

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)
Cleveland Thermal Chilled Water)
Distribution, LLC for Approval of a) Case No. 19-1321-CC-AEC
Chilled Water Distribution Agreement)
with Sphere Apartments, LP)

APPLICATION

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JUNE 13, 2019

**ATTORNEYS FOR CLEVELAND THERMAL CHILLED
WATER DISTRIBUTION, LLC**

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APPLICATION

Pursuant to R.C. 4905.31, Cleveland Thermal Chilled Water Distribution, LLC ("Cleveland Thermal") submits a Chilled Water Distribution Agreement ("Agreement") for the Public Utilities Commission of Ohio's ("Commission") review and approval.

In support of this Application, Cleveland Thermal states that:

1) Cleveland Thermal is a public utility and a cooling company pursuant to R.C. 4905.03(H), providing chilled water service to consumers in Cleveland, Ohio, and is subject to the jurisdiction of this Commission.

2) This Application seeks approval of a special contractual arrangement with accompanying attachments that would permit Cleveland Thermal to provide chilled water distribution service to Sphere Apartments, LP ("Customer") at 1801 East 12th Street, Cleveland, Ohio 44114. The redacted Agreement is attached hereto as Exhibit A. An unredacted version of page 17 of the Agreement is being filed under seal.

3) The provision of chilled water distribution service by Cleveland Thermal to Customer shall not impair or reduce the quality of service to other Cleveland Thermal customers.

Through the Agreement, Cleveland Thermal and Customer have agreed to provisions regarding the termination of this arrangement. Cleveland Thermal and Customer both seek the Commission's approval to make the Agreement's termination provisions operable without obtaining any Commission approval that may be required prior to ending this special arrangement.

WHEREFORE, Cleveland Thermal respectfully requests the Commission to approve the Chilled Water Distribution Agreement between Cleveland Thermal and Customer.

Respectfully submitted,

/s/ Frank P. Darr

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**ATTORNEYS FOR CLEVELAND THERMAL CHILLED
WATER DISTRIBUTION, LLC**

EXHIBIT A

CHILLED WATER DISTRIBUTION AGREEMENT

BY AND BETWEEN

CLEVELAND THERMAL CHILLED WATER DISTRIBUTION, LLC

AND

SPHERE APARTMENTS, LP

**CHILLED WATER DISTRIBUTION AGREEMENT
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CHILLED WATER DISTRIBUTION AGREEMENT

This Chilled Water Distribution Agreement (hereinafter, the *Agreement*) is entered into as of the 1st day of January, 2019 (*Effective Date*), between **Sphere Apartments, LP**, located at 1801 East 12th Street, Cleveland, Ohio 44114, (hereinafter, the *Customer*) and **CLEVELAND THERMAL CHILLED WATER DISTRIBUTION, LLC**, located at 1921 Hamilton Avenue, Cleveland, Ohio 44114 (hereinafter, the *Company*).

WHEREAS, Company is a district energy company engaged in the business of distributing chilled water to owners of buildings located in certain areas of the City of Cleveland, Ohio (hereinafter, the *City*) in accordance with reasonable arrangements or otherwise applicable tariff schedules (*Tariff*) filed with the Public Utilities Commission of Ohio (hereinafter, *PUCO*);

WHEREAS, Customer desires that Company obtain for and distribute processed chilled water to Customer to meet Customer's air conditioning and other cooling energy needs for the Building for a period of ten years;

WHEREAS, Company and Customer have agreed to terms and conditions that will permit Customer to take chilled water from Company pursuant to the terms and conditions of this agreement;

NOW THEREFORE, in consideration of the mutual promises hereinafter set forth, and subject to the terms and provisions hereof, Company and Customer agree as follows:

1. GENERAL PERFORMANCE OBLIGATIONS

- A. Subject to the more specific identification of Customer's requirements set forth herein, Company shall obtain for and distribute to Customer and Customer shall receive from Company's existing distribution system and at the *Point of Delivery* (as specified in accordance with this Agreement) the total chilled water and cooling requirements of the building or premises identified on Appendix A attached hereto and incorporated herein by reference (hereinafter, the *Building*). Company shall also receive returned water from Customer at the *Point of Delivery* pursuant to this Agreement. However, this Agreement does not obligate Company to provide uninterrupted service to Customer and Customer acknowledges, by executing this Agreement, that Customer's service may be interrupted or discontinued by Company when Company cannot maintain service through commercially reasonable measures. In the event that Company cannot provide continuous chilled water distribution service to Customer in accordance with the terms and conditions of this Agreement for a period exceeding twenty-four (24) hours, Company shall make a pro rata adjustment to Customer's chilled water service charges described below based on the amount of time such service was not provided during the applicable Billing Period (as defined below). Company shall also provide Customer with periodic invoices stating the charges Customer owes Company for service provided under this Agreement and, notwithstanding any other provision in this Agreement, Company may discontinue service under this Agreement in the event that Customer has not made full payment for any Billing Period invoice within the period specified in Paragraph 5.A below. Company shall furnish, install, own and maintain, at its expense, isolation valves and such metering equipment as it deems appropriate to measure the chilled water distributed to Customer and water returned to Company by Customer.
- B. Customer shall be responsible for all provisions of Sections 1 through 17, inclusive, of Company's Tariff (except to the extent inconsistent with the provisions of this Agreement), including all amendments, supplements and replacements of any thereof, in addition to the terms and conditions of this Agreement. Customer shall pay all future costs from the date of this Agreement for connecting the Building to Company's distribution mains and shall use commercially reasonable efforts to receive chilled water from Company's distribution system for the Building, return water in sufficient quantity and without abnormal loss to Company, meet the conditions established by Company to receive chilled water distribution service from Company and timely pay Company for service provided pursuant to this Agreement. Upon Company's request and at no cost to Company, Customer shall provide adequate space and any interest in real property suitable to Company on Customer's property and within the Building to permit Company to meet its initial and ongoing service obligations under this Agreement or otherwise and shall allow Company reasonable access thereto at all times upon request by Company. By executing this Agreement, Customer authorizes Customer's property manager, any Building manager or such other person that may have the ability to do so, to permit Company to enter the Building for the purpose of performing this Agreement. By executing this Agreement, Customer acknowledges that it is solely responsible for establishing and maintaining such facilities, pumps and other equipment as may be required to redistribute chilled water within the Building and to install and operate such equipment, plant and facilities as may reasonably be necessary to avoid the actions or inactions of Customer and occupants of the Building from negatively affecting Company's ability to safely and adequately meet the needs of its other customers. Upon request, Customer shall furnish Company with information that is sufficient to demonstrate that Customer has installed plant, facilities, and equipment and implemented operating procedures to avoid imposing overpressure or pressure-related shocks on Company's distribution system. Beyond such chilled water redistribution as Customer may need to perform to meet the chilled water needs within the Building, Customer shall not redistribute chilled water, with or without a charge to the receiving party, for any other purpose without prior written consent of Company. By executing this Agreement, Customer agrees that the temperature at which Customer returns water to Company's distribution system has a significant effect on Company's ability to effectively distribute chilled water to Customer and Company's other customers and that Customer shall install and operate such Building equipment and facilities as may reasonably be required to keep the temperature of water returned to Company's distribution system within the range specified herein. Unless otherwise specifically agreed to by Company, Customer shall design, own, construct, install, operate and maintain, at its own expense, piping

necessary to receive chilled water from Company at the Point of Delivery and all cooling equipment, including but not limited to pumps, valves, insulation, gauges, and controls necessary to return water to Company at the Point of Delivery within the temperature range specified herein. Customer shall not cause any additive, chemical, or other such item to enter Company's chilled water system or otherwise affect the chemical content of the chilled water received from or returned to the Company.

