

**AGREEMENT FOR DISTRICT ENERGY DEMONSTRATION PROJECT**

THIS Agreement ("Agreement") is made as of the \_\_\_\_\_ day of \_\_\_\_\_, 2011 between the Freehold Group, LLC, hereafter called "District Energy Provider," and King County, hereafter called "County," both of which are located in and existing under the laws of the State of Washington (collectively referred to as the "Parties").

**RECITALS:**

WHEREAS, the County owns and operates the Elliot Bay Interceptor that conveys wastewater to the West Point Treatment Plant;

WHEREAS, technologies are now available that allow for the extraction of heat energy from wastewater pipelines to provide heating and cooling at a district or neighborhood level;

WHEREAS, the extraction of heat energy from wastewater reduces energy dependence on fossil fuels and is consistent with the County's mission of recovering resources from wastewater;

WHEREAS, although a market for heat energy recovery currently does not exist, it is anticipated that markets and monetary value will increase in the long-term;

WHEREAS, District Energy Provider plans to construct a residential and commercial development in the Interbay area of the City of Seattle;

WHEREAS, as part of the development District Energy Provider proposes to construct a closed loop parallel or similar connection to the County's Elliot Bay Interceptor for the purpose of extracting heat energy from the wastewater; and

WHEREAS, the connection to County's wastewater pipeline and the area served by the heat energy extracted from the pipeline shall serve as a district energy demonstration or pilot project to test the viability, efficiency and cost-effectiveness of an emerging technology that extracts heat from wastewater;

NOW THEREFORE, it is mutually agreed as follows:

**1. Purpose**

The purpose of this Agreement is to set forth the mutual rights, responsibilities and obligations of the Parties for the Interbay District Energy Demonstration Project ("Project").

## 2. Term and Milestones

2.1. Initial Term. This Agreement shall become effective upon execution by both Parties (the "Effective Date"). The "Commercial Operation Date" shall be the date on which the Connection is completed and is prepared to commence delivery of heat energy. This Agreement shall, unless sooner terminated as provided in Section 11 of this Agreement, remain in force and effect until the thirtieth (30<sup>th</sup>) anniversary of the Commercial Operation Date.

2.2 District Energy Provider's Option to Extend. District Energy Provider shall have the option to extend the initial term for a period of ten (10) years (the "Extension Term") upon notice to County, such notice to be delivered to County not less than one hundred eighty (180) days prior to the expiration of the initial term or by June 30, 2043, whichever date is earlier, on terms mutually negotiated by the Parties; provided however, that District Energy Provider shall not have the right to extend the initial term if District Energy Provider has committed an event of default which is continuing on the date District Energy Provider provides notice of extension. The extension of this Agreement pursuant to the first sentence of this Section 2.2 shall be on terms and conditions mutually negotiated by the Parties. If District Energy Provider does not timely provide notice to exercise this option or the Parties cannot agree on terms and conditions for the Extension Term, then this Agreement shall terminate at the end of the initial term.

2.3. Milestones. The Parties agree to the following schedule of Milestones and Milestone Dates by which District Energy Provider shall complete or satisfy each Milestone:

| <u>Milestone</u>  | <u>Milestone Date</u> |
|---|-----------------------|
| Filing date for required Project and Connection Permits | _____                 |
| Completion of Permit Acquisitions                       | _____                 |
| Construction Start date                                 | _____                 |
|   |                       |
| Deadline for Commercial Operation Date                  | _____                 |

If District Energy Provider fails to meet any of the Milestones by the applicable Milestone Date, then such failure will be considered a District Energy Provider Default event and County shall have the right to terminate this Agreement in accordance with Section 11.

## 3. Demonstration Zone

The Parties agree that for the purposes of this Agreement, the District Energy Project Demonstration Zone will be contained within the Elliott Bay Interceptor Section 8. The Elliott Bay Interceptor Section 8 (EBI8) extends from the Interbay Pump Station up to

the District Energy Provider Project site located at <address>. Describing the EB18 in GIS coordinates, it's location is as follows:

| <u>Structure</u>      | <u>Easting</u> | <u>Northing</u> |
|-----------------------|----------------|-----------------|
| Interbay Pump Station | 1259661        | 234779          |
| WW*NINT.B20-01        | 1260011        | 242369          |

North American Datum 1983, Washington State Plane Coordinates, North Zone, feet, and is depicted in Exhibit \_\_\_\_.

The purpose of the Demonstration Zone is to provide, to the extent practicable, usable heat value to the District Energy Provider, subject to the provisions of Sections 4.3 and 6.3 of this Agreement. During the term of this Agreement, the County will not authorize similar upstream heat withdrawal projects within the Demonstration Zone unless the County determines and the District Energy Provider agrees that such projects will not have a material change in the heat value to the District Energy Provider's Project.

#### **4. Connection to County Interceptor**

4.1 Connection. The County shall allow District Energy Provider to connect to the Elliot Bay Interceptor at [MH Location], as depicted in Exhibit \_\_, (the "Connection") for the purpose of demonstrating sewage heat recovery technologies provided the County approves the design, engineering plans, and wastewater volume to be diverted through the Connection and such Connection is otherwise consistent with the terms of the Agreement.

4.2 Design Standards. The District Energy Provider shall design and construct the Connection in conformance with County design standards and all applicable state and local laws and regulations.

4.2.1. After the Effective Date, the County shall provide District Energy Provider with potentially relevant and available as-builts, layout diagrams, plan and profile drawings for the section of the interceptor pipe and manhole locations where the proposed connection(s) shall take place.

4.2.2. Within \_\_\_\_ days of the Effective Date, the District Energy Provider shall provide the County with a 30% design packet, depicting District Energy Provider's design of the Connection including without limitation, District Energy Provider's specifications, drawings and design assumptions for County review and comment. The County shall have 30 days from receipt of the 30% design packet to review and provide comments to District Energy Provider.

