

5. Construction Timing and Progress Reporting. Customer shall involve Supplier in planning discussions to coordinate construction and installation of the chilled water facilities with any other related 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 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 commencing construction of Supplier's chilled water facilities on the Premises, Customer shall provide a geotechnical engineering report for the Premises and disclose to Supplier in writing any known or suspected environmental contamination of the Premises. Supplier shall have no obligation to perform any work on the Premises if environmental contamination is present or incur any additional costs as a result of that 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 determines unsuitability or incompatibility, unless Customer makes changes in its system or equipment Supplier deems reasonably necessary, (ii) prior to substantial completion of Customer's mechanical room construction and installation responsibilities, as determined by Supplier, or (iii) until Customer has thoroughly cleaned and flushed its installation as determined and approved by Supplier. Supplier shall review Customer's chilled water system and equipment to determine compatibility solely for Supplier's benefit 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 the compatibility of Customer's equipment, 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 Supplier's prior written consent, which Supplier shall not unreasonably withhold.
8. Access to Premises. Customer shall provide Supplier's duly authorized representatives access to the mechanical room and Customer's vehicle parking facilities, if any, on a 24-hour-per-day basis, to the extent necessary to install, inspect, test, adjust, maintain, replace and/or remove Supplier's equipment and other property or any other proper purpose related

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to this Agreement. Supplier's duly authorized representatives shall comply with Customer's reasonable security requirements to access the Premises.

9. Resale. As provided in Section 3.3 of the main body of the Agreement, Customer may resell Service only to a co-owner, manager or tenant of the Premises; **provided** 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 remains primarily liable to Supplier for all costs and charges payable under this Agreement. Customer shall pay all taxes or governmental charges arising from its resale of Service. Supplier will not provide any submetering of Service under this Agreement.

10. Metering.
 - A. *Meters*. Supplier shall furnish, install and maintain meters and associated equipment appropriate (at the time of installation) to provide the Service. Supplier shall have the right to install and remove test meters on Customer's equipment at Supplier's expense and in a manner not interfering with or damaging Customer's equipment and operation. If Customer requests a meter in addition to those determined appropriate by Supplier, Customer shall pay all related installation and other equipment expenses. 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 conform to generally accepted engineering practices and standards applicable to chilled water metering. Supplier shall test its meters for accuracy in accordance with manufacturers' recommendations. If a test establishes the meter 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**, if the meter is found accurate, Customer will bear the cost of such meter tests.

 - C. *Bill Adjustments Based on Estimated Use*. If a meter proves inaccurate, Supplier shall make a billing adjustment from the date the meter inaccuracy began. If the date any meter inaccuracy began cannot be determined, Supplier shall make a billing adjustment (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, Supplier will estimate the quantities of Service billed for such period 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 those periods based on the estimated amount. Supplier shall indicate on the invoice all billings based on estimated usage. Customer may dispute such determination in accordance with the dispute resolution procedure in Section 16. of the main body of the Agreement.

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EXHIBIT D

**APPROVED MECHANICAL ROOM DESIGN PLANS
PROVIDED BY _____ AND SEALED: [INSERT DATE]**

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EXHIBIT E

INSURANCE

Insurance Coverage

Customer shall carry insurance in the following types and amounts for the duration of this Agreement and furnish Supplier with certificates of insurance and policy endorsements:

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 of an amount sufficient to cover the full replacement cost of all personal property placed in the care, custody, and control of Customer by Supplier, including all Supplier Equipment on the Premises. Customer shall make the City of Austin 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 the coverage is claims-made and the retroactive date. Customer shall maintain coverage for this Agreement's duration and all additional periods required to remove Supplier's equipment from the Premises. Customer shall annually provide Supplier a certificate of 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.

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Supplier will not commence work under this Agreement until Customer provides proof of the required insurance and Supplier accepts the coverage. Supplier's approval of insurance 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 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. Policies required by this Agreement covering Supplier and Customer shall be primary coverage.

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

Customer shall pay any and all actual losses not covered by insurance due Customer's failure to provide the required insurance.