- C. Each party shall, respectively, design, construct, operate and maintain its plant, facilities, equipment and piping in an efficient, safe and reliable manner so that the purpose of this Agreement may be fulfilled. Prior to commencing service under this Agreement and throughout the Term, as defined below, Company shall have the right, but not the duty, to inspect, review and approve the connection of Customer's equipment and piping to Company's chilled water distribution system. Company's right of inspection shall in no way impose a duty or liability on Company with respect to the lawful, safe or proper operation of Customer's equipment and piping. By executing this Agreement, Customer represents to Company that it is not relying upon Company's expertise or knowledge in connection with the design or operation of Customer's equipment and the redistribution or use of chilled water within the Building. Notwithstanding the foregoing, from and after the Effective Date, Company shall cooperate with Customer, as reasonably requested, in providing information related to Company's facilities which will facilitate the design, construction and installation of the Building's piping and equipment and connection thereof to Company's mains.
 - D. Throughout the Term, the utility chilled water service provided by Company shall be the sole source of Customer's air conditioning and cooling energy requirements for the Building and the sole source of chilled water service to the Building.
2. **TERM OF AGREEMENT AND EARLY TERMINATION**
- A. The term of this Agreement (the *Term*) shall commence on the Effective Date and shall terminate on the termination date set forth in Appendix B, attached hereto and incorporated herein by reference, unless sooner terminated pursuant to the provisions hereof.
 - B. Customer may cancel or terminate this Agreement prior to the end of the Term only as set forth in Appendix B.
 - C. Company may terminate this Agreement upon forty-five (45) days prior written notice to Customer in the event of any default by Customer which default continues for a period of more than forty-five (45) days following a written demand by Company to cure such default. Any cure right that Customer may have pursuant to this Paragraph shall not extend to any default that arises as a result of Customer's failure to make timely payment. In such event, Customer shall pay to Company a cancellation charge equal to the sum of: (1) the Distribution Capacity Charge (as defined below) in effect at the time of the written notice multiplied by the Contract Capacity (as defined below) then in effect and the number of months remaining under the Term of the Agreement; (2) an amount equal to all amounts, if any, due with respect to unamortized costs from the date of termination to the end of the amortization period as shown on any then current Schedule, as defined below, with interest thereon as may be set forth in the Schedule or as otherwise determined by Company; and (3) all costs incurred by Company in disconnecting the Building from Company's chilled water distribution system. This cancellation charge shall be in addition to any other damages incurred by Company as a result of Customer's default. Company reserves the right to seek damages from Customer to compensate Company for all losses, damages, costs and expenses, including reasonable attorneys' fees and lost profits, suffered by Company as a result of Customer's breach of this Agreement. In lieu of terminating the Agreement upon a default by Customer, Company shall have the right, and may elect, in its sole discretion, to discontinue or suspend service to Customer and the Building upon the giving of such notice as may then be required by law (or upon fifteen (15) days prior written notice if no notice is then required by law and so long as Customer remains in default). In the event that Company suspends or discontinues service pursuant to this Paragraph, Company reserves the right to seek damages from Customer to compensate Company for all losses, costs, damages and expenses, including reasonable attorneys' fees and lost profits, suffered by Company as a result of Customer's default.
 - D. In the event of any suspension or discontinuance of service or cancellation of the Agreement, (1) pursuant to Paragraph C above, or (2) by Customer pursuant to any right under Appendix B, or (3) as a result of the end of the Term, Company shall discontinue providing chilled water and distribution services hereunder, and Customer shall provide Company with such access to

Customer's Building and property as Company may reasonably request to remove Company's plant, equipment, facilities and piping. Customer's obligation to provide Company with such access for the purpose of removing such equipment and piping shall survive the termination of this Agreement for so long as Company may reasonably require to remove such equipment and piping. When chilled water service to the Building has been disconnected for any reason covered by Paragraph C above, a reconnection charge of Two Hundred Fifty Dollars (\$250.00) plus the actual labor and materials cost to reconnect will be required if the former Customer requests reconnection, but Company shall be under no obligation to reconnect such Customer unless such Customer, prior to any reconnection, has paid all outstanding indebtedness in full to Company and has provided any security required by Company and, in addition, in the event that there has occurred any tampering, interference or unauthorized use of Company's lines or equipment by Customer, its employees or agents (as contemplated by Sections 4933.18 and 4933.23, Ohio Revised Code) or has fraudulently or illegally obtained service from Company or been the beneficiary of such fraudulent or illegal action (as contemplated by Section 4933.18, Ohio Revised Code), has paid the Company an investigation fee of One Hundred Dollars (\$100) plus the actual costs of such investigation (if Company has undertaken an investigation of the matter) plus, further, an amount determined by the Company to be reasonable compensation for the service fraudulently or illegally obtained and not paid for and for any damage to the property of Company, including any costs to repair any damage or tampering.

- E. By executing this Agreement, Customer assents to Company's receipt, in advance, of any such regulatory authority as Company may need to suspend, discontinue, cancel or terminate service pursuant to this Agreement either at the end of the Term of this Agreement or upon early cancellation.
 - F. All obligations of Customer that arose prior to the cancellation of this Agreement, including, without limitation, the obligation to pay in full any cancellation charge and any unpaid invoices plus late charges for service provided by Company prior to the effective date of cancellation, shall survive the cancellation or termination of this Agreement. No eminent domain or condemnation proceedings with respect to the Building's premises shall relieve Customer of its obligations hereunder.
 - G. By executing this Agreement, Customer acknowledges that Company's service obligations pursuant to this Agreement involve the incurrence of fixed costs associated with long-lived assets and that cancellation charges specified herein are designed to require Customer to provide Company with sufficient revenue upon early termination to approximate Customer's just and reasonable contribution of a return of and return on the capital invested to make service available pursuant to this Agreement. Customer and Company have agreed to the cancellation charges with the understanding that the calculation of the actual fixed costs incurred by Company to meet Customer's service needs is subject to judgment and assumptions, as it is in any situation involving network utility service and costs incurred to meet the needs in common of multiple customers, and that the method of computing the cancellation charges set forth in this Agreement is appropriate and reasonable.
 - H. If at any time a local regulatory authority, other regulatory authority, or Company judges that Customer's plant or equipment may be unsafe, Company may withhold or discontinue service until Customer has completed corrective actions and the actual or potential unsafe condition has been eliminated. Except in the case of an emergency, Company will attempt to provide Customer with reasonable notice prior to discontinuing or suspending service due to an unsafe condition.
3. **INSTALLATION OF EQUIPMENT**
- A. Company shall design, locate, own, construct and install, at its own expense, all equipment and piping (except for such equipment and piping required to be paid for by Customer pursuant to Paragraph 1.B above) necessary for Customer to receive chilled water from Company at the Point of Delivery in such amounts as may be reasonably required to meet Customer's cooling needs as specified herein and to receive into its distribution system returned water from Customer at the Point of Delivery.
 - B. If the Point of Delivery is located within the Building or other structure, then Customer shall provide Company with suitable pipe penetrations through the Building's or structure's wall or foundation to provide for suitable space for the installation and maintenance of Company's piping, metering and other plant, facilities or equipment associated with the provision of service to Customer. However, upon Customer's request, Company may elect, in its sole discretion, to install,

on behalf of Customer, such pipe penetrations or other improvements for Customer, provided that Customer's request for Company to act in such capacity on behalf of Customer shall obligate Customer to hold Company harmless from any claim or liability arising from Company's actions and provided that Customer first properly executes and delivers to Company the form of release attached hereto as Appendix 3, the terms and provisions of which, if and when executed and delivered, shall automatically be incorporated into this Agreement. Any costs incurred by Company in undertaking such installation shall be subject to the provisions of Paragraph 5.E below. Each of Customer and Company acknowledges and agrees that Company is currently providing chilled water service to the Building and that the prior provisions of this Paragraph shall apply only to any changes, modifications or additions to service subsequent to the date of this Agreement.

