

**STEAM SERVICE AGREEMENT**

**Dated as of April \_\_, 2010**

**Between**

**The City and County of Denver**

**and**

**Public Service Company of Colorado**

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## **STEAM SERVICE AGREEMENT**

THIS STEAM SERVICE AGREEMENT is dated as of April \_\_, 2010, by and between Public Service Company of Colorado, a Colorado corporation (“Supplier”), and The City and County of Denver (“Customer”), a municipal corporation of the State of Colorado.

### **RECITALS:**

A. Supplier is a Colorado public utility which owns and operates a district steam plant and steam distribution system serving building owners and other customers in the area generally described as the central business district of downtown Denver, Colorado, and provides steam service subject to the regulatory jurisdiction of the Public Utilities Commission of the State of Colorado (“PUC”) pursuant to a steam service tariff on file with the PUC;

B. Customer is planning to construct a criminal detention and adjudication facility complex roughly bounded by Colfax Avenue to the north, 14th Avenue to the south, Delaware Street to the east and Fox Street to the west (“Justice Center”), with such construction to be substantially completed by April 15, 2010;

C. Customer has expressed its intention to install a natural gas-fired boiler and water heater facilities in the Justice Center, but has also expressed its desire to control its annual costs of operating, maintaining and replacing the boiler and water heaters for the long term and to avoid making substantial capital investments with respect to installing a new heating plant for the Justice Center;

D. C.R.S. § 40-3-104.3 provides for a public utility to request authorization from the PUC to provide steam service to a customer by contract without reference to the public utility’s tariffs on file with the PUC under certain circumstances which Supplier and Customer believe exist with respect to the Justice Center;

E. Customer desires to purchase from Supplier, and Supplier desires to provide to Customer, steam service to the Justice Center on the terms and subject to the conditions set forth herein.

THEREFORE, in consideration of the promises and of the mutual covenants herein contained, Supplier and Customer agree as follows:

### **ARTICLE I** **DEFINITIONS**

As used herein, the following terms shall have the meanings specified or referred to below, which shall apply equally to single and plural forms:

1.1 “Business Day” means a day on which commercial banks generally are open for business in Denver, Colorado.

1.2 “Calendar Year” means each full period of twelve consecutive months during the Term hereof which begins on January 1 and ends on the following December 31.

1.3 “Colorado Public Utilities Law” means the body of law codified at Title 40 of the Colorado Revised Statutes, pursuant to which the PUC regulates steam service in Colorado.

1.4 “Commencement Date” means the day when Supplier’s Facilities and any interconnections facilities necessary for Supplier to commence providing steam service to the Premises hereunder has been constructed and made operational using commercially-reasonable efforts, or such other date mutually agreeable to Customer and Supplier.

1.5 “Commercial In-Service Date” means the date that either of the distinct operational components of the Premises (the courthouse or short-term detention center) first opens to the public for full and regular operations, or such other date mutually agreeable to Customer and Supplier. The Commercial In-Service Date is currently scheduled to be April 15, 2010.

1.6 “Customer’s Internal Heating System” means the internal piping, circulation pumps and other equipment located within the Premises which will be used by Customer for space heating, distribution of domestic hot water or humidification within the Premises after the Commencement Date.

1.7 “Delivery Point” means the single connection between Supplier’s steam distribution system and Customer’s Internal Heating System located at two (2) feet inside building wall of the Premises adjacent to Delaware Street and approximately 92 feet north of the 14th Avenue property line of the Premises.

1.8 “Expense” means for purposes of Sections 8.1 and 8.2, any and all expenses incurred in connection with investigating, defending or asserting any claim, action, suit or proceeding incident to any matter indemnified against hereunder (including, without limitation, court filing fees, court costs, arbitration fees or costs, witness fees, and reasonable fees and disbursements of legal counsel, investigators, expert witnesses, consultants, accountants and other professionals).

1.9 “Force Majeure” means acts of God, war, civil commotion, embargoes, epidemics, fires, cyclones, droughts or floods, or any governmental law, regulation, order, request, instruction or injunction, or failure to provide or cancellation of rights-of-way, permits, licenses or other authorization, whether valid or invalid, or any other cause, whether or not similar to the foregoing, beyond the reasonable control of a party hereto.

1.10 “Loss” for purposes of Sections 8.1 and 8.2, shall include any and all losses, costs, obligations, liabilities, settlement payments, awards, judgments, fines, penalties, damages, expenses, deficiencies or other charges.

1.11 “Mlb” means one thousand pounds of steam, measured either as steam or as condensate, delivered to the Premises for Customer’s use.

1.12 “Premises” means the Justice Center, including its two distinct operational components -- the courthouse and short-term detention center – and other related structures and facilities located within the Justice Center complex.

1.13 “PUC” means the Public Utilities Commission of the State of Colorado.

1.14 “Supplier’s Facilities” means all piping and other related equipment to be provided by Supplier from Supplier’s existing district steam system in the street and up to and including the input flange at the Delivery Point, all as more fully described in hereto.

