

**LONG-TERM LEASE AND CONCESSION AGREEMENT FOR  
THE OHIO STATE UNIVERSITY UTILITY SYSTEM**

dated as of

April 10, 2017

by and between

THE OHIO STATE UNIVERSITY

and

OHIO STATE ENERGY PARTNERS LLC

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**LONG-TERM LEASE AND CONCESSION AGREEMENT FOR  
THE OHIO STATE UNIVERSITY UTILITY SYSTEM**

THIS LONG-TERM LEASE AND CONCESSION AGREEMENT FOR THE OHIO STATE UNIVERSITY UTILITY SYSTEM (this “Agreement”) is made and entered into as of this 10th day of April, 2017 by and between The Ohio State University (the “University”) and Ohio State Energy Partners LLC, a Delaware limited liability company (the “Concessionaire”).

**RECITALS**

WHEREAS, the University has a long-term commitment to sustainability and the reduction of its impact on the environment, and the Transaction (as defined herein) is a critical component of that commitment; and

WHEREAS, the University has established a Utility System (as defined herein) and owns the Utility Facilities and the Utility System Assets (both, as defined herein); and

WHEREAS, pursuant to Ohio Rev. Code Ann. § 3345.11 and under the terms and conditions of that certain resolution adopted by the Board of Trustees of the University (the “Board”) on April 7, 2017 and attached hereto as Schedule 1, the University is authorized to enter into the Transaction; and

WHEREAS, the Concessionaire desires to lease the Utility Facilities from the University, and obtain a grant from the University of the exclusive right to operate, maintain, possess, control and improve the Utility System for the Term (as defined herein) of this Agreement in connection therewith, all as hereinafter provided; and

WHEREAS, the University desires to lease the Utility Facilities to the Concessionaire and grant the Concessionaire the exclusive right to operate, maintain and improve the Utility System for the Term of this Agreement in connection therewith, all as hereinafter provided; and

WHEREAS, the Concessionaire agrees to lease the Utility Facilities and to operate, maintain and improve the Utility System in accordance with the provisions of this Agreement, including the Performance Standards (as defined herein); and

WHEREAS, the Concessionaire agrees to provide the Utility Services (as defined herein) to the University pursuant to the terms and conditions of this Agreement;

NOW THEREFORE, for and in consideration of the promises, the mutual covenants, representations, warranties and agreements contained herein and other valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties (as defined herein) covenant and agree as follows:

**ARTICLE 1  
DEFINITIONS AND INTERPRETATION**

**Section 1.1. Definitions.** Unless otherwise specified or the context otherwise requires, for the purposes of this Agreement the following terms have the following meanings:

“10-Year ECM Costs” means the lesser of (1) the Approved costs for items identified as ECMs as of June 30, 2028 and (2) the actual, out-of-pocket costs incurred by the Concessionaire during the Term for such ECMs as of June 30, 2028.

“10-Year EUI Reduction” means the percentage reduction in the Energy Use Intensity score from the beginning of the Fiscal Year ending on June 30, 2017 through the end of the Fiscal Year ending on June 30, 2028.

“30-Day Closing Extension Payment” means \$10,000,000.

“60-Day Closing Extension Payment” means \$25,000,000.

“AAA” means the American Arbitration Association.

“AA-Compensation” has the meaning ascribed thereto in Section 14.1(b).

“AA-Dispute Notice” has the meaning ascribed thereto in Section 14.1(c).

“AA-Notice” has the meaning ascribed thereto in Section 14.1(c).

“AA-Preliminary Notice” has the meaning ascribed thereto in Section 14.1(c).

“Actual Knowledge of the University” means the actual, current knowledge of the University’s Chief Financial Officer, Senior Energy Adviser, Associate Vice President of Facilities, Operations and Development and University Engineer on any date which a relevant representation or warranty is made, with the duty for each of the foregoing to inquire of his or her direct reports within 5 Business Days prior to the date of such representation or warranty regarding the relevant matter, but without any other duty of inquiry or investigation.

“Additional Coverages” has the meaning ascribed thereto in Section 13.3(n).

“Adjusted for Inflation” means adjusted by the arithmetic average of the percentage increases, if any, or decreases, if any, in the CPI Index during the most recent 3 adjustment periods as specified herein.

“Adverse Action” has the meaning ascribed thereto in Section 14.1(a).

“Affiliate”, when used to indicate a relationship with a specified Person, means a Person that, directly or indirectly, through one or more intermediaries (i) has a 50% or more voting or economic interest in such specified Person or (ii) controls, is controlled by or is under common control with (which shall include, with respect to a managed fund or trust, the right to direct or cause the direction of the management and policies of such managed fund or trust as manager, advisor, supervisor, sponsor or trustee pursuant to relevant contractual arrangements) such specified Person, provided that a Person shall be deemed to be controlled by another Person if controlled in any manner whatsoever that results in control in fact by that other Person (or that other Person and any Person or Persons with whom that other Person is acting jointly or in concert), whether directly or indirectly and whether through share ownership, a trust, a contract or otherwise (for purposes of this definition, a managed fund or trust shall be deemed to be an

Affiliate of the Person managing, supervising, sponsoring or advising such fund or trust and a limited partner in a managed fund or trust shall be deemed to be an Affiliate of such fund or trust and of the Person managing, supervising, sponsoring or advising such fund or trust).

“Agreement” has the meaning ascribed thereto in the preamble hereto (including all Schedules referred to herein), as amended from time to time in accordance with the terms hereof.

“Approved Five-Year Plan” means the Five-Year Plan then in effect pursuant to Section 7.3.

“Approval”, “Approved”, “Approves”, “Approved by the University” and similar expressions mean approved or consented to by the University in accordance with the provisions of Section 1.15.

“Assignment and Assumption Agreement” has the meaning ascribed thereto in Section 19.8(c).

“Assumed Liabilities” has the meaning ascribed thereto in Section 3.2(d).

“Audit and Review” and similar expressions mean, with respect to any matter or thing relating to the Utility System, the Utility System Operations or this Agreement, the performance by or on behalf of the University of such reviews, investigations, inspections and audits relating to such matter or thing as the University may reasonably determine to be necessary in the circumstances, conducted in each case in accordance with Prudent Industry Practices, if any, or as required by Law, but in accordance with the provisions of this Agreement.

“Authorization” means any approval, certificate of approval, certification, authorization, consent, waiver, variance, exemption, declaratory order, exception, license, filing, registration, permit, franchise, notarization or other requirement of any Person that applies to the Utility System or is reasonably required from time to time for the Utility System Operations, including any of the foregoing issued, granted, given or otherwise made available by or under the authority of any Governmental Authority or pursuant to any applicable Law.

“Bank Rate” means the 3-month LIBOR (or any successor rate thereto) as reported in the *Wall Street Journal* (or any successor thereof).

“Barclays” has the meaning ascribed thereto in Section 9.1(k).

“Benchmark Interest Rate” has the meaning ascribed thereto in Section 2.2(c).

“Bid Date” means March 17, 2017.

“Board” has the meaning ascribed thereto in the Recitals to this Agreement.

“Breakage Costs” means any breakage costs, make-whole premium payments, termination payments or other prepayment amounts (including debt premiums and interest rate hedge termination costs) that are required to be paid by the Concessionaire with respect to

Leasehold Mortgage Debt as a result of the early repayment (including, following acceleration) of such Leasehold Mortgage Debt prior to its scheduled maturity date.

“Business Day” means any Day that is neither a Saturday, a Sunday nor a Day observed as a holiday by the University; provided, that solely with respect to the timing of any payment obligation under this Agreement, a Business Day shall also not be a Day on which banks that are members of the United States federal reserve system are permitted or required to be closed.

“Capital Improvement” means (i) any improvement to or replacement or expansion of the components of the Utility Facilities, which may include an ECM, and (ii) any ECM that is on the Non-Utility Campus, in each case that is capital in nature, as determined in accordance with GAAP.

“Capped O&M Ceiling” has the meaning ascribed thereto in Schedule 5.

“Capped O&M Costs” means the following out-of-pocket operating and maintenance costs and expenses incurred by the Concessionaire (which costs and expenses shall include payments due and payable by the Concessionaire to the Operator or other Contractors pursuant to an Operating Agreement or similar agreement) or the Operator in operating the Utility System and complying with their respective obligations under this Agreement: (i) the charges as described in Section 3.9(a); (ii) the professional expenses, salaries, employee benefits and bonuses paid or granted to employees and contractors of the Concessionaire or the Operator to perform any of the Utility System Operations and including the costs of issuing and administering requests for proposals in connection with the procurement of subcontractors; (iii) the cost of the supplies (other than Supplies) reasonably necessary to operate and manage the Utility System and used exclusively in connection therewith, specifically, (1) office supplies, (2) motor vehicle supplies, (3) safety supplies, (4) uniforms, (5) computer supplies, (6) telecommunication equipment, (7) measuring and testing equipment and instruments, (8) radios, pagers, cell phones and similar communication equipment, (9) gas containers and (10) hand tools; (iv) postage and delivery charges; (v) long-distance and local telephone call charges; (vi) internet access charges; (vii) repair and maintenance of any of the Utility System Assets or Utility Facilities to the extent incurred in accordance with Prudent Industry Practices; (viii) legal fees directly related to the operation of the Utility System and specifically excluding those associated with the negotiation of this Agreement, the McCracken Sublease or the Design-Build Agreement, any amendment or modification thereto or any dispute with the University in connection with this Agreement, the McCracken Sublease, the Design-Build Agreement, the Utility System Operations or the Transaction; (ix) design, energy auditing and engineering services (other than in connection with any University Directive); (x) janitorial services for the Utility Facilities; (xi) seminar and training costs for employees of the Concessionaire or the Operator; (xii) service vehicles exclusively used in the performance of Utility System Operations; (xiii) insurance charges for the insurance that the Concessionaire is required to carry pursuant to Article 13; (xiv) lease and rental charges other than any payments paid by the Concessionaire to the University for the lease of the Utility System; (xv) the costs of performing inspections required by the Performance Standards; (xvi) the costs incurred in connection with utility coordination pursuant to Section 3.9(b); (xvii) the costs of compliance with the Title V Permit; (xviii) any cost that would otherwise be deemed a Capital Improvement that the Concessionaire elects not to deem a Capital Improvement, which prior to the date hereof, the

University included in its “repair and restoration” line item in its budget; (xix) other selling, general and administrative expenses but only to the extent that such expenses would be properly included in a cost of service rate regulated by the Federal Energy Regulatory Commission and are not Uncapped O&M Costs; (xx) the costs of audits of buildings or other improvements on the Columbus Campus to determine what ECMs may be appropriate for such buildings or other improvements; (xxi) payments to the Operator pursuant to the agreement between the Concessionaire and the Operator to operate the Utility System pursuant to this Agreement; (xxii) the costs for the Operator to be a member of OUPS and any other regulatory program, to the extent required by Law or this Agreement; and (xxiii) the costs for any Authorizations for the Concessionaire or Operator to perform the Utility System Operations, to the extent required by Law; provided that, in no event, shall Capped O&M Costs include any costs or expenses incurred by the Concessionaire or the Operator that result from the negligence or willful misconduct of the Concessionaire or the Operator.

“Capped O&M Index” has the meaning ascribed thereto in Schedule 5.

“Cash Deposit” has the meaning ascribed thereto in Section 2.3(a).

“Casualty Cost” has the meaning ascribed thereto in Section 13.4(a)(ii).