4. COOLING CAPACITY REQUIREMENTS AND BILLING DETERMINANTS

- A. The amount of chilled water distribution capacity reserved by the Company for Customer's use under this Agreement shall be the amount identified in Appendix A attached hereto and incorporated herein (hereinafter, the *Contract Capacity*). In order to assist Company with chilled water acquisition and distribution capacity planning efforts, Customer shall notify Company of any anticipated changes in Customer's Contract Capacity requirements as identified herein and shall do so not later than thirty (30) days prior to the start of each calendar year and promptly at any time during the year if the information provided in the annual notice changes. By executing this Agreement, Customer acknowledges that failure to provide Company with information identifying anticipated changes in Customer's Contract Capacity requirements may negatively affect Company's ability to timely obtain and distribute sufficient chilled water to meet Customer's needs.
- B. If, during the Term of this Agreement, Customer's highest actual demand for chilled water measured over an integrated sixty (60) minute period during any Billing Period (hereinafter, *Actual Demand*) exceeds the then existing Contract Capacity, the then existing Contract Capacity shall be restated to the level of such Actual Demand, thereby prospectively establishing Customer's new Contract Capacity. Upon written request by Customer, Company may agree to forgive an Actual Demand's restatement of Customer's Contract Capacity where the Actual Demand was the result of conditions or circumstances not reasonably within Customer's control.
- C. In the event a new Contract Capacity has been established as described in paragraph 4B, Company shall, upon Customer's written request and at the end of the next *Summer Period* (defined as May through October), make a downward adjustment to and reset the Contract Capacity in recognition of actions taken by Customer to effectively manage its demand for chilled water distributed by Company. Such downward adjustment shall be based on an examination of the two most recent Summer Periods' highest actual monthly demands with the average of such actual demands becoming the Customer's new Contract Capacity. In no event, however, shall the Customer's Contract Capacity be less than the initial Contract Capacity set forth in Appendix A.
- D. The parties agree that Company is not obligated to distribute chilled water to Customer in excess of the Contract Capacity. However, Company shall, consistent with generally accepted industry practices and subject to its other service obligations, use reasonable efforts to meet Customer's Actual Demand to the extent that it exceeds the stated amount of Contract Capacity. To the extent that Company reasonably believes that Customer's Actual Demand may negatively affect Company's ability to meet the needs of its other customers, Company may restrict or otherwise limit the distribution of chilled water to Customer.

5. RATES, CHARGES AND BILLING

- A. From and after the *Service Commencement Date* (as defined in Appendix A attached to this Agreement and incorporated herein), Customer shall be billed by Company on billing cycle basis (herein, a *Billing Period*) with approximately twelve (12) Billing Periods in each calendar year and each Billing Period approximating one service month. Company's invoices shall be based on the rates, charges and fees stated herein as applied to Customer's billing determinants during the Billing Period. Customer shall pay Company's invoice within fifteen (15) days of the invoice date. Any invoice unpaid in full within thirty (30) days of the invoice date shall be deemed late and subject to an additional charge of one and one-half percent (1.5%) per month multiplied by the balance not timely paid or two dollars (\$2.00), whichever is higher. Company's invoice for service supplied to Customer pursuant to this Agreement shall include the following:

- a. *Distribution Capacity Charge.* The *Distribution Capacity Charge* shall be equal to *Distribution Capacity Rate* (as shown in Appendix 1) for the Billing Period.
 - b. *Distribution Consumption Charge.* The *Distribution Consumption Charge* shall be equal to the product of the *Distribution Consumption Rate* (as shown in Appendix 1) multiplied by the total number of ton hours of chilled water distributed to Customer by Company during the Billing Period.
 - c. *Purchased Chilled Water Cost Recovery Charge.* The *Purchased Chilled Water Cost Recovery Charge* shall recover the dollar-for-dollar delivered cost of the chilled water which Company purchases to meet Customer's chilled water requirements at the Point of Delivery. The *Purchased Chilled Water Cost Recovery Charge* shall be adjusted and reconciled periodically based on such delivered cost in accordance with the formula specified in Appendix 1 and multiplied, as adjusted, on a bills rendered basis to the total number of ton hours of chilled water distributed to Customer by Company during each Billing Period.
 - d. *Lost Water Charge.* The *Lost Water Charge* shall be equal to the *Lost Water Rate* (as shown in Appendix 1) times the total gallons of chilled water lost on the Customer's side of the Point of Delivery during the Billing Period, as verified by Company.
 - e. *Return Temperature Adjustment Charge or Credit.* The *Return Temperature Adjustment Charge or Credit* shall be equal to the charge or credit, as applicable, multiplied by the quantity of Billing Period ton hours at less than 55°F or in excess of 57°F, respectively. A *Return Temperature Adjustment Charge* shall be applied only during months when the Building's actual demand is greater than or equal to twenty percent (20%) of the Contract Capacity. No *Return Temperature Adjustment Charge* shall apply during a seasonal start-up or shut-down of Customer's system.
 - f. *Late Charge.* Company shall render invoices to Customer for chilled water for each Billing Period and such invoices shall be due and payable when issued by Company. The *Late Charge* shall be equal to the monthly interest rate specified herein times the balance not timely paid or two dollars (\$2.00), whichever is higher.
 - g. *GRT Charge.* The total amount of all rates and charges shown on each Billing Period invoice shall be adjusted upwards by a *GRT Charge* specified in Appendix 1. The value of the *GRT Charge* shall be specified as a percentage calculated so as to permit the billing and collection of incremental revenue sufficient for Company to recover the amount of any gross receipts, sales or other charges to which Company may, from time to time, be subject under the laws and regulations of the State of Ohio or other taxing authority, excluding taxes imposed on net income by federal, state and other taxing authorities. Company shall have the right to amend the *GRT Charge* from time to time to account for changes in the taxes imposed by the applicable taxing authorities.
 - h. *Regulatory Recovery Charge.* In the event that Company incurs any cost or charge as described in subparagraph D below, the prorated amount determined in accordance with such subparagraph shall be included on Customer's invoice for each Billing Period as a *Regulatory Recovery Charge*.
 - i. *Adjustments to Charges.* The *Distribution Consumption Charge*, the *Lost Water Charge* and the *Return Temperature Adjustment Charge or Credit* shall each be subject to annual escalations each April 1st following the Service Commencement Date, by an amount not to exceed one and one-quarter (1.25) times the annual increase in the CPI-AUC for the prior calendar year. In the event the publication of the CPI-AUC is discontinued, the Company will use a revised or replacement index that is similar to the discontinued CPI-AUC for purposes of computing all charge adjustments authorized by this Agreement based on changes in the CPI-AUC.
- B. *Metering and Billing.* Company shall install metering equipment sufficient to measure Customer's capacity requirements, usage of chilled water and amount and temperature of water returned to Company's system at each Point of Delivery and to bill and collect for service provided by Company pursuant to this Agreement. Such metering equipment shall permit Company to measure and, over time, record chilled water flow and water temperature differences and convert this relationship to ton hours with each ton hour equivalent to 12,000 British thermal units of cooling within sixty (60) minutes. No person, except a duly authorized employee of Company, shall be

authorized herein or elsewhere to alter or interfere with the operation of any Company meter, or its connections, regulators or any other item of plant, facilities or equipment furnished by Company. In the event of an emergency, Customer may operate stop valves and meter stop valves provided that such operation is warranted based on emergency conditions, Customer notifies Company of such operation as quickly as possible, the operation is limited to the duration of the emergency and provided that the emergency does not arise after Company has discontinued or suspended service to Customer. A quantity of chilled water supply sufficient to initially fill Customer's system downstream of the Point of Delivery shall be subtracted from Customer's initial invoice under this Agreement with any additional requirements beyond normal make-up charged at the Lost Water Charge Rate then in effect.

