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**ADDENDUM TWO**

Date of Addendum: MAY 10, 2024

NOTICE:

This Addendum modifies, amends, and supplements designated part of the BID DOCUMENTS for the project identified as “Request for Proposals No. 24-025, Operations, Maintenance, and Management for the Water Treatment Facility, Pawtucket Water Supply Board, City of Pawtucket” dated April 2024 is hereby made a part thereof by reference and shall be as binding as though inserted in its entirety in the locations designated hereunder. It shall be the responsibility of the Bidder to notify all subcontractors and suppliers he proposes to use for the various parts of the work of any changes or modifications contained in this Addendum. No claim for additional compensation due to lack of knowledge of the contents of the Addendum will be considered.

**PROPOSAL:**

1. In accordance with Section 2.2 of the Request for Proposals. the PWSB is issuing the following:

Attachment 1: Operations, Maintenance, and Management Service Agreement (Draft).

**END OF ADDENDUM TWO**

Attachment 1: Operations, Maintenance and Management  
Service Agreement (Draft)

**PAWTUCKET REGIONAL WATER TREATMENT FACILITY  
OPERATIONS, MAINTENANCE AND MANAGEMENT AGREEMENT  
BY AND AMONG  
THE CITY OF PAWTUCKET, RHODE ISLAND,  
THE PAWTUCKET WATER SUPPLY BOARD  
AND [-----]**

**DATED AS OF [-----], 2024**

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# PAWTUCKET REGIONAL WATER TREATMENT FACILITY

## OPERATIONS, MAINTENANCE AND MANAGEMENT AGREEMENT

This PAWTUCKET REGIONAL WATER TREATMENT FACILITY OPERATIONS, MAINTENANCE AND MANAGEMENT AGREEMENT (this “Agreement”), dated as of \_\_\_\_\_, 2024, is entered into by and among THE CITY OF PAWTUCKET, RHODE ISLAND (the “City”), THE PAWTUCKET WATER SUPPLY BOARD (the “PWSB”) and [\_\_\_\_\_] a [\_\_\_\_\_] organized and existing under the laws of [\_\_\_\_\_] (the “Company”).

### WITNESSETH:

WHEREAS, the City owns, and the PWSB operates through its contractor Veolia Water Contract Operations USA, Inc. (“Veolia”), the City of Pawtucket Water Treatment Facility (the “Veolia Agreement”);

WHEREAS, the PWSB issued a request for proposals dated April 12, 2024, as amended for the operation, maintenance and management of the Facility commencing upon the expiration of the Veolia Agreement, in response to which the Company submitted a proposal; and

WHEREAS, the Company has been selected to operate, maintain and manage the Facility in accordance with the terms and subject to the conditions of this Agreement.

NOW, THEREFORE, in consideration of the mutual covenants, representations, warranties and agreements contained herein, and intending to be legally bound hereby, the parties agree as follows:

### ARTICLE I SCHEDULES

#### **Section 1.1 Schedules and Exhibits.**

The following Schedules and Exhibits are attached hereto and made a part of this Agreement. In the event of a conflict or inconsistency between or among the Schedules and this Agreement, the provisions of this Agreement control over the Schedules unless otherwise agreed to in writing by the parties or unless otherwise specifically provided in this Agreement.

**[RE-NUMBER SCHEDULES AS NEEDED]**

Schedule 1 PERFORMANCE STANDARDS

Schedule 2 OPERATION AND MAINTENANCE STANDARDS

Schedule 3 FACILITY PLANS

Schedule 4 INSURANCE

<u>Schedule 5</u>	ESCALATION INDICES
<u>Schedule 6</u>	PERMITS AND CONSENT AGREEMENTS
<u>Schedule 8</u>	MAXIMUM UTILITIES UTILIZATION
<u>Schedule 9</u>	EQUIPMENT AND CHEMICALS INVENTORY
<u>Schedule 10</u>	PASS THROUGH COSTS
<u>Schedule 11</u>	SERVICE FEE
<u>Schedule 12</u>	TERMINATION PAYMENTS
<u>Schedule 13</u>	EXAMPLE ADJUSTMENT METHODOLOGY FOR ANNUAL SERVICE FEE USING THE INFLATION INDEX
EXHIBIT A	DESCRIPTION OF SYSTEM
EXHIBIT B	GUARANTY <sup>1</sup>
EXHIBIT C	COMPANY PROPSAL
EXHIBIT D	FORM OF OPERATIONS BOND

## ARTICLE II CERTAIN DEFINITIONS

### **Section 2.1 Definitions.**

As used herein, the following terms shall have the following meanings:

“Agreement Date” means the date of this Agreement as executed by the parties.

“Agreement Term” or “Term” has the meaning specified in Section 7.1.1 hereof.

“Agreement Year” means the consecutive twelve (12) month period commencing on January 1 in any year and ending on December 31 of that year; provided, however, that the first Agreement Year shall begin on the Commencement Date and shall end on the following December 31, and the last Agreement Year shall commence on January 1 prior to the date this Agreement expires or is terminated, whichever is appropriate, and shall end on the last day of the Agreement Term or the effective date of any termination, whichever is appropriate.

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<sup>1</sup> In the event that the selected Company satisfies the financial and other requirements of the Request for Proposals and a Guarantor is not required, references to a Guaranty and Guarantor in this draft will be removed from this Agreement, and such related edits as are necessary to reflect such removal shall be made to this Agreement prior to execution.



“Affiliate(s)” means any person, corporation or other entity directly or indirectly controlling or controlled by another person, corporation or other entity or under direct or indirect common control with such person, corporation or other entity.

“Analytical Services” has the meaning specified in Schedule 2.2.4 hereto.

“Annual Facility Inspection” has the meaning specified in Schedule 2.4.3 hereto.

“Annual Report” has the meaning specified in Schedule 2.4.2.

“Applicable Law” means any law, rule, regulation, requirement, action, determination, guideline, or order of, or any legal entitlement issued by any governmental body having jurisdiction, applicable from time to time to the siting, design, acquisition, construction, equipping, financing, ownership, possession, start-up, testing, operation, maintenance or repair of the Facility, the delivery, treatment, or storage of water, the transfer, handling, transportation or disposal of residue or any other transaction or matter contemplated hereby including, without limitation, any of the foregoing which pertain to water.

“Auditor” has the meaning specified in Section 7.3 hereof.

“Auditor’s Report” has the meaning specified in Section 7.3 hereof.

"AWWA Standard" means those standards recognized and adopted by the American Water Works Association (AWWA) establishing quality and performance levels for water treatment facility and water utility system design, construction, operation, maintenance, training, safety, and management.

“Billing Month” means each calendar month in an Agreement Year.

“BLS Index” means BLS Series WPUFD4131 (PPI - Final demand – Finished goods less foods and energy).

“Buildings Services” has the meaning specified in Schedule 2.2.7 hereto.

“Certificates” means insurance certificates as specified in Schedule 4 hereto.

"Change in Law" means (a) the enactment, adoption, promulgation, modification or repeal after the Agreement Date of any federal, State, or local law, ordinance, code, rule, regulation or other similar legislation or the change in interpretation after the Agreement Date, of any federal, State, or local law, ordinance, code, rule, regulation, official permit, license or approval by any regulatory or judicial entity having jurisdiction with respect to the operation or maintenance of the Facility, or (b) the imposition, after the Agreement Date, of any material conditions on the issuance, modification or renewal of any official permit, license or approval necessary for the operation and maintenance of the Facility, which, in either case, modifies the Company's guarantees of Facility performance or increases the Service Fee by establishing requirements with respect to the operation or maintenance of the Facility which are materially more burdensome than the most stringent requirements:

- (i) in effect on the Agreement Date,
- (ii) agreed to by the City in any applications for official permits, licenses or approvals for the Facility, other than any requirements set forth in said applications to comply with future laws, ordinances, codes, rules, regulations or similar legislation, or
- (iii) in the performance standards and guarantees in Schedule 1 and operation and maintenance standards in Schedule 2.

For purposes of part (a) of this definition, no enactment, adoption, promulgation or modification of laws, ordinances, codes, rules, regulations or similar requirement or enforcement policy with respect to any such requirement shall be considered a Change in Law if, as of the Agreement Date, such law, ordinance, code, rule, regulation or other similar requirement would have affected directly the continued management, operation and maintenance of the Facility by the PWSB after the Commencement Date in the absence of this Agreement and either such law, ordinance, code, rule, regulation or other similar requirement was either officially proposed by the responsible agency and published in final form in the Federal Register or equivalent federal, State or local publication and thereafter becomes effective without further action or enacted into law or promulgated by the appropriate federal, State or local body before the Agreement Date, and the comment period with respect to which expired on or before the Agreement Date and any required hearings concluded on or before the Agreement Date in accordance with applicable administrative procedures and which thereafter becomes effective without further action. In no event shall a change in any federal, State or local tax law be considered a Change in Law.

“Chemical(s)” has the meaning specified in Schedule 2, Section 2.2.5 hereto.

“CMMS Software” means a computerized maintenance management system that documents activities to be performed by the Company under this Agreement.

“Commencement Date” means the date the PWSB gives the Company notice pursuant to Section 3.2 hereof.

“Company Fault” means any breach (including the untruth or breach of any Company representation or warranty set forth herein), failure, nonperformance or noncompliance by the Company under this Agreement (whether or not attributable to any officer, member, agent, employee, contractor, subcontractor of any tier, or an independent contractor of the Company or any Affiliate of the Company) which is not solely attributable to any Uncontrollable Circumstance or PWSB Fault, and which materially and adversely affects the PWSB’s rights or ability to perform under this Agreement.

“Company Indemnitees” has the meaning specified in Section 4.4.2 hereof.

“Compliance Plan” has the meaning specified in Section 3.9 hereof.

“Contracts” has the meaning specified in Schedule 7 hereto.

“Cost Substantiation” means, with respect to any cost reasonably incurred or to be incurred

by the Company which is directly or indirectly chargeable in whole or in part to the PWSB hereunder, delivery to the PWSB of a certificate signed by an officer of the Company, setting forth the amount of such cost and the provisions of this Agreement under which such cost is properly chargeable to the PWSB, stating that such cost is a fair market price for the service or materials supplied or to be supplied and that such services and materials are reasonably required pursuant to this Agreement, and accompanied by copies of such documentation as shall be necessary to reasonably demonstrate that the cost as to which Cost Substantiation is required under this Agreement has been or will be incurred. Such documentation shall include reasonably detailed information concerning (1) all Subcontracts; (2) the amount and character of materials furnished or to be furnished, the persons from whom purchased or to be purchased, the amounts payable therefor and related delivery and transportation costs and any sales or personal property taxes, if any; (3) a statement of the equipment used or to be used and any rental payable therefor; (4) Company worker hours, duties, wages, salaries, benefits, assessments, taxes and premiums; and (5) Company expenses, including administrative expenses, bonds, insurance, overhead, and other expenses; and (6) Company profit (4.0%).

“Disposal Agreement” has the meaning specified in Section 3.4 hereof.

“Disposal Facility” has the meaning specified in Section 3.4 hereof.

“Distribution System” means any water collection, conveyance, or transmission piping, conduits, or underground electrical wiring not within the confines of the Facility or any pump station or siphon.

“Encumbrance(s)” means any lien, lease, mortgage, security interest, charge, judgment, judicial award, attachment or encumbrance of any kind with respect to the Site, other than Permitted Encumbrances.”

“Enterprise Fund” means the PWSB’s fund through which all PWSB revenues are collected and expenses are paid, as authorized by the Rhode Island Public Utilities Commission.

“EPA” means the United States Environmental Protection Agency or any successor.

“Equipment” means all vehicles, machinery, structures, components, parts and materials located at the Facility which are utilized in the operation, maintenance, and management of the Facility.

“Equipment and Chemical Responsibilities” has the meaning specified in Schedule 2.2.5 hereto.

“Facility” means the existing PWSB Water Treatment Facility, including but not limited to all treatment processes, disposal facilities, sludge lagoons, laboratory, water storage, pump stations, discharge facilities, and fixtures, equipment, tools and other property stored on or constituting the water plant, pump stations, aeration systems, well fields, intake structure, and associated site properties.

“Facility Modification” means any improvement, alteration, addition or other modification

to the Facility requested or approved by the PWSB. Facility Modifications do not include maintenance, repair or replacement activities required to be undertaken by the Company pursuant to this Agreement.

“Monthly Operations Report” has the meaning specified in Schedule 3.4 hereto.

“Fees and Costs” means reasonable fees and expenses of employees, attorneys, architects, engineers, expert witnesses, contractors, consultants and other persons, and costs of transcripts, printing of briefs and records on appeal, copying and other reimbursed expenses, and expenses reasonably incurred in connection with any Legal Proceeding.

“Fiscal Year” means the fiscal year of the PWSB, currently July 1 through June 30.

“Governmental Body” means any federal, State, City or regional legislative, executive, judicial or other governmental board, agency, authority, commission, administration, court or other body, or any official thereof having jurisdiction.

“Guaranty” means the agreement executed between the PWSB and the Project Guarantor, in the form attached at Exhibit B.

“Hazardous Substance” has the meaning given such term in CERCLA, applicable State law and the regulations promulgated thereunder.

“Hazardous Waste” means any hazardous, toxic or dangerous waste, substance or material, or contaminant, pollutant or chemical, oil or petroleum product or byproduct, known or unknown, defined or identified as such in (or for the purposes of) any existing or future local, State or federal law, statute, code, ordinance, rule, regulation, guideline, decree or order relating to human health or the environment or environmental conditions, including but not limited to the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6901 et seq.; the Toxic Substances Control Act (“TSCA”), 15 U.S.C. § 2601 et seq.; the Federal Water Pollution Control Act, 49 U.S.C. § 1801 et seq.; the Safe Drinking Water Act, 42 U.S.C. § 300 et seq.; the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), 42 U.S.C. § 9601 et seq.; the Clean Air Act, 42 U.S.C. § 7401 et seq.; the Hazardous Materials Transportation Act, 49 U.S.C. App. § 1802 et seq.; the Occupational Safety and Health Act, 29 U.S.C. § 651 et seq.; including all similar State of Rhode Island laws and municipal ordinances; including all rules, regulations and guidelines promulgated under such statutes and including all amendments and supplements to such statutes and rules, regulations and guidelines, and any order or decree relating to or imposing liability or standards or conduct concerning, or prohibiting, limiting or regulating exposure to, any waste, material, substance, contaminant, pollutant or chemical.