“Change in Control” means, with respect to any Person, whether accomplished through a single transaction or a series of related or unrelated transactions and whether accomplished directly or indirectly, any of (i) a change in ownership so that 50% or more of the direct or indirect voting or economic interests in such Person is transferred to a Person or group of Persons acting in concert, (ii) the power directly or indirectly to direct or cause the direction of management and policy of such Person, whether through ownership of voting securities, by contract, management agreement, or common directors, officers or trustees or otherwise, is transferred to a Person or group of Persons acting in concert or (iii) the merger, consolidation, amalgamation, business combination or sale of substantially all of the assets of such Person; provided, however, that notwithstanding anything to the contrary set forth in this definition, none of the following shall constitute a Change in Control for the purposes of this Agreement:

- (a) Transfers of direct or indirect ownership interests in the Concessionaire between or among Persons that are majority-owned Affiliates of each other or Persons who are under common control, whether directly or indirectly and whether through share ownership, a trust, a contract or otherwise;
- (b) Transfers of equity of the Concessionaire or of the direct or indirect owners of the Concessionaire pursuant to bona fide open market transactions on the New York Stock Exchange, NASDAQ, London Stock Exchange, Toronto Stock Exchange or comparable U.S. or foreign securities exchange, including any such transactions involving an initial or “follow on” public offering of direct or indirect equity holders of the Concessionaire; provided that no Person (that is not an Equity Participant or its beneficial owner having ownership interests in the Concessionaire as of the date hereof) or group of Persons acting in concert (that is not an Equity Participant or its beneficial owner having ownership interests in the Concessionaire as of the date hereof) acquires securities such that such

Person or group of Persons beneficially owns more than 50% of the publicly traded securities of the Concessionaire;

- (c) Transfers of direct or indirect ownership interests in the Concessionaire by any Equity Participant or its beneficial owners to any Person so long as the Equity Participants or their respective beneficial owners having ownership interests in the Concessionaire as of the date hereof together retain, in the aggregate, (1) 50% or more of the direct or indirect voting or economic interests in the Concessionaire or (2) the power to directly or indirectly direct or cause the direction of management and policy of the Concessionaire, whether through ownership of voting securities, contract or management agreement or common directors, officers or trustees or otherwise;
- (d) Any change of ownership that is attributable to a lease, sublease, concession, management agreement, operating agreement or other similar arrangement that is subject and subordinate in all respects to the rights of the University under this Agreement so long as (1) no Change in Control occurs with respect to the Concessionaire, and (2) the Concessionaire remains obligated under this Agreement;
- (e) The creation of a trust or any other transaction or arrangement that is solely a transfer of all or part of the Concessionaire's economic interest under this Agreement to another entity so long as (1) no Change in Control occurs with respect to the Concessionaire, and (2) the Concessionaire remains obligated under this Agreement;
- (f) Transfers of direct or indirect ownership interests in the Concessionaire (1) between or among investment funds, including funds that invest in infrastructure, and investors therein; provided that following such Transfer such direct or indirect ownership interests remain under the same common ownership, management or control as existed prior to such Transfer, or (2) from investment funds, including infrastructure funds, or investors therein, to any Person; provided that such direct or indirect ownership interests, following consummation of such Transfer, remain under the same management or control that existed prior to such Transfer, it being understood that ownership interests shall be deemed to be controlled by a Person if controlled in any manner whatsoever that results in control in fact, whether directly or indirectly, and whether through share ownership, a trust, a contract or otherwise; and
- (g) Mergers between an Equity Participant and a third party, provided that, immediately prior to such merger, the equity interests of both parties are publicly traded in open market transactions on the New York Stock Exchange, NASDAQ, London Stock Exchange, Toronto Stock Exchange or comparable U.S. or foreign securities exchange.

“Chapter 153” means Ohio Rev. Code Ann. Chapter 153 and, where applicable, Sections 9.32 through 9.335 of the Ohio Rev. Code Ann.

“Claim” means any demand, action, cause of action, suit, proceeding, arbitration, claim, judgment or settlement or compromise relating thereto which may give rise to a right to a payment obligation under Section 12.1 or Section 12.2.

“Closing” has the meaning ascribed thereto in Section 2.2(a).

“Closing Consideration” has the meaning ascribed thereto in Section 2.1.

“Closing Date” has the meaning ascribed thereto in Section 2.2(a).

“Closing Deposit” has the meaning ascribed thereto in Section 2.3(a).

“Closing Period” means the period between the date hereof up to the Time of Closing.

“Code” means the Internal Revenue Code of 1986, as amended from time to time. Any reference in this Agreement to a particular provision of the Code shall be interpreted to include a reference to any corresponding provision of any successor statutes.

“Columbus Campus” means (i) the real property shown on Appendix 2 of Schedule 16 and (ii) the improvements located thereon that are owned and/or leased by the University and listed or depicted on Appendix 1 and Appendix 2 or Schedule 16, as such real property and improvements may be modified pursuant to the terms and conditions of this Agreement.

“Comparable Utility Systems” means with respect to any component of the Utility System, a utility system producing and/or delivering any of the Utilities (whether privately or publicly owned) that is located at a large university, is used in connection with providing such utility services to such university, its employees, customers and visitors and is reasonably comparable to the relevant component of the Utility System in terms of physical structure, capacity, utilization and the nature of the services provided, provided that the University and the Concessionaire may designate by written agreement one or more utility systems as “Comparable Utility Systems”.

“Compensation Calculation Date” means (i) every 3rd June 30 during the Term, commencing as of June 30, 2020, (ii) the date of removal of the Operator pursuant to Section 3.3(c)(ii), (iii) the first June 30 after any date on which one Party notifies the other Party that it, in good faith, believes that the Concession and KPI Compensation Balance would exceed \$5,000,000 if calculated on the date of such notice and (iv) the End Date.

“Compensation Calculation Measuring Period” means (i) with respect to the first Compensation Calculation Date, the period commencing on (a) the Closing Date, for Concession Compensation and (b) the Day immediately following the Post-Closing Transition Period, for KPI Compensation, and, in each case expiring on such Compensation Calculation Date, and (ii) with respect to each subsequent Compensation Calculation Date, the period between such Compensation Calculation Date and the immediately preceding Compensation Calculation Date.

“Compensation Event” means (i) subject to Article 5, the Concessionaire’s compliance with or the implementation of any University Directive or any modified or changed Performance Standard subject to Section 6.3(b), provided that it shall not be a Compensation Event if the costs

or reduction in revenue incurred in connection therewith will be recovered by the Concessionaire pursuant to the calculation and payment of the Utility Fee; (ii) the occurrence of an Adverse Action; (iii) the occurrence of an event causing a delay described in the definition of “Delay Event” but only to the extent that the Utility Fee is reduced by a Delay Event caused by such event pursuant to Section 15.1(c); (iv) the occurrence of those certain events described under Section 3.7(a) and Section 3.7(e) which are expressly identified as requiring the payment of Concession Compensation; (v) the University distributing or permitting any third party to distribute on the Columbus Campus, any Utility, except as permitted by Section 3.21; (vi) the Concessionaire incurring any Losses as a result of failing to obtain, or being unreasonably delayed in obtaining, or failing to promptly renew or maintain in good standing, an Authorization from the University that is necessary to comply with Law, despite the Concessionaire’s use of its reasonable best efforts to obtain, promptly renew or maintain in good standing such Authorization, and such failure or delay could not have been reasonably prevented by commercially reasonable technical, scheduling or other measures of the Concessionaire; (vii) any action of the Public Utilities Commission of Ohio or the Federal Energy Regulatory Commission, or their respective successors, that subjects the Concessionaire to such agency’s regulatory jurisdiction due solely to the Utility System Operations performed in accordance with this Agreement and has a material adverse effect on the fair market value of the Concessionaire Interest (whether as a result of a decrease in the Utility Fee or other revenues or increased expenses that cannot be recovered pursuant to this Agreement or both), except where such action is in response to any act or omission on the part of the Concessionaire that is illegal (other than an act or omission rendered illegal by virtue of the agency’s action) or such action is otherwise permitted under this Agreement, and such designation as a Compensation Event shall be the Concessionaire’s sole right and remedy with respect to any action by the Public Utilities Commission of Ohio or the Federal Energy Regulatory Commission subjecting a Person to its jurisdiction in connection with the Utility System; or (viii) the occurrence of any other event that under the terms of this Agreement expressly requires the payment of Concession Compensation.

“Concession Compensation” means any compensation payable by the University to the Concessionaire in order to restore the Concessionaire to the same economic position the Concessionaire would have enjoyed if the applicable Compensation Event had not occurred, which Concession Compensation for any Compensation Calculation Date shall be equal to the sum of (i) all Losses for the applicable Compensation Calculation Measuring Period (including increased O&M Costs (which, for the avoidance of doubt, shall be regardless of the Capped O&M Ceiling) and financing costs but excluding any costs and expenses (including O&M Costs) that the Concessionaire is able to recover through the payment of the Utility Fee) plus (ii) the actual and estimated net losses of the Utility Fee for the applicable Compensation Calculation Measuring Period that is reasonably attributable to such Compensation Event; provided, however, that with respect to clause (ii), the amount of such actual and estimated net losses that may be claimed at any Compensation Calculation Date shall not exceed the amount of actual and estimated net losses of the Utility Fee suffered during, and attributable only to, such Compensation Calculation Measuring Period (including the inability to make Capital Improvements that the University had Approved); provided, further, that with respect to clause (ii), the amount of such actual and estimated net losses reasonably attributable to such Compensation Event and suffered during, and attributable only to, a future Compensation Calculation Measuring Period may be claimed as Concession Compensation for such future Compensation Calculation Measuring Period only during such future Compensation Calculation



Measuring Period in accordance with Article 15. Concession Compensation, if any, shall be paid in accordance with Article 15 and shall not be subject to any limitations on the amount of the Utility Fee including the Capped O&M Ceiling. If the Concessionaire is required to provide its own capital for a Capital Improvement with respect to compliance with any Compensation Event that is not recoverable by the Concessionaire pursuant to the Utility Fee, then the Concession Compensation, shall, in addition to the components described above, take into account a return on such capital equal to the Return on Equity Factor.

“Concession and KPI Compensation Balance” means, at each Compensation Calculation Date, (i) Concession Compensation due and payable with respect to such Compensation Calculation Measuring Period pursuant to the terms of this Agreement less (ii) the sum of all KPI Compensation due and payable with respect to such Compensation Calculation Measuring Period pursuant to the terms of this Agreement, plus (iii) the Concession and KPI Compensation Balance (which may be negative) for the preceding Compensation Calculation Measuring Period if carried forward pursuant to Section 15.3(e).

“Concessionaire” has the meaning ascribed thereto in the preamble to this Agreement.

“Concessionaire Compressed Air System” has the meaning ascribed thereto in Section 3.25.

“Concessionaire Default” has the meaning ascribed thereto in Section 16.1(a).

“Concessionaire Interest” means the interest of the Concessionaire in the Utility System created by this Agreement and the rights and obligations of the Concessionaire under this Agreement.

“Concessionaire Required Coverages” has the meaning ascribed thereto in Section 13.1.

“Concessionaire’s Parent” shall mean the Person, if any, that directly owns, and only owns, 100% of the shares of capital stock, units, partnership or membership interests, other equity interests and equity securities, to the extent applicable, of the Concessionaire.

“Consent” means any approval, consent, ratification, waiver, exemption, franchise, license, permit, novation, certificate of occupancy or other authorization of any Person, including any Consent issued, granted, given or otherwise made available by or under the authority of any Governmental Authority or pursuant to any applicable Law.

“Contractor” means, with respect to a Person, any contractor with whom such Person contracts to perform work or supply materials or labor in relation to the Utility System, including any subcontractor of any tier, supplier or materialman directly or indirectly employed pursuant to a subcontract with a Contractor. For the avoidance of doubt, the Operator (if other than the Concessionaire) shall be a Contractor of the Concessionaire.

“CPI Index” means the “Consumer Price Index – Midwest Urban, All Items” (not seasonally adjusted) as published by the U.S. Department of Labor, Bureau of Labor Statistics; provided, however, that if the CPI Index is changed so that the base year of the CPI Index changes, the CPI Index shall be converted in accordance with the conversion factor published by

the U.S. Department of Labor, Bureau of Labor Statistics; provided further, that if the CPI Index is discontinued or revised during the Term, such other index or computation with which it is replaced shall be used in order to obtain substantially the same result as would be obtained if the CPI Index had not been discontinued or revised.