- (i) A meter shall be deemed accurate if it is measuring within three percent (3%), more or less, of actual quantities. When a meter fails to accurately register the quantity of chilled water consumed or returned, Company will change or repair the meter and invoice Customer for the relevant Billing Period(s) based on either of the following methods:
 - a. Estimates of the chilled water consumed on the basis of past usage during a similar period and under similar conditions; or
 - b. Estimates of the chilled water consumed on the basis of usage registered by the new or repaired meter during a subsequent period.
 - (ii) Company may inspect and maintain its metering equipment located within the Building, as Company may determine to be reasonably necessary. In the event Customer believes that the meters located within the Building are not operating properly, Customer may request, in writing, a test of the meters whereupon Company shall conduct a test, in Customer's presence if desired by Customer, upon the meters located in the Building. If the results of such test show that the meters are inaccurate, then Company shall bear the costs of such test and shall either repair or replace the defective meters at its own expense. If the results of the test show the meters to be accurate, Customer shall bear the costs of such test. Customer and Company agree to negotiate in good faith the amount of any billing adjustment, if any, made by Company as a result of any meter test, whether such adjustment would result in payments by, or credits issued to, Customer.
 - (iii) Company may, at its option, estimate Billing Period invoices. Differences between estimated bills and actual amounts due for the Billing Period(s) subject to estimated invoices shall be reconciled in the first subsequent invoice that is based on actual meter data. In no event shall Company estimate meter readings for more than three (3) consecutive months unless it is unable to read Customer's meter for reasons beyond Company's control.
 - (iv) Upon request by Customer, Company may, in its discretion, provide Customer with one or more additional Points of Delivery. Unless otherwise specifically agreed by Company, service provided to each Point of Delivery shall be separately metered and billed by Company and paid for by Customer.
- C. In the event that any tax, fee, levy, surcharge, assessment, imposition or similar charge (other than a gross receipts tax or other charge included in the GRT Charge set forth above) is imposed or assessed by any taxing authority on Company or Customer (but only to the extent that such charge is required to be collected by Company from Customer and remitted to such taxing authority), which tax or other charge is identifiable to, or measured by Customer's use, consumption, invoice, or purchase of Company's products or services (or the sale thereof by Company to Customer), the Customer's rates and charges established herein shall be increased by an amount equal to the amount necessary for Company to recover such charge(s) imposed or assessed on Company or which Company is required to collect. In the event that Company is required to collect any such charge or imposition imposed on Customer, Company shall have no obligation at any time to reimburse Customer for any such amount collected or any portion thereof.
- D. *Governmental Authority or Insurance Company Mandated Changes or Modifications.* Changes or modifications as mandated, from time to time, by any governmental authority or insurance

company and required to produce, obtain or distribute chilled water for Company's customers' needs are not a part of this Agreement. In the event that financial costs for compliance with such requirements must be incurred, a prorated amount of the total expense from time to time outstanding will be applied by Company to each ton of chilled water sold to customers over a reasonable period so as to permit the recovery of the cost thereof.

- E. *Mutually Agreed Charges.* Upon the mutual agreement of the parties hereto, Company may elect to provide assistance to Customer in installing equipment and/or improvements to the Building related to the use of Company's products or service or the commencement of service to the Building. The type and amount of such assistance to be provided by Company, and the manner of repayment of such costs by Customer, if any, shall be set forth in a supplemental schedule to Appendix 3 to this Agreement (*Schedule*) mutually agreed to by the parties and attached to this Agreement. In the event that Company shall provide such assistance, Customer shall cooperate with Company and execute any instruments, certificates and other documents reasonably requested by Company in connection with providing such assistance, including but not limited to any consents to assignment by Company of this Agreement or any part hereof, or of any revenues hereunder, including any amounts to be paid by Customer pursuant to the Schedule, to any lender providing funds to Company for such assistance or other party.

6. CONDITIONS TO RECEIVE AND MAINTAIN SERVICE AND CHANGES IN CONDITIONS

Customer's rights and Company's obligations under this Agreement are contingent on Customer satisfying the Conditions to Receive Chilled Water Distribution Service (hereinafter, *Conditions*) attached hereto as Appendix 2 and incorporated herein. Customer agrees that Company may, with written notice to Customer change the Conditions to the extent that Company reasonably determines that such changes are necessary for proper, efficient, and safe operation of Company's system provided that such changes shall have effect on a prospective basis commencing thirty (30) days following the date of Company's written notice. All such changes shall, to the extent practicable, be applied uniformly and shall, on their effective date, automatically become a part of this Agreement without need for Customer and Company to formally execute an amendment or otherwise modify this Agreement.

7. MISCELLANEOUS

- A. Permits. Company shall use all commercially reasonable efforts to secure and maintain all necessary permits, easements, ordinances, franchises and licenses over private and public property and any other approvals that may be required to operate its distribution system. Company and Customer agree that all obligations of Company to perform under this Agreement are contingent upon and subject to securing and maintaining all such permits, easements, ordinances, franchises, licenses and approvals; otherwise, unless specifically agreed to by the parties hereto in writing, this Agreement shall terminate and neither party shall have any further obligation hereunder. Customer agrees to assist and cooperate with Company, and further agrees to permit the installation, operation, maintenance and replacement of service lines and valve pits within and on Customer's property or within the Building, and hereby grants to Company, at no cost to Company, the right to access and use such property and Building for the purpose of performing the actions required or permitted by this Agreement. Company shall provide advance notice and coordinate the installation of such service lines and valve pits with Customer.
- B. Force Majeure. Except with regard to Customer's obligation to make payment(s) due pursuant to this Agreement, neither party shall be liable to the other for failure to perform an obligation to the extent such failure was caused by *Force Majeure*. The term *Force Majeure* as employed herein means any cause not reasonably within the control of the party claiming the suspension as further defined herein. Force Majeure shall include, but not limited to the following: (1) physical events such as acts of God, landslides, lightening, earthquakes, fires, storms or storm warnings, such as hurricanes or tornadoes, which result in evacuation of the affected area, floods, washouts, explosions, breakage or accident or necessity of repairs to machinery, plant or equipment or lines or pipe; (2) weather related events affecting an entire geographic region, such as low temperatures which cause freezing of lines or pipes;

(3) interruption or curtailment of chilled water supply to Company's distribution system; (3) acts of others such as strikes, lockouts, or other industrial disturbances, riots, sabotage, insurrections or wars; and (4) governmental action such as the necessity for compliance with any court order, law, statute, ordinance, regulation or policy having the effect of law promulgated by a governmental authority having jurisdiction. Customer and Company shall make reasonable efforts to avoid the adverse impacts of a Force Majeure and to resolve the event or occurrence once it has occurred in order to resume performance. Notwithstanding anything to the contrary herein, the parties agree that the settlement of strikes, lockouts or other industrial disturbances shall be within the sole discretion of the party experiencing such disturbance. The party whose performance is prevented by Force Majeure must provide notice to the other party. Initial notice may be given orally; however, written notice with reasonably full particulars of the event or occurrence is required as soon as reasonably possible. Upon providing written notice of Force Majeure to the other party, the affected party will be relieved of its obligation, from the onset of the Force Majeure event and to the extent and duration of Force Majeure.