“Independent Panel” has the meaning specified in Section 5.8.2 hereof.

“Inflation Index” means the sum of the following:

1. Labor Component - BLS Series CIU201000000510A (ECI - All Union workers), which shall comprise fifty-five percent (55.0%) of the Inflation Index.

2. Chemicals Component - BLS Series WPU06790961 (PPI – Chemicals and allied products- Water treating compounds), which shall comprise twenty-five percent (20.0%) of the Inflation Index.

3. All Other Component - BLS Series WPUFD4131 (PPI - Final demand – Finished goods less foods and energy), which shall comprise twenty percent (25.0%) of the Inflation Index.

“Insurance” has the meaning specified in Schedule 4 hereto.

“Insurance Requirement(s)” means any rule, regulation, code, or requirement issued by any fire insurance rating bureau or any other body having similar functions or by any insurance company which has issued a policy of Insurance under this Agreement, as in effect during the Agreement Term, compliance with which is a condition to the effectiveness of such policy.

“Inventory Report” shall have the meaning specified in Schedule 9 hereto.

“Legal Entitlement” means any and all Permits, licenses, approvals, authorizations, consents and entitlements of whatever kind and however described which are required under Applicable Law to be obtained or maintained by any person with respect to the operation, maintenance and management of the Facility or the performance of any other obligation of the Company under this Agreement, including, without limitation, the Consent Agreements and Permits detailed in Schedule 6 hereto.

“Legal Proceeding” means every action, suit, litigation, arbitration, administrative proceeding, and any other legal or equitable proceeding having a bearing upon this Agreement.

“Letter of Credit” has the meaning specified in Section 8.2.4 hereof.

“Lien” means any and every lien against the Facility or the Site or against any moneys due or to become due from the PWSB to the Company under this Agreement, for or on account of the Services, including without limitation mechanics’, materialmen’s, laborers’, and lenders’ liens.

“Loss-and-Expense” means any and all loss, liability, forfeiture, obligation, damage, delay, penalty, judgment, deposit, cost, claim, demand, charge, tax, or expense, except as explicitly excluded or limited under any provision of this Agreement.

“Manuals” shall mean the Operations Manual and related operations and maintenance manuals, including future operations manuals issued with new Equipment.

“Material Decline in Guarantor’s Credit Standing” has the meaning specified in Section 8.2.3 hereof.

“Monthly Meeting” has the meaning specified in Schedule 2.4.5 hereto.

“Monthly Reports” have the meaning specified in Schedule 2 hereto.

“Operation and Maintenance Fee” means the component of the Service Fee consisting of

the costs of performing the Services.

“Operation and Maintenance Manual” has the meaning specified in Section 3.3 hereof.

“Operation and Maintenance Plan” or “O&M Plan” has the meaning specified in Schedule 3.4 hereto.

“Operation Period” means the period of time commencing with and including the Commencement Date, through and including the last day of the Agreement Term.

“Operation Period Letter of Credit” has the meaning specified in Section 8.3.3 hereof.

“Operations Bond” has the meaning specified in Section 8.3.2 hereof.

“Operations Records” has the meaning specified in Schedule 2.4.4 hereto.

“Pass Through Cost(s)” means that component of the monthly invoices from the Company to the PWSB consisting of those costs of the Company listed on Schedule 10 hereto, but not included in the Service Fee.

“Performance Requirements” means the Performance Standards set forth in Schedule 1 hereto as well as any other performance requirements relating to the Facility set forth in this Agreement that are the responsibility of the Company.

“Performance Standards” has the meaning specified in Schedule 1 hereof.

“Permits” has the meaning specified in Schedule 6 hereto.

“Permitted Encumbrances” means, as of any particular time, any one or more of the following:

(1) encumbrances for utility charges, taxes rates and assessments not yet delinquent or, if delinquent, the validity of which is being contested diligently and in good faith by the Company and against which the Company has established appropriate reserves in accordance with generally accepted accounting principles;

(2) any encumbrance arising out of any judgment rendered which is being contested diligently and in good faith by the Company, the execution of which has been stayed or against which a bond or bonds in the aggregate principal amount equal to such judgments shall have been posted with a financially sound insurer and which does not have a material and adverse effect on the ability of the Company to operate the Facility;

(3) any encumbrance arising in the ordinary course of business imposed by law dealing with materialmen’s, mechanics’, workmen’s, repairmen’s, warehousemen’s, landlords’, vendors’ or carriers’ encumbrances created by law, or deposits or pledges which are not yet due or, if due, the validity of which is being contested diligently and in good faith by the Company and against which the Company has established appropriate reserves;

(4) servitudes, licenses, easements, encumbrances, restrictions, rights-of-way and rights in the nature of easements or similar charges which will not in the aggregate materially and adversely impair the operation of the Facility by the Company; and

(5) zoning and building bylaws and ordinances, municipal bylaws and regulations, and restrictive covenants which do not materially interfere with the operation of the Facility by the Company.

“Plans” has the meaning specified in Schedule 3 hereto.

“Project Guarantor” or “Guarantor” means the entity financially guarantying the performance of the Company to fulfill the obligations of this Agreement by issuing the Guaranty, if applicable.

“Proposal” means the Company’s Proposal submitted in response to the RFP and the responses submitted by the Company including (a) responses to the PWSB’s Requests for Clarifications and (b) all clarifying documents and correspondence from the Company to the PWSB. The Proposal is attached hereto as Exhibit C and made a part hereof. The Proposal is intended to be used for background and interpretation purposes in the event of any ambiguity in this Agreement; provided, however, that in the event of a conflict between the Proposal and the terms and conditions of this Agreement (including all Schedules and Exhibits thereto other than the Proposal), this Agreement shall be controlling.

“Pump Station(s)” has the meaning specified in Schedule 2.2.3.

“Purchasing Agent” means the Purchasing Director of the City of Pawtucket Purchasing Board, as established pursuant to City of Pawtucket Charter § 3-700 and R.I. Gen. Laws § 45-55-3.

“PWSB Engineer” means either (1) an engineer employed by the PWSB, or (2) a consulting engineer or firm of consulting engineers, having experience with respect to the operation and maintenance of water treatment facilities, in either case designated for purposes relating to this Agreement, as the PWSB Engineer from time to time in writing by the PWSB.

“PWSB Fault” means any breach (including the untruth or breach of any PWSB representation or warranty set forth herein), failure, nonperformance or noncompliance by the PWSB under this Agreement (whether or not attributable to any officer, member, agent, employee, contractor, subcontractor of any tier, the PWSB Engineer, or an independent contractor of the PWSB) which is not directly attributable to any Uncontrollable Circumstance or Company Fault, and which materially and adversely affects the Company’s rights or ability to perform under this Agreement.

“PWSB Indemnitees” has the meaning specified in Section 4.4.1 hereof.

“Rating Service” means Moody’s Investors Service or Standard & Poor’s Rating Services, or any of their respective successors.

“Renewal and Replacement Plan” has the meaning specified in Schedule 3.4 hereto.

“Repair and Replacement Fund” has the meaning specified in Section 3.6 hereof.

“Residuals” or “Facility Residuals” means any liquid, semisolid or solid material resulting from the water treatment process at the Facility.

“RFP” means the Request for Proposals for Operations, Maintenance and Management of City of Pawtucket Water Treatment Facility, dated April 12, 2024 and all amendments and addenda thereto.

“RIDEM” means the Rhode Island Department of Environmental Management or its successor.

“RIPUC” means the Rhode Island Public Utilities Commission.

“Safety and Security Plan” has the meaning specified in Schedule 3.5 hereto.

“SCADA System” means the supervisory control and data acquisition system at the Facility.

“Schedule(s)” mean(s) the schedule(s) attached to this Agreement, which together with this Agreement and the Exhibits attached thereto constitute the entire Agreement with respect to the operations, maintenance and management of the Facility.

“Selected Proposer” means the Company.

“Service Fee” means the annual amount payable to the Company by the PWSB for the Services provided under this Agreement as set forth in Schedule 11 hereto.

“Service Territory” means the City of Pawtucket, City of Central Falls, Town of Cumberland, and all other territory in which customers are served by the Facility during the Agreement Term.

“Services” means the operations, maintenance, and management of the Facility to be provided by the Company in accordance with the terms and provisions of this Agreement.

“Site” means the Facility together with the real property located at Pawtucket, Rhode Island, on which the Facility is situated.

“Staffing Plan” has the meaning specified in Schedule 3.3 hereto.

“State” means the State of Rhode Island and all its relevant administrative, contracting and regulatory agencies and offices.

“Subcontract” means an agreement between the Company and a Subcontractor, or between two Subcontractors, as applicable.



“Subcontractor” means every person (other than employees of the Company) employed or engaged by the Company or any person directly or indirectly in privity with the Company (including every subcontractor of whatever tier) whether for the furnishing of labor, materials, equipment, supplies, services, or otherwise.

“System” means the City of Pawtucket water treatment system as described in Exhibit A hereto, and including any and all modifications to the System during the Agreement Term, but not including the operation and maintenance of the watershed lands and reservoir system and the water distribution system, and appurtenances (excluding pump stations and those transmission facilities designed or rehabilitated by the Company), capital planning, policy development, long range and Service Area planning, the setting of customer rates and charges, meter reading, billing and collection.

“System Revenues” means all revenues derived by the PWSB in connection with the operation of the System and accounted for under the PWSB’s Enterprise Fund.

“Termination for Convenience” has the meaning specified in Section 5.4.1 hereof.

“Transition Plan” has the meaning specified in Schedule 3.6 hereto.

“Unconditional Guaranty” has the meaning specified in Section 8.2.4 hereof.

"Uncontrollable Circumstance(s)" means any act, event or condition to the extent that it impacts the cost of performance of or materially and adversely affects the ability of either party to perform any obligation under the Agreement (except for payment obligations), if such act, event or condition, in light of the circumstances known or reasonably believed to exist at the time, is beyond the reasonable control and is not a result of the willful or negligent act, error or omission or failure to exercise reasonable diligence on the part of the party relying thereon; provided, however, that the contesting in good faith or the failure in good faith to contest such action or inaction shall not be construed as a willful or negligent act, error or omission or a lack of reasonable diligence of either party.

(a) *Inclusions.* Subject to the foregoing, such acts, events, or conditions may include, but shall not be limited to, the following:

(1) an act of God, landslide, earthquake, fire, flood or other natural disasters, but not including reasonably anticipated weather conditions for the geographic area of the Facility as of the Agreement Date;

(2) a Change in Law;

(3) explosion, sabotage, acts of a declared public enemy, terrorism or riot;

(4) the failure of any appropriate governmental agency or private utility to provide and maintain utilities (excluding reasonably anticipated power outages);

(5) the preemption, confiscation, diversion, destruction, or other interference in possession or performance of materials or services by, on behalf of, or with authority of a

governmental body in connection with a declared or asserted public emergency or any condemnation or other taking by eminent domain or similar action of any portion of the Facility.

(b) *Exclusions.* None of the following acts, events, or conditions shall constitute Uncontrollable Circumstances:

- (1) general economic conditions, interest or inflation rate fluctuations, commodity prices or changes in prices, or currency or exchange rate fluctuations;
- (2) changes in the financial condition of the PWSB, the Company, the Project Guarantor, or any of their affiliates or subcontractors;
- (3) union work rules which increase the Company's operating cost for the Facility;
- (4) any impact of prevailing wage laws on the Company's costs;
- (5) the consequence of Company error, including any errors of Company affiliates or subcontractors;
- (6) failure of any subcontractor or supplier to furnish labor, services, materials or equipment on the dates agreed to;
- (7) strikes, work stoppages or labor disputes;
- (8) equipment failure (unless caused by an Uncontrollable Circumstance);
- (9) failure of the Company to secure licenses, permits or other approvals;
- (10) the outbreak of COVID-19 or any other pandemic, epidemic or public health emergency; and
- (11) litigation against the Company, its affiliates or subcontractors.

“Vehicle(s)” means all cars, trucks, vans or other modes of transportation used in connection with the operation of the Facility for transporting people or things or used for other necessary functions in the operation or maintenance of the Facility.

“Vehicle Maintenance Responsibilities” has the meaning described in Schedule 2.2.6 hereto.

## **ARTICLE III OPERATION, MAINTENANCE AND MANAGEMENT OF THE FACILITY**

### **Section 3.1 Conditions Precedent to the Commencement Date.**

#### **Section 3.1.1 Company Obligations.**

(i) The Commencement Date shall be subject to the satisfaction by the Company, to the PWSB's sole satisfaction, of all of the following conditions precedent:

(a) The Guarantor shall have executed and delivered the Guaranty to the PWSB and the Company shall have delivered the Operations Bond, duly executed by its issuer in the amount equal to one hundred fifty percent (150%) of the current year's annualized Service Fee plus estimated pass-through costs to the PWSB.

(b) The Company shall have delivered to the PWSB (i) a certificate of an authorized officer of the Company, dated as of the Commencement Date, to the effect that each of the representations of the Company set forth in Section 6.2 of this Agreement is true and correct in all material respects as if made on such date, and an (ii) opinion of counsel to the Company, in customary form and reasonably acceptable to the PWSB, regarding matters of law set forth in Sections 6.2.1 through 6.2.5 hereof.

(c) The PWSB shall have received documentation that all Insurance required to be obtained by the Company pursuant to this Agreement has been obtained.