4.2.3. Within \_\_\_\_ days of the Effective Date, the District Energy Provider shall provide the County with a 60% design packet, depicting District Energy Provider's design of the Connection including without limitation, responses to County's 30% review

comments. The County shall have 30 days from receipt of the 60% design packet to review and provide comments to District Energy Provider.

4.2.4. Within \_\_\_\_ days of the Effective Date, the District Energy Provider shall provide the County with a 90% design packet, depicting District Energy Provider's design of the Connection including without limitation, responses to County's 60% review comments.

4.2.5. Within \_\_ days of the Effective Date, the District Energy Provider shall submit to the County for its review and approval or denial, the final design for the Connection including all specifications special provisions, technical requirements, and technical specifications, necessary to construct the work. Comments from the County on the 90% design shall be resolved to the County's satisfaction. The County shall have 30 days from receipt of the final design packet to review and give its approval or denial of the Connection. If approved, the final design shall be referred to as the "Approved Final Design."

4.2.6. Prior to submitting any permit application for the Connection or Project District Energy Provider shall have first obtained the County's written approval of the Approved Final Design.

4.3. Proper Design. The County's review of any design documents shall not relieve District Energy Provider from its obligation to properly design the Connection and Project and to obtain all necessary permits and approvals for the Connection and Project.

4.4. Flow Volume and Temperature. The County does not warranty or make any representation as to the temperature or flow volume of the wastewater conveyed to the connection.

4.5. County Contact. The County shall designate an Energy Program Project Manager who shall serve as the District Energy Provider's point of contact with the County; provide limited assistance and technical expertise in the energy, wastewater and technology assessment fields; and maintain communications with District Energy Provider and Project stakeholders.

## **5. District Energy Provider Responsibilities for Design, Construction and Operation of Connection**

5.1. District Energy Provider shall comply with all applicable laws and regulations with respect to the construction and operation of the Connection and Project. The Interbay District Energy Demonstration Project will be a private Investor Owned Utility (IOU) and therefore subject to local, state and federal laws related to the governance and oversight of IOUs. District Energy Provider shall provide County with a copy of any written notice it receives regarding noncompliance or alleged noncompliance by District Energy Provider with respect to the Connection, Project or IOU within three (3) business days of receipt. King County will be held harmless if the

Connection, Project or IOU are in non-compliance and/or are subject to fines, lawsuits or damages.

5.2. Overall Responsibility for Connection and Project. District Energy Provider shall design, construct, install and operate the Connection and Project at its sole cost and expense. District Energy Provider shall be solely responsible for obtaining all permits and regulatory approvals for the design, installation and operation of the Connection and Project, including the use of a public right of way or other public property.

5.3. Responsibility for Construction of Connection. District Energy Provider shall allow the County access to its construction site necessary to inspect the Connection during construction. District Energy Provider shall obtain written approval and acceptance from the County for the Connection prior to backfill. District Energy Provider shall be solely responsible for designing, constructing and installing all equipment, pipes, conduits and related facilities required for and shall bear all costs and expenses incurred in and for the Connection and with bringing its facilities to the Connection. District Energy Provider shall pay prevailing wages for the construction, maintenance and operation of the Connection and Project.

5.4. Coordination of Design. District Energy Provider's connection to the County's sewer main shall be consistent with the Approved Final Design and the County design manual or similar technology approved in writing by the County that will allow the temporary diversion and return of sewage to allow for the drawing of heat from the wastewater conveyance as depicted in Exhibit \_\_\_\_.

5.5. Coordination of Construction of Connection. District Energy Provider shall coordinate construction activity for the Connection with the County's designated Local Public Agency coordinator. At the County's request, District Energy Provider shall construct the Connection during a specified period in conjunction with a planned improvement or maintenance activity affecting County's conveyance system.

5.5.1. Obligation to Diligently Pursue Permits. District Energy Provider is responsible for timely obtaining all required permits and approvals. District Energy Provider shall use its best efforts to diligently pursue permitting and construction of the Project and Connection by the Milestone Dates set forth in Section 2. District Energy Provider's failure to obtain permitting and/or to commence construction by the Milestone Dates set forth in Section 2 shall be grounds for the County to terminate the Agreement for default under section 11.1.

5.5.2. Prior to construction of the Connection, District Energy Provider shall have been granted all required permits, including a street use permit and any other permits or approvals from all applicable government bodies necessary for the construction of the Connection, either unconditionally or subject to conditions that do not materially prejudice its rights, the enjoyment of its benefits or the performance of its obligations under this Agreement and each such required permit or approval shall be in

full force and effect and any appeal period shall have been expired or appeals exhausted.

5.5.3. District Energy Provider shall comply with all applicable laws and regulations with respect to the construction, operation and oversight of the Connection and Project. District Energy Provider shall provide County with a copy of any written notice it receives regarding noncompliance or alleged noncompliance by District Energy Provider with respect to the Connection or Project within three (3) business days of receipt.

5.5.4. No changes may be made to the Approved Final Design without the express written consent of the County. Before or during construction, if District Energy Provider requests a change to the Approved Final Design, District Energy Provider shall provide to the County for review a description of the requested change and reason for the requested change along with a copy of all plans, drawings, specifications and submittals regarding the requested change for County review and approval or denial. County shall have five (5) business days to review the information submitted and decide, in its sole judgment and discretion, whether to approve, modify or deny the requested change.

5.6. County may request additions and changes to the Approved Final Design if required for the County to meet its maintenance, operational and/or permit goals and requirements.