1.15 “Term” shall mean the Initial Term and all renewal terms for which this Agreement continues in effect as provided in Article IX hereof.

## **ARTICLE II** **STEAM SERVICE**

2.1 Purchase. Commencing on the Commencement Date and continuing until the Commercial In-Service Date, Supplier shall use commercially reasonable efforts to supply, and Customer agrees to purchase, at the Delivery Point, steam service to meet the variable space and hot water heating needs of the Premises during its construction and pre-commissioning, to the extent steam service capacity is available considering the requirements of existing contracted steam service to other buildings being served from Supplier’s district steam system. Commencing on the Commercial In-Service Date, Supplier agrees to supply and Customer agrees to purchase at the Delivery Point steam service to meet Customer’s space and domestic hot water heating needs in the Premises. Customer estimates that steam service hereunder during the first year following the Commercial In-Service Date will be between 25,000 and 35,000 lbs/hour with a peak capacity of 44,610 lbs/hour at 70 psig, and total annual consumption of approximately 50,000 Mlbs. Steam pressure supply may vary between 60 and 110 psig. Upon the Commencement Date, billing for the charges set forth in Section 2.2 will begin.

2.2 Charges. Subject to Sections 2.3 and 2.4, Customer shall pay Supplier each month 96% of the effective base tariff rates for steam service under the applicable rate schedule, plus any and all applicable franchise fees, surcharges or taxes, subject to Section 2.7 below, and the Steam Cost Adjustment and any other applicable rate adjustments, as authorized by the PUC and set forth from time to time in Supplier’s effective Colorado PUC steam tariff. For any partial month in which steam service is rendered hereunder, all such rates and charges shall be prorated for the number of days in the month in which service was made available and rendered. In the

event steam service provided by Supplier in Colorado is deregulated such that Supplier's Colorado PUC steam tariff is no longer applicable to Supplier's steam service provided in Colorado, Supplier and Customer shall promptly meet to determine mutually agreeable charges for steam service to be rendered thereafter. If the parties are unable to reach an agreement as to such charges, then the applicable rates and charges that were effective hereunder on the date of deregulation (including annual adjustments to reflect steam production and fuel costs calculated in accordance with the applicable procedures and terms of the effective Steam Cost Adjustment clause in Supplier's Colorado PUC steam tariff on the day immediately preceding the effective date of such deregulation) shall continue in effect for a period of five years thereafter, after which either party shall have the right to terminate this agreement upon six months written notice to the other effective on or after the expiration of such five-year period.

2.3 Minimum Rate Under C.R.S. § 40-3-104.3. For so long as steam service provided by Supplier in Colorado is subject to regulation by the PUC under the Colorado Public Utilities Law, at no time shall the charges payable by Customer hereunder ever be less than Supplier's variable cost for steam service. For the purpose of enforcing this provision, each Calendar Year during the term of this Agreement, the variable cost of providing steam service shall be calculated in accordance with Supplier's Colorado PUC steam tariff and the principles and methodologies common in the public utility industry and, if applicable, accepted by the PUC. For any year in which the aggregate amount of charges billed hereunder is less than the variable cost of steam service as so calculated, Customer shall pay Supplier any such shortfall. Any such shortfall will be billed to Customer in a separate invoice prior to June 30 of the following year.

2.4 Most Favored Nations. If, during the term of this Agreement, Supplier provides steam service to any other customer located in downtown Denver similarly situated to Customer hereunder, for which the average price per Mlb for steam service thereunder (taking into account all applicable charges for such steam service) during the prior twelve (12) months is less than the average price per Mlb (taking into account all applicable charges) under this Agreement for the same period, then the charges applicable hereunder shall automatically be reduced to equal ninety-nine and one-half percent (99.5%) of the average price per Mlb charged to such other customer. Supplier shall be required to notify Customer of any such agreement with another customer for which the annualized charge per Mlb is less than the annualized charge under this Agreement.

2.5 Service Invoices. For steam service provided hereunder, Supplier will provide monthly invoices to Customer on the beginning of the month immediately following the Commencement Date, listing and setting forth in reasonable detail the basic charges applicable under Section 2.2 (prorated in the case of partial months), and any taxes, fees and surcharges payable by Customer pursuant to or Section 2.7. For steam service provided on and after the Commencement Date and prior to the Commercial In-service Date, Supplier will also provide a copy of such invoice to Customer's designated agent or contractor.

2.6 Payment. An invoice delivered under Section 2.5, and any other invoice delivered by Supplier under this Agreement, will be due and payable upon delivery to Customer and Customer will pay, or will cause its designated agent or contractor to pay, the total amount of

such invoice to Supplier at the place of payment specified in such invoice within 30 days after the date of such invoice, without any further notice or demand. In the event Customer fails to pay the invoice within 36 days of the invoice, Customer will pay interest and/or penalties on the balance of each invoice which remains unpaid effective after the time period specified in Customer's prompt payment ordinance, Denver Revised Municipal Code § 20-107, *et seq.*

2.7 Taxes, Fees and Surcharges. Customer is exempt from payment of taxes and franchise fees. Customer will pay all applicable fees and surcharges from which Customer is not exempt, including, without limitation, any present or future charge, assessment, franchise fee or fee of any other nature (including interest, penalties and additions thereto) that is imposed by any federal, state or local taxing authority on steam service provided by Supplier or any aspect of such service, or on any payments made by Customer, under this Agreement, excluding Supplier's income tax.