“Credit Rating Agencies” means Standard & Poor’s Rating Services, Fitch Investors Service, Inc. and Moody’s Investor Services, or their successors, provided that if any of the foregoing and any of their successors cease to exist, the University shall, by written notice to the Concessionaire, identify other credit rating agencies as the “Credit Rating Agencies” that, at such time, are Nationally Recognized Statistical Rating Organizations as determined and defined by the United States Securities and Exchange Commission or their equivalents.

“Day” means a calendar day, beginning at midnight in the eastern time zone of the United States coinciding with the calendar day.

“Defending Party” has the meaning ascribed thereto in Section 12.4(c).

“Delay Event” means (i) an event of Force Majeure that interrupts, limits or otherwise adversely affects the performance of the Concessionaire’s obligations hereunder or the Concessionaire’s use of all or any material part of the Utility System; (ii) a failure to obtain, or delay in obtaining, any Authorization from a Governmental Authority (provided that such failure or delay could not have been reasonably prevented by technical and scheduling measures or other reasonable measures of the Concessionaire); (iii) the enactment of a new Law or the modification, amendment or change in enforcement or interpretation of a Law (including a change in the application or implementation thereof by any Governmental Authority) arising after the Setting Date; (iv) a delay caused by the performance of works (including the activities authorized by Section 3.7) carried out by the University or at its direction or, for purposes of Delay Events only (and not Compensation Events), by any other Person not acting under the authority or direction of the Concessionaire or the Operator; (v) a delay caused by a failure by the University to perform or observe any of its covenants or obligations under this Agreement; (vi) a delay caused by the presence in, on, under, over or around the Utility System of Hazardous Substances, which in each case results in or would result in a delay or interruption in the performance by the Concessionaire of any obligation under this Agreement and which was not caused by the Concessionaire, the Operator or any of their respective Representatives; (vii) a delay in providing the Utility Services caused by the failure of a third party or the University to provide any of the inputs into the Utility System that would be included in the definition of “Supplies”; (viii) subject to Section 9.4(a), a delay caused by a breach by the University of its representations and warranties set forth herein; (ix) a writ, decree or injunction that precludes or prevents the performance of the Concessionaire’s obligations hereunder or the Concessionaire’s use of all or any material part of the Utility System; (x) the discovery at or about the site of construction required or permitted to be undertaken pursuant to this Agreement of legally protected plant or animal species or archaeological, paleontological or cultural resources; or (xi) a written notice from a Governmental Authority requiring the Concessionaire specifically to cease all or a material part of the Utility System Operations due to a failure to comply with applicable Law and such failure is because the Utility System Operations are not in compliance with Law due directly and primarily to the fact that the University unreasonably withheld its Approval to a Capital Improvement, ECM or Material Change that, if Approved, would have

caused the Utility Systems Operations to comply with the relevant Law to which such notice, requirement or direction from a Governmental Authority relates. For the avoidance of doubt, a Delay Event shall not include any event of which the consequence is otherwise specifically dealt with in this Agreement or arises by reason of (A) the negligence or intentional misconduct of the Concessionaire, the Operator or any of their respective Representatives, (B) any act or omission by the Concessionaire or its Representatives in breach of the provisions of this Agreement, (C) any strike, labor dispute or other labor protest involving any Person retained, employed or hired by the Concessionaire or its Representatives to supply materials or services for or in connection with the Utility System Operations or any strike, labor dispute or labor protest pertaining to the Concessionaire, in all cases to the extent that such strike, dispute or protest (1) is not of general application and (2) is caused by or attributable to any act (including any pricing or other practice or method of operation) or omission of the Concessionaire or its Representatives or (D) lack or insufficiency of funds or failure to make payment of monies or provide required security on the part of the Concessionaire, unless such lack or insufficiency of funds or such failure is caused by another relevant Delay Event.

“Delay Event Dispute Notice” has the meaning ascribed thereto in Section 15.1(e).

“Delay Event Notice” has the meaning ascribed thereto in Section 15.1(e).

“Delay Event Remedy” has the meaning ascribed thereto in Section 15.1(d).

“Depository” means a savings bank, a savings and loan association or a commercial bank or trust company which would qualify as an Institutional Lender, designated by the Concessionaire, that enters into an agreement with the Concessionaire to serve as depository pursuant to this Agreement, provided that such Depository shall have an office, branch, agency or representative located in the City of Columbus, Ohio; provided, however, that so long as a Leasehold Mortgage is in effect, the Depository under Section 13.4 shall be the institution acting as the collateral agent or depository under the financing secured by such Leasehold Mortgage, whether or not it has an office, branch, agency or representative located in the City of Columbus, Ohio.

“Design-Build Agreement” has the meaning ascribed thereto in Section 4.3(g)(iii)(A).

“Design-Build ECM” means any ECM to the Non-Utility Campus, which involves any construction, addition, alteration, structural or other improvement or heating, cooling or ventilating plants or other equipment installed or material supplied therefor, the estimated cost of which amounts to \$200,000 (or the threshold established by Section 153.53 of the Ohio Rev. Code Ann.) or more.

“Designated Senior Person” means such individual who is designated as such from time to time by each Party for the purposes of Article 18 by written notice to the other Party, which may be changed at any time by written notice from such Party to the other Party. Initially, the Designated Senior Person for the University will be the Senior Vice President for Business and Finance, and the Designated Senior Person for the Concessionaire will be Andre Cangucu.

“Direct Claim” means any Claim by an Obligee against an Obligor that does not result from a Third Party Claim.

“Disclosure Schedules” means the following Schedules: Schedule 3, Schedule 4, Schedule 6, Schedule 9, Schedule 10, Schedule 11, Schedule 12, Schedule 14, Schedule 16, Schedule 17, and Schedule 20.

“Dispute Notice” has the meaning ascribed thereto in Section 15.3(b).

“Document” has the meaning ascribed thereto in Section 1.15(b).

“EAC” means the Energy Advisory Committee to be formed by the University to provide input to the University with respect to the operation and use of the Utility Facilities. The membership and voting procedures of the EAC shall be determined by the University, in its sole discretion, provided that at least one member shall be a Representative of the Concessionaire.

“East Regional Chilled Water Plant” means the building and associated improvements identified on Part IV of Schedule 3.

“ECM” means any energy conservation measure on the Columbus Campus intended to increase the efficiency of the Utility System or reduce the Energy Use Intensity (which energy conservation measure may or may not be considered a Capital Improvement).

“Eligible Investments” means any one or more of the following obligations or securities: (i) direct obligations of, and obligations fully guaranteed by, the United States of America or any agency or instrumentality of the United States of America, the obligations of which are backed by the full faith and credit of the United States of America; (ii) demand or time deposits, federal funds or bankers’ acceptances issued by any Institutional Lender (provided that the commercial paper or the short-term deposit rating or the long-term unsecured debt obligations or deposits of such Institutional Lender at the time of such investment or contractual commitment providing for such investment have been rated “A” (or the equivalent) or higher by a Credit Rating Agency or any other demand or time deposit or certificate of deposit fully insured by the Federal Deposit Insurance Corporation); (iii) commercial paper (including both non-interest-bearing discount obligations and interest-bearing obligations payable on demand or on a specified date not more than one Year after the date of issuance thereof) which has been rated “A” (or the equivalent) or higher by a Credit Rating Agency at the time of such investment; (iv) any money market funds, the investments of which consist of cash and obligations fully guaranteed by the United States of America or any agency or instrumentality of the United States of America, the obligations of which are backed by the full faith and credit of the United States of America and which have been rated “A” (or the equivalent) or higher by a Credit Rating Agency; and (v) other investments then customarily accepted by the University in similar circumstances; provided, however, that no instrument or security shall be an Eligible Investment if such instrument or security evidences a right to receive only interest payments with respect to the obligations underlying such instrument or if such instrument or security provides for payment of both principal and interest with a yield to maturity in excess of 120% of the yield to maturity at par.

“Emergency” means (i) an Unplanned Outage or (ii) a situation that is urgent and calls for immediate action, which, if such action is not taken, is reasonably likely to result in imminent harm or physical damage to any or all of the Utility System or any Person, including the University or the Concessionaire.

“Encumbrance” means any mortgage, lien, judgment, execution, pledge, charge, security interest, restriction, easement, servitude, option, reservation, lease, claim, trust, deemed trust or encumbrance of any nature whatsoever, whether arising by operation of Law, judicial process, contract, agreement or otherwise created.

“End Date” means the date on which this Agreement expires or is terminated.

“Energy Use Intensity” has the meaning ascribed thereto in Schedule 19.

“Environment” means soil, surface waters, ground waters, land, stream sediments, surface or subsurface strata and ambient air.

“Environmental Laws” means any Laws applicable to the Utility System or Utility System Operations regulating or imposing liability or standards of conduct concerning or relating to (i) the regulation, use or protection of human health or the Environment or (ii) the presence of or regulation, use or exposure to Hazardous Substances.

“Equity Participant” means any Person who holds directly any shares of capital stock, units, partnership or membership interests, other equity interests or equity securities of the Concessionaire.

“Escrow Agent” means a bank, trust company or national banking association selected by the University to hold the Cash Deposit.

“Excluded Liabilities” has the meaning ascribed thereto in Section 3.2(d).

“Extended Term” has the meaning ascribed thereto in Section 16.5(b).

“Extension Option” means the Concessionaire’s right, subject to Section 16.5, to elect to extend the term of its lease of the Utility System Land and the Utility Facilities pursuant to Section 2.1(b)(i) and its non-exclusive license pursuant to Section 2.1(b)(ii), which right, if exercised, shall automatically extend the term during which the Concessionaire shall have the exclusive right and obligation to provide the Utility Services to the Columbus Campus pursuant to Section 2.1(b)(iii), and shall have the effect of extending the Term with such modifications as set forth in Section 16.5.

“Extension Purchase Option” has the meaning ascribed thereto in Section 16.5(a).

“Fiscal Year” means the period from July 1 to June 30, provided that if the University adjusts its fiscal year during the Term, the Fiscal Year shall be adjusted to be the same as the University’s fiscal year.

“Five-Year Plan” means the budget and plan prepared by the Concessionaire in accordance with Section 7.3 for the operation of the Utility System and performance of its obligations under this Agreement in respect of (i) the period consisting of the first partial Fiscal Year of the Term and the first 5 full Fiscal Years of the Term, (ii) any given period of exactly 5 full Fiscal Years during the Term or (iii) if fewer than 5 full Fiscal Years remain in the Term, the remaining full and partial Fiscal Years of the Term.

“Fixed Fee” has the meaning ascribed thereto in Schedule 5.

“Force Majeure” means any event beyond the reasonable control of the Concessionaire and the University that delays, interrupts or limits the performance of the affected Party’s obligations hereunder, including an intervening act of God or public enemy, war, invasion, armed conflict, act of foreign enemy, blockade, revolution, act of terror, sabotage, civil commotions, interference by civil or military authorities, condemnation or confiscation of property or equipment by any Governmental Authority, nuclear or other explosion, radioactive or chemical contamination or ionizing radiation, fire, tornado, flooding, earthquake or other natural disaster, riot or other public disorder, epidemic, quarantine restriction, strike, labor dispute or other labor protest, stop-work order or injunction issued by a Governmental Authority, a governmental embargo or unavailability of supplies or products for the construction, operation, maintenance, repair, replacement and renovation of the Utility System.

“Forecast Utility Fee” has the meaning ascribed thereto in Section 7.1(a).

“GAAP” means U.S. generally accepted accounting principles, consistently applied.

“Gashouses” means the buildings and associated improvements identified on Part IX of Schedule 3.