5.7. District Energy Provider will notify County upon completion of the construction of the Connection and will invite County to participate in a pre-final inspection of the completed work.

5.8. County will inspect the completed facilities and will approve or reject construction or materials which are deficient, or which deviate from the Approved Final Design or any County-approved revisions to the Approved Final Design. County will submit a written response within ten (10) business days of the date of the pre-final inspection, notifying District Energy Provider that the Connection has been constructed in accordance with the Approved Final Design, or rejecting the completed facilities. In the event that the completed work is rejected, such response will include written notice of any known deficiencies so that the District Energy Provider can use the response in determining appropriate remedies for each deficiency.

5.9. Once the District Energy Provider determines that all deficiencies have been remedied, District Energy Provider shall invite County to participate in a final inspection of the completed facilities.

5.10. The County shall not be responsible or obligated for any costs, change orders or delays associated with the construction of the Connection or the Project.

5.11. Any and all property of any kind or description whatsoever placed or moved onto the Connection, County property or the Project site by the District Energy Provider, its agents, contractors and invitees shall be at the District Energy Provider's sole risk, and the County shall not be liable for any damage done to, or loss of, such property.

5.12. District Energy Provider shall be solely responsible for administration, operations, maintenance, repair and replacement of the Connection and the Project, including but not limited to the loop parallel pipe or similar technology, and any associated equipment necessary for the heat energy transfer process.

5.13. District Energy Provider shall be responsible for any and all costs and expenses, of any nature whatsoever, including, but not limited to County staff time, associated with odor control efforts resulting from the Connection or the Project.

5.14. District Energy Provider shall own the pipe and equipment up to the point of connection with the County's Elliot Bay Interceptor and all facilities and equipment located on the Project site. District Energy Provider may divert, in accordance with this Agreement, wastewater collected by the Connection only upon the condition that the County retains the rights to such wastewater. Nothing in this Agreement shall be construed as transferring or granting any right, title or interest to District Energy Provider in the County's Elliot Bay Interceptor, the wastewater conveyed therein and/or the County's Wastewater Treatment System.

5.15. District Energy Provider shall not discharge sewage to County's regional wastewater system via the loop parallel pipe required for the Connection.

## **6. Operation and Maintenance of WTD Facilities**

6.1. The Parties agree that the primary responsibility of County is to operate the Elliot Bay Interceptor and the Wastewater Treatment System in a manner that meets County's sewage disposal, environmental and public health objectives and obligations. District Energy Provider shall not interfere with County's Elliot Bay Interceptor or Wastewater Treatment System operations or facilities.

6.2. The County's operation of its wastewater conveyance system shall have priority over District Energy Provider's operation of the Connection and the County may require the District Energy Provider to temporarily suspend and/or terminate operation of the heat energy recovery operation at the Connection if the County determines in its sole discretion and judgment that such suspension of operation is necessary to ensure reliable performance of the wastewater system.

6.3. COUNTY MAKES NO WARRANTIES AS TO THE QUALITY OR QUANTITY OF SEWAGE AVAILABLE IN THE COUNTY'S ELLIOT BAY INTERCEPTOR OR WASTEWATER TREATMENT SYSTEM OR DELIVERED TO THE CONNECTION OR TO DISTRICT ENERGY PROVIDER PURSUANT TO THIS

AGREEMENT. COUNTY AND DISTRICT ENERGY PROVIDER AGREE THAT THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE AND ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, ARE EXCLUDED FROM THIS AGREEMENT AND DO NOT APPLY TO THE HEAT ENERGY RECOVERY OPERATIONS OR FACILITIES DESCRIBED IN THIS AGREEMENT.

6.4. The County shall provide District Energy Provider with notice of any planned maintenance outages for the Elliot Bay Interceptor and/or the Wastewater Treatment System that would reduce the quantity of wastewater in the Elliot Bay Interceptor in the vicinity of the Connection. In the event the County reasonably anticipates that any event or events may result in an unscheduled outage for the Elliot Bay Interceptor and/or the Wastewater Treatment System that would reduce the quantity of wastewater in the Elliot Bay Interceptor in the vicinity of the Connection, County shall endeavor to provide oral notice thereof to District Energy Provider.

6.5. The District Energy Provider shall be responsible for the maintenance and operation of the Connection. The County shall be held harmless and District Energy Provider shall have no cause of action whatsoever against County for any temporary suspension of operations or any impacts to the operation of the Connection or Project.

## **7. Consideration to County for Use of County's Wastewater Heat**

7.1. Royalty Rate. For an initial period of ten (10) years beginning with the date on which energy is provided to a third party or customer within the demonstration zone, the District Energy Provider shall pay County a royalty rate equal to 4.1 percent of the rate charged for heat energy or the rate received for the heat energy, whichever is greater. The Royalty Rate payments shall be paid to the County monthly and is due on the 1<sup>st</sup> of each month for the prior month. On the first of each month District Energy Provider shall pay County the Royalty Rate for each person or customer receiving heat energy within the Demonstration Zone. Accompanying each payment, District Energy Provider shall provide County with an itemized receipt indicating the amounts billed to each person or customer for the prior month and the calculation of the amounts owing to County.

7.2. Renewable Energy Credits (RECs). To the extent that any Renewable Energy Credits (as defined by state legislation initiative 937), Federal Renewable Energy Certificates and/or any other federal, state or local renewable energy benefits are available or become available for the Project or Connection that are attributable to the waste heat provided by the County, during the term of this Agreement, District Energy Provider shall offer ownership of one-half (50%) of RECs or agree to pay to County, in addition to all other payments hereunder, one-half (50%) of any such available credits



7.3. Late Payments. Any payments due hereunder shall bear interest at the rate of 12% per annum, one percent per month from and after their due date if not timely paid.