2.8 Maximum Amount. The maximum aggregate amount to be paid by Customer to Supplier for steam service supplied under this Agreement shall in no event exceed the sum of fifty million dollars (\$50,000,000.00), unless this Agreement is modified to increase said maximum aggregate amount by a duly authorized, written amendment to this Agreement mutually agreed to and executed by the Parties hereto. If the aggregate amount payable by Customer to Supplier for steam service supplied under this Agreement ever exceeds the applicable maximum aggregate amount payable hereunder pursuant to this Section 2.8, as may be amended from time to time, this Agreement shall automatically terminate effective upon the day immediately preceding the date upon which such applicable maximum aggregate amount is exceeded.

### **ARTICLE III INSTALLATION OF SUPPLIER'S FACILITIES; CONNECTION OF SYSTEM; METERS**

3.1 Supplier's Facilities. Supplier will provide and install, at its sole cost and expense, a steam service line extending from its district steam system in the street through the foundation wall of the Premises to the input flange at the Delivery Point, along with all necessary equipment, reinforcements, expansions and upgrades to provide steam service hereunder pursuant to Section 2.1 hereof. Customer will provide all assistance reasonably requested by Supplier to allow Supplier to install Supplier's Facilities and all other service and metering equipment in accordance with this Agreement.

(b) Supplier, at its expense, will operate and maintain Supplier's Facilities during the term of this Agreement.

(c) Supplier's Facilities purchased and installed by Supplier on or within the Premises will remain the property of Supplier. Supplier's Facilities will remain personal property and no item thereof will become a fixture of any buildings or the Premises, notwithstanding its installation on or attachment to real property or any improvement located

thereon. Plates or markings may be affixed to Supplier's Facilities and piping by Supplier to indicate its ownership thereof.

(d) Customer, at its expense, will maintain Customer's Internal Heating System during the term of this Agreement.

(e) The building isolation valves and other equipment on Supplier's side of the Delivery Point will be operated only by authorized personnel of Supplier, except that Customer may close isolation valves and operate bypass valves when necessary due to emergency circumstances, and Customer will give Supplier prompt notice of any such operation. Supplier will close its street service valves to allow Customer to repair or perform maintenance on Customer's Internal Heating System upon reasonable advance request therefor; provided that, in emergency circumstances, Supplier will use all reasonable efforts to close such valves as soon as practicable. In the event Supplier is required to perform the requested procedures under this subparagraph outside of normal business hours, Customer agrees to reimburse Supplier for its reasonable out-of-pocket costs, including the incremental cost of any necessary overtime labor.

(f) The service stop valves on Customer's Internal Heating System will be operated only by authorized personnel of Customer, except that Supplier may close the service stop valves when necessary due to emergency circumstances which require immediate cessation of the operation of Customer's Internal Heating System, and Supplier will give Customer prompt notice of any such cessation.

(g) Customer, its agents and employees, will not authorize or knowingly permit any person, except a duly authorized employee or agent of Supplier, to operate, maintain, alter or otherwise affect any component or equipment of Supplier, to break or replace any seal or lock of Supplier, or to alter or interfere with the operation of meters or Supplier's connection or metering equipment or any other item of service equipment (other than Customer's Internal Heating System) installed by Supplier at the Premises.

3.2 Metering. (a) All metering equipment will be furnished, paid for, and maintained by Supplier. Supplier shall furnish metering equipment for physical installation by Customer at the agreed upon location prior to steam service being provided to the Premises on or before January 1, 2009. Customer will install the metering run in accordance with Supplier's standard requirements. Supplier shall have the right to inspect the meter installation within thirty (30) days of Customer's notice of completion of installation. Within ten (10) days of such inspection, Supplier shall either approve such installation or provide Customer written notice detailing any defect in such installation. If Supplier provides Customer written notice of any defect in such installation, Customer shall have fourteen (14) days within which to cure such defect. If Customer fails to cure such defect with said fourteen (14) day period, Supplier shall have the right to enter the Premises and cure such defect at Customer's expense. If Supplier fails to inspect the meter installation or provide a written notice of defect within the periods provided herein, Supplier's approval shall be deemed given. Once the meter is installed, Supplier shall make all of the necessary interconnections to the meter and recorder.