“Generator Plant” means the buildings and associated improvements identified on Part X of Schedule 3.

“Governmental Authority” means any court, federal, state, local or foreign government, department, commission, board, bureau, agency or other regulatory, administrative, governmental or quasi-governmental authority, which shall not include the University.

“Hazardous Substance” means any solid, liquid, gas, odor, heat, sound, vibration, radiation or other substance or emission which is a contaminant, pollutant, dangerous substance, toxic substance, hazardous waste, subject waste, hazardous material or hazardous substance which is or becomes regulated by applicable Environmental Laws or which is classified as hazardous or toxic under applicable Environmental Laws (including gasoline, diesel fuel or other petroleum hydrocarbons, polychlorinated biphenyls, asbestos, lead-based paint and urea formaldehyde foam insulation).

“Initial Five-Year Plan” means the Five-Year Plan in respect of the period set forth in clause (i) of the definition of “Five-Year Plan”.

“Initial Term Expiration Date” has the meaning ascribed thereto in Section 16.5(a).

“Institutional Lender” means (i) the United States of America, any state thereof or any agency or instrumentality of either of them, any municipal agency, public benefit corporation or public authority, advancing or insuring mortgage loans or making payments which, in any manner, assist in the financing, development, operation and maintenance of projects, (ii) any (a) savings bank, savings and loan association, commercial bank, trust company (whether acting individually or in a fiduciary capacity) or insurance company organized and existing under the laws of the United States of America or any state thereof, (b) foreign insurance company or

commercial bank qualified to do business as an insurer or commercial bank as applicable under the laws of the United States of America, (c) pension fund, foundation or university or college or other endowment fund or (d) investment bank, pension advisory firm, mutual fund, investment company or money management firm, (iii) any “qualified institutional buyer” under Rule 144(A) under the Securities Act or any other similar Law hereinafter enacted that defines a similar category of investors by substantially similar terms or (iv) any other financial institution or entity designated by the Concessionaire and Approved by the University (provided that such institution or entity, in its activity under this Agreement, shall be acceptable under then current guidelines and practices of the University); provided, however, that each such entity (other than entities described in clause (iii) of this definition) or combination of such entities if the Institutional Lender shall be a combination of such entities shall have individual or combined assets, as the case may be, of not less than \$500,000,000, which shall include, in the case of an investment or advisory firm, assets controlled by it or under management.

“Intellectual Property Escrow” has the meaning ascribed thereto in Section 3.11(h)(ii).

“Intellectual Property Escrow Agent” has the meaning ascribed thereto in Section 3.11(h)(ii).

“Key Performance Indicators” means those requirements and standards for the operation of the Utility System as set forth on Schedule 15.

“KPI Compensation” means the amount of compensation due from the Concessionaire to the University for a KPI Event, which amount for each KPI Event is set forth in Schedule 15.

“KPI Event” has the meaning set forth in Schedule 15, unless such KPI Event is due to a Delay Event, a Compensation Event, a breach of this Agreement by the University, the negligence or willful misconduct of the University or its Representatives, grantees, tenants, contractors, mortgagees, licensees, concessionaires and others claiming by, through, or under the University, or otherwise excused pursuant to this Agreement.

“Law” means any order, writ, injunction, decree, judgment, law, ordinance, decision, opinion, ruling, policy, statute, code, rule or regulation of any Governmental Authority.

“Leasehold Mortgage” means any lease, indenture, mortgage, deed of trust, pledge or other security agreement or arrangement, including a securitization transaction with respect to the Utility Fee or any part thereof, encumbering any or all of the Concessionaire Interest or the shares or equity interests in the capital of the Concessionaire and any of its subsidiaries or any cash reserves or deposits held in the name of the Concessionaire, in each case that satisfies all of the conditions in Section 19.1.

“Leasehold Mortgage Debt” means any bona fide debt (including principal, accrued interest, original issue discount and customary lender or financial insurer, agent and trustee fees, costs, premiums, expenses, indemnities and reimbursement obligations (whether liquidated or contingent) with respect thereto, and including all payment obligations under interest rate hedging agreements with respect thereto and reimbursement obligations with respect thereto to any financial insurer) and/or an assignment in connection with a securitization transaction secured by a Leasehold Mortgage relating to the Utility System and granted to a Person pursuant

to an agreement entered into prior to the occurrence of any Adverse Action, University Default or any event of termination, cancellation, rescinding or voiding referred to in Section 16.4 giving rise to the payment of amounts for or in respect of termination under this Agreement. For the purposes of determining the Utility System Concession Value, Leasehold Mortgage Debt shall not include (i) debt from an Affiliate of the Concessionaire or the Operator, unless such debt is on terms consistent with terms that would reasonably be expected from a non-Affiliate lender acting in good faith; (ii) any increase in debt to the extent such increase is the result of an agreement or other arrangement entered into after the Concessionaire was aware (or should have been aware, using reasonable due diligence) of the prospective occurrence of an event giving rise to the payment of the Utility System Concession Value; or (iii) any debt with respect to which the Leasehold Mortgagee did not provide the University with notice of its Leasehold Mortgage in accordance in all material respects with the Leasehold Mortgage Notice Requirements.

“Leasehold Mortgagee” means the holder or beneficiary of a Leasehold Mortgage or a trustee or agent acting on behalf of such holder or beneficiary, including the Lessor in a lease or Leveraged Lease.

“Leasehold Mortgagee Notice Requirements” means the delivery by a holder or beneficiary of a Leasehold Mortgage to the University, not later than 10 Days after the execution and delivery of such Leasehold Mortgage by the Concessionaire, of a true and complete copy of the executed original of such Leasehold Mortgage, together with a notice containing the name and post office address of the holder of such Leasehold Mortgage, which may be an agent on behalf of the provider of the Leasehold Mortgage Debt.

“Leasehold Mortgagee’s Notice” has the meaning ascribed thereto in Section 19.7(a).

“Lessor” means a Leasehold Mortgagee that has purchased all or a portion of the Concessionaire Interest and leased that interest in the Concessionaire Interest to the Concessionaire.

“Letter of Credit” means a committed, irrevocable, unconditional, commercial letter of credit, in favor of the University, in form and content reasonably acceptable to the University, payable in U.S. dollars upon presentation of a sight draft and a certificate confirming that the University has the right to draw under such letter of credit in the amount of such sight draft, without presentation of any other Document, which letter of credit (i) is issued by a commercial bank or trust company that is a member of the New York Clearing House Association or the Clearing House Interbank Payments System and that has a current credit rating of A2 or better by Standard & Poor’s Ratings Services and an equivalent credit rating by another Credit Rating Agency (or such other commercial bank or trust company reasonably acceptable to the University and Approved by the University prior to the submission of the letter of credit) or such other commercial bank or trust company that is Approved by the University, and (ii) provides for the continuance of such letter of credit for a period of at least one Year or as otherwise provided in this Agreement. The office for presentment of sight drafts specified in the Letter of Credit shall be located (a) at a specified street address within the City of Columbus, Ohio or other location acceptable to the University or (b) at a facsimile number located within the United States.



“Leveraged Lease” means a lease, sublease, concession, management agreement, operating agreement or other similar arrangement in which the Lessor has borrowed a portion of the purchase price of the interest in the Concessionaire Interest acquired by the Lessor and granted to the lenders of those funds a security interest in that interest.

“LIBOR” means the London Interbank Offered Rate.

“Loss” means, with respect to any Person, any loss, claim, liability, damage, penalty, amount paid pursuant to a settlement, charge or out-of-pocket and documented cost or expense (including fees and expenses of counsel and any Tax losses) actually suffered or incurred by such Person but excluding any punitive, special, exemplary, indirect and consequential damages and any contingent liability until such liability becomes actual.

“Major KPI Event” means a KPI Event which obligates the Concessionaire to pay KPI Compensation to the University, with respect to that KPI Event only, in an amount equal to the greater of (i) \$10,000,000 and (ii) 10% of the Utility Fee.

“Material Adverse Effect” means a material adverse effect (after taking into account contemporaneous material positive effects) on the business, operations, financial condition or results of operations of the Utility System taken as a whole or on the ability of the University to consummate the Transaction or perform any material obligation hereunder; provided, however, that no effect arising out of or in connection with or resulting from any of the following shall be deemed, either alone or in combination, to constitute or contribute to a Material Adverse Effect: (i) general economic conditions or changes therein; (ii) financial, banking, currency or capital markets fluctuations or conditions (either in the United States of America or any international market and including changes in interest rates); (iii) conditions affecting the financial services or utility industries generally; (iv) any existing event or occurrence of which the Concessionaire has actual knowledge as of the Setting Date; (v) any action, omission, change, effect, circumstance or condition contemplated by this Agreement or attributable to the execution, performance or announcement of this Agreement or the Transaction (except for any litigation relating thereto or to this Agreement (or the matters contemplated herein)); and (vi) negligence, intentional misconduct or bad faith of the Concessionaire or its Representatives.

“Material Change” means any material change in the dimensions, character, quality or location of any part of the Utility System that would not be considered Capital Improvements or ECMs.

“McCracken Power Plant” means the building and associated improvements identified on Part II of Schedule 3.

“McCracken Sublease” means the sublease of certain space within the McCracken Power Plant for office and ancillary uses unrelated to the Utility System or Utility System Operations by the University in substantially the form attached hereto as Schedule 18.

“Memorandum of Lease” has the meaning ascribed thereto in Section 2.8.

“New Agreement” has the meaning ascribed thereto in Section 19.5(a).

“New Approved Capital Improvement” has the meaning ascribed thereto in Schedule 5.

“New Approved Capital Improvement Cost” has the meaning ascribed thereto in Schedule 5.

“Non-Construction ECM” means any ECM to the Non-Utility Campus which does not involve construction, addition, alteration, structural or other improvement or heating, cooling or ventilating plants or other equipment installed or material supplied therefor, the estimated cost of which amounts to \$200,000 (or the threshold established by Section 153.53 of the Ohio Rev. Code Ann.) or more.

“Non-Utility Campus” means the Columbus Campus other than Utility System Land and Utility Facilities.

“Notice Period” has the meaning ascribed thereto in Section 12.4(b).

“O&M Costs” means, in the aggregate, the Capped O&M Costs and the Uncapped O&M Costs.

“Obligation Payment” has the meaning ascribed thereto in Section 12.7.

“Obligee” means any Person entitled to the benefit of a payment obligation under Article 12.

“Obligor” means any Person obligated to meet a payment obligation under Article 12.

“OFAC” has the meaning ascribed thereto in Section 17.1(h).

“Offsets” has the meaning ascribed thereto in Section 12.11(a).

“Ongoing Utility System Projects” means those projects that the University is undertaking with respect to the Utility System that are listed on Schedule 11, provided that the University may, if it completes any such projects prior to the Time of Closing, provide the Concessionaire notice thereof and amend Schedule 11 accordingly.

“Operating Agreement” means any material agreement, contract or commitment to which the Concessionaire is a party or otherwise relating to the Utility System Operations as in force from time to time (including any warranties or guaranties), but excluding any Leasehold Mortgage and financing documents related thereto.

“Operations Plan” has the meaning ascribed thereto in Schedule 2.

“Operator” has the meaning ascribed thereto in Section 3.3(a).

“Operator Evaluation Period” means, as applicable, (i) the period commencing on the Day immediately following the Post-Closing Transition Period and ending on the 5-year anniversary thereof or (ii) each subsequent 5-year period after the period described in clause (i). For the avoidance of doubt, such 5-year periods are fixed periods, rather than rolling periods.

“OSU Substation” means the building and associated improvements identified on Part V of Schedule 3.

“OUPS” has the meaning ascribed thereto in Section 3.3(e).

“Parking Agreement” has the meaning ascribed thereto in Section 21.1.

“Party” means a party to this Agreement and “Parties” means both of them.

