

NC

30

FILE

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)
Cleveland Thermal Chilled Water)
Distribution, LLC for Approval of a)
Chilled Water Distribution Agreement)
with WKYC-TV, Inc.)

Case No. 10- -CC-AEC

2413

PUCO

2010 OCT 22 PM 4:55

RECEIVED-BOOKETING DIV

APPLICATION

Gretchen J. Hummel (Trial Attorney)
McNees Wallace & Nurick LLC
Fifth Third Center
21 East State Street, 17th Floor
Columbus, OH 43215
Telephone: 614-469-8000
Telecopier: 614-469-4653
ghummel@mwncmh.com

October 22, 2010

**Attorney for Cleveland Thermal Chilled
Water Distribution, LLC**

{C32322: }

This is to certify that the images appearing are an
accurate and true reproduction of a case file
document delivered in regular course of business.
Technician SM Date Processed OCT 25 2010

**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. 10- -CC-AEC
Chilled Water Distribution Agreement)	
with WKYC-TC, Inc.)	

APPLICATION

Pursuant to Section 4905.31, Revised Code, 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 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 that would permit Cleveland Thermal to provide chilled water distribution service to WKYC-TV, Inc. ("WKYC"). The Agreement is attached hereto as Exhibit A.
- 3) The provision of chilled water distribution service by Cleveland Thermal to WKYC shall not impair or reduce the quality of service to other Cleveland Thermal customers.

4) Cleveland Thermal requests confidentiality for certain rates contained in Appendix 1 of Exhibit A of this Agreement as described in the Motion for Protective Order filed contemporaneously with this Application.

Through the Agreement, Cleveland Thermal and WKYC have agreed to provisions regarding the termination of this arrangement. Cleveland Thermal and WKYC 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 WKYC.

Respectfully Submitted,



Gretchen J. Hummel
McNees, Wallace & Nurick
Fifth Third Center
21 East State Street, 17th Floor
Columbus, Ohio 43215
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
ghummel@mwncmh.com

**Attorney for Cleveland Thermal
Chilled Water Distribution, LLC**

EXHIBIT A

CHILLED WATER DISTRIBUTION AGREEMENT

BY AND BETWEEN

CLEVELAND THERMAL CHILLED WATER DISTRIBUTION, LLC

AND

WKYC-TV INC

**CHILLED WATER DISTRIBUTION AGREEMENT
TABLE OF CONTENTS**

1. General Performance Obligations.....	Page 1
2. Term of Agreement and Early Termination.....	Page 2
3. Installation of Equipment.....	Page 4
4. Cooling Capacity Requirements and Billing Determinants.....	Page 4
5. Rates, Charges and Billing.....	Page 5
6. Condition to Receive and Maintain Service and Changes in Conditions.....	Page 7
7. Miscellaneous.....	Page 7

Appendices

Appendix A The Building.....	Page 13
Appendix 1 Rates Schedule for Chilled Water Service.....	Page 14
Appendix 2 Conditions to Receive and Maintain Service.....	Page 16

CHILLED WATER DISTRIBUTION AGREEMENT

This Chilled Water Distribution Agreement (hereinafter, the *Agreement*) is entered into as of the 26 day of August, 2010, between WKYC-TV INC, located at 1333 Lakeside Avenue, E, Cleveland, Ohio 44114-1134, (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 cooling 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 filed with the Public Utilities Commission of Ohio (hereinafter, *PUCO*); and

WHEREAS, Customer is the owner of a certain building located in the City and desires that Company obtain for and distribute processed chilled water to Customer to meet Customer's air conditioning and other cooling energy needs.

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 and Distribution Capacity Charges* (as defined 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 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 individually 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, its tenants and other 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 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. 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 its term, 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.

2. TERM OF AGREEMENT AND EARLY TERMINATION

- A. The initial term of this Agreement shall be for a period of 5 years, beginning on the *Service Commencement Date* (as defined below).
- B. At the end of the initial term, this Agreement shall automatically renew for one five year period, unless either party provides not less than six (6) months prior written notice to the contrary.
- C. The *Service Commencement Date* shall be the date on which Company commences providing chilled water distribution service at the Point of Delivery by opening the Building's supply and return isolation valves to, if needed, initially fill Customer's chilled water redistribution system and cooling equipment within the Building or otherwise commences the flow of chilled water to the Building. The Service Commencement Date expected at the time of execution of this Agreement is the date identified in Appendix A attached hereto and incorporated herein by reference. The Service Commencement Date shall not be before

Company has secured such regulatory approvals as may be necessary to effectuate this Agreement, including but not limited to any approvals required by local authorities having jurisdiction over the same. 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.