(b) Supplier will test its metering equipment in accordance with the manufacturer's recommendations or at the request of Customer, but in no event more frequently than once every six months. When requested by Customer, Supplier will quote Customer a reasonable price to conduct any additional such tests at Customer's expense. If any test requested by Customer indicates that the tested equipment provides metering results which are inaccurate by 3% or more in a manner which is adverse to Customer, Customer will not be liable for the cost of the test. Supplier will maintain and, within thirty (30) days after completion of each test, provide Customer an accurate log or record of such metering tests.

(c) Supplier will repair or replace any materially defective metering equipment within three Business Days after receiving notice, or otherwise becoming aware of any such defect. If replacement metering equipment is not immediately available, Supplier and Customer shall mutually agree upon a billing procedure for the time period the metering equipment was supplying inaccurate metering data until the metering equipment is either repaired or replaced and installed.

(d) The meter shall be used to calculate the monthly charges for steam service provided under this Agreement.

(e) If Supplier's metering record is interrupted at any time for any reason, the measurement of steam service to be billed for such period of interruption will be estimated by Supplier and, by mutual consent, based upon (i) Supplier's meter record immediately before and after the period of interruption, (ii) past consumption during a similar period and under similar conditions, (iii) the characteristic pattern of steam consumption for the Premises with respect to weather, or (iv) some reasonable combination of these methods, and Customer will pay invoices during such period based on the estimated measurement.

(f) Under or over charges generated by meters found to be failed or functioning improperly will be resolved within 30 days of the time they are proven to be materially malfunctioning. Undercharges will be billed to Customer with sufficient information to confirm the amount of the variation. Overcharges will be credited to Customer's account, also with sufficient information to confirm the amount of the variation. No late charges, interest or penalties will be assessed on charges attributable to metering malfunctions. In the event that the amount of the error is not determinable by test or other recording device, then an appropriate correction to the consumption of Customer shall be made if the percentage of error is ascertainable by calibration, special test or mathematical calculation or, if not available, by methods (ii) and (iii) in Section 3.2(e) above. Such adjustment shall be made effective as of the midpoint in time between the date of the previous test and the date of repair or replacement of the measurement equipment unless a probable malfunction date can be reasonably established by other means.

(g) Customer will provide, without charge, reasonably available and adequate space in and around the Premises for the housing and maintenance of all metering and directly related equipment. Customer shall provide access and escort to restricted areas to Supplier for

the purpose of meter reading and maintenance of Supplier's equipment upon 4 hour advanced notice provided by Supplier.

(h) Customer shall supply, at its sole cost and expense, two (2) 120 volt 20 ampere electrical circuits with uninterruptible power supply (UPS) in reasonable proximity to the meter location, to be used for control power.

#### **ARTICLE IV ACCESS**

4.1 License and Related Rights. Customer hereby grants Supplier the right and license to maintain sufficient space on the Premises for the purposes of installing, inspecting, testing, operating, protecting, servicing, maintaining, replacing and removing Supplier's Facilities, and metering and other service equipment in the areas approved by Customer. The location of Supplier's equipment necessary for Supplier's operation and maintenance of its facilities on the Premises, and the manner and location of Supplier's storage of materials, shall be subject to advance approval by Customer. Customer hereby grants to Supplier the right and license to install, operate, maintain and repair equipment on the Premises. Supplier shall have access to and from the Premises necessary for Supplier to perform any one or more of the activities, rights and obligations contemplated by or in connection with this Agreement, with an escort provided by Customer, if Customer deems such escort necessary; provided, however, that Supplier shall have routine access to restricted areas, with an escort provided by Customer, after providing four-hour advance notice to Customer, and emergency access to restricted areas upon expedited notice, with an escort provided by Customer. All space, licenses and rights-of-access will be in the location designated by Supplier and approved by Customer, such approval not to be unreasonably withheld, delayed or conditioned. Supplier's obligations under this Agreement are conditioned upon the grant, and undisturbed enjoyment of, the rights granted under this Section. Supplier's representatives entering the Building must pass prior background checks acceptable to Customer.

#### **ARTICLE V ADDITIONAL AGREEMENTS**

5.1 Customer Reporting. Customer will give prompt notice to Supplier of (i) any steam leaks from any of Supplier's Facilities located in or around the Premises or (ii) any other material or operational deficiency of which Customer becomes aware.

5.2 Non-exclusive Provider. Supplier shall be the exclusive provider of centralized steam service to the Premises to meet Customer's space heating and domestic hot water heating needs based on the design of the Premises as of the date of this Agreement. While it is expected that Supplier shall be the provider for all of such needs, Customer reserves the right to provide localized facilities to provide minor supplemental space heating and domestic hot water heating in certain locations, as necessary. Customer further reserves the right to use other service

providers or facilities to supply any supplemental space heating and domestic hot water heating needs arising at the Premises as the result of any expansion of the Premises during the term hereof.

5.3 Engineering Assistance. Supplier agrees, without additional cost to Customer, to coordinate with Customer and provide engineering advice, analysis and assistance to Customer in optimizing the design and ongoing operations of Customer's Internal Heating System, including the use of economizers.