(d) The Company shall have recruited, retained and employed all management and other personnel necessary for its performance of the Services hereunder and consistent with the Company's Staffing Plan, which personnel shall be duly licensed as and to the extent required by Applicable Law, and shall have delivered to the PWSB a roster of all such personnel together with copies of the licenses of all personnel required to be licensed.

(e) The Company shall have obtained and shall have submitted to the PWSB copies of all Legal Entitlements required to be obtained by the Company by Applicable Law as a condition of performing the Services hereunder.

(f) The Company shall have provided to the PWSB resumes of key staff including, but not limited to the Company plant manager.

(g) The PWSB shall have received and approved the Company's emergency response plan for the Facility and Services hereunder.

### **Section 3.1.2 PWSB Obligations.**

The Commencement Date shall be subject to the satisfaction by the PWSB of the following condition precedent:

(a) The PWSB shall have delivered to the Company a certificate of an authorized representative of the PWSB, dated as of the Commencement Date, to the effect that each of the representations of the PWSB set forth in Section 6.1 of this Agreement is true and correct in all material respects as if made on such date.

### **Section 3.2 Satisfaction of Conditions Precedent.**

The Company and PWSB shall satisfy or waive the conditions precedent identified in Section 3.1.1 and Section 3.1.2 on or before the date that is thirty (30) days from the Agreement

Date or such later date as is mutually agreed upon in writing by the parties hereto (which date shall in no event exceed the date that is ninety (90) days from the Agreement Date); each party shall give the other prompt notice when any condition precedent has been satisfied. Upon satisfaction of all such conditions precedent, the PWSB shall give written notice to the Company, and the Commencement Date shall occur on such date, so long as, as of such date:

(1) No action, suit, proceeding or official investigation shall have been overtly threatened or publicly announced or commenced by any person or federal, State or local governmental authority or agency other than the PWSB in any federal, State or local court, that seeks to enjoin, assess civil or criminal penalties against, assess civil damages against or obtain any judgment, order or consent decree with respect to the PWSB or the Company as a result of the PWSB's or the Company's negotiation, execution, delivery or performance of this Agreement, other than any such action, suit, proceeding or investigation which would not, if adversely determined, materially adversely affect this Agreement or the performance by the parties of their respective obligations hereunder; or

(2) No changes shall have occurred after the Agreement Date and on or before the Commencement Date in any applicable federal, State or local rule, regulation or ordinance thereunder, or in the interpretation thereof by any applicable regulatory authority, that would make (i) the execution or delivery of this Agreement by the PWSB or the Company or (ii) compliance by the PWSB or the Company with the terms and conditions of this Agreement, a violation of such law, rule, regulation or ordinance.

If all such conditions precedent set forth in Sections 3.1.1 and 3.1.2 hereof are not so satisfied or waived on or before the date that is thirty (30) days from the Agreement Date or such later date mutually agreed to in writing by the parties hereto, or if any circumstances described in clauses (1) or (2) above, if any, exist and continue as of thirty (30) days from the Agreement Date or such later date mutually agreed to in writing by the parties hereto, then the PWSB, by notice in writing to the Company, may terminate this Agreement or may extend the date upon which the Commencement Date shall occur. If the PWSB shall give written termination notice to the Company for failure of the Company to fulfill the Company obligations set forth in Section 3.1.1 or clauses (1) or (2) above, the PWSB shall have recourse to the Operations Bond to recoup the PWSB's costs in connection with re-procurement.

### **Section 3.3 Overall Company Responsibilities.**

#### **Section 3.3.1**

On and after the Commencement Date and throughout the Agreement Term, the Company shall:

(1) operate, maintain and manage the Facility in accordance with this Agreement (including, without limitation, the requirements set forth in the Schedules hereto) and Applicable Law, said Company responsibilities including, without limitation, the following:

(a) preparing and delivering to the PWSB an updated Operation and Maintenance Manual for the Facility (the "Operation and Maintenance Manual");

(b) conducting day-to-day operations and monitoring in accordance with this Agreement, including all Schedules hereto, and in compliance with Applicable Law;

(c) preparing and submitting to appropriate authorities all reports and plans mandated by this Agreement and by Applicable Law;

(d) complying with all emergency and safety requirements set forth in Schedule 3 hereto and required by Applicable Law;

(e) performing all scheduled maintenance to ensure the long-term efficient operation of Facility;

(f) performing maintenance, repairs and replacements as needed on infrastructure components;

(g) maintaining the inventory and inventory records for the consumable supplies and Equipment needed for the operations and maintenance of the System, including, without limitation, the Equipment and Chemicals Inventory described more particularly in Schedules 2 and 9 hereto;

(h) maintaining the grounds at the Site in a neat and orderly condition;

(i) disposing of Facility residuals;

(j) plowing access roads and parking areas when snow levels reach two (2) or more inches;

(k) integrating, on an on-going basis, the SCADA System with Facility operations, including, without limitation, any staff training with regard to the SCADA System that may be required;

(l) hiring and retaining appropriate staff for the Facility while maintaining compliance with Section 3.8 hereof;

(m) maintaining records of performance of maintenance items, and maintenance backlog (items, skills and hours) for the Facility utilizing the CMMS Software, to be implemented within ninety (90) days of the Commencement Date (the Company will provide the PWSB staff with read-only access); and

(n) maintaining any and all appropriate records in connection with the activities specified above.

(2) Except for Equipment and other facilities and materials included in the Facility as of the Commencement Date, and except for expenditures under the Repair and Replacement Fund, provide, at its sole cost and expense, all labor, materials, machinery, vehicles, equipment, office equipment (i.e. copiers, computers, etc.), fuel, chemicals, supplies, spare parts, expendables, consumables, testing and laboratory analysis and any other items required for operation, maintenance repair, replacement, renewal and management of the Facility in accordance

with this Agreement.

(3) As requested by the PWSB, provide facilities and facility operation of any future Facility upgrades or expansions in accordance with terms and conditions mutually agreed to by the PWSB and the Company.

### **Section 3.4 Identification of an Authorized Disposal Facility.**

The Company also shall be responsible for the identification, subject to the PWSB's approval, of an authorized disposal facility for the disposal of Facility residuals (the "Disposal Facility"), and the negotiation and execution of a contract or other agreement with the Disposal Facility (the "Disposal Agreement"); provided, however, that prior to the Company's entering into the Disposal Agreement, the terms and conditions of said Disposal Agreement shall be approved in writing by the PWSB.

### **Section 3.5 Responsibilities.**

On and after the Commencement Date and during the remainder of the Agreement Term, the PWSB shall:

(1) pay, or cause to be paid, the Service Fee to the Company in accordance with the terms and conditions of this Agreement for the Company's performance of its obligations under this Agreement;

(2) afford the Company access to the Facility to the extent necessary for the Company to perform its obligations hereunder;

(3) retain responsibility for the operation and maintenance of the Distribution System, perform meter reading and maintenance, and perform long-term System and Service Area planning and management of watershed dams and reservoirs;

(4) make available to the Company Equipment warranty information, engineering drawings, calculations, maintenance manuals, operational records, logs, reports, submittals, repair records, audits, and information which may be in the PWSB's possession or that of its agents, relating to the design, condition, operation or maintenance of the Facility.

### **Section 3.6 Repair and Replacement.**

The Company will be responsible for repairing and replacing equipment that fails. Repairs and replacements with a cost of less than \$20,000 will be paid by the Company through the Service Fee. The PWSB will establish a "Repair and Replacement Fund" in the amount of \$200,000 (to be adjusted by the change in the BLS Index, using 2024 as a baseline) per fiscal year. Certain repair and replacement expenses in excess of \$20,000 (to be adjusted by the change in the BLS Index, using 2024 as a baseline) will be funded separately from the Service Fee through the Repair and Replacement Fund, but only with PWSB approval and authorization (not to be unreasonably withheld) following documented submittals by the Company to the PWSB. Costs for repair and replacement expenditures over and above the Repair and Replacement Fund shall be approved by the PWSB in advance and

shall be the responsibility of the Company; provided, however, if the Company's expenditures from the Repair and Replacement Fund exceed the yearly amount, such expenditures may, at the Company's option, be charged against the fund amount for the following year only (not subsequent years). For the avoidance of doubt, the foregoing is not a one-time allowance over the term of the Agreement; rather, the Company may exercise the option to charge against the Repair and Replacement Fund for the following year repeatedly over the term of the Agreement.

No funds shall be disbursed from the Repair and Replacement Fund without the prior written consent of the PWSB. The Company shall submit to the PWSB a monthly report on expenses that should be reimbursed out of the Repair and Replacement Fund and may request the PWSB to pay such expenses directly from the Repair and Replacement Fund.

The Company shall prepare and submit to the PWSB each year an annual report, which shall include a five-year forecast of the major repair and replacement ("R&R") activities that the Company believes need to be performed at the Facility during such five-year period to keep the Facility in good working condition. Subject to discussions with and approval by the PWSB, the identified R&R projects for the next Agreement Year may be funded from the R&R Fund, subject to the requirements and limitations of that fund. The PWSB is not obligated to approve any identified projects.

The Company shall recommend and perform activities to be paid for from the Repair and Replacement Fund as follows:

The Company shall evaluate the necessity for performing any major repair and replacement activities payable from the Repair and Replacement Fund. Ordinary maintenance activities shall continue to be paid for by the Company.

The Company shall prepare written recommendations for all major repair and replacement activities to be paid from the Repair and Replacement Fund that the Company advises are required to keep the Facility in a state of good operating order, which recommendations shall include the approximate cost of completing such activities.

The PWSB, within thirty (30) days of the receipt of such written recommendations, shall either approve or deny the Company's recommendation in writing, provided that if the PWSB fails to timely notify the Company in writing, such recommendation shall be deemed denied.

In the event that the PWSB shall approve the Company's recommendation, and in the event the cost of the major repair or replacement activity plus the total aggregate cost of all such activities previously incurred during any Agreement Year does not exceed the total amount in the Repair and Replacement Fund, the Company shall proceed with the recommended work, and it shall be paid for from the Repair and Replacement Fund.

In the event the PWSB shall approve the Company's recommendation, but the cost of the major repair or replacement activity plus the total aggregate cost of all such activities previously made during the current Agreement Year exceeds the total amount then in the Repair and Replacement Fund, the PWSB shall be responsible for providing the additional funding.

Any amounts not used by the Company and remaining in the Repair and Replacement Fund at the end of each Agreement Year will be rolled over and accumulate. Any amounts not used by the Company and remaining in the Repair and Replacement Fund at the end of the Term shall revert back to the PWSB. The PWSB reserves the right to withdraw from the Repair and Replacement Fund at its sole discretion for any purposes deemed valid by the PWSB.

This section of this Agreement shall also be in accordance with the proposed O&M plan under Facility Plans in Section 3.3 above.

The Company shall make all necessary Repair and Replacement expenditures and on a monthly basis shall submit to the PWSB a report of expenses which should be reimbursed out of the Repair and Replacement Fund and, at its option, may request the PWSB to pay such expenses directly from the Repair and Replacement Fund.

During the Agreement Term, within ninety (90) days of the start of a new Agreement Year, the Company provide the PWSB with a plan for its anticipated use of the Repair and Replacement Fund in that Agreement Year. The Company shall recommend and perform activities to be paid from the Repair and Replacement Fund as follows:

(1) The Company shall demonstrate the necessity for performing any major repair and maintenance activities payable from the Repair and Replacement Fund, and shall further demonstrate that all applicable and routine maintenance has been performed.

(2) The Company shall prepare written recommendations for all major repair and maintenance activities to be paid from the Repair and Replacement Fund that the Company determines may be required to keep the Facility in a state of good operating repair and order, which recommendations shall include the approximate cost of completing such activities.

(3) In the event that the PWSB shall approve the Company's recommendation, the Company shall proceed with the recommended work and it shall be paid for from the Repair and Replacement Fund or by the PWSB if no such Repair and Replacement Funds are available; provided, however, that in the event of an emergency situation involving health and safety concerns, the Company shall, upon prior notice to and approval of the PWSB's Chief Engineer/General Manager, immediately undertake work to be paid for from the Repair and Replacement Fund (or reimbursed by the PWSB, as applicable).

### **Section 3.7 Company Project Manager.**

The Company has designated [-----] as the Company's full-time Project Manager and such Project Manager, and any PWSB-approved successor, shall, within ninety (90) days after the Commencement Date. The PWSB has selected the Company to perform the services contemplated under this Agreement based, in part, on the past successful experience and expertise of the designated Project Manager. Accordingly, the Company shall not, absent good cause, replace such Project Manager during the Term of this Agreement, without the prior approval of the PWSB. If such Project Manager or any PWSB-approved successor shall retire, resign as Project Manager or otherwise cease employment with the Company, the Company shall not appoint a successor Project Manager without the prior written approval of the PWSB. If the PWSB, in its sole



discretion, determines that the Project Manager is performing in an unsatisfactory manner, or if an unworkable relationship between the Project Manager and the PWSB shall arise, the Company, upon written notice from the PWSB of such circumstance, shall promptly replace such Project Manager with a successor acceptable to the PWSB; provided, however, the PWSB represents that it will not give such notice to the Company unless and until the PWSB, in its sole determination, has exercised reasonable good faith efforts to rectify to its satisfaction the adverse circumstance regarding the Project Manager.

### **Section 3.8 Personnel**

#### **Section 3.8.1 Orientation and Career Planning.**

Within the first two (2) weeks of the Commencement Date, the Company shall conduct a Company orientation and career planning workshop or workshops at the Company's sole cost and expense.