## 8. District Energy Provider's Representations and Warranties

8.1. District Energy Provider makes the following representations and warranties to the County, all of which are made as of the execution of this Agreement:

8.1.1. Organization. District Energy Provider is a limited liability company duly organized, validly existing and in good standing under the laws of the State of Washington, is qualified to do business in the State of Washington and has the power and authority to enter into the transactions contemplated hereunder, and to execute, deliver and perform its obligations under this Agreement.

8.2.2. Authorization. District Energy Provider's execution and delivery of and the consummation of the transactions contemplated by this Agreement have been duly authorized by all necessary action of District Energy Provider. This Agreement constitutes a legal, valid and binding obligation of District Energy Provider and is enforceable against it in accordance with its respective terms.

8.2.3. Litigation, etc. To District Energy Provider's knowledge, there are no actions, suits, claims, complaints, investigations or legal or administrative or arbitration proceedings pending or threatened, whether at law or in equity, whether civil or criminal in nature, or whether before any governmental authority or arbitrator against or affecting District Energy Provider which could reasonably be expected to have a material adverse effect on District Energy Provider or its ability to perform its obligations under this Agreement. There is no outstanding order, writ, injunction, decree, judgment or award by any court, arbitration panel or governmental authority against or affecting District Energy Provider which could reasonably be expected to have a material adverse effect on District Energy Provider or its ability to perform its obligations under this Agreement.

8.2.4. No Conflict. None of the execution or delivery of this Agreement, the performance by District Energy Provider of its obligations hereunder or the fulfillment of the terms and conditions hereof shall: (i) conflict with or violate any provision of District Energy Provider's organizational documents; (ii) conflict or violate or result in a breach of any federal, state or local law in effect as of the date of execution of this Agreement; or (iii) conflict with, violate or result in the breach of, or constitute a default under or result in the imposition or creation of, any security under any agreement or instrument to which District Energy Provider is a party or by which it or any of its properties or assets are bound.

## 9. Records and Audits

9.1. District Energy Provider shall maintain current and accurate records of various ongoing data points for the Project, and will make those records available to County for the life of the Connection. Data points include, but are not limited to, the amount of sewage diverted, amount of heat extracted from sewage and detailed operating costs of heat exchanger system and all District Energy Provider's records that are necessary to determine the Royalty rate payments to be made to the County pursuant to this Agreement, including, but not limited to, records of energy generated from the Project and prices paid for that energy. Data points, records, as-builts and other information to be tracked for the demonstration and research benefit of the project will be jointly defined in Exhibit \_\_\_\_ by (date) after the specific technology, engineering and operations have been more clearly defined. District Energy Provider shall make such records and data available to County or its designees or representatives, upon not less than two (2) business days prior notice and during normal business hours, as may be required to determine whether all obligations are being performed in conformity with this Agreement. District Energy Provider shall retain all of its books and records for six (6) years following the creation thereof or for such longer period as may be required by applicable federal, state or local law, provided that all records that are necessary to demonstrate eligibility for tax credits, if applicable, shall be retained for ten (10) years following the creation thereof or such longer period as may be required by applicable law.

9.2. County shall have the right, at its own cost and expense, from time to time and upon reasonable notice to District Energy Provider and during normal business hours, to (a) examine the records and data of District Energy Provider required to be maintained under Section 9.1 and (b) cause an audit to be made with respect to any amounts claimed as being due from District Energy Provider to County hereunder.

## **10. Force Majeure.**

10.1. Effect of Event of Force Majeure. If County is prevented, hindered or delayed from performing any of its obligations under this Agreement including, but not limited to delivering wastewater to the Connection because of an interruption of its operations by an event of Force Majeure, then so long as that situation continues County shall be excused from performance of such obligations.

10.2. Termination for Extended Force Majeure. If an event of Force Majeure has prevented the County from performing any of its obligations under this Agreement for ninety (90) consecutive days, then either Party, as its sole and exclusive right and remedy in the case of such extended Event of Force Majeure, may terminate this Agreement by providing a Notice of Termination. In such case, the Agreement shall terminate on the date set forth in such Notice.

## **11. Defaults, Termination and Remedies.**

11.1. Either Party may terminate this Agreement prior to the initiation of construction of the Connection, by providing ten (10) days' written notice to the other

Party, in which case each Party shall bear their own costs incurred to the date of such termination. In such case the Agreement shall terminate on the tenth (10<sup>th</sup>) day following the effective date of such notice.

11.2. The County may terminate this Agreement if the County determines that operation of the Connection is interfering with the County's ability to comply with good engineering and maintenance practices and/or applicable federal, state and local laws and/or County permit conditions. In such case the County shall provide 30 days' written notice to the District Energy Provider and the Agreement shall terminate on the date set forth in such notice.

11.3. Events of Default. Each of the following events shall constitute events of default which, if not cured within the time permitted (if any) to cure such event of default, shall entitle County to terminate this Agreement pursuant to Section 11.4:

11.3.1. District Energy Provider terminates or suspends the design, permitting, construction or operation of the Connection or the Project, which continues for a period of sixty (60) days in any ninety (90) day period, without notice to, and the consent of, County;

11.3.2. District Energy Provider fails to meet any of the Milestones by the applicable Milestone Dates set forth in Section 2 of this Agreement.