- C. Assignment. This Agreement shall inure to the benefit of and be binding upon the parties' respective successors and assigns; provided, however, that any assignment by Customer of this Agreement or any rights hereunder shall be void and of no effect and Customer shall not be relieved of its obligations and liabilities hereunder, except as set forth in the following sentence. If there occurs any act (by a transfer of assets, stock or other equity interests, long term lease, management or operating agreement, or otherwise) whereby a third party (*Assignee*) acquires the right to control the Building or its operations, Customer may assign this Agreement and be relieved of its obligations and liabilities hereunder for any obligations not having theretofore accrued only if (i) Customer and such Assignee execute, respectively, assignment and assumption agreements substantially in the forms set forth in Exhibits A and B hereto or as otherwise satisfactory to Company in its sole discretion, and (ii) Company approves such assignment and the creditworthiness of such Assignee, which approval shall not be unreasonably withheld or delayed after being given reasonable notice of such assignment and evidence of such creditworthiness. Any assignment by Customer that does not adhere to the terms and conditions of this provision shall give Company the right, in its sole discretion, to terminate this Agreement and be relieved of its obligations hereunder. Company may assign this Agreement upon giving not less than thirty (30) days prior written notice to Customer of its intent to make such assignment. Except in any instance in which the assignment shall be a collateral assignment in favor of a secured lender, any such assignment shall relieve Company of all its obligations under this Agreement provided that Company obtains any such regulatory approvals for such assignment as may be required. Customer agrees that, at any time and from time to time, it will promptly and duly execute and deliver any and all such further instruments and documents and take such further action as Company may reasonably request in writing in order to evidence Customer's acknowledgment of such assignment by Company and to implement the provisions of this paragraph. This Agreement does not, and shall not be construed as to confer any rights of a third party beneficiary upon any person or entity.
- D. Estoppel Certificate. Customer and Company agree, upon the written request of the other party, to execute and deliver to the other party, or to such person or entity as may be designated by the other party, a certificate which: (a) identifies this Agreement and any amendments and states that this Agreement as so amended is in full force and effect and has not been further amended as of the date of such certificate; (b) specifies the date through which amounts owing under this Agreement have been paid; and (c) states that, to the best of the knowledge of the party delivering such certificate, neither Company nor Customer are in default of any of its respective obligations under this Agreement (or, if any such default is claimed, identifying the same).
- E. Entire Agreement. This Agreement, including all attachments hereto, sets forth all the understandings, either oral or otherwise, between the parties as to the subject matter hereof and any prior understandings, contracts or agreements are superseded by this Agreement. Except as otherwise specified herein, this Agreement may be amended only by a writing executed by both parties. The headings and subheadings contained in this Agreement are used solely for convenience and do not constitute a part of this Agreement and shall not be used to construe or interpret the provisions of this Agreement.

- F. Severability. If any provision in this Agreement is deemed to be invalid, void or unenforceable by any court having jurisdiction, such determination shall not invalidate, void, or make unenforceable any other provision of this Agreement.
- G. Waiver. No waiver of breach of this Agreement shall be held to be a waiver of any other or subsequent breach.
- H. Governing Law/Jurisdiction. The interpretation and performance of this Agreement shall be governed by the laws of Ohio excluding, however, any conflict of laws rule which would apply the law of another jurisdiction. The parties agree that the state and federal courts sitting in Cleveland, Ohio will have exclusive jurisdiction over any claim arising out of this Agreement, and each party consents to the exclusive jurisdiction of such courts, except as necessary to effect any right of appeal.
- I. Authority. Each party to this Agreement represents that it has full and complete authority to enter into and perform this Agreement. Each person who executes this Agreement on behalf of either party represents and warrants that it has full and complete authority to do so and such party will be bound thereby.
- J. Notices. All notices, demands, requests, reports and statements provided for in this Agreement shall be made in writing and sent by facsimile or electronic means, a nationally recognized overnight courier service, hand delivered, or by regular mail addressed as follows:

To Company: Cleveland Thermal Chilled Water Distribution, LLC
1921 Hamilton Avenue
Cleveland, Ohio 44114
Attention: Vice-President
Fax: 216-241-6486
swhitney@clevelandthermal.com

To Customer: ~~NRP Management Company~~ *SPH26 ALLOTMENTS LP*
1228 Euclid Ave 4th floor
Cleveland, OH 44115
Fax
Attn:
Phone:

or to such other address and person as either party may, from time to time, notify the other in writing delivered to the address stated above. Notice and all other communications will be given when received on a business day by the addressee. In the absence of proof of the actual receipt date, the following presumptions will apply. Notices and other communications sent by facsimile or other electronic means shall be deemed to have been received upon the sending party's receipt of its facsimile or other machine's confirmation of successful transmission. If the day on which such facsimile is received is not a business day or is after five p.m. on a business day, then the facsimile or other electronic transmission shall be deemed to have been received on the next following business day. Communications by overnight mail or courier shall be deemed to have been received on the business day after it was sent or such earlier time as is confirmed by the receiving party. Communications via regular mail shall be considered delivered five (5) business days after mailing.

- K. Remedies Cumulative. Each remedy under this Agreement shall be cumulative and in addition to any other remedy provided by law. The failure of either party to insist on strict performance of any provision under this Agreement, or to take advantage of any right hereunder shall not be construed as a waiver of such provision or right. No single or partial exercise of any right, power or privilege hereunder shall preclude any other or future exercise thereof or the exercise of any other right, power or privilege. Any suspension or waiver of a default or other provision under this Agreement shall not suspend, waive or


affect any other default or other provision under this Agreement, and shall not be construed as a bar to any right or remedy that a party would otherwise have had on any future occasion.

- L. No Warranty. Except as expressly stated herein, Company makes no warranties or representations, express or implied, as to any matter whatsoever related to the interconnection or performance of the district cooling system to the Building including the design, capacity, efficiency and operation thereof.
- M. Arbitration. Any claim or dispute involving an amount in controversy less than \$300,000 that arises out of or related to this Agreement or any breach thereof, shall be resolved by arbitration in accordance with the rules of the American Arbitration Association and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. Any arbitration shall be conducted in Cleveland, Ohio. Reasonable discovery shall be permitted in any such arbitration subject to the control of the arbitrators and shall include, but not be limited to, depositions of the parties and production of documents. Claims or disputes involving an amount in controversy in excess of \$300,000 may be resolved by arbitration, but only at the election of the parties at the time of the dispute.
- N. Security. If Company has reasonable grounds for insecurity regarding Customer's performance of any obligation under this Agreement (whether or not then due), including, without limitation, the occurrence of a material change in creditworthiness, Company shall have the right to require that Customer provide adequate assurance of performance and provide sufficient security in the form, amount and for the term reasonably acceptable to Company, including but not limited to, a standby irrevocable letter of credit, a prepayment, a security interest in an asset or a performance bond or guaranty.
- O. Indemnity. Company agrees to indemnify and hold Customer harmless against any loss, damage, expense (including reasonable attorney's fees), or claim for personal injury, death, property damage, or otherwise arising from Company's distribution of chilled water to the Point of Delivery pursuant to this Agreement to the extent such loss, damage, expense or claim is determined to be the direct result of Company's violation of its public utility obligations as determined in a final determination by the PUCO. Customer agrees to indemnify and hold Company harmless against any loss, damage, expense (including reasonable attorney's fees), or claim for personal injury, death, property damage, or otherwise arising from Customer's receipt of chilled water at the Point of Delivery, Customer's utilization of such chilled water and Customer's return of water to Company's distribution system pursuant to this Agreement to the extent such loss, damage, expense or claim is caused by negligence of Customer, its employees or agents.
- P. LIMITATION OF DAMAGES. FOR BREACH OF ANY PROVISION FOR WHICH AN EXPRESS REMEDY OR MEASURE OF DAMAGES IS PROVIDED, SUCH EXPRESS REMEDY OR MEASURE OF DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY. A PARTY'S LIABILITY HEREUNDER SHALL BE LIMITED AS SET FORTH IN SUCH PROVISION, AND ALL OTHER REMEDIES AT LAW OR IN EQUITY ARE WAIVED. IF NO REMEDY OR MEASURE OF DAMAGES IS EXPRESSLY PROVIDED HEREIN, A PARTY'S LIABILITY SHALL BE LIMITED TO DIRECT ACTUAL DAMAGES ONLY. SUCH DIRECT AND ACTUAL DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY, AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED. UNLESS EXPRESSLY HEREIN PROVIDED, NEITHER PARTY SHALL BE LIABLE FOR CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY OR INDIRECT DAMAGES OR OTHER BUSINESS INTERRUPTION DAMAGES, BY STATUTE, IN TORT OR CONTRACT, UNDER ANY INDEMNITY PROVISION OR OTHERWISE. IT IS THE INTENT TO THE PARTIES THAT ANY LIMITATIONS HEREIN IMPOSED ON REMEDIES AND THE MEASURE OF DAMAGES BE WITHOUT REGARD TO THE CAUSE OR CAUSES RELATED THERETO, INCLUDING THE NEGLIGENCE OF ANY PARTY, WHETHER SUCH NEGLIGENCE BE SOLE, JOINT OR CONCURRENT, OR ACTIVE OR PASSIVE. TO THE EXTENT THAT ANY DAMAGES REQUIRED TO BE PAID HEREUNDER ARE LIQUIDATED, THE PARTIES ACKNOWLEDGE THAT THE DAMAGES ARE DIFFICULT OR IMPOSSIBLE TO DETERMINE, OR OTHERWISE OBTAINING AN ADEQUATE REMEDY IS INCONVENIENT AND THE DAMAGES CALCULATED HEREUNDER CONSTITUTE A REASONABLE APPROXIMATION OF THE HARM OR LOSS.