#### **Section 3.9 Noncompliance Assessments.**

The Company is required to satisfy the requirements of Applicable Law with respect to the quality of treated raw water by the Facility as set forth in Schedule 1 hereto except during events of Uncontrollable Circumstances. Except where such failure is due to Uncontrollable Circumstances, failure to satisfy such requirements, or failure to operate the Facility in such a manner as to minimize noise and/or dust emanating from the Facility, shall result in the imposition on the Company of a noncompliance assessment in the manner and in the amounts set forth in this Section 3.9. If the Company fails to meet Finished Water Requirements as and when required hereunder:

- (1) the Company shall immediately take all reasonable and appropriate action to satisfy all Finished Water Requirements as applicable;
- (2) the Company shall provide a plan to the PWSB outlining corrective actions for achieving compliance with Finished Water Requirements as applicable (the "Compliance Plan") within forty-eight (48) hours of written notice of noncompliance given by the PWSB;
- (3) the PWSB will review and provide written comments on the Compliance Plan within forty-eight (48) hours after receipt; and
- (4) the Company shall immediately implement the Compliance Plan, which shall address the PWSB's comments.

The Company will be responsible for performing any and all operational modifications as specified by the Compliance Plan. Failure to either provide a Compliance Plan or to implement the corrective actions set forth in the Compliance Plan shall result in Company liability for a noncompliance assessment in the amount of \$5,000 per day from such time that either (i) the Compliance Plan should have been submitted, or (ii) the date on which corrective actions should have commenced pursuant to the Compliance Plan. Neither the review of or comment on, nor the failure of the PWSB to comment on, any Compliance Plan proposed by the Company, shall relieve

the Company of any of its responsibilities under this Agreement, be deemed to constitute a representation that the PWSB that the corrective actions proposed in any such Compliance Plan will cause the Facility to be in compliance with the Finished Water Requirements or otherwise impose any liability on the PWSB.

Non-compliance assessments shall also be imposed on the Company as follows:

- Failure to maintain staffing levels consistent with its approved staffing plan - \$10,000 per month for all vacancies open for more than 60 days.
- Failure to provide and maintain a CMMS consistent with the requirements of this Agreement - \$10,000 per occurrence.
- Failure to provide all required reports in a timely basis - \$500 per occurrence.
- Failure to maintain records as required under this Agreement - \$500 per occurrence.
- Violations requiring public notification - \$25,000 per occurrence.

In addition, all fines or penalties imposed on the PWSB or the Company by any Governmental Body as a result of failure of the Facility to conform to the Finished Water Requirements shall be the sole obligation of and shall be paid by the Company.

The PWSB reserves the right to deduct the amount of any non-compliance assessment from the Service Fee or other amounts owed to the Company by the PWSB hereunder.

### **Section 3.10 Fees and Payments.**

#### **Section 3.10.1 Service Fee.**

Commencing with the first Billing Month and for each Billing Month thereafter, the PWSB shall pay to the Company a Service Fee for managing, operating and maintaining the Facility pursuant to the terms and conditions of this Agreement. Except as otherwise provided in this Agreement, the Service Fee includes all compensation to the Company for managing, operating and maintaining the Facility. The Service Fee shall be paid in increments of 1/12th each during each month of an Agreement Year.

#### **Section 3.10.2 Service Fee Adjustments.**

The Service Fee shall be consistent with the private activity limitations described in Section 141 of the Internal Revenue Code and regulations and official interpretations issued thereunder, including, without limitation, Revenue Procedure 2017-13. The PWSB shall have the right to equitably adjust the Service Fee payment formula over the course of the Agreement Term as follows:

- (1) As necessary, to comply with the private activity limitations described in Section 141 of the Internal Revenue Code and regulations and official interpretations issued

thereunder, including, without limitation, Revenue Procedure 2017-13. Any such adjustments shall be such that the fixed and variable components of the Service Fee are within the specified percentages allowed by the private activity limitations described in Section 141 of the Internal Revenue Code and regulations issued thereunder. Adjustments shall not entitle the Company to additional compensation. Should such adjustments not be possible so that continued compliance with the private activity limitations described in Section 141 of the Internal Revenue Code and regulations issued thereunder is not possible, the PWSB reserves the right to terminate this Agreement upon thirty (30) days' notice to the Company. Any such termination shall be deemed to be a Termination for Convenience pursuant to and governed by Section 5.4.1 hereof;

(2) If the 12-month moving average for finished water quantity falls outside of the established range set forth on Schedule 2 for the monthly average of finished water production and/or the 12-month moving averages for raw water quality parameters fall outside of the range of +/- 15% of the values specified in Schedule 2 (tables S2-1 and S2-2), then the Company and the PWSB shall negotiate in good faith to adjust upward or downward the Service Fee in accordance with the adjustment methodology set forth in Schedule 11 incorporated by reference herein and made a part hereof;

(3) The Service Fee payment formula shall be adjusted by (i) mutual agreement of the parties as to the amount and/or methodology and (ii) determination by the PWSB that any such adjustment will not contravene the Applicable Law (including, without limitation, any law relating to procurement) or the private activity limitations described in Section 141 of the Internal Revenue Code and regulations and official interpretations issued thereunder, including, without limitation, Revenue Procedure 2017-13; and

(4) The Service Fee payment formula shall be adjusted annually on the anniversary date of the Commencement Date, the Service Fee will be adjusted to reflect changes in the Inflation Index as outlined in Schedule 11 hereto, which adjustment shall utilize the percentage change in the Inflation Index for the prior 12 month period using all monthly indices published for that 12 month period as outlined in Schedule 13.

(5) On an annual basis, the PWSB shall monitor compliance with the private activity limitations described in Section 141 of the Internal Revenue Code and regulations and official interpretations issued thereunder, including, without limitation, Revenue Procedure 2017-13. In the event the PWSB determines that any payment or fee would result in a violation of the private activity limitations, the PWSB shall immediately notify the Company. The PWSB and the Company shall then mutually agree to make any and all adjustments necessary to comply with Applicable Law.

In addition, the PWSB is currently working on an intermunicipal agreement with a nearby community to sell water on a going forward basis. Therefore, the Service Fee will depend on which demand level applies, the "Base Production Level" with an annual average of 7.85 mgd, or the "Enhanced Production Level" with an annual average of 9.0 mgd. The Service Fee will also include an adjustment if annual water production is greater than 9.1 mgd or less than 6.7 mgd for the Base Production Level and greater and 10.4 mgd or less than 7.7 for the Enhanced Production Level. The Service Fee for each Production Level is set forth in Schedule 11.

**Section 3.10.3 Cost Savings.**

The Company shall actively pursue improvements in the effectiveness and efficiency of the operation, maintenance and management of the Facility that may reduce the Service Fee or Pass Through Costs. Any Company proposals for such improvements, including the costs, benefits and anticipated net savings, shall be provided to the PWSB in writing. If the PWSB approves any such proposals, and if implementation of any such proposal results in net savings to the PWSB as determined by the PWSB, the PWSB shall pay the Company an amount equal to forty percent (40%) of the aggregate net savings to the PWSB resulting from the implementation of any such proposal. Such share of net savings shall be, at the discretion of the PWSB, either (i) a one-time payment to the Company, or (ii) an annual payment, depending on the nature of the modification and the resulting net savings. Any such payment shall be consistent with the private activity limitations described in Section 141 of the Internal Revenue Code and regulations and official interpretations issued thereunder, including, without limitation, Revenue Procedure 2017-13.

**Section 3.11 Additional Compliance Obligations.**

Should the Company fail to timely perform the other aspects of the work scope contained in this Agreement, including reporting and administrative requirements, and should such failure continue following written notification to cure and a five business day period to cure, the Company shall be liable to the PWSB for a noncompliance assessment in the amount of \$1,000 per day until such time as the noted deficiency is corrected. In the event of repeated failure to timely perform such aspects of this Agreement within any twelve (12) month period, such fine shall be increased to \$5,000 per day until such time as the noted deficiency is corrected.

**ARTICLE IV - LIABILITY, INSURANCE, UNCONTROLLABLE CIRCUMSTANCES AND INDEMNIFICATION**

**Section 4.1 Liability.**

The Company shall be liable for injuries and death to any and all persons and for damage to the Facility and the property of others which result from the acts, errors or omissions by the Company occurring in connection with, or arising out of, the operation and maintenance of the Facility.

**Section 4.2 Insurance.**

**Section 4.2.1 General Requirements.**

At all times during the Agreement Term, the Company shall maintain or cause to be maintained insurance as required by Schedule 4 hereto and this Agreement against such risks and for such amounts as are indicated on Schedule 4 hereto paying, as the same became due and payable, all premiums with respect thereto.

**Section 4.2.2 Insurers, Deductibles and PWSB Rights.**

All Insurance shall be procured and maintained from financially sound and generally recognized responsible insurance companies selected by the Company with the consent of the PWSB, which consent shall not be unreasonably withheld, and authorized to write such insurance in the State of Rhode Island. Such insurance may be written with deductible amounts comparable to those on similar policies carried by other companies engaged in businesses similar in size, character and respects to those in which the Company is engaged. The Company shall be responsible for any deductible amounts. All policies evidencing such insurance shall provide for (1) payment of the losses to the City and PWSB, and to the Company as their respective interests may appear, and (2) at least thirty (30) days prior written notice of the cancellation thereof to the Company and the PWSB. All policies of insurance required by this Section shall be primary insurance without any right of contribution from other insurance carried by the PWSB.

### **Section 4.2.3 Certificates, Policies and Notice.**

The Company shall deliver to the PWSB, in connection with the Commencement Date as set forth in Section 3.1.1 above, and within sixty (60) days prior to each Agreement Year thereafter, a certificate setting forth in reasonable detail the particulars as to all insurance policies which the Company is required to maintain pursuant to this Section, listing the risks that are covered thereby, the name of the insurers issuing such insurance, certifying that the same are in full force and effect and giving the amounts and expiration dates of such insurance. The Company shall also supply, upon the written request of the PWSB, the PWSB with certified copies of said policies promptly following issuance by the insurers. Such policies shall contain an endorsement to the effect that the insuring company shall notify the PWSB at least thirty (30) days prior to the effective date of the cancellation or material change in the provisions of such policy or policies. Whenever a Subcontractor is utilized, the Company shall either procure and maintain or require the Subcontractor to procure and maintain comprehensive general liability, worker's compensation and motor vehicle liability insurance coverage subject to the requirements of Schedule 4, covering damage caused by actions of the Subcontractor or its employees.

### **Section 4.3. Uncontrollable Circumstances.**

#### **Section 4.3.1 Relief from Obligations.**

Except as expressly provided under the terms of this Agreement, neither party to this Agreement shall be liable to the other for any loss, damage, delay or failure to perform any obligation to the extent it results from an Uncontrollable Circumstance. The occurrence of an Uncontrollable Circumstance shall not excuse or delay the performance of a party's obligation to pay monies previously accrued and owing under this Agreement.

#### **Section 4.3.2 Notice and Mitigation.**

The party experiencing an Uncontrollable Circumstance shall notify the other party, on or promptly after the date the party experiencing such Uncontrollable Circumstance first knew of the commencement thereof, followed within fifteen (15) days by a written description of (1) the Uncontrollable Circumstance and the cause thereof (to the extent known), (2) the date the Uncontrollable Circumstance began, its estimated duration, the estimated time during which the performance of such party's obligations hereunder shall be delayed, and the impact, if any, on the

Acceptance Date, (3) the amount, if any, by which the Service Fee is proposed to be adjusted as a result of such Uncontrollable Circumstance, (4) its estimated impact on the other obligations of such party under this Agreement, and (5) any areas where costs might be reduced and the approximate amount of such cost reductions. Each party shall provide prompt written notice of the cessation of such Uncontrollable Circumstance. Whenever such act, event or condition shall occur, the party claiming to be adversely affected thereby shall, as promptly as reasonably possible, use its best efforts to eliminate the cause therefor, reduce costs and resume performance under this Agreement. While the delay continues, the affected party shall give notice to the other party, before the first day of each succeeding month, updating the information previously submitted. The Company shall furnish promptly (if and to the extent available to the Company) any additional documents or other information relating to the Uncontrollable Circumstance reasonably requested by the PWSB.

### **Section 4.3.3 Conditions and Schedule Relief.**

If and to the extent that Uncontrollable Circumstances interfere with, delay or increase the cost of the Company's performing the Operation Services in accordance herewith, and the Company has given timely notice as required by this Section, the Company shall not be entitled to an increase in the Service Fee except as set forth in Sections 4.3.4 and 4.3.5 hereof. In the event that the Company believes it is entitled to any relief on account of any Uncontrollable Circumstance, it shall furnish the PWSB written notice of the specific relief requested and detailing the event giving rise to the claim within thirty (30) days after the giving of notice delivered pursuant to Section 4.3.2. Within thirty (30) days after receipt of such a timely submission from the Company, the PWSB shall issue a written determination as to the extent, if any, it concurs with the Company claim.

### **Section 4.3.4 Facility Modifications.**

Before proposing any adjustment to the Service Fee in its notice of requested relief under this Section, the Company shall determine whether any increased costs of operation and maintenance of the Facility resulting from an Uncontrollable Circumstance can reasonably and prudently be reduced by the undertaking of a Facility Modification. In the event that the Company makes such a determination, the Company shall provide the PWSB with a notice thereof. The PWSB shall thereupon determine, in its sole discretion, whether such a Facility Modification shall be undertaken and shall so advise the Company. In no event shall the Company undertake such Facility Modification except at the express written direction of the PWSB.

### **Section 4.3.5 Share of Costs of Uncontrollable Circumstances.**

The Company shall share the net costs after insurance proceeds are realized resulting from the occurrence of an insured Uncontrollable Circumstance to the extent of the first twenty-five percent (25%) of the costs necessitated by Uncontrollable Circumstances up to an aggregate of \$200,000 per Fiscal year. The cost of insurance deductibles to be borne by the Company hereunder shall not be a cost which is included in the Company's share of Uncontrollable Circumstances within such limits. Such risk sharing by the Company shall be reflected in a decrease in the amount by which the Service Fee shall otherwise have been increased on account of such occurrence.