11.3.3. The failure by District Energy Provider to make any payment required to be made under this Agreement to County when due, where such failure shall have continued for ten (10) days after notice thereof has been given by County to District Energy Provider;

11.3.4. The failure by District Energy Provider to comply with any covenant, obligation or agreement of District Energy Provider contained in this Agreement where such failure has an adverse effect on County or District Energy Provider's ability to perform its obligations under this Agreement;

11.3.5. District Energy Provider commences a voluntary case or other proceeding seeking liquidation, reorganization or other relief with respect to itself or its debts under any bankruptcy, insolvency or other similar law now or hereafter in effect or seeking the appointment of a trustee, receiver, liquidator, custodian or other similar official of it or any substantial part of its property or shall consent to any such relief or to the appointment of or taking possession by any such official in an involuntary case or other proceeding commenced against it, or shall make a general assignment for the benefit of creditors, or shall fail generally to pay its debts as they become due, or shall take any corporate action to authorize any of the foregoing;

11.3.6. District Energy Provider has an involuntary case or other proceeding commenced against it seeking liquidation, reorganization or other relief with respect to it or its debts under any bankruptcy, insolvency or other similar law now or

hereafter in effect or seeking the appointment of a trustee, receiver, liquidator, custodian or other similar official of it or any substantial part of its property and such involuntary case or other proceeding shall remain undismitted for a period of sixty (60) days; or an order for relief shall be entered against it under the federal bankruptcy laws as now or hereafter in effect;

11.3.7. Any representation or warranty made by District Energy Provider in this Agreement shall prove to have been incorrect in any material respect when made or when deemed to have been made and such failure has an adverse effect on County or District Energy Provider's ability to perform its obligations under this Agreement.

11.4 Termination Procedure for Events of Default.

11.4.1. Upon the occurrence of default that is not cured within the applicable period (if any) for cure, or a termination event under Section 11.3 of this Agreement, the County may, at its option, initiate termination of this Agreement by delivering a Notice of Intent to Terminate this Agreement to District Energy Provider. The Notice of Intent to Terminate shall specify in reasonable detail the applicable default giving rise to the Notice of Intent to Terminate.

11.4.2. Except as otherwise provided herein, if the basis for termination is a failure to perform that can be cured, the termination shall not take effect so long as the District Energy Provider cures the default within thirty (30) days of service of the Notice of Intent to Terminate. Unless the default is remedied within the 30 days, the County may terminate this Agreement by delivering a Termination Notice to District Energy Provider, whereupon this Agreement shall terminate on the date set forth in the Termination Notice (which date shall in no event be earlier than the date such Termination Notice is delivered to the District Energy Provider). No Cure Period shall be provided for a default under Section 11.3.1, 11.3.2 or 11.3.3. The Agreement may be terminated by a Termination Notice based upon a default of Section 11.3.1, 11.3.2 or 11.3.3 if the default is not fully remedied within ten (10) days of the sending of the Notice of Intent to Terminate.

11.3.3. Removal of Property. In the event of default by the District Energy Provider, the County shall have the right, but not the obligation, to remove from its premises the Connection and all equipment, pipes, conduits and related facilities and any and all of District Energy Provider's personal property, goods, and effects located therein, and may dispose of such property, in any manner, without further notice, at District Energy Provider's cost and expense.

11.4. Cumulative Remedies. In the event of default, the County may pursue any remedy at law or in equity, including termination of this Agreement without prejudice to any rights or actions or remedies it may have in respect of any breach or default of this Agreement or any rights or obligations which expressly survive termination of this Agreement.

11.5. Duties Upon Expiration or Termination of Agreement. Upon termination of this Agreement and unless otherwise arranged, the District Energy Provider shall use reasonable care and remove from the Connection site, the Connection and all equipment, pipes, conduits and related facilities and any and all of District Energy Provider's personal property, goods, and effects. If the District Energy Provider fails to perform this duty at termination, the County may cause such removal to be made at District Energy Provider's cost and expense. Any personal property, goods and effects that remains on the property after the expiration or termination of this Agreement shall be deemed abandoned by District Energy Provider and County may dispose of such property in any manner, without further notice, at District Energy Provider's cost and expense. It is understood and agreed that the property constituting the Connection is the property of King County and that all improvements to that property will continue to belong to King County upon termination of this Agreement.

## 12. Obligation to Defend and Indemnify

12.1. District Energy Provider shall hold harmless, indemnify and defend the County, its officers, appointed and elected officials, employees and agents, from and against any and all claims, actions, suits, liability, loss, expenses, damages and judgments of any nature whatsoever, including but not limited to costs and attorney's fees in defense thereof, for non-payment of wages, injury, sickness, disability or death to persons or damage to property or business, caused by or arising out of the District Energy Provider's acts, errors or omissions in the performance of this Agreement and arising by reason of the District Energy Provider's construction, operation and maintenance of the Connection, the Project and/or participation in a Neighborhood District Energy Project.

12.2. The District Energy Provider's obligations under this section shall include, but not be limited to:

12.2.1. The duty to promptly accept tender of defense and provide defense to the County at District Energy Provider's own expense;

12.2.2. The duty to indemnify and defend the County from any claim, demand and/or cause of action brought by or on behalf of any of District Energy Provider's employees or agents. The foregoing duty is specifically and expressly intended to constitute a waiver of the District Energy Provider's immunity under Washington's Industrial Insurance Act, RCW Title 51, as to the County, in order to provide the County with a full and complete indemnity and defense of claims made by the District Energy Provider's employees. The Parties acknowledge that these provisions were mutually negotiated by them and each party has had the opportunity, and has been encouraged, to consult with independent counsel regarding this waiver.

12.2.3. To the maximum extent permitted by law, the District Energy Provider shall indemnify and defend the County from and be liable for all damages and injury which shall be caused to owners of property on or in the vicinity of the Project which shall occur to any person or persons or property whatsoever arising out of the performance of this Agreement and/or the construction or operation of the Project and/or the Connection, whether or not such injury or damage is caused by the negligence of the District Energy Provider or caused by the inherent nature of the Project or the Connection.