“Performance Standards” means the standards, specifications, policies, procedures and processes that apply to the operation of, maintenance of, rehabilitation of and Capital Improvements to the Utility System set forth in Schedule 2 and its appendices (as may be modified pursuant to the terms hereof), including any plans submitted by the Concessionaire to the University as required therein. To the extent that any term or provision set forth in Schedule 2 or incorporated by reference in Schedule 2 conflicts with any term or provision specified in this Agreement, then such term or provision of this Agreement shall govern and shall supersede any such conflicting term or provision.

“Permitted Concessionaire Encumbrance” means, with respect to the Concessionaire Interest: (i) any Encumbrance that is being contested in accordance with Section 3.5(a) (but only for so long as such contest effectively postpones enforcement of any such Encumbrance); (ii) any (A) lien or security interest for obligations not yet due and payable to a Contractor or other Person, (B) statutory lien, deposit or other non-service lien or (C) lien, deposit or pledge to secure mandatory statutory obligations or performance of bids, tenders, contracts (other than for the repayment of borrowed money) or leases, or for purposes of like general nature, any of which are incurred in the ordinary course of business of all or any part of the Utility System Operations and are either (x) not delinquent or (y) which are being contested by the Concessionaire in accordance with Section 3.5(a) (but only for so long as such contest effectively postpones enforcement of any such Encumbrance); (iii) inchoate materialmen’s, mechanics’, workmen’s, repairmen’s, employees’, carriers’, warehousemen’s or other like Encumbrances arising in the ordinary course of business of all or any part of the Utility System or the Concessionaire’s performance of any of its rights or obligations hereunder, and either (A) are not delinquent or (B) are being contested by the Concessionaire in accordance with Section 3.5(a) (but only for so long as such contest effectively postpones enforcement of any such Encumbrance); (iv) any right reserved to or vested in any Governmental Authority or the University by any statutory provision or under common law (it being understood and agreed that nothing in this clause (iv) shall limit or otherwise affect the University’s obligations or the Concessionaire’s rights hereunder); (v) any other Encumbrance permitted hereunder (including any Leasehold Mortgage (and financing statements or other means of perfection relating thereto)); (vi) liens incurred in the ordinary course of business in connection with workers’ compensation, unemployment insurance, social security and other governmental rules and that do not in the aggregate materially impair the use, value or operation of the Utility System; (vii) any Encumbrances created, incurred, assumed or suffered to exist by the University or any Person claiming through the University; (viii) any Encumbrance, security interest or pledge imposed upon the Concessionaire and any Affiliate as to the Concessionaire’s and any Affiliate’s assets arising from borrowings, financings, leases or similar transactions in the ordinary course of business; (ix) any Encumbrances in existence as of the Closing not caused by the Concessionaire, the Operator or any of their respective

Representatives; and (x) any amendment, extension, renewal or replacement of any of the foregoing.

“Permitted University Encumbrance” means: (i) the Concessionaire Interest; (ii) any Encumbrance that is being contested, or being caused to be contested, by the University in accordance with Section 3.5(b) (but only for so long as such contest effectively postpones enforcement of any such Encumbrance); (iii) inchoate materialmen’s, mechanics’, workmen’s, repairmen’s, employees’, carriers’, warehousemen’s or other like Encumbrances arising in the University’s performance of any of its rights or obligations hereunder, and either (A) are not delinquent or (B) are being contested, or are being caused to be contested, by the University in accordance with Section 3.5(b) (but only for so long as such contest effectively postpones enforcement of any such Encumbrance); (iv) any easement, covenant, condition, right-of-way or servitude (or other similar reservation, right and restriction) or other defects and irregularities in the title to the applicable assets that do not materially interfere with the Utility System Operations or the rights and benefits of the Concessionaire under this Agreement or materially impair the value of the Concessionaire Interest from and after the Closing Date; (v) any zoning, building, environmental, health, safety or other Law; (vi) the police and regulatory powers of the State of Ohio, City of Columbus, Ohio and Franklin County, Ohio with respect to the Utility System, and the regulation of the use of the Public Way (it being understood and agreed that nothing in this clause (vi) shall prevent any exercise of such powers being an Adverse Action if it meets the definition thereof); (vii) any right reserved to or vested in any Governmental Authority by any statutory provision or under common law (it being understood and agreed that nothing in this clause (vii) shall prevent any exercise of such right being an Adverse Action if it meets the definition thereof); (viii) any other Encumbrance permitted hereunder; (ix) any Encumbrances created, incurred, assumed or suffered to exist by the Concessionaire or any Person claiming through it; (x) any rights reserved to or vested in the University by any statutory provision (it being understood and agreed that nothing in this definition shall limit or otherwise affect the University’s obligations or the Concessionaire’s rights hereunder); (xi) any of the Encumbrances set forth on Schedule 10; and (xii) any amendment, extension, renewal or replacement of any of the foregoing.

“Person” means any individual (including, the heirs, beneficiaries, executors, legal representatives or administrators thereof), corporation, partnership, joint venture, trust, limited liability company, limited partnership, joint stock company, unincorporated association or other entity or a Governmental Authority. Person shall include the University.

“Post-Closing Transition Period” means the period from the Closing Date to the date that is 6 months after the Closing Date, provided that the Concessionaire may terminate the Post-Closing Transition Period earlier on written notice to the University.

“Property Taxes” means any ad valorem property Tax attributable to the Utility System or the Concessionaire Interest, including an ad valorem tax on real property and improvements, buildings, structures, fixtures and all tangible personal property.

“Proprietary Intellectual Property” has the meaning ascribed thereto in Section 3.11(h)(i).

“Prorated Items” means all revenues, charges, costs and expenses with respect to Assumed Liabilities.

“Prudent Industry Practices” means, at a particular time, those practices, methods, standards and acts which are engaged in and generally accepted by prudent providers of services of the kind contemplated by this Agreement in the United States, taking into account practices, methods and acts in use at Comparable Utility Systems or individual utility facilities forming part of Comparable Utility Systems, life-cycle maintenance costs and considerations, and the design, engineering, construction, testing, operation and maintenance requirements set out in this Agreement, and which, in the exercise of reasonable judgment at the time the decision was made, could reasonably have been expected to achieve the desired result consistent with applicable Law, safety, reliability, efficiency and expedition. “Prudent Industry Practices” is not intended to be limited to the optimum practice or method to the exclusion of all others, but rather to be a spectrum of reasonable practices, methods, standards and acts.

“Public Way” means the streets, alleys, driveways and sidewalks owned by (or for the benefit of) the University, all as may be further described in Appendix X to Schedule 2.

“Quarter” means each calendar quarter of each Fiscal Year of the Term.

“Reconciliation Statement” has the meaning ascribed thereto in Section 7.1(b).

“Recovery Period” means the 20-year period over which the Concessionaire shall recover the cost of a New Approved Capital Improvement in the Utility Fee pursuant to Schedule 5, as such period may be adjusted pursuant to Section 4.3.

“Release” means depositing, spilling, leaking, pumping, pouring, emitting, discarding, abandoning, emptying, discharging, injecting, escaping, leaching, dumping or disposing of any Hazardous Substances into the Environment.

“Repetitive Failure” means a Repetitive Non-Major KPI Event or a Repetitive Performance Standards Failure.

“Repetitive Non-Major KPI Event” means, during any given Operator Evaluation Period, the occurrence of a KPI Event for a particular Key Performance Indicator 3 or more times during such Operator Evaluation Period.

“Repetitive Performance Standards Failure” means, during any given Operator Evaluation Period, if the Concessionaire fails, or causes a failure, to comply with or meet a distinct requirement of the Performance Standards (provided that the University shall have provided separate written notices for each such failure) 3 or more times during such Operator Evaluation Period.

“Representative” means, with respect to any Person, any director, officer, employee, official, partner, member, owner, agent, lawyer, accountant, auditor, professional advisor, consultant, engineer, Contractor, other Person for whom such Person is at law responsible or other representative of such Person and any professional advisor, consultant or engineer

designated by such Person as its “Representative”. For the avoidance of doubt, the Operator (if other than the Concessionaire) shall be deemed a Representative of the Concessionaire.

“Required Coverages” has the meaning ascribed thereto in Section 13.2.

“Residual Asset Value” means \$1, which is the residual value of the Utility System and the Utility Facilities existing as of the Closing Date (without regard to any Capital Improvements undertaken after the Closing Date), solely for the purposes of Section 16.5.

“Restoration” has the meaning ascribed thereto in Section 13.4(a)(ii).

“Restoration Funds” has the meaning ascribed thereto in Section 13.4(a)(iii).

“Return on Equity Factor” has the meaning ascribed thereto in Schedule 5.

“Reversion Date” means the Business Day immediately following the End Date.

“Revised Proration Statement” has the meaning ascribed thereto in Section 2.2(b)(ii).

“Schedule” means a schedule attached hereto and incorporated in this Agreement, unless otherwise expressly indicated by the terms of this Agreement.

“Securities Act” means the United States Securities Act of 1933, as amended.

“Senior Officials” has the meaning ascribed thereto in Section 3.3(c)(i)(A).

“Setting Date” means the Day that is 10 Business Days prior to the Bid Date.

“Smith Substation” means the building and associated improvements identified on Part VI of Schedule 3.

“South Campus Central Chiller Plant” means the building and associated improvements identified on Part III of Schedule 3.

“Supplies” has the meaning ascribed thereto in Section 7.4(a).

“Supply Contract” has the meaning ascribed thereto in Section 7.4(a).

“Supply Costs” means all out-of-pocket costs incurred in the procurement of Supplies (including any transmission costs, riders or other similar costs reasonably necessary to procure Supplies).

“Target” has the meaning ascribed thereto in Schedule 15.

“Tax” means any federal, state, local or foreign income, gross receipts, commercial activity, license, payroll, employment, excise, severance, stamp, occupation, premium, windfall profits, environmental, customs duties, permit fees, capital stock, franchise, profits, withholding, social security, unemployment, disability, real property, personal property, parking, sales, use, transfer, registration, value added, alternative or add-on minimum, estimated or other tax, levy,

impost, stamp tax, duty, fee, withholding or similar imposition of any kind payable, levied, collected, withheld or assessed at any time, including any interest, penalty or addition thereto, whether disputed or not.

“Tax-Advantaged Bond” means any bond that is (i) a bond the interest on which is excluded from gross income for purposes of the Code, (ii) a “Build America Bond” as defined in Section 54AA of the Code, or (iii) a “qualified tax credit bond” as defined in Section 54A of the Code.

“Term” has the meaning ascribed thereto in Section 2.1.

“Termination Damages” has the meaning ascribed thereto in Section 14.2(a).

“Third Party Agreement” has the meaning ascribed thereto in Section 3.18.

“Third Party Claim” means any Claim asserted against an Obligee by any Person who is not a Party or an Affiliate of such a Party.

“Time of Closing” means 11:00 a.m. Eastern Time on the Closing Date or such other time on that date as that the University and the Concessionaire agree in writing that the Closing shall take place.

“Title Commitment” has the meaning ascribed thereto in Section 2.4(a)(iii).

“Title Company” means First American Title Insurance Company.

“Title V Permit” has the meaning ascribed thereto in Section 11.13.

“Transaction” has the meaning ascribed thereto in Section 2.1.

“Transfer” means to sell, convey, assign, lease, sublease, mortgage, encumber, transfer or otherwise dispose of.

“Transferee” means any Person who obtains the Concessionaire Interest pursuant to a Transfer.

“Tunnels” means the tunnels and other underground passageways where Utility System Assets or Utility Facilities are located as identified on Schedule 17, which Tunnels, for the avoidance of doubt, are not part of the Utility System. To the extent that additional tunnels where Utility System Assets or Utility Facilities are located are identified by the Concessionaire or the University after the date hereof, the definition of “Tunnels” shall include those later-identified tunnels. For the avoidance of doubt, all vaults and trench-boxes not exclusively used in connection with the Utility System shall be treated as Tunnels.