**Section 4.3.6 No Reimbursement for Costs Due to Delays Caused by Uncontrollable Circumstances.**

If an Uncontrollable Circumstance causes the Company a delay in performance of any of its obligations under this Agreement, the sole remedy available to the Company shall be a reasonable extension of time pursuant to Section 4.3.3 hereof. The Company shall not be entitled to any reimbursement of costs due to any such delay caused by Uncontrollable Circumstances.

**Section 4.3.7 Acceptance of Relief Constitutes Release.**

The Company's acceptance of any Service Fee relief under this Section shall be construed as a release of the PWSB by the Company (and all persons claiming by, through, or under the Company) for any and all Loss-and-Expense resulting from, or otherwise attributable to, the event giving rise to the relief claimed.

**Section 4.4 Indemnification.**

**Section 4.4.1 Indemnification by the Company.**

The Company agrees that it shall protect, indemnify, defend and hold harmless the PWSB, and its officers, employees, agents and persons under the PWSB's control or supervision (the "PWSB Indemnitees"), from and against (and pay the full amount of) all claims for Loss-and-Expense and shall defend the PWSB Indemnitees in any suit, including appeals, for personal injury to, or death of, any person, or loss or damage to property to the extent arising out of (1) the negligence, wrongful conduct or other fault of the Company or any of its officers, members, employees, agents, representatives, contractors or Subcontractors in connection with its obligations or rights under this Agreement, (2) the operation of the Facility by or under the direction of the Company, or (3) the performance or non-performance of the Company's obligations or rights under this Agreement. The Company shall not, however, be required to reimburse or indemnify any PWSB Indemnitee for any Loss-and-Expense to the extent due to (a) Finished Water Quality that meets the standards set forth in this Agreement and conforms to Applicable Law, (b) the negligence or other wrongful conduct of any PWSB Indemnitee or due to any Uncontrollable Circumstance or (c) any act or omission of any PWSB Indemnitee responsible for or contributing to the Loss-and-Expense, and the PWSB Indemnitee whose negligence or other wrongful conduct, act or omission is adjudged to have caused such Loss-and-Expense shall be responsible therefor in the proportion that its negligence or wrongful conduct caused or contributed to the Loss-and-Expense. A PWSB Indemnitee shall promptly notify the Company of the assertion of any claim against it for which it is entitled to be indemnified hereunder, shall give the Company the opportunity to defend such claim, and shall not settle the claim without the approval of the Company. These indemnification provisions are for the protection of the PWSB Indemnitee only and shall not establish, of themselves, any liability to third parties. Except as set forth herein, this indemnification obligation shall be unconditional and shall include, but shall not be limited to, all claims against the PWSB by an employee or former employee of the Company, any Guarantor or any Subcontractor and the Company expressly waives all immunity and limitation on liability under any Industrial Insurance Act, other worker's compensation act, disability benefit act, or other employee benefit act of any jurisdiction which would otherwise be applicable in the case of such a claim. Notwithstanding anything contained in this Section 4.4.1 hereof to the contrary, the

liability of the Company pursuant to this Section 4.4.1 hereof or under this Agreement shall not exceed One Hundred Million Dollars (\$100,000,000.00) (the “Liability Cap”) cumulatively for the Agreement Term; provided, however, that the foregoing limitation shall be reduced by any amounts paid to the PWSB by or on behalf of the Company or its insurers with respect to claims of the PWSB under this Section 4.4.1 hereof or under this Agreement, and provided, further, however, that in no event shall any fines or penalties incurred by the Company count toward the Liability Cap. The provisions of this Section shall survive termination of this Agreement.

#### **Section 4.4.2 Indemnification by the PWSB.**

The PWSB agrees that, to the extent permitted by Applicable Law, it shall protect, indemnify and hold harmless the Company and its Affiliates and their respective officers, directors, shareholders, agents and employees (the “Company Indemnitees”) from and against all claims for Loss and Expense, and shall defend the Company Indemnitees in any lawsuit, including appeals, for personal injury to, or death of, any person, or loss or damage to property arising out of (1) the negligence, wrongful conduct or other fault of the PWSB or any of its officers, employees, agents, representatives, contractors or subcontractors in connection with its obligations or rights under this Agreement, or (2) the performance or nonperformance of the PWSB’s obligations under this Agreement. The PWSB shall not, however, be required to reimburse or indemnify any Company Indemnitee for any Loss-and-Expense to the extent due to (a) the negligence or other wrongful conduct of any Company Indemnitee or (b) to the extent due to any Uncontrollable Circumstance or any act or omission of any Company Indemnitee responsible for or contributing to the Loss-and-Expense, and the Company Indemnitee whose negligence or other wrongful conduct, act or omission is adjudged to have caused such Loss-and-Expense shall be responsible therefor in the proportion that its negligence or wrongful conduct caused or contributed to the Loss-and-Expense. A Company Indemnitee shall promptly notify the PWSB of the assertion of any claim against it for which it is entitled to be indemnified hereunder, shall give the PWSB the opportunity to defend such claim, and shall not settle any such claim without the approval of the PWSB. Notwithstanding anything contained in this Section 4.4.2 hereof to the contrary, the liability of the PWSB and City pursuant to this Section 4.4.2 hereof or under this Agreement shall not exceed the amount of the Liability Cap cumulatively for the Agreement Term. These indemnification provisions are for the protection of the Company Indemnitee only and shall not establish, of themselves, any liability to third parties.

### **ARTICLE VIII - EVENTS OF DEFAULT, REMEDIES AND TERMINATION**

#### **Section 5.1 Remedies for Breach.**

##### **Section 5.1.1 General.**

The parties agree, except as otherwise specifically provided for in this Agreement, that (1) neither party shall have the right to terminate this Agreement, and (2) in the event that either party breaches any material obligation under this Agreement, or in the event any representation made by either party hereunder is untrue in any material respect, the other party shall have the right to terminate this Agreement under the terms provided herein, and recover damages or to secure the performance of such obligations as provided herein. The parties agree that the provisions herein constitute an adequate remedy for any breach of such obligation or any material untruth in any



such representation.

**Section 5.1.2 No Payment or Damages for PWSB Delay.**

If the Company shall claim to have sustained any damages or costs by reason of delays, extraordinary or otherwise, or hindrances which it claims to be due to any action, omission or direction of the PWSB, to the extent such delay is due to Uncontrollable Circumstances, the Company shall be entitled only to an extension of time and shall not have or assert any other claim, cause or action against the PWSB based on such delay or hindrance.

**Section 5.2 Events of Default by the Company.**

**Section 5.2.1.**

Due to the opportunity already given to cure or the seriousness of the Event of Default, each of the following shall constitute an Event of Default by the Company upon which the PWSB may terminate this Agreement without any requirement to provide notice or further opportunity to cure:

(1) Failure to comply with Applicable Law or the Performance Standards set forth in Schedule 1 hereto.

(2) Abandonment. The failure to operate or the abandonment of the Facility for a period of one (1) or more days in any Agreement Year.

(3) Failure to Pay or Credit. The failure of the Company to pay or credit amounts not in dispute (including non-compliance assessments) owed to the City or PWSB (excluding matters in dispute pursuant to Section 5.8 hereof) under this Agreement as and when such payments become due and owing.

(4) Failure to Provide, Extend or Replace Security. The failure of the Company to provide, extend or replace the Operations Bond or any Letter of Credit or other security acceptable in the sole discretion of PWSB when and if required by Section 8.3 hereof.

(5) Bankruptcy. The voluntary or involuntary filing by or against the Company of a petition seeking relief under the Federal Bankruptcy Code or any Federal or State statute intended to provide relief for entities that are insolvent or unable to meet their obligations as they come due.

(6) Failure to Perform Any Other Material Obligation. The failure of the Company to perform any material obligation hereunder, where said failure is caused by any job action, including, but not limited to, a labor strike or slow down, a work stoppage, a walkout, or a secondary boycott, by employees of the Company performing services pursuant to this Agreement.

**Section 5.2.2. Events of Default Requiring Notice and Cure Opportunity for Termination.**

It shall be an Event of Default by the Company upon which the PWSB may terminate this Agreement if the Company fails or refuses to perform any material obligation under this

Agreement (unless such failure or refusal is excused by an Uncontrollable Circumstance or PWSB Fault), including but not limited to the following specific Events of Default:

(1) Failure to comply with Applicable Law for five (5) cumulative days in any Agreement Year.

(2) Defaults of Company or Guarantor. The failure of the Company or any Guarantor (if applicable) to satisfy their respective covenants and agreements, the material untruth of any representation or warranty of the Company contained in this Agreement or of the Guarantor contained in the Guaranty Agreement, or the failure of the Company or the Guarantor to comply with the terms and conditions of Section 8.2 hereof

(3) Bankruptcy. The voluntary or involuntary filing by or against the Guarantor of a petition seeking relief under the Federal Bankruptcy Code or any Federal or State statute intended to provide relief for entities that are insolvent or unable to meet their obligations as they come due.

(4) If an Uncontrollable Circumstance shall occur relative to a material obligation of the Company and such Uncontrollable Circumstance or the effect thereof prevents performance of such material obligation for a period of thirty (30) or more days, the PWSB, upon notice to the Company, may, at its sole discretion, terminate the Agreement forthwith, notwithstanding that such Uncontrollable Circumstance may only be cured by the PWSB's procurement or implementation of a capital improvement, repair or construction which the PWSB determines, in its sole discretion, not to procure or implement. Such termination will be treated as a Termination for Convenience, except that the notice period shall be fifteen (15) days.

Notwithstanding the foregoing, no such failure or refusal to perform (other than those set forth in Section 5.2.1) shall constitute an Event of Default giving the PWSB the right to terminate this Agreement for cause under this Section unless:

(a) the PWSB has given prior written notice to the Company stating that a specified failure or refusal to perform exists which constitutes a material breach of this Agreement by the Company which gives the PWSB a right to terminate this Agreement for cause under this Section, unless such default is corrected within a reasonable time; and

(b) the Company has neither (i) challenged in an appropriate forum the PWSB's conclusion that such failure or refusal to perform has occurred or constitutes a material breach of this Agreement nor (ii) corrected or diligently taken steps to correct such default within a reasonable period of time, but not more than sixty (60) days, from receipt of the notice given pursuant to the preceding paragraph (but if the Company shall have diligently taken steps to correct such default within a reasonable period of time, the same shall not constitute an Event of Default for as long as the Company is diligently continuing to take such steps to correct such default).

**Section 5.2.3. Termination Damages and Other Legal Rights Upon Company Default.**

The right of termination provided under this Section upon an Event of Default by the

Company is not exclusive. Upon the occurrence of an Event of Default by the Company, the PWSB or the City may exercise, without prejudice to any other right held by the PWSB or the City, any rights provided by law to the PWSB or the City to bring appropriate legal action to recover actual damages for failure in the performance by the Company of its obligations pursuant to this Agreement for the remaining Agreement Term. No such termination or other exercise of legal rights shall affect the right of the PWSB or the City to exercise its rights under any Bonds.

**Section 5.2.4. Enforcement Costs.**

The Company agrees to pay to the PWSB all Fees and Costs incurred by or on behalf of the PWSB in enforcing payment or performance of the Company's obligations hereunder in any instance in which the PWSB is successful in such enforcement action by the PWSB.

**Section 5.3 Events of Default by the PWSB.**

**Section 5.3.1 Events of Default Not Requiring Notice of Cure Opportunity for Termination.**

The following shall constitute an Event of Default by the PWSB upon which the Company may terminate this Agreement without any requirement of notice or cure opportunity:

(a) Bankruptcy. The filing by the PWSB of a petition seeking relief under the Federal Bankruptcy Code or any Federal or State statute intended to provide relief for political subdivisions which are insolvent or unable to meet their obligations as they mature.

**Section 5.3.2 Events of Default Requiring Notice and Cure Opportunity for Termination.**

The following shall be an Event of Default by the PWSB upon which the Company may terminate this Agreement upon the conditions stated in (1) and (2) below:

(a) The PWSB fails or refuses to perform any material obligation under this Agreement (unless such failure or refusal is excused by an Uncontrollable Circumstance or Company Fault),

(b) The failure of the PWSB to pay undisputed amounts owed to the Company under this Agreement.

(1) the Company has given prior written notice to the PWSB stating that a specified failure or refusal to perform exists which shall, unless corrected, constitute a material breach of this Agreement on the part of the PWSB and which shall, in its opinion, give the Company a right to terminate this Agreement for cause under this Section unless such default is corrected within a reasonable period of time; and

(2) the PWSB has neither challenged in an appropriate forum the Company's conclusion that such failure or refusal to perform has occurred or constitutes a material breach of this Agreement nor corrected or diligently taken steps to correct such default within a reasonable period of time but not more than sixty (60) days from the date of the notice given pursuant to the

preceding paragraph (but if the PWSB shall have diligently taken steps to correct such default within a reasonable period of time, but in no event greater than sixty (60) days, the same shall not constitute an Event of Default for as long as the PWSB is continuing diligently to take such steps to correct such default).

### **Section 5.3.3 Termination Liquidated Damages During the Initial Term.**

If this Agreement is terminated by the Company for cause as a result of an Event of Default by the PWSB during the Initial Term (as defined in Section 7.1.1 hereof), the PWSB shall be obligated to pay the Company, as liquidated damages upon any such termination, the sum specified in Section 5.4 hereof which would be payable if this Agreement were terminated during the Initial Term, according to the year of termination, at the election of the PWSB for convenience and without cause. The parties agree that since the Company's actual damages upon termination of the PWSB for cause under this Section during the Initial Term would be difficult or impossible to ascertain, that the termination liquidated damages provided for in this Section are intended to place the Company in the same economic position it would have been in had the Event of Default permitting termination for cause during the Initial Term not occurred, and that such termination liquidated damages shall constitute the only damages payable by the PWSB upon any such termination for cause, regardless of legal theory.