### **13. Insurance**

13.1. Prior to commencement of construction of the Project and Connection, and at all times during the term of this Agreement, District Energy Provider shall obtain and maintain the following insurance coverages and provide King County with evidence thereof:

13.1.1. General Liability - Coverage shall be at least as broad as Insurance Services Office form number CG 00 01 Ed. 11-88 covering COMMERCIAL GENERAL LIABILITY. \$5,000,000 combined single limit per occurrence and for those policies with aggregate limits, a \$5,000,000 aggregate limit. Excess/Umbrella Liability coverage may be provided to satisfy the required limits. This coverage shall be required to remain in good standing through the duration of this agreement.

13.1.2. Automobile Liability - Coverage shall be at least as broad as Insurance Services Office form number CA 00 01 Ed. 12/90 covering BUSINESS AUTO COVERAGE, symbol 1 "any auto"; or the combination of symbols 2, 8, and 9. \$5,000,000 combined single limit per accident. Excess/Umbrella Liability coverage may be provided to satisfy the required limits. This coverage shall be required to remain in good standing through the duration of this agreement.

13.1.3. Workers' Compensation - Statutory requirements of the State of residency. Coverage shall be at least as broad as Workers' Compensation coverage, as required by the Industrial Insurance Act of the State of Washington, as well as any similar coverage required for this work by applicable Federal or "other States" State Law. This coverage shall be required to remain in good standing through the duration of this agreement.

13.1.4. Employer's Liability or "Stop Gap" - Coverage shall be at least as broad as the protection provided by the Workers Compensation policy Part 2 (Employers Liability) or, in states with monopolistic state funds, the protection provided by the "Stop Gap" endorsement to the general liability policy. Limit: \$ 1,000,000. This coverage shall be required to remain in good standing through the duration of this agreement.

13.1.5. Builder's Risk - Builders Risk coverage shall be placed on the project and any subsequent improvements. King County shall be an Additional Named Insured subject to a mortgagee clause and Waiver of Subrogation.

13.1.6. Contractor's Pollution Liability – Contractor's Pollution Liability coverage in the amount of \$1,000,000 per occurrence and in the aggregate to cover sudden and non-sudden bodily injury and/or property damage to include the destruction of tangible property, loss of use, clean up costs and the loss of use of tangible property that has not been physically injured or destroyed. If Asbestos, Lead or PCB's are a potential exposure, such insurance shall not exclude pollution arising out of Asbestos, Lead and/or PCB operations. Evidence of insurance must specifically state that coverage is included. Coverage shall contain a 6 years Products-Completed Operations extension running from Final completion of project.

13.1.7. Pollution Liability (OPA, CERCLA): \$1,000,000 and statutory limits of liability as applicable.

13.1.8. Professional Liability Errors and Omissions - \$1,000,000 per claim/\$5,000,000 aggregate prior to the beginning of any work to be performed by a Professional,

During construction of the Connection and Project, District Energy Provider shall require its Contractors and Professional Engineers to also maintain the insurance coverages set forth in section 13.1.

13.2. With respect to all Liability Policies except workers compensation, District Energy Provider shall name King County an additional insured with respect to primary and non-contributory limits in accordance with a standard separation of insureds clause, and King County shall be provided not less than 45 days prior written notice of cancellation (10 days with respect to cancellation for non-payment of premium) per RCW 48.18.290.

13.3. All insurers shall either be licensed to conduct business in the State of Washington and rated A-VII in the A.M. Best's Key Rating Guide or filed as a surplus lines placement by an authorized Washington State Surplus Lines Insurance Broker. Any form of self-insured retentions in excess of \$25,000 shall be disclosed and are subject to approval by King County.

13.4. Prior to commencement of the Project and Connection, and anytime upon request during the term of this Agreement, the District Energy Provider shall provide certificates of insurance in the form required by King County Risk Management with copies of the actual additional insured policy endorsements or blanket additional insured wording stating that King County is an additional insured. All insurance documentation shall be delivered to:

King County

Risk Management Section  
400 Yesler Way, Room 410  
Seattle, WA 98104

13.5. The Indemnity and Insurance provisions set forth in this Agreement shall survive the termination of this Agreement for any reason.

**14. ENVIRONMENTAL LIABILITY.**

14.1. District Energy Provider covenants and warrants that District Energy Provider, its employees, contractors, agents or invitees shall not use the Connection or any County property in a manner which violates any applicable federal, state or local law, regulation or ordinance governing the handling, transportation, storage, treatment, usage or disposal of toxic or hazardous substances, wastes or materials.

14.2. District Energy Provider shall not, without first obtaining King County's written approval, apply, store, deposit, transport, release or dispose of any hazardous substances, petroleum products, sewage, medicinal, bacteriological, or toxic materials, or pollutants, in the Connection or on County property. All approved application, storage, deposit, transportation, release and disposal shall be done safely and in compliance with applicable laws.

14.3. District Energy Provider shall immediately notify the County of any and all spills or releases of any toxic or hazardous substances, wastes, or materials, all failures to comply with any federal, state, or local law, regulation or ordinance, all inspections of the Connection and/or Project Site by any regulatory entity concerning the same, all regulatory orders or fines, and all response or interim cleanup action taken by or proposed to be taken by an government entity or private party on the Project site.

14.4. District Energy Provider shall indemnify, defend, and hold harmless the County from any claims, judgments, damages, penalties, fines, expenses, liabilities (including sums paid in settlements of claims) or loss arising out of or in any way relating to a breach of the environmental warranty made by the District Energy Provider above. Such indemnity shall include, without limitation, attorneys' fees, consultants' fees, and expert fees, as well as costs incurred in connection with any investigation of site conditions or any cleanup, remedial, removal or restoration work required by any federal, state or local governmental agency or political subdivision.