5.4 Examination of Records. Customer, through any duly authorized representative, including the Denver Auditor or his designee, shall have access to and the right to examine any directly pertinent books, documents, papers, and records of Supplier involving activities under this Agreement. All such records must be kept for a minimum of four (4) years.

5.5 Rebate. Within thirty (30) days following the first anniversary of the Commercial In-Service Date, if the steam service usage at the Premises for such first year of commercial operations is consistent with the estimates provided in Section 2.1 hereof, Supplier shall pay Customer a rebate of \$340,443.

## **ARTICLE VI**

### **INTERRUPTION OF SERVICES**

6.1 Performance Generally. Supplier will use all reasonable efforts to make steam service available to Customer regularly and without interruption, but Supplier does not guarantee a constant supply of such steam service hereunder. In the event of a shortage of steam supply, Supplier will consider Customer a priority steam customer, and will deem continued service to Customer essential to public welfare. Supplier will not be liable to Customer or any other person under any circumstances for any interruptions of the supply of, or failure to provide, steam service under this Agreement. In no event shall Supplier have any liability under this Section 6.1(a) for special, exemplary or consequential damages, including without limitation, loss of profit or revenue or interference with operations, or have any liability under this Section 6.1 to any person other than Customer. Any liability of Supplier under this Section 6.1 shall be reduced by the amount of any insurance recovery of Customer.

6.2 Service Interruption. Supplier will have the right at any time and from time to time to interrupt steam service for a reasonable duration, upon providing such notice to Customer as is reasonably practicable, for the purpose of performing maintenance, repairs, replacements, connections or changes to Supplier's Facilities (whether within the Premises or on its district steam distribution system), provided, that Supplier will exercise due diligence and will act with reasonable dispatch in restoring service and, to the extent practicable, will schedule such interruptions around Customer's requirements.

6.3 Force Majeure. (a) Notwithstanding any other provision of this Agreement, if either party hereto is prevented from performing any of its obligations hereunder by reason of an

event of Force Majeure, such party will notify the other party in writing as soon as practicable and thereafter will be excused from its obligations hereunder to the extent of such interference; provided, that no payment obligation hereunder will be excused or delayed as the result of Force Majeure.

(b) The party whose performance hereunder is prevented as the result of an event of Force Majeure, will use reasonable efforts to remedy its inability to perform; provided, however, nothing in this Section 6.3(b) will be construed to require the settlement of any strike, walkout or other labor dispute on terms which, in the reasonable judgment of the affected party, are contrary to its interest. It is understood that the settlement of a strike, walkout or other labor dispute will be entirely within the discretion of the affected party.

(c) If, as a result of an event of Force Majeure, Supplier is prevented wholly from rendering, or Customer is prevented wholly from receiving and using, steam service hereunder for a period of thirty (30) consecutive days, then the party not prevented from so performing due to such event of Force Majeure shall have the right to terminate this Agreement upon thirty days' written notice to the other party. This subsection (c) shall not apply to give either party the right to terminate this Agreement if the Premises, or any portion thereof, is rendered untenable by damage from fire or other casualty.

## **ARTICLE VII** **DEFAULT**

7.1 Defaults. In the event either party fails to perform any material obligation of such party under the terms of this Agreement, such failure shall constitute a default under this Agreement. Upon the occurrence of a default, the non-defaulting party shall be entitled to terminate this Agreement if such default is not cured, to the reasonable satisfaction of such non-defaulting party, within thirty (30) days after notice has been given to the defaulting party. In addition to said 30-day period, a defaulting party shall have, with respect to curable defaults only, that number of additional days which is equal in number to the number of days which the defaulting party is prevented from curing such default solely by reasons or causes beyond its reasonable control, provided the defaulting party has commenced curing such default within such 30-day period, is proceeding diligently and continuously, and is using all reasonable efforts to cure the default. Nothing in this paragraph shall compromise or reduce either party's rights under Section 6 of this Agreement.

## **ARTICLE VIII** **INDEMNIFICATION**

8.1 Indemnification by Supplier. In addition to any rights Customer may have at law or in equity against Supplier with respect to any default by Supplier under this Agreement, Supplier agrees to defend, indemnify and hold harmless Customer from and against any and all Loss and Expense incurred by Customer in connection with or arising from any acts or omissions

of Supplier's agents and employees or others under its control in connection with any accident, injury or death to any person or damage to property (including damage to any component of the Customer's Internal Heating System or Customer's other equipment and piping) occurring in or around the Premises, except to the extent such Loss or Expense results from any negligent or intentional conduct of Customer or its agents or employees or others under its control. This section shall survive the termination of this Agreement.