### **Section 5.4 PWSB Discretionary Termination.**

#### **Section 5.4.1 Discretionary Termination Right.**

Commencing upon the fourth (4<sup>th</sup>) anniversary of the Commencement Date, the PWSB shall have the right to terminate this Agreement in its sole discretion, for its convenience and without cause at any time upon ninety (90) days' written notice to the Company (a "Termination for Convenience"), except that a Termination for Convenience may occur at any time if the PWSB terminates this Agreement for either of the following reasons: (1) funds for the operations, maintenance and management of the Facility are not appropriated or otherwise made available; or (2) an Uncontrollable Circumstance, regardless of the cause, shall have occurred relative to a material obligation of the Company hereunder, and said material obligation of the Company is not performed for a period of thirty (30) days following the initial occurrence of said Uncontrollable Circumstance; provided, however, that in the event of a Termination for Convenience for the reasons specified in (1) and (2) above, the PWSB may terminate this Agreement upon fifteen (15) days' written notice. The amount paid as liquidated damages for termination shall be \$[-----], if such termination occurs within the first four (4) years of the Term. Beginning in the fifth (5<sup>th</sup>) year of the term, the maximum amount for termination shall a sum that equals \$[-----], which amount shall decline by [-----]% each year during the remaining term of this Agreement, plus \$[-----] for demobilization-related costs, which demobilization-related costs amount shall not be subject to reduction.

#### **Section 5.4.2 Adequacy of Termination Payment.**

The Company agrees that the applicable termination payments provided in this Section constitute full and adequate compensation to the Company and all Subcontractors for all profits, costs, expenses, losses, liabilities, damages, taxes, and charges of any kind whatsoever (whether

foreseen or unforeseen) attributable to such termination of the Company's right to perform this Agreement.

### **Section 5.4.3 Completion or Continuance by the PWSB.**

After the date of any termination under this Section, the PWSB may at any time (but without any obligation to do so) take any and all actions necessary or desirable to continue the Operations Services so terminated, including, without limitation, entering into contracts with other contractors.

## **Section 5.5 Certain Obligations of the Company Upon Termination or Expiration.**

### **Section 5.5.1 Company Obligations Upon Termination.**

Upon a termination of the Company's right to perform this Agreement under Sections 5.2, 5.3 or 5.4 hereof or upon the expiration of this Agreement under Section 7.1 hereof, the Company shall, as applicable: (1) stop the Operation Services on the date and to the extent specified by the PWSB; (2) promptly take all action as necessary to protect and preserve all materials, equipment, tools, facilities and other City property; (3) promptly remove from the Site all equipment, implements, machinery, tools, temporary facilities of any kind and other property owned or leased by the Company, and repair any damage caused by such removal; (4) clean the Site and Facility, and leave the same in a neat and orderly condition; (5) promptly remove all employees of the Company and any Subcontractors and vacate the Site; (6) promptly deliver to the PWSB copies of any and all Subcontracts, together with a statement of: (a) the items ordered and not yet delivered pursuant to each agreement; (b) the expected delivery date of all such items; (c) the total cost of each agreement and the terms of payment; and (d) the estimated cost of canceling each agreement; (7) deliver to the PWSB promptly a list of: (a) all special order items previously delivered or fabricated by the Company or any Subcontractor but not yet incorporated in the Operation Services; and (b) all other supplies, materials, machinery, equipment, and other property previously delivered or fabricated by the Company or any Subcontractor but not yet incorporated in the Operation Services; (8) advise the PWSB promptly of any special circumstances which might limit or prohibit cancellation of any Subcontract; (9) unless the PWSB directs otherwise, terminate all Subcontracts and make no additional agreements with Subcontractors; (10) as directed by the PWSB, transfer to the PWSB or the City by appropriate instruments or title, and deliver to the Site (or such other place as the PWSB may specify), all special order items pursuant to this Agreement; (11) promptly transfer to the PWSB all warranties given by any manufacturer or Subcontractor with respect to particular components of the Operation Services; (12) notify the PWSB promptly in writing of any Legal Proceedings against the Company by any Subcontractor relating to the termination of the Operation Service (or any Subcontracts); (13) give written notice of termination, effective as of date of termination of this Agreement, promptly under each policy of Insurance (with a copy of each such notice to the PWSB), but permit the PWSB to continue such policies thereafter at its own expense, if possible; and (14) take such other actions, and execute such other documents as may be necessary to effectuate and confirm the foregoing matters, or as may be otherwise necessary or desirable to minimize the PWSB's costs, and take no action which shall increase any amount payable to the PWSB under this Agreement.

### **Section 5.5.2. Additional Obligations.**

Upon termination of the Company's right to perform this Agreement under Sections 5.2, 5.3 or 5.4 hereof or upon the expiration of this Agreement under Section 7.1 hereof, the Company at its cost and expense shall provide, and shall use its best reasonable efforts to cause its Subcontractors to provide, operational, systems, technological and design advice and support to the PWSB or any replacement operator designated by the PWSB. Such advice and support shall be for a period of twelve (12) months and shall include providing any existing plans, drawings, renderings, blueprints, operating manuals, maintenance and operating records (each as the same may exist as of the date of termination), or other information useful or necessary for the PWSB or any replacement operation designated by the PWSB or any such replacement operator to perform the Operation Services. If terminated during the Operation Period, the Company shall exercise its best efforts to maintain the performance of the Facility during the transfer to the PWSB.

### **Section 5.5.3. Company Payment of Certain Costs.**

If termination is pursuant to Section 5.2.1 or 8.2.2 hereof, the Company shall be obligated to pay the costs and expenses of undertaking its post-termination responsibilities under this Section. If the Company fails to comply with any obligations under this Section, the PWSB may perform such obligations and the Company shall pay on demand all reasonable costs thereof subject to receipt of invoices or other substantiation.

### **Section 5.5.4. PWSB Payment of Certain Costs.**

If termination occurs under any article except 8.2.1 or 8.2.2 hereof, the PWSB shall pay to the Company within sixty (60) days of the date of the Company's invoice supported by Cost Substantiation all reasonable costs and expenses incurred by the Company in satisfying the requirements of this Section, subject to the limitation set forth in Section 5.5.

### **Section 5.6 No Waivers.**

No action of the PWSB or Company pursuant to this Agreement (including, but not limited to, any investigation or payment), and no failure to act, shall constitute a waiver by either party of the other party's compliance with any term or provision of this Agreement. No course of dealing or delay by the PWSB or Company in exercising any right, power or remedy under this Agreement shall operate as a waiver thereof or otherwise prejudice such party's rights, powers and remedies. No single or partial exercise of (or failure to exercise) any right, power or remedy of the PWSB or Company under this Agreement shall preclude any other or further exercise thereof or the exercise of any other right, power or remedy.

### **Section 5.7 Consequential or Punitive Damages.**

Provided the raw quality and quantity provided by the PWSB to the treatment facility is within the specifications established herein and except as excused by Uncontrollable Circumstances, the Company will protect the Board, the PWSB and the City from any consequential or punitive damage claim or liability asserted by a third party resulting from the Company's failure to provide from the treatment Facility finished water of equivalent quantity and of such quality that meets all regulatory standards.

The Company will further provide coverage for consequential or punitive damages up to a \$250,000 per occurrence limit to protect the PWSB and the City from other third party liabilities which arise from the Company's actions or failure to act. For purposes hereof, the term "occurrence" is defined as each individual claim, counterclaim, crossclaim, indemnity claim, demand, cause of action, claim of obligation, liability or damage of any kind, name, nature or description made against the PWSB or the City. For purposes hereof, the term "occurrence" shall not be defined as or with respect to an individual instance of the Company's actions or failure to act which does not take into account the number of individual claims, counterclaims, crossclaims, indemnity claims, demands, cause of actions, claims of obligation, liabilities or damages of any kind, name, nature or description made against the PWSB or the City.

As between the PWSB, the City and the Company, the parties shall not be liable to each other for special, indirect, consequential or punitive damages except as such are brought by a third party and are subject to indemnification by virtue of Sections 4.4.1 or 4.4.2 of this Agreement.

### **Section 5.8 Dispute Resolution.**

To the extent the parties cannot, after good faith attempts, resolve any controversy or dispute that may have arisen hereunder, either party, to the extent its interests are adversely impacted, may refer the matter to mediation. If despite the good faith efforts of the parties to resolve the dispute, the mediation does not conclude with a resolution of the dispute, the parties shall follow the procedure set forth in Section 5.8.4 hereof.

The parties shall continue to perform services and make payments not in dispute under this Agreement, without interruption or slowdown, pending resolution of any dispute(s), unless the matter at issue precludes such continued activity until resolved. This section shall survive termination of this Agreement.

#### **Section 5.8.1 Negotiation.**

The PWSB and the Company agree, prior to invoking any other method of dispute resolution as provided in this Agreement, first to engage in good faith negotiations regarding any dispute. Either party may invoke good faith negotiations by written notice to the other, and, upon receipt of such written notice, said negotiations shall commence forthwith. If the dispute has not been resolved by mutual agreement within seven (7) calendar days of the commencement of negotiations, either party may refer the dispute to non-binding mediation as provided below.

#### **Section 5.8.2 Independent Panel Establishment.**

The parties agree to establish, within one hundred twenty (120) days after executing this Agreement, an Independent Panel of Engineers (the "Independent Panel") to conduct non-binding mediation of any disputes referred for mediation which the parties have been unable to resolve through good faith negotiation. The Independent Panel shall consist of three (3) members chosen by agreement of the PWSB and the Company. The Independent Panel shall consist of engineers or other persons with expertise and experience in the operation of private, public or municipal water treatment plants, or other similar type facilities, similar in size and complexity to the Facility.

### **Section 5.8.3 Independent Panel Mediation.**

In the event that any dispute cannot be resolved through negotiation, either party may invoke the services of the Independent Panel to conduct non-binding mediation of the dispute by (a) giving written notice to the other of its intent to invoke non-binding mediation before the Independent Panel, which notice shall include a brief but detailed description of the dispute, including the relief requested, and (b) providing a copy of such notice to the Independent Panel. Within seven (7) days of its receipt of the written notice, the Independent Panel shall designate one member to serve as a mediator in the dispute, and so notify the Parties. The member so designated shall fix a time and place for the non-binding mediation, which date shall not be later than fourteen (14) days from the date of the receipt of such notice, and shall give the parties at least five (5) business days written notice of the initial mediation session. The Independent Panel shall meet with the parties until either (a) the dispute is resolved or (b) the Independent Panel decides that further meetings will not likely result in a resolution by agreement. All costs and expenses incurred by the mediator in the performance of the mediator's duties and responsibilities shall be shared equally between the PWSB and the Company. If the dispute has not been resolved by non-binding mediation within forty-five (45) days of the written notice convening such non-binding mediation, either party may refer the dispute to binding arbitration as provided below.

### **Section 5.8.4 Binding Arbitration.**

All disputes arising out of or relating to this Agreement, which have not been resolved by negotiation or mediation as provided above, shall be decided by binding arbitration conducted in accordance with the Public Works Arbitration Act, R.I. Gen. Laws § 37-16-1, et seq. The demand for arbitration shall be filed in writing with the other party to this Agreement and with the American Arbitration Association. A demand for arbitration shall be made within a reasonable time after the dispute has arisen, and in no event shall it be made after the date when institution of legal or equitable proceedings would be barred by the applicable statute of limitations. The party filing a notice of demand for arbitration must assert in the demand all disputes then known to that party on which arbitration is permitted to be demanded. The award rendered by the arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

## **ARTICLE IX - REPRESENTATIONS AND WARRANTIES**

### **Section 6.1. Representations of the PWSB.**

The PWSB represents and warrants to the Company as follows:

#### **Section 6.1.1 Existence and Powers.**

The PWSB is a department of the City of Pawtucket, Rhode Island, duly authorized by the City to enter into and to perform its obligations under this Agreement.

#### **Section 6.1.2 Due Authorization and Binding Obligation.**

This Agreement has been duly authorized, executed and delivered by all necessary action



of the PWSB and constitutes a legal, valid and binding obligation of the City through the PWSB, enforceable against the City through the PWSB in accordance with its terms, except as the same may be limited by bankruptcy, insolvency or other similar laws affecting creditors' rights from time to time in effect.

**Section 6.1.3 No Conflict.**

Neither the execution nor delivery by the PWSB of this Agreement, nor the performance by the PWSB of its obligations in connection with the transactions contemplated hereby or the fulfillment by the PWSB of the terms or conditions hereof (1) conflicts with, violates or results in the breach of any constitution, law or governmental regulation applicable to the PWSB, or (2) conflicts with, violates or results in the breach of any term or condition of any order, judgment or decree, or any contract, agreement or instrument, to which the PWSB is a party or by which the PWSB or any of its properties or assets are bound, or constitutes a default under any of the foregoing.

**Section 6.1.4 No Approvals Required.**

Except for RIPUC/Rhode Island Division of Public Utilities for approval of financing arrangements and water rates to pay for the PWSB operational and capital costs, no approval, authorization, order or consent of, or declaration, registration or filing with, any Governmental Body or referendum of voters is required for the valid execution and delivery by the PWSB of this Agreement or the performance by the PWSB of its payment or other obligations hereunder except as the same have been disclosed to the Company and have been duly obtained or made.

**Section 6.1.5 No Litigation.**

There is no action, lawsuit or proceeding, at law or in equity, before or by any court or Governmental Body, or proceeding for referendum or other voter initiative, pending or, to the best of the PWSB's knowledge, threatened against the PWSB, which is likely to result in an unfavorable decision, ruling or finding which would materially and adversely affect the execution and delivery of this Agreement or the validity, legality or enforceability of this Agreement, or any other agreement or instrument entered into by the PWSB in connection with the transactions contemplated hereby, or which would materially and adversely affect the ability of the PWSB to perform its obligations hereunder or under any such other agreement or instrument.