14.5. For the purposes of this section, "toxic or hazardous substances, wastes and materials" or "toxic substance" includes but is not limited to any material or substance which is (1) defined as a "hazardous substance" pursuant to Section 101 of the Comprehensive Environmental Response, Liability and Compensation Act, 42 U.S.C. 9601(14); (2) defined as a "hazardous Waste" pursuant to Section 1004 or Section 3001 of the Resource, Conservation and Recovery Act, 42 U.S.C. 6903, 42 U.S.C. 6921; (3) included on the toxic pollutant list under Section 307(a) of the Federal Water Pollution Control Act, 33 U.S.C. 1317(a); (4) defined as a "hazardous Substance" pursuant to Section 311 of the Federal Water Pollution Control Act, 33 U.S.C. 1321; (5)



defined as a "hazardous air pollutant" under Section 112 of the Clean Air Act, 42 U.S.C. 7412; (6) defined as a "hazardous substance" under Washington's Hazardous Waste Cleanup Act, RCW 70.105B.020; (7) defined as a "hazardous substance" pursuant to the hazardous waste site cleanup law, the Model Toxics Control Act ((initiative 97). "Toxic or hazardous substances, wastes and materials" specifically includes, but is not limited to, asbestos, polychlorinated biphenyls (PCBs), petroleum and petroleum products, and urea formaldehyde.

14.6. The covenants and warranties in this Section 14 shall survive the termination of this Agreement for any reason.

## **15. Dispute Resolution**

15.1. The Parties shall work collaboratively in accordance with the following steps to resolve disagreements from activities performed under this Agreement. In the event of a dispute, the disputing Party shall notify the other Party in writing of any problem or dispute which the disputing Party believes needs formal resolution. This written notice shall include: (1) a description of the issue to be resolved; (2) a description of the difference between the Parties on the issue; and (3) a summary of steps taken by the disputing Party to resolve the issue. The Parties shall meet within five (5) business days of receiving the written notice and attempt to resolve the dispute.

15.2. The Parties agree that they shall have no right to seek relief under this Agreement in a court of law until and unless this procedural step is exhausted; provided that this requirement shall not apply if the applicable statute of limitations will run during the time that may be required to exhaust the procedural steps set forth above.

## **16. Notices**

16.1. Any notice required to be given by either Party to the other pursuant to provisions of this Agreement or any law, present or future, shall be in writing and shall be deemed to have been duly given or sent if either delivered personally, sent by nationally recognized overnight delivery service or sent via United States Mail addressed to the following:

County  
Wastewater Treatment Division  
KSC-NR-0507  
Attn: Director of Wastewater Treatment Division  
201 S. Jackson Street  
Seattle, WA 98104-3855

District Energy Provider

**WITH A COPY TO:**

King County Prosecutor's Office  
King County Administration Building  
500 Fourth Avenue, 9<sup>th</sup> Floor  
Seattle, WA 98104  
Attn: Verna P. Bromley  
Sr. Deputy Prosecuting Attorney  
Fax: (206) 296-0415

Or, to such other person or address as is hereafter designated in writing by either Party to the other. Each Party may change its notice address set forth in this section by giving notice of a new address to the other Party in accordance with this section.

Notices may also be given by facsimile transmission (provided the fax machine has printed a confirmation of receipt). All notices that are mailed shall be deemed received three (3) business days after mailing. All other notices shall be deemed complete upon actual receipt or refusal to accept delivery.

**17. Taxes.**

17.1. General. District Energy Provider shall pay all taxes that may be levied upon or assessed against the Project site and any other property, including personal property that it owns or uses in connection with this Agreement and any taxes imposed on its income.

17.2. Excise Taxes. District Energy Provider is also responsible for the payment of all taxes and assessments imposed upon District Energy Provider with respect to its activities under this Agreement.

**18. Miscellaneous.**

18.1. The Parties shall coordinate regarding any publicity or media relations related to the Project.

18.2. The County's designated Energy Program Project Manager will upon District Energy Provider's request review grant applications for the Project and if appropriate provide a letter of support which may be used in District Energy Provider's soliciting grants and funding requests related to the Project. Nothing herein shall create or imply any duty upon King County to provide any County funds for design, construction or operation of the Connection and/or Project, such being the obligation solely of District Energy Provider .

18.3. Assignment. The District Energy Provider shall not have right to assign the Agreement or any of District Energy Provider's rights or obligations under this Agreement without the written consent of the County in its sole discretion and judgment. The Agreement is entered into solely for the mutual benefit of the Parties and there shall be no third party beneficiaries.

18.4. Modification. This Agreement shall not be amended, changed or modified except by a subsequent agreement in writing which indicates that such writing is intended to amend the terms of this Agreement and is signed by duly authorized officers of both Parties. The Parties agree that this Agreement shall not be amended in any manner by any course of dealing between the Parties.

18.5. Waiver. No delay or forbearance by a Party in exercising any right, power or remedy accruing to such Party upon the occurrence of any breach or default by the other hereto under this Agreement shall impair any such right, power or remedy of such Party, nor shall it be construed to be a waiver of any such breach or default, or an acquiescence therein.

18.6. Entire Agreement. This Agreement, contains and integrates the complete agreement between the Parties with respect to the subject matter hereof and supersede all other agreements and understandings between the Parties, whether written or oral, with respect to the subject matter hereof.

18.7. Relationship of Parties. The relationship of the Parties shall be that of independent contractors. Neither this Agreement nor the performance by the Parties of their respective obligations under this Agreement shall create or constitute, or be construed to create or constitute, a partnership, joint venture or association, or establish a fiduciary relationship, a principal and agent relationship or any other relationship of a similar nature, between County and District Energy Provider.