- D. Customer may cancel this Agreement at any time by providing the Company with written notice at least six (6) months prior to the effective date of such cancellation and by making a lump sum early cancellation charge payment to Company equal to the sum of: (1) the *Distribution Capacity Charge* (as defined below) in effect at the time of the written cancellation notice multiplied by the *Contract Capacity* (as defined below) then in effect and the number of months remaining under the term of the Agreement but for the early cancellation; (2) the unamortized balance of any connection costs incurred by Company, to commence service under this Agreement as identified in Appendix 4 of this Agreement provided there is such an unamortized balance; and (3) an amount equal to all amounts then outstanding under the Schedule (as defined below), if any.
- E. Company may terminate this Agreement upon thirty (30) days prior written notice to Customer in the event of any default by Customer which default continues for a period of more than thirty (30) 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* in effect at time of the written notice multiplied by the *Contract Capacity* then in effect and the number of months remaining under the term of the Agreement; and, (2) the unamortized balance of any connection costs incurred by Company to commence service under this Agreement as identified in Appendix 4 of this Agreement. This cancellation charge shall be in addition to any other damages incurred by Company as a result of Customer's default.
- F. In the event of cancellation by either party, Company shall discontinue providing chilled water 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.
- G. 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.
- H. 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 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.
- I. 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.

3. INSTALLATION OF EQUIPMENT

- A. Company shall design, locate, own, construct and install, at its own expense, all equipment and piping 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. 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 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 capacity requirements may negatively affect Company's ability to timely obtain and distribute sufficient chilled water to meet Customer's needs.
- 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 to install, on behalf of Customer, such pipe penetrations 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.

4. COOLING CAPACITY REQUIREMENTS AND BILLING DETERMINANTS

- A. The initial 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*).
- 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 describe in paragraph 4B, Company shall, upon Customer's written request and at the end of the next Summer Period, 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 Period's 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 181 tons.

- D. The parties agree that Company is not obligated to distribute chilled water to Customer in excess of the Contract Capacity as it may be revised from time to time. 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 then in effect. 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. Customer shall be billed by Company on billing cycle basis (herein, the *Billing Period*) with approximately twelve 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. 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 the product of the *Distribution Capacity Rate* (as shown in Appendix 1) multiplied by Customer's then current Contract Capacity for the Billing Period as such Contract Capacity has been established in accordance with Paragraph 4.B and Appendix A. The *Distribution Capacity Charge* shall escalate on an annual basis each April 1st following the Service Commencement Date, 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.
 - 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 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 the 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-installed flow device(s).
 - e. *Return Temperature Adjustment Charge or Credit.* The *Return Temperature Adjustment Charge or Credit* shall be equal to the rate 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 Actual Demand is greater than or equal to twenty percent (20%) of the Contract Capacity then in effect. 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.
- g. *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.

On April 2, 2016 only, all the above rates will increase by 5% in place of the annual increase described in the above paragraphs.

- 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 Delivery Point 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 difference and converts this relationship to ton hours with each ton hour equivalent to 12,000 Btu's of cooling within sixty (60) minutes. No person, except a duly authorized employee of Company, shall be authorized herein or 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 *Delivery Point* 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 upon the meters located in the Building. If the results of such test show that the meters have overstated the amount of product used by Customer by at least three percent (3%), then Company shall bear the costs of such test and shall either repair or replace the defective meters at its own expense. In all other cases, 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 Delivery Points. Unless otherwise specifically agreed by Company, service provided to each Delivery Point shall be separately metered and billed by Company and paid for by Customer.

C. For so long as the State of Ohio or any other taxing authority or authorities impose a tax on Company's gross receipts, the rates and charges established herein shall be increased by an amount equal to the total rate of gross receipts tax(es) imposed by all taxing authorities multiplied by the total of such rates and charges. In the event that any tax, fee, levy, surcharge, assessment, imposition or similar charge (other than a gross receipts tax) 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.