“Uncapped O&M Costs” means the sum of: (i) the following specifically identified out-of-pocket operating and maintenance costs and expenses incurred by the Concessionaire (which costs and expenses shall include payments due and payable by the Concessionaire to the Operator or other Contractors pursuant to an Operating Agreement or similar agreement) or the

Operator in operating the Utility System and complying with their respective obligations under this Agreement: (a) costs incurred due to a Delay Event, provided that for events described in clause (iii) of the definition of “Delay Event”, Uncapped O&M Costs shall only include those costs (which are not Capital Improvements) necessary to bring the Utility System into compliance with the applicable Law and not the ongoing costs associated therewith, (b) costs incurred to modify the location or configuration of the Utility System as directed by the University pursuant to Section 3.23 (but only to the extent such costs are not costs incurred to make a Capital Improvement), (c) costs incurred by the Concessionaire pursuant to Section 4.3(c)(ii) if the relevant proposed Capital Improvement, ECM or Material Change is not Approved by the University, (d) costs incurred to disconnect real property from the Utility System if required pursuant to Section 5.3(a), (e) costs incurred in connection with a modification to the Performance Standards pursuant to Section 6.3(a), (f) costs incurred to perform the obligations set forth in Section 7.6 or Section 7.7, but only to the extent such costs were Approved by the University prior to being incurred, (g) costs incurred to pay Property Taxes, if such costs are included in Uncapped O&M Costs pursuant to Section 3.8, (h) costs incurred in connection with Supply procurement assistance under Section 7.4(a) or Section 7.4(b), but only to the extent such costs were Approved by the University prior to being incurred, (i) costs incurred as a direct result of the Concessionaire’s failure to comply with Law if the sole reason for such failure is that the University failed to be reasonable in its Approval of all possible Capital Improvements, ECMs or Material Changes that would cure or prevent such failure to comply with such Law or (j) costs incurred in connection with assistance for the regional campuses under Section 7.5(b); and (ii) an amount equal to the sum of (a) the federal income Taxes that the Concessionaire would pay on funds received in respect of the Variable Fee Component assuming the highest corporate income tax rate and (b) the Taxes that the Concessionaire would pay on funds received in respect of the Variable Fee Component to the State of Ohio for the commercial activity Tax imposed by the State of Ohio pursuant to Ohio Rev. Code Ann. § 5751 *et seq.*, in each case regardless of the amount of such Taxes actually paid by the Concessionaire; provided that, in no event, shall Uncapped O&M Costs include any costs or expenses incurred by the Concessionaire that result from the negligence or willful misconduct of the Concessionaire or the Operator.

“University” has the meaning ascribed thereto in the preamble to this Agreement.

“University Default” has the meaning ascribed thereto in Section 16.2(a).

“University Directive” means a written order or directive prepared by or on behalf of the University in conformity with the requirements and limitations of this Agreement directing the Concessionaire, to the extent permitted hereby, other than pursuant to Section 3.23, to (i) add to, or perform work in respect of, the Utility System in addition to that provided for in this Agreement (including (a) work within the Columbus Campus on utility facilities, energy equipment or ECMs that are not and will not be considered part of the Utility System in accordance with the definition thereof and (b) taking control of the internal University billing system for Utilities) or (ii) change the dimensions, character, quantity, quality, description, location or position of any part of the Utility System or make other changes to the Utility System; provided, however, that no such order or directive may in any event order or direct the Concessionaire to do any act that is not technically feasible or could reasonably be expected to violate any applicable Law, contravene any Consent or Authorization issued by a Governmental



Authority, cause a material insured risk to become uninsurable or cause the Concessionaire to fail to be in compliance with this Agreement.

“University Liaison” means the University’s Senior Energy Advisor, who is Scott Potter as of the date hereof, or such other Person as may be identified by the University to the Concessionaire in writing.

“University Required Coverages” has the meaning ascribed thereto in Section 13.2.

“University Utility System Employees” means those Persons employed by the University immediately prior to the Closing whose duties directly relate to the operation or maintenance of the Utility System.

“University’s Option” has the meaning ascribed thereto in Section 19.7(a).

“Unplanned Outage” has the meaning ascribed thereto in Schedule 2.

“Unrecovered Balance” has the meaning ascribed thereto in Schedule 5.

“Utility” means any of the following specific individual utility services: (i) electricity, (ii) steam and condensate, (iii) chilled water, (iv) natural gas and (v) geothermal power, and “Utilities” means each of them.

“Utility Facilities” means the improvements and equipment (a) constituting part of or located on the Columbus Campus, including those identified in Schedule 3, that are directly and exclusively involved in the generation, distribution and return of the Utilities and the operation and maintenance of the Utility System and that are not beyond the line of demarcation for each Utility as set forth in the Performance Standards, including the distribution pipes carrying the Utilities, the trench-boxes and vaults exclusively used in connection with the Utilities, the McCracken Power Plant, the South Campus Central Chiller Plant, the East Regional Chilled Water Plant, the OSU Substation, the Smith Substation, the West Campus Substation, the Gashouses, the Generator Plant, the Water Treatment Plant, the geothermal wells, and electric distribution wires or (b) located on Utility System Land; provided that the definition of “Utility Facilities” does not include (i) any improvements or equipment that are beyond the line of demarcation for each Utility as set forth in the Performance Standards, except for those areas expressly set forth in the Performance Standards as being within said line of demarcation or (ii) any cameras or other public safety equipment installed, maintained or used by the Department of Public Safety.

“Utility Fee” means the fee established as compensation for the Utility Services, as set forth on Schedule 5 and as may be adjusted pursuant to the terms of this Agreement.

“Utility Services” means the services to be provided by the Concessionaire as grantee of the concession under this Agreement.

“Utility System” means (A) the personal property, improvements, fixtures and equipment owned and operated by the University prior to the Time of Closing to provide the Utilities on the Columbus Campus, specifically limited to (i) the Utility System Assets, (ii) the computer

systems and software set forth on Schedule 12, (iii) the Utility Facilities and (iv) the Utility System Land; provided, however, that the “Utility System” shall not include, other than expressly referred to above, (x) any utility distribution facilities or other equipment that is beyond the line of demarcation for each Utility, as set forth in the Performance Standards, (y) any interest in the Public Way or similar real property or (z) any utility facilities in a building that is not a building leased by the Concessionaire, up to the Utility System point of demarcation for such building, as described in the Performance Standards; and (B) from and after the Time of Closing, such Utility System as it is reconfigured, replaced, improved or relocated by the Concessionaire or the Operator pursuant to the terms of this Agreement.

“Utility System Assets” means (i) as of the time immediately prior to the Time of Closing, the personal property of the University used in connection with operations of the Utility System and identified on Part I of Schedule 3 as “Personal Property” and (ii) from and after the Time of Closing, the personal property of the Concessionaire or the Operator used in connection with the operations of the Utility System.

“Utility System Concession Value” means, at any given date, the fair market value of the Concessionaire Interest at the time of the occurrence of the relevant Adverse Action or University Default or any event of termination, cancellation, rescinding or voiding referred to in Section 16.4 (but excluding the effect of such Adverse Action, University Default or event described in Section 16.4), as determined pursuant to a written appraisal prepared in conformity with the Uniform Standards of Professional Appraisal Practice as set forth by the Appraisal Standards Board, or its successor organization, by an independent third party appraiser that is nationally recognized in appraising similar assets and that is acceptable to the University and the Concessionaire; provided, however, that the Utility System Concession Value shall in no event be less than the amount of all Leasehold Mortgage Debt (including Breakage Costs) on the End Date. If the Parties fail to agree upon such a single appraiser within 30 Days after a Party requests the appointment thereof, then the University and the Concessionaire shall each appoint an independent third party appraiser and both such appraisers shall be instructed jointly to select a third independent third party appraiser to make the appraisal referred to above. The University shall pay the reasonable costs and expenses of any appraisal.

“Utility System Contracts” means the agreements to which the University is a party relating to the operations of the Utility System that are set forth on Schedule 4 and that will be assigned to the Concessionaire at the Time of Closing.

“Utility System Land” means those parcels of real property described in Schedule 3 for McCracken Power Plant, South Campus Central Chiller Plant, the East Regional Chilled Water Plant, the OSU Substation, the Smith Substation, the West Campus Substation, the Water Treatment Plant, the Generator Plant, the Gashouses and certain other land as identified on Schedule 3 and further described in the Memorandum of Lease.

“Utility System Operations” means the operation, management and maintenance of the Utility System and all other actions relating to the Utility System that are performed by or on behalf of the Concessionaire pursuant to this Agreement.

“Utility System Purposes” means the use of the Utility System to provide Utility Services in support of the University by providing utility services to University facilities on the Columbus Campus, including to students, faculty, administrators, employees and invitees of the University thereon and others providing services to the University, subject to the rights of the Concessionaire under Section 3.15(c).

“Variable Fee Component” has the meaning ascribed thereto in Schedule 5.

“Visionary Project” has the meaning ascribed thereto in Section 20.1(a)(i).

“VP Advisory Committee” has the meaning ascribed thereto in Section 20.1(a)(ii).

“Wage and Hour Laws” has the meaning ascribed thereto in Section 11.3.

“Water Treatment Plant” means the building and associated improvements identified on Part VIII of Schedule 3.

“West Campus Substation” means the building and associated improvements identified on Part VII of Schedule 3.

“Year” means the calendar year.

**Section 1.2. Number and Gender.** In this Agreement, words in the singular include the plural and vice versa and words in one gender include all genders.

**Section 1.3. Headings.** The division of this Agreement into articles, sections and other subdivisions is for convenience of reference only and shall not affect the construction or interpretation of this Agreement. The headings in this Agreement are not intended to be full or precise descriptions of the text to which they refer and shall not be considered part of this Agreement.

**Section 1.4. References to this Agreement.** The words “herein”, “hereby”, “hereof”, “hereto” and “hereunder” and words of similar import refer to this Agreement as a whole, including the Schedules, and not to any particular portion of it. The words “Article”, “Section”, “paragraph”, “sentence”, “clause” and “Schedule” mean and refer to the specified article, section, paragraph, sentence, clause or schedule of or to this Agreement.

**Section 1.5. References to Any Person.** A reference in this Agreement to any Person at any time refers to such Person’s permitted successors and assignees.

**Section 1.6. Meaning of Including.** In this Agreement, the words “include”, “includes” or “including” mean “include without limitation”, “includes without limitation” and “including without limitation”, respectively, and the words following “include”, “includes” or “including” shall not be considered to set forth an exhaustive list.

**Section 1.7. Meaning of Discretion.** In this Agreement, unless otherwise modified, the word “discretion” with respect to any Person means the sole and absolute discretion of such Person.

**Section 1.8. Meaning of Notice.** In this Agreement, the word “notice” means “written notice”, unless specified otherwise.

**Section 1.9. Consents and Approvals.** Unless specified otherwise, wherever the provisions of this Agreement require or provide for or permit an approval or consent by either Party, such approval or consent, and any request therefor, must be in writing (unless waived in writing by the other Party).

**Section 1.10. Trade Meanings.** Unless otherwise defined herein, words or abbreviations that have well-known trade meanings are used herein in accordance with those meanings.

**Section 1.11. Laws.** Unless specified otherwise, references to a Law are considered to be a reference to (i) such Law as it may be amended from time to time, (ii) all regulations and rules pertaining to or promulgated pursuant to such Law, (iii) the successor to the Law resulting from recodification or similar reorganizing of Laws and (iv) all future Laws pertaining to the same or similar subject matter.

**Section 1.12. Currency.** Unless specified otherwise, all statements of or references to dollar amounts or money in this Agreement are to the lawful currency of the United States of America.

**Section 1.13. Generally Accepted Accounting Principles.** All accounting and financial terms used herein, unless specifically provided to the contrary, shall be interpreted and applied in accordance with GAAP.