8.2 Indemnification by Customer. Customer believes that it is legally prohibited from pledging its credit, indemnifying or otherwise contractually incurring obligations with respect to claims or damages for injury to persons or property which may impose financial consequences on Customer for which Customer would not otherwise be legally responsible. To the extent permitted by law and without waiving Customer's position regarding such prohibitions and the provisions of the Colorado Governmental Immunity Act, C.R.S. §§ 24-10-101, *et seq.*, Customer shall defend, indemnify and hold harmless Supplier, its officers, employees and agents from and against any and all Loss and Expense incurred by Supplier in connection with any liability, loss, property damage or personal injury arising from this Agreement or from Supplier's presence in or around the Premises and caused by any negligent or intentional conduct of Customer, its employees or agents; provided, however, that Customer shall not indemnify, defend or hold harmless Supplier, its officers, agents and employees, from damages or liability to the extent resulting from the negligence or intentional conduct of Supplier's officers, agents and employees. This section shall survive the termination of this Agreement.

8.3 Notice of Claims. (a) Any party seeking indemnification hereunder will give to the other party a claim notice describing the facts underlying, and the amount of, its indemnification claim. A notice in respect of any action at law or suit in equity by or against a third person as to which indemnification will be sought will be given promptly after the party seeking indemnification has notice that such action or suit has commenced; provided, that failure to give such notice will not relieve the party from whom indemnification is sought of its obligations hereunder except to the extent it will have been prejudiced by such failure.

(b) In calculating any loss or expense, there will be deducted (i) any insurance recovery by the party seeking indemnification in respect thereof (and no right of subrogation will accrue hereunder to any insurer) and (ii) the amount of any tax benefit to the party seeking indemnification with respect to such loss or expense (after giving effect to the tax effect of receipt of the indemnification payments).

(c) After any claim notice has been given pursuant hereto, the amount of indemnification to which an party seeking indemnification will be entitled under this Article VIII will be determined: (i) by the written agreement between the party seeking indemnification and the other party; (ii) by a final judgment or decree of any court of competent jurisdiction; or (iii) by any other means to which the party seeking indemnification and the other party will agree.

**ARTICLE IX**  
**TERM**

9.1 Term. This Agreement will be effective when executed by both parties and the necessary PUC approval referenced in Section 10.5 is obtained (“Effective Date”) and, unless sooner terminated as provided in Section 9.3, will remain in effect for an Initial Term ending on December 31, 2034. This Agreement will become automatically renewable for ten (10) year periods unless either party gives written notice of termination at least one year prior to expiration of the Initial Term or subsequent renewal term. Supplier will notify Customer by letter of the upcoming expiration of the Initial Term between December 1, 2032 and May 31, 2033, and between 18 and 24 months prior to the expiration of all subsequent renewal terms thereafter.

9.2 Government Appropriations. It is understood and acknowledged by the parties that the financial obligations of Customer are contingent upon funds for that purpose being appropriated, budgeted, encumbered, and otherwise made available. In the event sufficient funds are not appropriated to Customer to meet its obligations hereunder, and this Agreement is terminated pursuant to Section 7.1, then Supplier shall be entitled to recover from Customer the unamortized portion of the total cost incurred by Supplier to construct Supplier’s Facilities, assuming a straight line amortization of such costs over the Initial Term.

9.3 Early Termination. In addition to the termination rights of either party under applicable law following a default, Supplier may terminate this Agreement if a withdrawal, cancellation or lapse of any right, permit or authorization of any governmental authority necessary to allow Supplier to operate its steam district energy system or to provide steam service to Customer.

9.4 Effect of Termination. Upon the expiration or earlier termination of this Agreement:

(a) Removal of equipment and material. (i) Supplier will immediately remove all materials deemed at the time to be hazardous which it owns from Customer’s property. (ii) With consent of Customer, Supplier may transfer to Customer all remaining property and appurtenances in and around the Premises, such equipment having been maintained in reasonable working order. (iii) If Supplier desires to remove any of its equipment from the Premises, Supplier shall provide written notice of its intent to do so and will subsequently remove all equipment and fittings necessary to restore the space to a reasonably usable condition approximating its original condition, less normal wear and tear.

(b) Customer will pay Supplier all amounts then payable to Supplier hereunder; and

(c) Customer and Supplier will have no further obligations hereunder other than (i) obligations accruing prior to the date of such termination, (ii) Customer’s obligations to provide access rights pursuant to Section 9.4(a), (iii) obligations under Article VIII, all which will survive the expiration or termination of this Agreement, and (iv) any other provisions of this Agreement which by their nature should survive termination.

**ARTICLE X**  
**LAWS AND REGULATORY BODIES**

10.1 Agreement Subject to Laws and Regulations. This Agreement and the rights and obligations of the parties hereunder shall be subject to all valid applicable state, local and federal laws, rules, regulations, ordinances, orders and decisions issued or promulgated for or by any court or regulatory agency having or asserting jurisdiction over this Agreement, the services to be performed hereunder or either of the parties hereto.