[Signature page follows.]

IN WITNESS WHEREOF, the parties have executed this Agreement by their duly authorized officers as of the date first above written.

CUSTOMER: SPHERE APARTMENTS, LP

By: 
Name: Tom McDonald
Title: Assistant Regional VP
Phone: 216.475.8900
Fax:

COMPANY: CLEVELAND THERMAL CHILLED WATER DISTRIBUTION, LLC

By: 
Name: Seth Whitney
Title: Vice President
Phone: 216-241-3331
Fax: 216-241-6486

**APPENDICES
&
EXHIBITS**

APPENDIX A

THE BUILDING

1. **Building:** The Sphere, is a high-rise 200 foot tall, 20-story apartment building complex in the Reserve Square area of downtown Cleveland located at 1801 East 12th Street, Cleveland, Ohio 44114.
2. **Service Commencement Date:** The date of this Agreement.
3. **Contract Capacity:** The Contract Capacity is, as of the Effective Date, to be 359.8 tons.

APPENDIX B

TERM AND CUSTOMER TERMINATION

The provisions of this Appendix B supplement the foregoing Agreement and are incorporated therein. Defined terms used in this Appendix but not defined herein shall have the same meanings as set forth in the Agreement, unless the context clearly requires otherwise.

TERMINATION DATE

The term shall terminate on December 31, 2028

EARLY TERMINATION BY CUSTOMER

Customer may terminate the Agreement before the Termination Date as provided below:

(1) Customer may terminate the Agreement upon forty-five (45) days prior written notice to Company in the event of any default by Company which default continues for a period of more than forty-five (45) days following a written demand by Customer to cure such default. Customer and Company acknowledge and agree that, in the event of Customer's termination of this Agreement pursuant to this provision, Customer shall not be required to pay any termination penalty and shall only be required to pay to Company the amounts owing as at the end of such forty-five (45) day written notice period calculated in accordance with Section 5 (Rates, Charges and Billing) of this Agreement; or

(2) Customer may cancel the Agreement at any time by providing the Company with written notice at least twelve (12) months prior to the effective date of such cancellation and by making, no later than fifteen (15) days after the effective date of the termination of the Agreement, a lump sum early cancellation charge payment to Company as follows:

- a) If Customer cancels this Agreement in accordance with this provision during the first seventy-two (72) months of the Term, Customer shall pay to Company a lump sum early cancellation charge equal to (i) the number of months following the effective date of the cancellation to the seventy-second (72nd) month of the contract times \$10,000 and (ii) the number of remaining months following the seventy-second (72nd) month of the Agreement times \$1,500. Fractional months will be considered a full month for this charge; or
- b) If Customer cancels this Agreement in accordance with this provision after the seventy-second (72nd) month of the Term, Customer shall pay to Company a lump sum early cancellation charge equal to the number of remaining months of the Agreement times \$1,500. Fractional months will be considered a full month for this charge.

APPENDIX 1

RATE SCHEDULE FOR CHILLED WATER SERVICE

A. DISTRIBUTION CAPACITY RATE



B. DISTRIBUTION CONSUMPTION RATE



C. PURCHASED CHILLED WATER COST RECOVERY CHARGE

Base Charge: \$0.1500 per ton hour consumed.

The Base Charge specified shall be adjusted up or down at least quarterly by Company to recover the delivered cost of chilled water purchased by Company to meet the chilled water needs of Customer at the Point of Delivery and reconciled on Customer's Billing Period invoices over not least than three (3) Billing Periods to avoid abrupt adjustments and substantial swings or volatility in Customer's invoices but to ensure that the revenues obtained by Company match the Company's delivered cost of purchased chilled water. Company shall forecast its actual delivered cost of purchased chilled water on at least a quarterly basis, net of any prior period over or under recovery, and the ton hours subject to the Purchased Chilled Water Cost Recovery Charge and compute a new quarterly (or other period not to exceed a quarter) Purchased Chilled Water Cost Recovery Charge based on such forecasts. The new Purchased Chilled Water Cost Recovery Charge shall be computed by dividing the forecasted period's ton hours subject to such Charge into the forecasted period's delivered cost of purchased chilled water net of any prior period over or under recovery. The Base Charge specified above shall be adjusted up or down for the forecasted period by the positive or negative difference between each newly computed Purchased Chilled Water Cost Recovery Charge. Company shall notify Customer of the as adjusted Purchased Chilled Water Cost Recovery Charge thirty (30) days prior to the effective date of such Charge. Should events or circumstances (for example, significant market volatility in fuel costs or extreme weather conditions) indicate to Company that actual purchased chilled water costs or actual ton hours subject to said Charge may be substantially different than the amounts forecasted, Company may adjust the Base Charge more frequently than quarterly.

E. LOST WATER RATE

\$0.0328** per gallon lost in the Building during each Billing Period.

F. RETURN TEMPERATURE ADJUSTMENT RATE

\$0.0328** per ton hour when the provisions of Paragraph 5.A.e of the Agreement are applicable.

- a. When return water temperature is between 55°F and 57°F, no adjustment is applied;
- b. When return water temperature is greater than 57°F, the metered volume of ton hours consumed under those conditions multiplied by the above rate is subtracted from Customer's invoice for the applicable Billing Period;
- c. When return water temperature is less than 55°F, the metered volume of ton hours consumed under those conditions multiplied by the above rate is added to Customer's invoice for the applicable Billing Period.

G. GRT CHARGE

There is currently no GRT Charge as of the Effective Date of the Agreement.

* For the distribution capacity charge and capacity in excess of the Contract Capacity, the Distribution Capacity Charge shall escalate on an annual basis each April 1st following the Service Commencement Date until the end of the Term, in an amount equal to two percent (2%) plus one-half (1/2) of any annual increase in the Consumer Price Index- All Urban Consumers (hereinafter, *CPI-AUC*) for the prior calendar year.