**Section 1.14. Calculation of Time.** For purposes of this Agreement, a period of Days shall be deemed to begin on the first Day after the event that began the period and to end at 5:00 p.m., which time shall be determined by the time in the City of Columbus, Ohio on the last Day of the period. If, however, the last Day of the period does not fall on a Business Day, the period shall be deemed to end at 5:00 p.m., which time shall be determined by the time in the City of Columbus, Ohio on the next Business Day.

**Section 1.15. Approvals, Consents and Performance by the University.**

- (a) *Procedures.* Wherever the provisions of this Agreement require or provide for or permit an approval or consent by the University of or to any action, Person, Document, or other matter contemplated by this Agreement, the following provisions shall apply: (i) such request for approval or consent must (1) contain or be accompanied by any documentation or information required for such approval or consent in reasonably sufficient detail, as reasonably determined by the University, (2) clearly set forth the matter in respect of which such approval or consent is being sought, (3) form the sole subject matter of the correspondence containing such request for approval or consent, and (4) state clearly that such approval or consent is being sought; (ii) such approval or consent shall not be unreasonably withheld, conditioned or delayed (unless such provision provides that such approval or consent may be unreasonably withheld, conditioned or delayed or is subject to the discretion of the University); (iii) the University shall

advise the Concessionaire by written notice either that it consents or approves or that it withholds its consent or approval, in which latter case it shall set forth, in reasonable detail, its reasons for withholding its consent or approval, which reasons may include the insufficiency, as determined by the University acting reasonably, of the information or documentation provided; (iv) unless a time period is specifically set forth elsewhere herein, the University shall provide the foregoing written notice no later than 10 Business Days of receipt of the Concessionaire's request; (v) if the responding notice mentioned in clause (iii) of this Section 1.15(a) indicates that the University does not approve or consent, the Concessionaire may take whatever steps may be necessary to satisfy the objections of the University set out in the responding notice and, thereupon, may resubmit such request for approval or consent from time to time and the provisions of this Section 1.15 shall again apply; (vi) if the disapproval or withholding of consent mentioned in clause (iii) of this Section 1.15(a) is subsequently determined pursuant to Article 18 to have been improperly withheld or conditioned by the University, such approval or consent shall be deemed to have been given on the date by which such approval or consent should have been provided; provided that, to the extent any deadlines for performing work are determined by reference to the date of consent or approval, such consent or approval shall be deemed to have been given on the date of determination rather than the date such consent or approval should have been provided; and (vii) for the avoidance of doubt, any dispute as to whether or not a consent or approval has been unreasonably withheld, conditioned or delayed shall be resolved in accordance with the provisions of Article 18. The Concessionaire shall submit any request for approval or consent to the University Liaison, who will direct such request to the appropriate committee, Person or group within the University.

- (b) *Approved Documents.* Subject to the other provisions hereof, wherever in this Agreement an approval or consent by the University is required with respect to any document, proposal, certificate, plan, drawing, specification, contract, agreement, budget, schedule, report or other written instrument whatsoever (a "Document"), following such Approval such Document shall not be amended, supplemented, replaced, revised, modified, altered or changed in any manner whatsoever without obtaining a further Approval in accordance with the provisions of this Section 1.15.

**Section 1.16. Incorporation of Schedules.** The Schedules are integral to, and are made a part of, this Agreement. In the event of any conflict between the terms of this Agreement and the terms of the Schedules, the terms of this Agreement shall control.

**Section 1.17. References to Agreements Generally.** References to agreements (including this Agreement) and other contractual instruments shall be deemed to include all amendments, restatements, extensions and other modifications to such instruments.

**Section 1.18. Cost Responsibilities.** In this Agreement, the phrases "at Concessionaire's sole cost and expense", "at Concessionaire's cost and expense", "the

Concessionaire shall be responsible for providing”, “the Concessionaire shall pay” and similar phrases and provisions that require the Concessionaire to take certain actions or perform certain services, shall not mean that such costs or expenses, or the costs and expenses associated with such actions or activities, are necessarily subject to recovery as part of the Utility Fee or otherwise in accordance with this Agreement. The inclusion of such costs and expenses in the Utility Fee shall be determined in accordance with Schedule 5.

**Section 1.19. Out-of-Pocket Costs.** In this Agreement, any reference to “out-of-pocket” or “out of pocket” costs or expenses of the Concessionaire or Operator and similar phrases and provisions shall mean the reasonable, incremental actual costs paid by the Concessionaire or Operator to a third party that (i) is not an Affiliate of the Concessionaire, the Operator or any Equity Participant or (ii) is an Affiliate of the Concessionaire, the Operator or any Equity Participant, provided that the payments to such Affiliate are on arms’ length terms consistent with those terms offered by unaffiliated third parties for similar goods or services.

## ARTICLE 2

### THE TRANSACTION; CLOSING; CONDITIONS PRECEDENT; COVENANTS

**Section 2.1. Grant of Concession.** Upon the terms and subject to the conditions of this Agreement, effective at the Time of Closing, (a) the Concessionaire shall pay the University the exact amount of \$1,015,000,000 in cash (the “Closing Consideration”) in accordance with Section 2.2(a), (b) the University shall (i) demise and lease the Utility System Land and the Utility Facilities to the Concessionaire free and clear of Encumbrances other than Permitted University Encumbrances and on an exclusive basis, other than as expressly provided in this Agreement, for and during the term (the “Term”) commencing on the Closing Date and expiring on the 50th anniversary of the Closing Date (or such later date as may be required to effect a Delay Event Remedy but subject to earlier termination as provided in this Agreement), provided that such demise and lease of the Utility Facilities other than those located on the Utility System Land shall not prevent the University from using, occupying, developing, leasing or otherwise enjoying the real property and the improvements other than the Utility Facilities on which the Utility Facilities are located without the payment of any fee, charge or rent to the Concessionaire, (ii) grant the Concessionaire a non-exclusive license during the Term, appurtenant to the leasehold interest described in clause (i) above, to access (A) the Tunnels, (B) the Public Way and (C) the basement of Park-Stradley Hall and the well fields under Hale Green and South Oval where certain geothermal equipment and improvements identified on Part XII of Schedule 3 are located, in each case solely in order to operate, maintain, repair, replace, improve and service the Utility Facilities located therein to the extent permitted or required under this Agreement, (iii) grant the Concessionaire, free and clear of any Encumbrances (other than Permitted University Encumbrances) an exclusive right for and during the Term to operate the Utility System (and any expansions, improvements or replacements thereto) and to provide Utility Services on the Columbus Campus (except as expressly provided herein), and in connection therewith (A) to use, possess, control, operate, manage, modify, maintain and rehabilitate the Utility System; and (B) to charge the Utility Fee; and (iv) assign, transfer and otherwise convey to the Concessionaire by bill of sale each of the Utility System Assets identified on Schedule 3, free and clear of any Encumbrances (other than Permitted University Encumbrances) and the Concessionaire shall accept each such demise, lease, grant, assignment, transfer and conveyance, (c) the University and the Concessionaire shall execute the McCracken

Sublease and (d) the University and the Concessionaire shall execute the Design-Build Agreement to the extent required by Section 4.3(g) (collectively, the “Transaction”).

**Section 2.2. Closing.**

- (a) The closing of the Transaction (the “Closing”) shall take place on the date that is on or before 90 Days after the date hereof, of which date the Concessionaire shall provide written notice to the University at least 20 Business Days prior thereto, or such other date as agreed in writing by the Concessionaire and the University (the “Closing Date”), provided that the Concessionaire shall have a one-time right to extend the Closing Date by 30 Days or 60 Days by delivery of written notice to the University at least 10 Business Days prior to the originally scheduled Closing Date and payment of the 30-Day Closing Extension Payment or the 60-Day Closing Extension Payment, as applicable, contemporaneously therewith, which payment shall be in consideration of such extension and shall not be a credit against the Closing Consideration. The Closing shall be held at the offices of Jones Day, 325 John H. McConnell Blvd., Suite 600, Columbus, Ohio, 43215 or such other place agreed to in writing by the University and the Concessionaire. At the Time of Closing, the Concessionaire shall deliver or cause to be delivered to the University same-day funds by wire transfer in the amount of the Closing Consideration (as adjusted pursuant to Section 2.2(c) and plus or minus, as appropriate, any adjustment in accordance with Section 2.2(b)), and upon receipt of such payment the Transaction shall be effective. The Concessionaire shall wire the Closing Consideration to bank account(s) and in increments designated by the University. Upon receipt of the funds described in the preceding sentences in this Section 2.2(a), the University shall immediately cancel and return the Closing Deposit and the Cash Deposit (unless such Closing Deposit or Cash Deposit is applied against the Closing Consideration by the University in accordance with Section 2.3(c)), in accordance with the Concessionaire’s instructions).
- (b) All Prorated Items shall be prorated between the University and the Concessionaire as of 11:59 p.m. on the Day immediately preceding the Closing Date based upon the actual number of Days in the month and a 365-Day year and the required payment resulting from such proration shall be added to or subtracted from the Closing Consideration as follows:
  - (i) At least 5 Days prior to the Closing, the University will provide to the Concessionaire an itemized statement of such Prorated Items, estimated in good faith as of the Closing and reasonably based on relevant billing information from third parties or (in the absence of such information) the University’s financial statements as of June 30, 2016, and such statement shall be the basis of proration of any Prorated Items at the Closing and any resulting adjustment to the Closing Consideration in accordance with this Section 2.2(b);

- (ii) Within 45 Business Days after the Closing, the University will provide to the Concessionaire a revised good-faith accounting of such Prorated Items as of the Closing in the form of an itemized statement of such Prorated Items (the “Revised Proration Statement”);
  - (iii) Within 15 Business Days after the Concessionaire’s receipt of the Revised Proration Statement, the Concessionaire will review the Revised Proration Statement and notify the University of any adjustments made by the Concessionaire to the Revised Proration Statement in good faith;
  - (iv) To the extent the University disagrees with any of the Concessionaire’s adjustments to the Revised Proration Statement, the University shall provide notice to the Concessionaire within 15 Business Days after the University’s receipt of the Concessionaire’s adjustments, and any disagreement shall be resolved in accordance with Article 18; and
  - (v) Upon final resolution with respect to the proration of each such Prorated Item (whether by agreement of the Parties or in accordance with Article 18), the Party that is determined to owe money pursuant to the proration of that Prorated Item shall pay to the other party the amount owed within 10 Business Days of such determination.
- (c) Using the LIBOR swap spot curve (the “Benchmark Interest Rate”) as provided by Bloomberg as of 10:00 am Eastern Time on March 15, 2017 through 11:00 am Eastern Time on May 24, 2017, the amount of the Closing Consideration will be decreased by \$815,000 for every 1 basis point increase in the applicable 30-year, mid-market Benchmark Interest Rate; during the same period, the amount of the Closing Consideration will be increased by \$815,000 for every 1 basis point decrease in the applicable 30-year, mid-market Benchmark Interest Rate; provided that any such protection may not exceed 25 basis points without the prior written consent of the University or the Concessionaire, as the case may be. Any change to the Benchmark Interest Rate, regardless of its impact on the Closing Consideration, shall not excuse any Party’s performance under this Agreement, including the obligation to complete the Closing in accordance with Section 2.4. Furthermore, the Concessionaire and the University agree that any adjustment resulting from this Section 2.2(c) will be to provide a neutral hedge to the Concessionaire’s initial debt structure and shall not be applied to any speculative positions on interest rate movements generally resulting from the Concessionaire’s initial debt structure.

### **Section 2.3. Deposit.**

- (a) The University acknowledges receipt from the Concessionaire of a combination of cash (the “Cash Deposit”) and one or more Letters of Credit with a term of at least 210 Days from the date hereof (the “Closing Deposit”), in an amount equal to \$75,000,000, to be held by the University for the sole purpose described in Section 2.3(b). The University shall deposit any Cash Deposit with the Escrow



Agent, which shall invest such amount in Eligible Investments pending the Closing.