10.2 Rights Upon Regulatory Agency or Court Action. Except as may be otherwise provided herein, in the event that any court or regulatory agency having or asserting jurisdiction over these premises takes any action or issues any determination that directly or indirectly prohibits performance to a material extent under this Agreement by either or both parties or otherwise makes such performance illegal or impossible, such action or determination will be considered to be an event of Force Majeure. In the event that any such court or regulatory agency takes any action or issues any determination that directly or indirectly effects a material adverse change to any substantive provision of this Agreement, in the terms of performance or with respect to the rights or obligations of either party hereto (in that party's reasonable good faith opinion), then the party materially adversely affected may: (i) continue to perform its obligations under the Agreement as changed, (ii) seek to renegotiate the terms of this Agreement by providing written notice to the other party of its desire to renegotiate, or (iii) at any time during a period of ninety (90) days next following receipt by the other party of written notice of any such action by any such court or regulatory agency, terminate this Agreement by providing written notice to the other party hereto on or before the end of such ninety (90) day period, such termination to be effective on the first day of the month next following ninety (90) days after the receipt of such notice of termination; provided however that, if such action or determination is rescinded prior to the effectiveness of such notice, such notice will be deemed invalid. In the event the Agreement terminates under this provision, all further rights and obligations of Supplier and Customer under this Agreement will be null and void. Each party hereto shall provide reasonable and prompt notice to the other party hereto as to any regulatory proceedings or actions described herein that could affect the rights and obligations of the parties hereto.

10.3 Performance Pending Renegotiation or Termination. To the extent not inconsistent with any action by any court or regulatory agency as contemplated by Sections 10.1 or 10.2, above, each of the parties hereto shall continue to honor and perform all of their respective warranties, representations and obligations under this Agreement including, but not limited to, the obligations of Supplier to provide steam service and the obligations of Customer to accept and pay Supplier for steam service as provided herein, until the parties either mutually renegotiate the terms of this Agreement or until this Agreement terminates pursuant to the provisions of Section 10.2 above.

10.4 Governing Law. This Agreement will be governed by and construed in accordance with the internal laws (as opposed to the conflicts of law provisions) of the State of Colorado.

10.5 PUC Approval. It is specifically understood and agreed by the parties hereto that this Agreement shall not become effective, and shall be null and void, unless and until the PUC issues a final order authorizing Supplier to provide steam service to Customer pursuant to the terms and conditions of this Agreement without regard to its steam tariff and without condition; provided, however, that if the PUC attaches a condition to its authorization of Supplier to provide service hereunder and such condition materially and adversely affects either Customer or Supplier, such affected party must give notice to the other party within 10 days of the mailing date of such final order or such party shall be deemed to have accepted such condition.

## **ARTICLE XI** **INSURANCE**

11.1 During the Term of this Agreement, Supplier shall maintain at its own expense a commercial general liability insurance policy with coverage in amounts not less than those which are from time to time acceptable to a prudent service provider in the same business as Supplier and in the area in which the Premises are located, but in any event not less than \$5,000,000. Policies for such insurance shall waive any right of subrogation against Customer, except for claims Customer has agreed to indemnify Supplier against pursuant to Section 8.2 hereof. Supplier shall provide a certificate of such insurance policies which meets the foregoing requirements, and which also names Customer as an additional insured and provides that coverage will not terminate without at least thirty days prior written notice to Customer. Except as otherwise provided in Section 8.2, Supplier shall be responsible for any and all claims, associated costs and expenses which fall within the deductible or self insured retention for insurance as required in the first sentence of this section.

11.2 Customer and Supplier shall maintain their own respective worker's compensation insurance policies insuring their respective employees, as required in the State of Colorado. Except as otherwise provided in Section 8.2, Supplier's Worker's Compensation insurance program and policy shall waive any right of subrogation against Customer.

## **ARTICLE XII** **GENERAL PROVISIONS**

12.1 Notices. All notices or other communications required or permitted hereunder will be in writing and will be deemed given or delivered (i) the day delivered when delivered personally, (ii) 3 days after mailing when sent by registered or certified mail or by private courier and (iii) 1 day after sending when sent by courier via commercial overnight delivery service, addressed as follows:



If to Customer, to:

City and County of Denver                      and  
Attention: Director of Utilities  
201 W. Colfax Ave. Room 11 H 5  
Denver, CO 80202

Office of the Mayor  
350 City and County Building  
1437 Bannock St.  
Denver, CO 80202

If to Supplier, to:

Public Service Company of Colorado  
Attention: Director of Thermal Energy  
P.O. Box 840  
1875 Delgany Street  
Denver, CO 80201

or to such other address as such party may indicate by a notice delivered to the other party hereto.

12.2 Successors and Assigns. (a) All of the terms, covenants, representations, warranties, and conditions of this Agreement shall be binding upon, and inure to the benefit of and be enforceable by, the parties hereto and their respective successors, but neither this Agreement nor the rights and obligations of the parties may be assigned without the prior written consent of the other party; provided, however, that a party shall have the right to assign its rights hereunder to one or more entities which are either wholly owned (directly or indirectly) by such party, or are under common ownership with such party. Either party may mortgage, pledge, or otherwise encumber its rights under this Agreement or its assets located in or around the Premises to secure any obligations of such party, and in connection therewith, upon the request of the other party hereto from time to time, Supplier or Customer, as the case may be, will provide one or more estoppel certificates in form and substance satisfactory to the requesting party.