** 2019 rate, subject to escalation beginning in 2019 as set forth in Paragraph 5.A.i. of the Agreement.

APPENDIX 2

CONDITIONS TO RECEIVE AND MAINTAIN SERVICE

As stated in Paragraph 6 of the foregoing Agreement, Customer's rights and Company's obligations under this Agreement are contingent on Customer satisfying the Conditions to Receive Chilled Water Distribution Service (*Conditions*) set forth in this Appendix and incorporated in such Agreement. Customer agrees that Company may, with written notice to Customer change the Conditions to the extent that Company reasonably determines that such changes are necessary for proper, efficient, and safe operation of Company's system provided that such changes shall have effect on a prospective basis commencing thirty (30) days following the date of Company's written notice. All such changes shall, to the extent practicable, be applied uniformly and shall, on their effective date, automatically become a part of this Agreement without need for Customer and Company to formally execute an amendment or otherwise modify this Agreement.

1. Company shall distribute chilled water to Customer and receive returned water from the Customer through Company's distribution system at the Point of Delivery at a normal operating pressure of between 90 psig and 150 psig and a maximum pressure of 180 psig. Company shall use commercially reasonable efforts to obtain and distribute chilled water to Customer at a temperature of between 40°F and 42°F during the calendar months of May through October (hereinafter, the *Summer Period*), and no more than 50°F during the calendar months of November through April (hereinafter, the *Winter Period*) provided that such temperature range shall only apply during Customer's normal business hours (8:00 am to 5:00 pm) during the Winter Period. Company shall use commercially reasonable efforts to provide Customer with continuous chilled water distribution service and to receive returned water from Customer from or through Company's existing distribution network.
2. During the Summer Period, Customer shall return water to Company's distribution system at a temperature of not less than 55°F. In addition to all other rates and charges applicable according to this Agreement and if Customer returns water to Company at a temperature of less than 55°F during the Summer Period, Company may assess Customer a Return Temperature Adjustment Charge (as defined in the Agreement) that applies when Customer's return water temperature is less than 55°F. In addition to such other actions as the Company may take under this Agreement, Company shall have the right to restrict or control Customer's service to insure the return chilled water temperature is 55°F or higher. If Customer returns water to Company at temperatures greater than 57°F during the Summer Period, Company may reduce Customer's bill by application of a Return Temperature Adjustment Credit (as defined in the Agreement). Any Return Temperature Adjustment Charge and Return Temperature Adjustment Credit shall occur only when the Building is operating at or above 20% of Contract Capacity (as defined in the Agreement).
3. Customer shall give immediate notice to Company of any leakage or escape of chilled water.
4. All repairs to or replacements of Customer's piping and equipment shall be made promptly by the Customer at Customer's expense and shall not interfere with Company's ability to meet the service needs of its other customers.
5. Customer shall provide Company's duly authorized representatives with access at all reasonable times and to all of Company's property on the premises of Customer and on all other premises which Customer may own or control for the purposes of meeting Company service responsibilities to Customer and its other customers. Company shall attempt to provide Customer with reasonable notice prior to accessing such property provided that the access sought by Company is not related to an existing or impending emergency condition.
6. On or prior to the Service Commencement Date, Company shall furnish shut-off valves and cathodic protection isolation flanges when, in Company's judgment, such equipment is needed to

- efficiently and safely meet Customer's service needs. Company shall also furnish the meter primary flow element, separable thermometer wells, the meter proper and the necessary electronics and recorders and Customer shall properly install such items. Customer shall provide to Company, at Customer's expense and at a location or locations Company determines to be suitable, 120-volt, 60-cycle, single-phase and reliable electricity supply. Customer shall also provide to Company, at Customer's expense and at a location or locations Company determines to be suitable, secure land phone line, Ethernet, LAN, cable or WAN access communications capability suitable to meet Company's metering, monitoring and data collection needs.
7. Customer shall provide the temperature control indicated for the control valves in accordance with Company's specifications.
 8. Customer will furnish install and operate pressure gauges and a straining device or devices in its return line as close as possible to the Point of Delivery to prevent foreign matter from entering Company's chilled water system. Customer shall ensure that the pressure drop through the straining device or devices is included in Customer's determination of the friction losses that Customer shall be responsible for overcoming through the installation and use of booster pumps. Customer shall periodically inspect, clean and, as needed, replace filters and straining devices to ensure efficient operation of its and Company's system.
 9. For design purposes, Customer understands that Company expects that the maximum combined running head on the chilled water distribution system will be 180 psig measured at the point chilled water is produced and supplied to Company's distribution system, the maximum supply pressure anticipated at Customer's main supply valve will be 150 psig and the maximum residual static head shall be 90 psig. Based on this understanding, Customer shall not design, install or operate its plant, equipment or facilities so as to exert static pressure head in excess of 90 psig. In addition, Customer shall provide, install, operate and maintain any booster pumps that may be reasonably required to supply the dynamic head sufficient to overcome friction loss that may occur on its property or within the Building and to supply any elevation head required above that provided by Company at the Point of Delivery.
 10. Company shall be responsible for obtaining a chilled water supply sufficient to meet normal make-up water requirements of its distribution system. However, Customer shall not take any action to cause make-up water requirements met by Company to exceed normal levels, shall promptly notify Company of any loss of chilled water that occurs on Customer's property or within the Building and act in a commercially responsible fashion to promptly minimize make-up water requirements. Chilled water supply requirements associated with thermal expansion of Company's chilled water distribution system shall be the responsibility of Company.
 11. Customer shall adopt and implement commercially reasonable practices to properly clean, degrease and flush the chilled water system within its control and install, operate and maintain such system so as to eliminate any leaks that might or do occur at the maximum operating pressure. Customer's shall be responsible for determining the means and methods by which its system shall be cleaned, degreased and flushed and shall provide Company with reasonable notice of the means and methods selected by Customer so that Company has a reasonable opportunity to object to such means and methods. In the event Company does so object, Company and Customer shall promptly engage in good faith discussions to identify mutually acceptable means and methods. However nothing herein will be construed as causing Company to assent to an improper means or method in circumstances where Company has not stated an objection or to impose an affirmative duty on Company to communicate an objection to Customer.