**Section 6.1.6 No Implied Representations or Warranties.**

Except as expressly set forth in this Agreement, the PWSB shall not be deemed to have made and has not made (1) any representations or warranties, either express or implied, irrespective of any reviews or other action by the PWSB, or its representatives, with respect to the Site, (2) any representations or warranties as to compliance with, design, operation, fitness for use, condition or capacity, actual or design, of the Facility or any component thereof, or (3) any representations or warranties as to the suitability of the Facility for the purpose specified in this Agreement or for any other purpose specified in this Agreement or otherwise.

**Section 6.2 Representations and Warranties of the Company.**

The Company represents and warrants to the PWSB and the City as follows:

**Section 6.2.1 Existence and Powers.**

The Company is a corporation duly organized, validly existing and in good standing under the laws of the State of [-----] and has the authority to do business in the State of Rhode Island, with the full legal right, power and authority to enter into and perform its obligations under this Agreement.

**Section 6.2.2 Due Authorization and Binding Obligation.**

This Agreement has been duly authorized, executed and delivered by all necessary corporate action of the Company and constitutes a legal, valid and binding obligation of the Company, enforceable against the Company in accordance with its terms, except to the extent that its enforceability may be limited by bankruptcy, insolvency or other similar laws affecting creditors' rights from time to time in effect.

**Section 6.2.3 No Conflict.**

Neither the execution nor delivery by the Company of this Agreement nor the performance by the Company of its obligations in connection with the transactions contemplated hereby or the fulfillment by the Company of the terms or conditions hereof (1) conflicts with, violates or results in a breach of any constitution, law or governmental regulation applicable to the Company or (2) conflicts with, violates or results in a breach of any order, judgment or decree, or any contract, agreement or instrument to which the Company is a party or by which the Company or any of its properties or assets are bound, or constitutes a default under any of the foregoing.

**Section 6.2.4 No Approvals Required.**

No approval, authorization, order or consent, or declaration, registration or filing with any governmental authority is required for the valid execution and delivery of this Agreement by the company or the performance of its payment or other obligations hereunder except as the same have been disclosed to the PWSB and have been duly obtained or made.

**Section 6.2.5 No Litigation.**

There is no action, lawsuit or proceeding, a law or in equity, before or by any court or Governmental Body pending or, to the best of the Company's knowledge, threatened against the Company, which is likely to result in an unfavorable decision, ruling or finding which would materially and adversely affect the execution and delivery of this Agreement or the validity, legality or enforceability of this Agreement, or any other agreement or instrument entered into by the Company in connection with the transactions contemplated hereby, or which would materially and adversely affect the ability of the Company to perform its obligations hereunder or under any such other agreement or instrument.

**Section 6.2.6 Practicability of Performance.**

The Company assumes and shall have exclusive responsibility for the design and the

technology to be employed in the Facility, and for their efficacy. The Company (1) assumes the risk of the practicability and possibility of performance of the Facility in accordance with its obligations required hereunder, (2) assumes the risk of treating water through the operation of the Facility which meets all of the requirements hereof even though such performance and supply may involve technological or market breakthroughs or overcoming facts, events or circumstances which may be different from those assumed by the Company in entering into this Agreement, and (3) agrees that sufficient consideration for the assumption of such risks and duties is included in the Service Fee. The Company's warranties in this paragraph shall apply notwithstanding the occurrence of any Uncontrollable Circumstance.

### **Section 6.2.7 Adequacy of Price and Schedule.**

The Company has reviewed carefully all other documents forming part of this Agreement, as existing on the Agreement Date. Subject to the terms of this Agreement, the Company agrees that it can perform the operations, maintenance and management of the Facility in consideration of the Service Fee set forth in Schedule 11 hereto.

### **Section 6.2.8 Information Supplied by the Company.**

The information in this Agreement supplied by the Company is correct and complete in all material respects.

## **Section 6.3 Representations and Warranties Against Patent Infringement.**

### **Section 6.3.1 Patents and Licenses.**

The Company warrants that it owns, or is authorized to use under patent rights, licenses, franchises, trademarks, copyrights, or otherwise, the technology necessary for the performance by the Company of this Agreement and the transactions contemplated hereby, without any known material conflict with the rights of others.

### **Section 6.3.2 Warrant Against Infringement.**

The Company warrants that it shall pay all applicable royalties and license fees and shall at its own cost and expense defend, indemnify, save and hold harmless, and pay any and all awards of damages assessed against the PWSB from and against any and all damages, costs, claims, expenses, and liabilities including, without limitation, all fees and costs, on account of infringements of patents, copyrighted or uncopyrighted works, secret processes, trade secrets, patented or unpatented inventions, articles or appliances, or claims thereof pertaining to the Facility, or any part or operation thereof, combinations thereof, processes therein or the use of any tools or implements used by the Company, or its Subcontractors; provided, however, that the PWSB: (1) promptly upon receipt forwards to the Company any communication charging infringement; (2) promptly forwards to the Company all process, pleadings, and other papers served in any action charging infringement; and (3) gives the Company the opportunity to defend any such action which defense shall be at the Company's sole cost and expense.

### **Section 6.3.3 Preliminary Injunction.**

If in any suit or proceeding, a temporary restraining order or preliminary injunction is requested, the Company shall immediately retain counsel and shall use its best efforts, by giving a satisfactory bond or otherwise, to avoid the issuance of or alternatively to secure the release of the order or injunction.

#### **Section 6.3.4 Permanent Injunction.**

If in any suit or proceeding the Facility, or any part or combination thereof or process therein, is held to constitute an infringement and its use is permanently enjoined, the Company shall at once use its best efforts to secure for the PWSB and the Company a license, at the Company's expense, including payment of any fee or royalty related thereto, authorizing the continued use of the Facility, part thereof, or combination therein.

#### **Section 6.3.5 Replacement.**

If the Company is unable to secure such license within a reasonable time as determined by the PWSB, the Company shall, at its own expense, and without impairing any Performance Requirements for the operation of the Facility, cause the infringing portion of the Facility to be replaced with non-infringing components or parts or modify the same so that they become non-infringing.

#### **Section 6.4 Survival of Representations and Warranties.**

Notwithstanding any other provision of this Agreement, the representations, warranties and covenants in this Article IX are intended to and shall survive termination of this Agreement.

### **ARTICLE X - TERM**

#### **Section 7.1 Term of Agreement.**

##### **Section 7.1.1 Effective Date and Termination Rights.**

This Agreement shall become effective on the Agreement Date, and shall continue in effect for ten (10) years following the Commencement Date (the "Initial Term") unless (1) if renewed at the option of the PWSB as provided in Section 7.2 hereof, this Agreement shall remain effective until the last day of any applicable renewal term (the "Renewal Term"; the Initial Term and any Renewal Term being referred to herein collectively as the "Term" or the "Agreement Term"), or (2) if earlier terminated pursuant to the termination provisions of Article VIII hereof, in which event the Term shall be deemed to have ended as of the date of such termination.

##### **Section 7.1.2 Survival of Certain Provisions.**

All representations and warranties of the parties contained in Article IX and such other provisions of this Agreement that expressly so provide, are intended to and shall survive the termination of this Agreement, and no such termination of this Agreement shall limit or otherwise affect the respective rights and obligations of the parties hereto accrued prior to the date of such termination.

## **Section 7.2    Renewal.**

The PWSB and the City shall have the option to renew this Agreement for two additional periods, each of five (5) years. If the PWSB and the City determine that they wish to renew this Agreement pursuant to this Section, the PWSB shall give the Company written notice of the PWSB's irrevocable election to renew this Agreement on or before one hundred eighty (180) days preceding the last day of the Initial Term hereof or the then effective Renewal Term hereof. If the PWSB so elects to renew this Agreement, such renewal shall be on the same terms and conditions as are applicable during the Initial Term hereof. However, the Company may terminate this Agreement at the expiration of the Initial Term only if, following request by the Company, the PWSB does not permit a reconsideration and adjustment, if warranted, of the amount of the Service Fee, based upon documented evidence, over a minimum of the previous five (5) years of the Initial Term, presented by the Company in support of such request for reconsideration.

## **Section 7.3    Review at Expiration of Agreement.**

Prior to the final Agreement Year, the Company and the PWSB shall mutually select an independent, technically qualified firm (the "Auditor") to perform an audit of the Facility to determine the condition of the Facility. The cost of the services provided by the Auditor shall be divided equally between the Company and the PWSB.

The Auditor will conduct a detailed and comprehensive survey and inspection of the Facility, including but not limited to, all Equipment, buildings, structures, pavements, grounds, utility lines, spare parts inventories, operation and maintenance records, to identify the physical and operational conditions and general status of repair of the Facility. The Auditor will prepare a detailed report documenting the findings of the survey and inspection during the first six (6) months of the final Agreement Year (the "Auditor's Report"). The Auditor's Report will include, but not be limited to, the following: an assessment of the current condition of each item or component, its estimated remaining service life, and whether its current condition is consistent with the maintenance and general upkeep requirements of this Agreement and expected normal wear and tear. An estimated cost, including a reasonable contingency allowance which will vary depending on the nature of the work required, for repair, renewal or replacement, as appropriate, will be included in the Auditor's Report for each item or component that is judged to be deficient by the Auditor.

The Auditor will provide a draft of the Auditor's Report to the PWSB and the Company for their respective review and comments. In the case of any disagreement between the PWSB and the Company as to the appraised condition of items or portions of the Facility, or the estimated cost for repair, renewal or replacement, the Auditor's determination will be final and binding upon both parties.

Also upon the expiration or any other termination of this Agreement, the Company will provide the PWSB with the license and maintenance agreements for the CMMS Software and the fully populated data base and maintenance plan and history. If the Company elects to use a proprietary program, it will transfer the asset data base, maintenance history and work plans to an off-the-shelf CMMS Software application that is then provided to the PWSB at no cost to the

PWSB. The failure to comply with this requirement will result in a non-compliance assessment of \$10,000.

## ARTICLE XI - MISCELLANEOUS

### **Section 8.1 Limited Recourse to PWSB or City.**

#### **Section 8.1.1 No Recourse to General Fund.**

No recourse shall be had to the general fund or general credit of the PWSB or the City for the payment of any amount due the Company hereunder, whether on account of the Service Fee, any Indemnity payment, or for any Loss-and-Expense or payment or claim of any nature arising from the performance or non-performance of the PWSB's obligations hereunder. The sole recourse of the Company for all such amounts shall be to the funds held in the PWSB's Enterprise Fund. All amounts held in the Enterprise Fund shall be held for the uses permitted thereby, and no such amounts shall constitute property of the Company.

#### **Section 8.1.2 Enforcement of Collections.**

The PWSB will use reasonable efforts to enforce its right to receive the System Revenues and will use reasonable efforts to enforce and collect the fees, rates and charges as contemplated in this Section. The PWSB shall, so long as this Agreement is in full force and effect, take all lawful action necessary or required, as determined in its sole discretion, to continue to entitle the PWSB to receive the System Revenues in an amount sufficient to satisfy its payment obligations hereunder.

### **Section 8.2 Company Business Activities and Guarantor Credit Standing.**

#### **Section 8.2.1 Company Business.**

The Company is presently a firm engaged in, among other areas of business, engineering, environmental services, and the operation, maintenance and management of public drinking water treatment facilities.

#### **Section 8.2.2 Guaranty Agreement.**

During the Agreement Term, the Company shall cause to be provided and maintained the Guaranty Agreement, substantially in the form attached hereto as Exhibit B.

#### **Section 8.2.3 Material Decline in Guarantor's Credit Standing.**

For purposes of this Section, a "Material Decline in Guarantor's Credit Standing" shall be deemed to have occurred if (1) in the event that the Guarantor has long-term senior debt outstanding which has a credit rating by either Rating Service; such rating by both Rating Services is established at or is reduced below investment grade level, or (2) in the event that the Guarantor does not have long-term senior debt outstanding or such debt is not rated by either Rating Service, the credit standing of the Guarantor declines to a level which is insufficient to support an

investment grade credit rating by either Rating Service on long-term senior debt of the Guarantor, whether or not any such debt is outstanding. The Company immediately shall notify the PWSB of any Material Decline in the Guarantor's Credit Standing.

**Section 8.2.4 Credit Enhancement.**

If, at any time, a Material Decline in Guarantor's Credit Standing occurs, the Company shall cause to be provided credit enhancement of its obligations hereunder within thirty (30) days after such occurrence. Such credit enhancement shall be in the form either of (1) an unconditional guaranty of all of the Company's obligations hereunder provided by a corporation or financial institution whose long-term senior debt is or would be rated investment grade by either Rating Service (the "Unconditional Guaranty"), or (2) a letter of credit securing the Company's obligations hereunder in the face amount of Five Million Dollars (\$5,000,000), provided by a financial institution whose long-term senior debt is or would be rated investment grade by either Rating Service (the "Letter of Credit"). Such Letter of Credit shall be maintained until the Guarantor's credit standing has been restored. In accordance with New York Insurance Regulations, this requirement for credit enhancement shall not be an obligation secured under the Operations Bond. Failure of the Company to provide such credit enhancement shall not be a cause for a claim under the Operations Bond. However, should the Company fail to provide such credit enhancement, the Company shall pay to the PWSB a daily delay non-compliance assessment in the amount of \$1,000 each day, commencing on the date that is sixty (60) days from the date of occurrence of such Material Decline in Guarantor's Credit Standing until the date that such credit enhancement is provided, or the date upon which Guarantor's credit standing has been restored.

**Section 8.2.5 [RESERVED]**

**Section 8.2.6 Annual Financial Reports.**

The Company shall furnish the PWSB, within ninety (90) days after the end of each Agreement Year, consolidated balance sheets and income statements for the Guarantor (which shall include the respective statements of the Company) attached to the Guarantor's audited year-end financial statements reported upon by the independent public accountant. To the extent not publicly available on the internet at [www.-----.com](http://www.-----.com), the Company shall also furnish the PWSB with copies of the quarterly and annual reports and other filings of the Guarantor filed with the Securities and Exchange Commission.