D. Other 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. The type and amount of such assistance to be provided by Company, and the manner of repayment of such costs by Customer, shall be set forth in a supplemental schedule ("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 reasonable 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 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. Company shall use all commercially reasonable efforts to secure and maintain all necessary permits, easements, ordinances 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, 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. 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 affect 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. This Agreement shall inure to the benefit of and be binding upon the parties' respective successors and assigns; provided, however, that Customer shall not be relieved of its obligations and liabilities hereunder, except as set forth below. If there occurs any act whereby a third party ("Assignee") acquires the right to control the Building or its operations (such as by a transfer of assets, stock or other equity interests, long term lease, management or operating agreement, or otherwise) (hereinafter an "Assignment"), Customer shall notify the Company within thirty (30) days. Customer shall be relieved of its obligations and liabilities hereunder for any obligations not having theretofore accrued only if: (i) Customer executes and delivers to Company the assignment letter agreement attached as Exhibit A to this Agreement; and (ii) the Assignee executes and delivers to Company the assumption letter agreement attached as Exhibit B to this Agreement. 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 Contract 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 Contract 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 and acknowledge Customer's consent to such assignment 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. 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. This Agreement, including each Appendix, sets forth all the understandings between the parties and any prior 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. 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. No waiver of breach of this Agreement shall be held to be a waiver of any other or subsequent breach.
- H. 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.
- I. 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 Contract 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. All notices, demands, requests, reports and statements provided for in this Agreement shall be made in writing and sent by facsimile or mutually acceptable 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: President

To Customer: WKYC-TV INC.

1333 Lakeside Avenue

Cleveland, Ohio 44114

Attn: _____

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 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 sent by facsimile shall be deemed to have been received upon the sending party's receipt of its facsimile 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 shall be deemed to have been received on the next following business day. Notice 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. Notice via regular mail shall be considered delivered five (5) business days after mailing.

- K. 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. 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 Customer's Building including the design, capacity, efficiency and operation thereof.
- M. 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. 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 may demand 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. 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 a final determination by the PUCO that Company violated its public utility obligations. 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 Company'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. 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, LOST PROFITS 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 THE 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.

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

CUSTOMER:

By: 

Name: Larry Giele

Title: Business mgr

Phone: 216-344-3385

Fax: 216-344-3377

COMPANY: CLEVELAND THERMAL CHILLED WATER DISTRIBUTION, LLC

By: 

Name: Marc Divis

Title: President

Phone: 216 241-4274

Fax: 216 241-6486

Appendices

APPENDIX A THE BUILDING

1. (Description of the Building) Located at 1333 Lakeside Avenue in Cleveland, Ohio. The building is listed at 126,638 gross area and houses the same WKYC-TV station and broadcasting equipment.
Construction was completed in 2000 with continuous operations to date.
2. Service Commencement Date (estimated): February, 2001
3. Contract Capacity: 181Tons

APPENDIX 1
RATE SCHEDULE FOR CHILLED WATER SERVICE

A. DISTRIBUTION CAPACITY RATE

_____ per month per ton of refrigeration.

B. DISTRIBUTION CONSUMPTION RATE

_____ per ton hour consumed.

C. PURCHASED CHILLED WATER COST RECOVERY CHARGE

Base Charge: _____ per ton hour consumed.

The Base Charge specified shall be adjusted up or down annually 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 annually reconciled to ensure that the revenues obtained by Company match the Company's delivered cost of purchased chilled water. On an annual basis Company shall forecast its actual delivered cost of purchased chilled water, 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 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 annual ton hours subject to such Charge into the forecasted annual 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 annually by the positive or negative difference between each newly computed Purchased Chilled Water Cost Recovery Charge and the Base Charge. Company shall notify Customer of the as adjusted Purchased Chilled Water Cost Recovery Charge _____ days prior to the effective date of such Charge. Should events or circumstances indicate to Company that actual purchased chilled water costs or actual ton hours subject to said Charge are substantially different than the amounts forecasted, Company may adjust the Base Charge more frequently than annually, but no more than _____ in any calendar year, to avoid abrupt annual adjustments and substantial swings or volatility in the over or under recovery of the actual delivered cost of purchased chilled water.

E. LOST WATER RATE

\$0.0260 per gallon lost in Customer's building during each Billing Period.

F. RETURN TEMPERATURE ADJUSTMENT RATE

\$0.0260 per ton hour when the provisions of paragraph 1B 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.

APPENDIX 2

CONDITIONS TO RECEIVE AND MAINTAIN SERVICE

As stated in Section 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 its best 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 AM to 5 PM during the Winter Period. Company shall use commercially reasonable efforts to provide Customer with continuous chilled water distribution service and receipt of 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 below) that applies when Customer is causing the return water temperature at 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 below). 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 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 install, operate and maintain any provide 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 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 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 ascent 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.

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 and Assignee; (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:

437582 v_01 \ 113493.0001

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. _____ ("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 and Assignee; (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:

437582 v_01 \ 113493.0001