(b) Nothing in this Agreement, expressed or implied, is intended or will be construed to confer upon any person (other than the parties and successors and assigns permitted by this Section 11.2) any right, remedy or claim under or by reason of this Agreement.

12.3 Entire Agreement; Amendments. This Agreement and the Schedules referred to herein and the documents delivered pursuant hereto contain the entire understanding of the parties hereto with regard to the subject matter contained herein or therein, and supersede all prior agreements or understandings between or among any of the parties hereto. This Agreement will not be amended, modified or supplemented except by a written instrument signed by an authorized representative of each of the parties hereto. In the event terms or provisions in the proposal, the letter of intent, the schedules, or documents delivered pursuant to this Agreement conflict with this Agreement, this Agreement will control.

12.4 Interpretation. Article titles and headings to sections herein are inserted for convenience of reference only and are not intended to be a part of or to affect the meaning or interpretation of this Agreement.

12.5 Reasonableness of Consent or Approval. Whenever under this Agreement "reasonableness" is the standard for the granting or denial of the consent or approval of either party hereto, such party shall be entitled to consider public and governmental policy, moral and ethical standards, as well as business and economic considerations.

12.6 Waivers. Any term or provision of this Agreement may be waived, or the time for its performance may be extended, by the party or parties entitled to the benefit thereof. Any such waiver will be validly and sufficiently authorized for the purposes of this Agreement if, as to any party, it is authorized in writing by an authorized representative of such party. The failure of any party hereto to enforce at any time any provision of this Agreement will not be construed to be a waiver of such provision, nor in any way to affect the validity of this Agreement or any part hereof or the right of any party thereafter to enforce each and every such provision. No waiver of any breach of this Agreement will be held to constitute a waiver of any other or subsequent breach.

12.7 Expenses. Each party hereto will pay all costs and expenses incident to its negotiation and preparation of this Agreement and, except as set forth herein, to its performance and compliance with all agreements and conditions contained herein on its part to be performed or complied with, including the fees, expenses and disbursements of its counsel and accountants.

12.8 Partial Invalidity. Wherever possible, each provision hereof will be interpreted in such manner as to be effective and valid under applicable law, but in case any one or more of the provisions contained herein will, for any reason, be held to be invalid, illegal or unenforceable in any respect, such provision will be ineffective to the extent, but only to the extent, of such invalidity, illegality or unenforceability without invalidating the remainder of such invalid, illegal or unenforceable provision or provisions or any other provisions hereof, unless such a construction would be unreasonable.

12.9 Execution in Counterparts. This Agreement may be executed in one or more counterparts, each of which will be considered an original instrument, but all of which will be considered one and the same agreement, and will become binding when one or more counterparts have been signed by each of the parties hereto and delivered to Supplier and Customer.

12.10 No Discrimination In Employment. In connection with the performance of work under this Agreement, Supplier agrees not to refuse to hire, discharge, promote or demote, or to discriminate in matters of compensation against any person otherwise qualified, solely because of race, color, religion, national origin, gender, age, military status, sexual orientation, marital status, or physical or mental disability; and Supplier further agrees to insert the foregoing provision in all subcontracts hereunder.

12.11 No Third Party Rights. This Agreement is exclusively for the benefit of the parties to this Agreement, their successors and permitted assigns and persons benefited by the indemnification provisions of this Agreement. No other person (including, without limitation, tenants of buildings within the Premises) shall be entitled to rely on any matter set forth in, or shall have any rights on account of the performance or non-performance by any party of its obligations under, this Agreement and no third party shall have the right to claim that they are a third party beneficiary and this paragraph shall be strictly construed.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed the day and year first written above.

**CUSTOMER:**


**CITY AND COUNTY OF DENVER**

ATTEST:

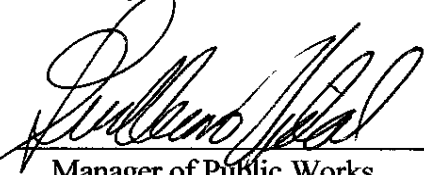
By: \_\_\_\_\_  
Stephanie Y. O'Malley  
Clerk and Recorder, Ex-Officio Clerk  
of the City and County of Denver

By: \_\_\_\_\_  
Mayor

RECOMMENDED AND APPROVED:

By:   
Manager of General Services

APPROVED AS TO FORM:  
David Fine  
Attorney for the City and County of Denver

By:   
Manager of Public Works

By: \_\_\_\_\_  
Assistant City Attorney


REGISTERED AND COUNTERSIGNED

By: \_\_\_\_\_  
Manager of Finance  
Contract Control No: CE9A067

By: \_\_\_\_\_  
Auditor

**SUPPLIER:**

**PUBLIC SERVICE COMPANY OF COLORADO**

By:   
Louis Matis  
Vice President

REVIEWED  
LEGAL

4-20-16 LMC