**Section 8.3. Financial Security for the Performance of the Company's Obligations.**

**Section 8.3.1 Operations Bond.**

The Company shall provide an Operations Bond issued by a surety reasonably acceptable to the PWSB as security for performance of its obligations hereunder during the Operation Period (the "Operations Bond"). The Operations Bond shall be in the amount of one hundred fifty percent (150%) of the Annual Service Fee plus pass-through costs at the time it is issued, shall be for a term of one (1) year, shall be continuously renewed, extended or replaced throughout the term of the Operations Period, or for as long as required by the PWSB, and shall be issued substantially in the form specified at Exhibit D. Failure to renew the annual performance bond or provide alternate

security acceptable to the PWSB shall be an event of default by the Company and constitute cause for termination under the provisions of this Agreement. However, neither the non-renewal of the Operations Bond by the surety nor the failure of the Company to provide a replacement Operations Bond shall constitute a loss to the PWSB or City recoverable under the Operations Bond or any renewal thereof.

### **Section 8.3.2 Operation Period Letter of Credit.**

Upon the occurrence of one or more of the following conditions:

- (1) Any Event of Default specified in Section 5.2;
- (2) The failure or refusal promptly to cure any Event of Default specified in Section 5.2.1; or
- (3) Continued and repeated material events of non-compliance with the Performance Requirements of Schedule 1 hereto;

then the Company shall provide a letter of credit in the stated amount of 150% of the then-established annual Service Fee, including pass through costs, and shall be annually adjusted thereafter by the annual Inflation Index adjustment as determined in Section 3.10.2. Such letter of credit shall be issued by a bank whose long-term debt is rated "A" or better by either Rating Service (the "Operation Period Letter of Credit"). The Operation Period Letter of Credit shall be for a term of one (1) year, shall be continuously renewed, extended or replaced so that it remains in effect for the entire Term of this Agreement, or such shorter period of time as determined by the PWSB, in its sole discretion, and shall be issued in form and substance acceptable to the PWSB. The PWSB shall be authorized under the Operation Period Letter of Credit to make one or more sight drawings thereon upon certification to the issuing bank of the Company's failure to pay any amounts due and owing under this Agreement when and as due as the result of an Event of Default by the Company. The Operation Period Letter of Credit shall permit a drawing thereon in the full stated amount thereof in the event that any required renewal, extension or replacement thereof is not made prior to thirty (30) days of its expiration. Such Letter of Credit shall serve as a security for the performance of the Company's obligations hereunder, and the stated amount thereof shall in no way limit the amount of damages to which the PWSB may be entitled for any Company Event of Default.

### **Section 8.4 Relationship of the Parties.**

The Company is an independent contractor of the PWSB and the relationship between the parties shall be limited to the performance of this Agreement in accordance with its terms. Neither party shall have any responsibility with respect to the services to be provided or contractual benefits assumed by the other party. Nothing in this Agreement shall be deemed to constitute either party a partner, agent or legal representative of the other party. Except as otherwise provided herein, no liability or benefits, such as workers' compensation, pension rights or liabilities, or other provisions or liabilities arising out of or related to a contract for hire or employer/employee relationship shall arise or accrue to any party's agent or employee as a result of this Agreement or the performance.



## **Section 8.5 Property Rights.**

The Company shall pay all royalties and license fees relating to the operation and maintenance of the Facility. The Company shall indemnify and hold harmless the PWSB and the PWSB Indemnities from and against all Loss and Expense, and shall defend the PWSB and the PWSB Indemnities in any suit, including appeals, arising out of or related to infringement of such patent, trademark or copyright relating to, or for the unauthorized use of trade secrets by reason of the operation and maintenance of the Facility, or at its option, shall acquire the rights of use under infringed patents, or modify or replace infringing equipment with equipment equivalent in quality, performance, useful life and technical characteristics and development so that such equipment does not so infringe. The Company shall not, however, be required to reimburse or indemnify any person for any Loss-and-Expense due to the negligent or willful conduct of such person. The provisions of this Section shall survive any expiration or termination of this Agreement.

## **Section 8.6 Interest on Overdue Obligations.**

Except as otherwise provided herein, all amounts due hereunder, whether as damages, credits, revenue, charges or reimbursements, that are not paid when due shall bear interest at the rate of interest which is the lower of (1) the maximum rate permitted by the law of the State or (2) 18%, on the amount outstanding from time to time, on the basis of a 365-day year, counting the actual number of days elapsed, and such interest accrued at any time, to the extent permitted by law, shall be deemed added to the amount due as accrued.

## **Section 8.7 No Discrimination.**

During the performance of this Agreement, the Company agrees that it will comply with all applicable anti-discrimination statutes, ordinances and regulations.

## **Section 8.8 Subcontractors.**

### **Section 8.8.1 Limited Review and Approval.**

The PWSB shall have the right, to the extent provided below in this Section, to approve Subcontractors engaged for the Operation Services at the Facility, except: (1) Affiliates of the Company, (2) equipment suppliers, (3) Subcontractors the common stock of which is publicly traded on a national exchange or over-the-counter, (4) Governmental Bodies and (5) Subcontractor(s) required for emergency response. At least 10 days prior to subcontracting with any Subcontractor, the Company shall furnish the PWSB written notice of its intention to engage such Subcontractors, together with all information requested by or otherwise available to the Company pertaining to the proposed Subcontractor and subcontract in the following areas: (a) any conflicts of interest, (b) any record of felony criminal convictions or pending felony criminal investigations, (c) any final judicial or administrative finding or adjudication of illegal employment discrimination, (d) any unpaid State, City or local taxes, and (e) any final judicial or administrative findings or adjudication of non-performance in contracts. In the event the PWSB fails to respond to any such notice of intention within ten (10) business days of receipt thereof, the PWSB shall be deemed to have approved the proposed Subcontractor. The approval or withholding thereof by the PWSB of any proposed Subcontractor shall not create any liability of the PWSB to the Company,

to third parties or otherwise. In no event shall any Subcontract be awarded to any person debarred, suspended or disqualified from State, or City contracting for any services. In the event of an emergency, the PWSB may waive the requirements of this Section 8.8.1.

**Section 8.8.2 Indemnity for Subcontractor Claims.**

No Subcontractor shall have any right against the PWSB for labor, services, materials or equipment furnished for the Operation Services. The Company acknowledges that its indemnity obligations under Section 4.4 hereof shall extend to all claims for payment or damages by any Subcontractor who furnishes or claims to have furnished any labor, services, materials or equipment in connection with the Operation Services.

**Section 8.9 Actions of the PWSB in its Governmental Capacity.**

**Section 8.9.1 Rights as Government Not Limited.**

Nothing in this Agreement shall be interpreted as limiting the rights and obligations of the PWSB in its governmental or regulatory capacity, or as limiting the right of the Company to bring any action against the PWSB, not based on this Agreement, arising out of any act or omission of the PWSB in its governmental or regulatory capacity.

**Section 8.9.2 No City Obligation to Issue Legal Entitlements.**

Notwithstanding any other provision of this Agreement, neither the PWSB nor the City shall be obligated in any manner to issue or approve any Legal Entitlement required with respect to the Facility, nor shall the PWSB or the City be deemed to be in breach or default hereunder as a result of any delay or failure in the issuance or approval of any such Legal Entitlement. The PWSB and the City retain all issuance and approval rights the PWSB and the City may have under Applicable Law with respect to such Legal Entitlements, and none of such rights shall be deemed to be waived, modified or amended as a consequence of the execution of this Agreement.

**Section 8.10 Assignment.**

**Section 8.10.1 By the Company.**

The Company shall not assign, transfer, convey, lease, encumber or otherwise dispose of this Agreement, its right to execute the same, or its right, title or interest in all or any part of this Agreement whatsoever to another entity without the prior written consent of the PWSB, in the PWSB's sole discretion. Any such approval given in one instance shall not relieve the Company of its obligation to obtain the prior written approval of the PWSB to any further assignment. Any such assignment shall require the assignee of the Company to assume the performance of and observe all obligations, representations and warranties of the Company under this Agreement, and no such assignment shall relieve the Guarantor of any of its obligations under the Guaranty, which shall remain in full force and effect during the Agreement Term. The approval of any assignment, transfer or conveyance shall not operate to release the Company in any way from any of its obligations under this Agreement unless such approval specifically provides otherwise. The following shall constitute an assignment for purposes hereof: (i) the sale, lease, or other disposal

of all or substantially all of the Company's assets to any other person, firm, corporation or association, or (ii) the entry by the Company into any agreement to any such effect. No purported assignment shall be valid absent the City's approval, and any such attempted assignment shall fail, be invalid and void and shall constitute a breach of this Agreement.

**Section 8.10.2 By the PWSB.**

The PWSB may not assign its rights or obligations under this Agreement without the prior written consent of the Company, except that the PWSB may assign its rights and obligations under this Agreement, without the consent of the Company, to another public or quasi-public entity if such entity is legally and financially capable of discharging the duties and obligations of the PWSB hereunder.

**Section 8.11 Amendment.**

This Agreement may not be amended, except by a written agreement signed by the parties. This Agreement shall not be amended in such a way as to make any current or future tax-exempt financing of this Agreement taxable.

**Section 8.12 No Other Agreements.**

All negotiations, proposals and agreements prior to the date of this Agreement are merged herein and superseded hereby, there being no agreements or understandings other than those written or specified herein, unless otherwise provided. This Agreement, including all Schedules and Exhibits attached hereto, constitutes the entire Agreement between the PWSB and the Company with respect to the management, operation and maintenance of the Facility. No obligation or covenant of good faith or fair dealing shall be implied or interpreted as conferring upon either party any right, duty, obligation or benefit other than as expressly set forth herein, notwithstanding the fact that certain terms and conditions hereof may give either party discretion in the manner of performance under this Agreement.

**Section 8.13 Notices.**

All notices, demands, requests and other communications hereunder shall be deemed sufficient and properly given if in writing and delivered in person to the following addresses or sent by first class mail and email, to such addresses:

- (a) If to the PWSB:                    James L. DeCelles  
    General Manager and Chief Engineer  
    Pawtucket Water Supply Board  
    85 Branch Street  
    Pawtucket, RI 02860  
    Phone:                    401-729-5001  
    Email:                    [decelles@pwsb.org](mailto:decelles@pwsb.org)

(b) If to the Company: [-----]

Telephone:

Email:

Either party may, by like notice, designate further or different addresses to which subsequent notices shall be sent. Any notice hereunder signed on behalf of the notifying party by a duly authorized attorney at law shall be valid and effective to the same extent as if signed on behalf of such party by a duly authorized officer or employee. Notices and communications given by mail hereunder shall be deemed to have been given five (5) days after the date of dispatch; all other notices shall be deemed to have been given upon receipt.

**Section 8.14 Binding Effect.**

This Agreement shall bind and inure to the benefit of and shall be binding upon the PWSB, the City and the Company and any assignee acquiring an interest hereunder consistent with Section 8.10.

**Section 8.15 Consent to Jurisdiction.**

THE COMPANY IRREVOCABLY (1) AGREES THAT ANY LEGAL PROCEEDING ARISING OUT OF THIS AGREEMENT NOT SUBJECT TO THE DISPUTE RESOLUTION PROCEDURES SET FORTH ABOVE SHALL BE BROUGHT IN THE STATE OR FEDERAL COURTS IN PROVIDENCE COUNTY, RHODE ISLAND, (2) CONSENTS TO THE JURISDICTION OF SUCH COURTS IN ANY SUCH SUIT, (3) WAIVES ANY OBJECTION WHICH IT MAY HAVE TO THE LAYING OF THE JURISDICTION OF ANY LEGAL PROCEEDING, AND (4) WAIVES ITS RIGHT TO A TRIAL BY JURY IN ANY LEGAL PROCEEDING IN ANY OF SUCH COURTS.

**Section 8.16 Further Assurances.**

The PWSB and the Company each agree to execute and deliver such further instruments and to perform any acts that may be necessary or reasonably requested in order to give full effect to this Agreement. The PWSB and the Company each agree, in order to carry out this Agreement, to use all reasonable efforts to provide such information, execute such further instruments and documents and take such actions as may be reasonably requested by the other and not inconsistent with the provisions of this Agreement and not involving the assumption of obligations or liabilities different from or in excess of or in addition to those expressly provided for herein.

**Section 8.17 Counterparts.**

This Agreement may be executed in any number of original counterparts. All such counterparts shall constitute one and the same document.

**Section 8.18 Governing Law.**

This Agreement shall be governed by and construed in accordance with the laws of the State of Rhode Island.

**Section 8.19 Headings.**

The Table of Contents and any heading preceding the text of Articles, Sections and Sections of this Agreement shall be solely for convenience of reference and shall not constitute a part of this Agreement, nor shall they affect its meaning, construction or effect.

**Section 8.20 Days.**

All references to days herein are references to calendar days, unless otherwise specified in this Agreement.

**[The remainder of this page is intentionally left blank]**

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their duly authorized representatives as of the day and year first above written.

CITY OF PAWTUCKET

By: \_\_\_\_\_  
Name (Print): \_\_\_\_\_  
Its duly authorized \_\_\_\_\_

PAWTUCKET WATER SUPPLY BOARD

By: \_\_\_\_\_  
Name (Print): \_\_\_\_\_  
Its duly authorized \_\_\_\_\_

By: \_\_\_\_\_  
Name (Print): \_\_\_\_\_  
Its duly authorized \_\_\_\_\_

[-----]

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

Name (Print): \_\_\_\_\_

Its duly authorized \_\_\_\_\_

EXHIBIT A

DESCRIPTION OF CITY OF PAWTUCKET WATER TREATMENT SYSTEM



EXHIBIT B

GUARANTY [IF APPLICABLE]

EXHIBIT C  
COMPANY PROPOSAL

EXHIBIT D

FORM OF OPERATIONS BOND