18.8. Third Party Beneficiary. This Agreement is for the sole and exclusive benefit of the Parties hereto and shall not create a contractual relationship with, or cause of action in favor of, any third party.

18.9. Governing Law and Venue. This Agreement and any provisions contained herein shall be governed by, and construed and interpreted in accordance with, the laws of the State of Washington. The Superior Court of King County in Seattle, Washington shall have exclusive jurisdiction and venue over any legal action arising under this Agreement.

18.10. Severability. Any provision of this Agreement that shall be prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions thereof, and any such prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction.

18.11. Costs. Each of the Parties shall pay its own costs and expenses of and incidental to the negotiation, preparation and completion of this Agreement and shall not have any right to claim or seek reimbursement of such costs and expenses from the other Party.

18.12. Time is of the Essence. Except as the context specifically otherwise requires, time is of the essence with respect to all dates and time periods set forth in this Agreement.

18.13. Schedules; Exhibits. The Schedules and Exhibits to this Agreement are incorporated by reference into, and shall form part of this Agreement, and shall have full force and effect as though they were expressly set out in the body of this Agreement; provided, however, that in the event of any conflict between the terms, conditions and provisions of this Agreement (excluding the Exhibits and Schedules thereto) and the Schedules or Exhibits hereto, the terms of this Agreement (excluding the Exhibits and Schedules thereto) shall prevail.

18.14. Counterparts. This Agreement may be executed in one or more counterparts (including facsimile copies) each of which shall be deemed an original and all of which shall be deemed one and the same Agreement.

[SIGNATURES APPEAR ON THE FOLLOWING PAGE]

**KING COUNTY**

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

Name:

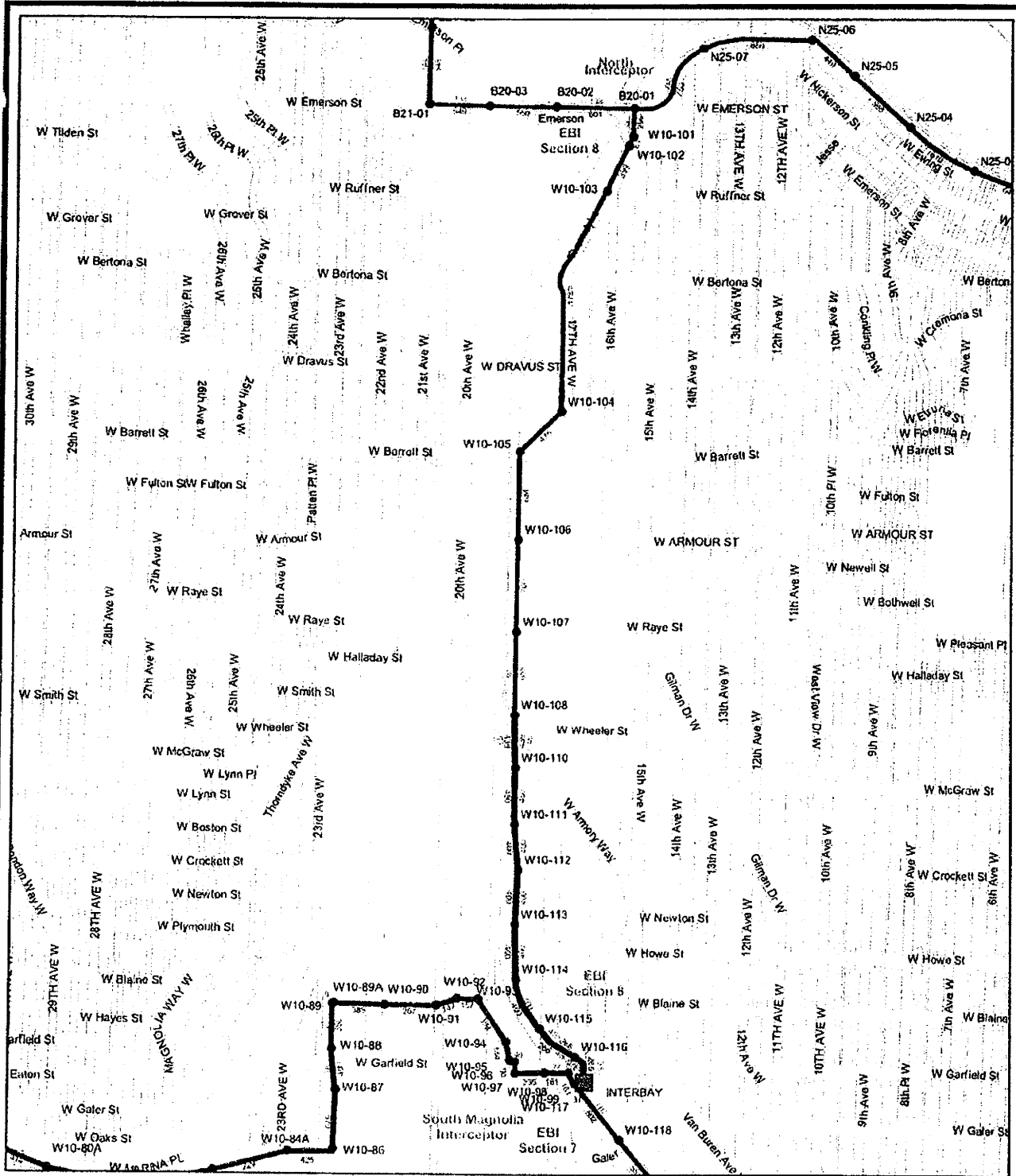
Title:

**DISTRICT ENERGY PROVIDER**

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


Name:

Title:



# EBI Section 8

## WW\*EBI8


**King County**  
 Department of Natural Resources and Parks  
 Wastewater Treatment Division