Appendix 5

TYPICAL INTERCONNECTION DIAGRAM

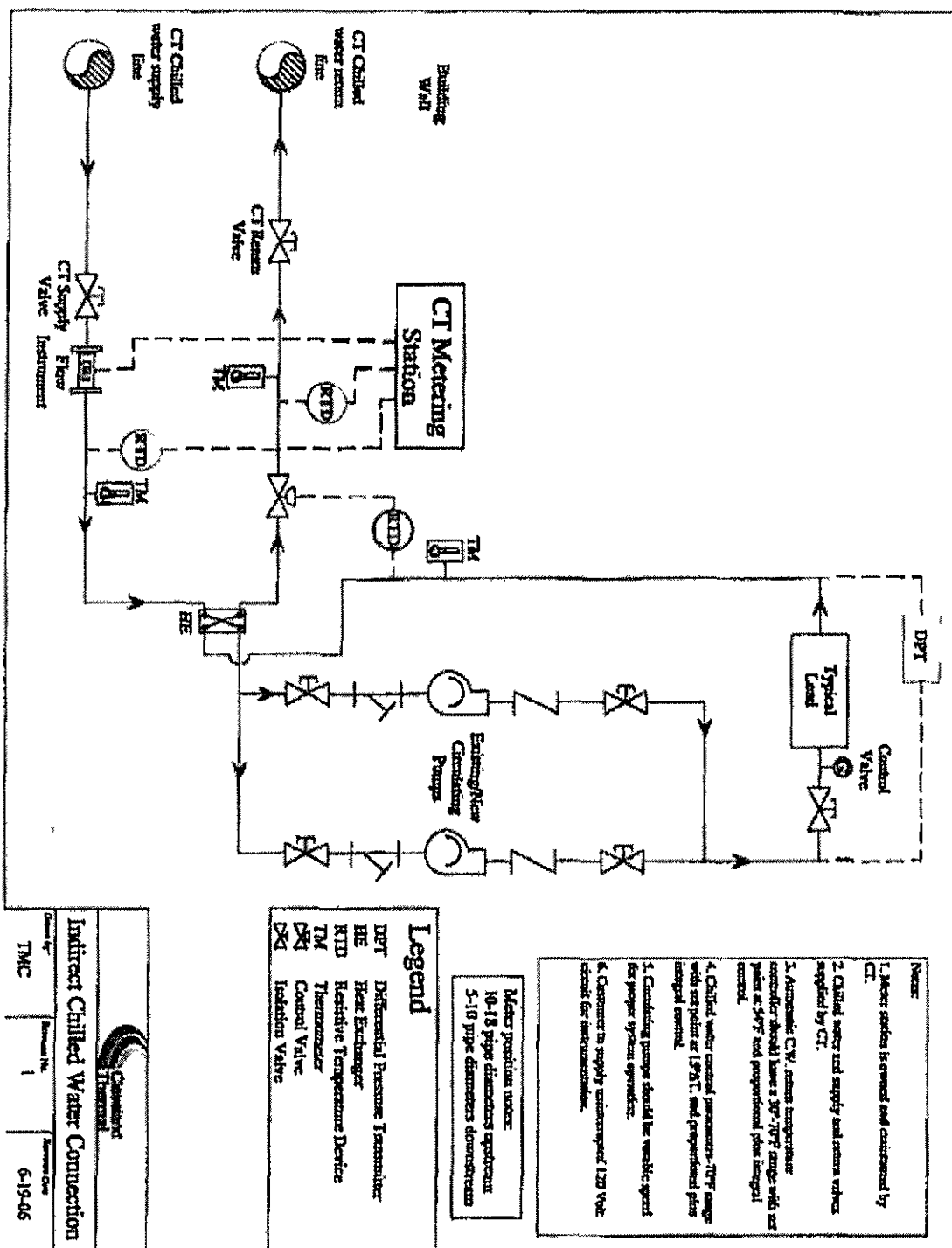


Exhibit A

[Letterhead of Assignor]

[Date]

Cleveland Thermal Chilled Water Distribution, LLC
1921 Hamilton Avenue
Cleveland, Ohio 44114
Attention: President

Re: Assignment of Chilled Water Distribution Agreement

Ladies and Gentlemen:

Cleveland Thermal Chilled Water Distribution, LLC ("Company") and _____ ("Assignor"), entered into a Chilled Water Distribution Agreement (the "Agreement") dated _____, 20____, pursuant to which Company agreed to distribute processed chilled water to Assignor to meet Assignor's air conditioning and other cooling energy needs. Assignor now desires to transfer its right, title, interest and obligations in the Agreement to _____ ("Assignee"), pursuant to the terms and conditions of this Assignment of Chilled Water Distribution Agreement (this "Assignment").

1. Assignor hereby irrevocably assigns, conveys, transfers and sets over to Assignee all of Assignor's right, title, interest and obligations in and to the Agreement.

2. Assignor represents and warrants to Company as follows: (i) this Assignment has been duly and validly executed and constitutes the legal, valid and binding obligation of each the Assignor and Assignee, enforceable against each of the Assignor and the Assignee in accordance with its terms; (ii) the Agreement remains in full force and effect and is enforceable against Assignor (only with respect to such matters arising from the Agreement prior to the date set out above) and Assignee (for all matters arising from the Agreement from and after the date set out above); (iii) the execution, delivery, performance and effectiveness of this Assignment shall not operate, nor be deemed to be nor construed as, a waiver of any right, power or remedy of the Company under the Agreement, any term, provision, representation, warranty or covenant contained in the Agreement, or any other documentation executed in connection therewith; (iv) none of the provisions of this Assignment shall constitute, be deemed to be or construed as, a waiver of any event of default under the Agreement; and (v) Assignor and Assignee are in compliance with all of the terms and provisions set forth in the Agreement on their part to be observed or performed, and no event of default specified the Agreement, nor any event which upon notice or lapse of time or both would constitute such an event of default, has occurred and is continuing.

3. The terms, covenants, conditions and warranties herein shall inure to the benefit of and shall be binding upon the parties hereto and their respective successors and assigns; subject, however, to all limitations on further assignment or transfer contained in the Agreement. In the event any provision of this Assignment should be invalid, the validity of the other provisions hereof and of the Agreement shall not be effected thereby. This Assignment shall be governed by and construed in accordance with the laws of the State of Ohio.

ASSIGNOR:

By: _____

Name: _____

Title: _____

Exhibit B

[Letterhead of Assignee]

[Date]

Cleveland Thermal Chilled Water Distribution, LLC
1921 Hamilton Avenue
Cleveland, Ohio 44114
Attention: President

Re: Assumption of Chilled Water Distribution Agreement

Ladies and Gentlemen:

Cleveland Thermal Chilled Water Distribution, LLC ("Company") and _____ ("Assignor"), entered into a Chilled Water Distribution Agreement (the "Agreement") dated _____, 20____, pursuant to which Company agreed to distribute processed chilled water to Assignor to meet Assignor's air conditioning and other cooling energy needs. _____ ("Assignee") now desires to assume and comply with all of the terms, provisions, conditions, warranties and covenants contained in the Agreement, pursuant to the terms and conditions of this Assumption of Chilled Water Distribution Agreement (this "Assumption").

1. Assignee hereby assumes, agrees and covenants with the Assignor and Company to perform and comply with all of the terms, provisions, conditions, warranties and covenants contained in the Agreement, under the terms thereof, as are to be performed and complied with by the Assignor. This Assumption by Assignee is specifically made for the benefit of Company, and from and after the date of the execution of this Assumption. Assignee acknowledges, covenants and agrees that Company may enforce all the terms, conditions and provisions of the Agreement against Assignee to the extent as if Assignee were originally named as the Customer in the Agreement.

2. Assignee represents and warrants to Company as follows: (i) this Assumption has been duly and validly executed and constitutes the legal, valid and binding obligation of each the Assignor and Assignee, enforceable against each of the Assignor and the Assignee in accordance with its terms; (ii) the Agreement remains in full force and effect and is enforceable against Assignor (only with respect to such matters arising from the Agreement prior to the date set out above) and Assignee (for all matters arising from the Agreement from and after the date set out above); (iii) the execution, delivery, performance and effectiveness of this Assumption shall not operate, nor be deemed to be nor construed as, a waiver of any right, power or remedy of the Company under the Agreement, any term, provision, representation, warranty or covenant contained in the Agreement, or any other documentation executed in connection therewith; (iv) none of the provisions of this Assumption shall constitute, be deemed to be or construed as, a waiver of any event of default under the Agreement; and (v) Assignor and Assignee are in compliance with all of the terms and provisions set forth in the Agreement on their part to be observed or performed, and no event of default specified the Agreement, nor any event which upon notice or lapse of time or both would constitute such an event of default, has occurred and is continuing.

3. The terms, covenants, conditions and warranties herein shall inure to the benefit of and shall be binding upon the parties hereto and their respective successors and assigns; subject, however, to all limitations on further assignment or transfer contained in the Agreement. In the event any provision of this Assumption should be invalid, the validity of the other provisions hereof and of the Agreement shall not be effected thereby. This Assumption shall be governed by and construed in accordance with the laws of the State of Ohio.

ASSIGNEE:

By: _____

Name: _____

Title: _____