- (b) If the University terminates this Agreement pursuant to Section 2.4(d)(iv) (including as a result of the failure of the Concessionaire to pay the Closing Consideration at the Closing in accordance with the terms hereof so long as said failure is not the result of the University's actions or omissions), then the University shall be entitled to (i) retain the Cash Deposit and all interest accrued thereon and, (ii) without notice to the Concessionaire, immediately draw the full amount of the Closing Deposit upon presentation of a sight draft and a certificate confirming that the University has the right to draw under the Closing Deposit in the amount of such sight draft, and the University shall be entitled to retain the Cash Deposit and all of the proceeds of the Closing Deposit, in each case as the sole remedy or right of the University against the Concessionaire hereunder (provided that this limitation shall not apply in the event of fraud or intentional misrepresentation of the Concessionaire); provided, however, that if this Agreement is terminated for any other reason prior to Closing, the University shall return any Cash Deposit and the interest earned thereon in accordance with the Concessionaire's reasonable instructions, and deliver, in accordance with the Concessionaire's reasonable instructions, the Closing Deposit and agree to cancel the Closing Deposit, in each case, immediately following any such termination. The Concessionaire acknowledges that the loss the University will incur in the event of a termination under Section 2.4(d)(iv) is difficult to ascertain, and that the University's right to retain the Cash Deposit and to draw the Closing Deposit as set forth above is based on the Parties' reasonable estimate – taking into account the magnitude of the Transaction and the other relevant considerations – as to such loss and is not intended as, and does not constitute, a penalty. Except in cases involving fraud or willful breach by the Concessionaire, the right of the University to retain the Cash Deposit or to draw the Closing Deposit is intended to be, and shall constitute, liquidated damages, and any payment thereof to the University shall terminate the University's rights and remedies in all respects.
- (c) At the Closing, upon the satisfaction of the conditions set forth in Section 2.4(a), Section 2.4(b) and Section 2.4(c), the Concessionaire shall be entitled to, as applicable, (i) with respect to the Cash Deposit, a full return of the Cash Deposit, if any, and all investment earnings accrued thereupon or apply the Cash Deposit (including any accrued interest) as a credit against the Closing Consideration and (ii) with respect to the Closing Deposit, a return of the Closing Deposit, its cancellation or its application as a credit against the Closing Consideration, in any case as directed by the Concessionaire prior to Closing.

#### **Section 2.4. Conditions Precedent; Termination.**

- (a) *Conditions for the Benefit of the Concessionaire.* The Concessionaire shall be obligated to complete the Closing only if each of the following conditions has

been satisfied in full at or before the Time of Closing, unless waived by the Concessionaire:

- (i) the representations and warranties of the University set forth in Section 9.1 shall be true and correct in all material respects on and as of the date hereof and at and as of the Time of Closing with the same force and effect as if made at and as of such time and date except that (A) representations and warranties that by their terms speak only as of the date hereof or some other date need to be true and correct only as of such date and (B) those representations and warranties which are subject to a materiality or a Material Adverse Effect qualifier in Section 9.1 shall be true and correct in all respects on and as of the date hereof and at and as of the Time of Closing with the same force and effect as if made at and as of such time and date;
- (ii) the University shall not be in material breach of any material covenant on its part contained in this Agreement which is to be performed or complied with by the University at or prior to the Time of Closing;
- (iii) the University shall have obtained and delivered to the Concessionaire, at the expense of the Concessionaire, a commitment effective at the Time of Closing for a leasehold title policy or policies, in form and substance reasonably acceptable to the Concessionaire (which will include an endorsement with the terms of the leasehold coverage), proposing to insure the leasehold interest of the Concessionaire in the Utility System Land, to the extent of such leasehold interest, subject only to (A) Permitted University Encumbrances, (B) Permitted Concessionaire Encumbrances (other than the Permitted Concessionaire Encumbrances specified in clause (iv), clause (vii) and clause (ix) of the definition of “Permitted Concessionaire Encumbrances” as it pertains to clause (iii) and clause (v) of this Section 2.4(a)) and (C) any Encumbrances the Concessionaire is required to remove pursuant to Section 3.5(a) (the “Title Commitment”) from the Title Company, from which Title Company the Concessionaire shall purchase any leasehold or other title insurance that it elects to purchase in connection with the Transaction;
- (iv) the University shall have delivered to the Concessionaire a legal opinion of outside counsel to the University, in substantially the form attached hereto as Schedule 7;
- (v) the University shall have executed and delivered to the Concessionaire (A) the assignments, transfers and conveyances contemplated by Section 2.1, and (B) the consents and estoppel certificates contemplated by Section 10.2 and the consent agreement contemplated by Section 19.1(i);
- (vi) there shall not have occurred a material casualty loss, destruction or damage to the Utility System; provided, however, that as used in this

Section 2.4(a)(vi), a material casualty loss, destruction or damage to the Utility System means the casualty, loss, damage or destruction of the Utility System such that its annualized aggregated delivery capacity (calculated in British Thermal Units) for the electricity, steam and natural gas portions of the Utility System has been reduced by at least 10% since the Setting Date;

- (vii) from the Setting Date through and including the Time of Closing, no action or event has transpired that would have constituted an Adverse Action had it occurred during the Term;
  - (viii) all material Authorizations set forth on Schedule 20 are in full force and effect and shall be transferred to the Concessionaire as of the Time of Closing; and
  - (ix) the University shall have delivered to the Concessionaire a certificate confirming that each of the conditions set forth in Section 2.4(a)(i) through Section 2.4(a)(viii) has been satisfied in full by the University (except for any condition that has been waived by the Concessionaire) at or before the Time of Closing.
- (b) *Conditions for the Benefit of the University.* The University shall be obligated to complete the Closing only if each of the following conditions precedent has been satisfied in full at or before the Time of Closing, unless waived by the University:
- (i) the representations and warranties of the Concessionaire set forth in Section 9.2 shall be true and correct in all material respects on and as of the date hereof and at and as of the Time of Closing with the same force and effect as if made at and as of such time and date except that (A) representations and warranties that by their terms speak only as of the date hereof or some other date need to be true and correct only as of such date and (B) those representations and warranties which are subject to a materiality or a Material Adverse Effect qualifier in Section 9.2 shall be true and correct in all respects on and as of the date hereof and at and as of the Time of Closing with the same force and effect as if made at and as of such time and date;
  - (ii) the Concessionaire shall not be in material breach of any material covenant on its part contained in this Agreement which is to be performed or complied with by the Concessionaire at or prior to the Time of Closing (including the obligation of the Concessionaire to pay the Closing Consideration at the Closing in accordance with the terms hereof);
  - (iii) the Concessionaire shall have delivered to the University a legal opinion of outside counsel to the Concessionaire, substantially in the form attached hereto as Schedule 8;

- (iv) all Leasehold Mortgage Debt issued by the Concessionaire on or before Closing shall have a credit rating of at least investment grade as determined by at least one of the Credit Rating Agencies; and
  - (v) the Concessionaire shall have delivered to the University a certificate confirming that each of the conditions set forth in Section 2.4(b)(i) through Section 2.4(b)(iv) has been satisfied in full by the Concessionaire (except for any condition that has been waived by the University) at or before the Time of Closing.
- (c) *Mutual Conditions.* In addition, the University and the Concessionaire shall be obligated to complete the Closing only if each of the following conditions precedent has been satisfied in full at or before the Time of Closing, unless waived by both the University and the Concessionaire:
- (i) there shall be no preliminary or permanent injunction or temporary restraining order or other order issued by a Governmental Authority of competent jurisdiction or other legal restraint or prohibition enjoining or preventing the consummation of the Transaction; and
  - (ii) there shall be no action taken, or any Law enacted, entered, enforced or deemed applicable to the Transaction by any Governmental Authority of competent jurisdiction that, in any such case, has resulted or (in the case of any pending review or proceeding, if adversely determined) could reasonably be expected to result in such Governmental Authority conditioning or restricting the consummation of the Transaction in a manner that would impose a material impairment on the Transaction or make the consummation of the Transaction illegal.
- (d) *Termination.* This Agreement may be terminated at any time prior to the Closing:
- (i) by mutual consent of the University and the Concessionaire in a written instrument;
  - (ii) by either the University or the Concessionaire, upon notice to the other Party, if any Governmental Authority of competent jurisdiction shall have issued an order, decree or ruling or taken any other action permanently restraining, enjoining or otherwise prohibiting the Transaction, and such order, decree, ruling or other action has become final and nonappealable; provided, however, that the right to terminate this Agreement under this Section 2.4(d)(ii) shall not be available to any Party whose failure to comply with any provision of this Agreement or other conduct has been the cause of, or results in such action;
  - (iii) by the Concessionaire, upon written notice to the University, if any condition set forth in Section 2.4(a) is not satisfied at the Time of Closing; provided, however, that the Concessionaire shall not have the right to

- terminate this Agreement under this Section 2.4(d)(iii) if (A) the Concessionaire shall have theretofore waived such condition, (B) the Concessionaire's failure to comply with any provision of this Agreement or other conduct has been the cause of, or resulted in, the failure of such condition or conditions to be satisfied or (C) any condition set forth in Section 2.4(b) is not satisfied at the Time of Closing;
- (iv) by the University, upon written notice to the Concessionaire, if any condition set forth in Section 2.4(b) is not satisfied at the Time of Closing; provided, however, that the University shall not have the right to terminate this Agreement under this Section 2.4(d)(iv) if (A) the University shall have theretofore waived such condition, (B) the University's failure to comply with any provision of this Agreement or other conduct has been the cause of, or resulted in, the failure of such condition or conditions to be satisfied or (C) any condition set forth in Section 2.4(a) is not satisfied at the Time of Closing; or
- (v) by either the University or the Concessionaire upon notice to the other Party if the Closing has not occurred within 5 Business Days after the Closing Date or such later date agreed to in writing by the Parties, provided that if the Closing has not occurred due to a Party's failure to satisfy the conditions precedent for the Closing for which such Party is responsible pursuant to this Section 2.4, that Party may not terminate this Agreement pursuant to this Section 2.4(d)(v).
- (e) *Effect of Termination.* In the event of termination of this Agreement by either the University or the Concessionaire as provided in Section 2.4(d), this Agreement shall forthwith become void and there shall be no liability or obligation on the part of the University or the Concessionaire or their respective Representatives, except as set forth in Section 2.3(b), this Section 2.4(e), Article 12, Article 18 and Article 19. In the event that the Concessionaire terminates this Agreement pursuant to Section 2.4(d)(iii) as a result of the failure of the University to satisfy any condition set forth in Section 2.4(a) (excluding Section 2.4(a)(vi) and Section 2.4(a)(vii), but, with respect to the exclusion of Section 2.4(a)(vii), only to the extent the event described in Section 2.4(a)(vii) was not an action taken by the University), the University will compensate the Concessionaire for up to \$2,500,000 of reasonable and documented out-of-pocket costs as well as reasonable internal costs (calculated based on the market rate for such costs) incurred by the Concessionaire or the Operator in connection with the Transaction. In the event of any termination pursuant to Section 2.4(d)(i), Section 2.4(d)(ii), Section 2.4(d)(iii) or Section 2.4(d)(v), the Cash Deposit and all investment earnings accrued thereon and the 30-Day Closing Extension Payment or the 60-Day Closing Extension Payment (if previously paid by the Concessionaire) shall be paid to the Concessionaire, and the Closing Deposit shall be returned undrawn to the Concessionaire marked canceled, as applicable.

## Section 2.5. Covenants.

- (a) *Cooperation.* During the Closing Period, the Parties shall cooperate with each other in order to permit the Closing to be consummated on the Closing Date.
- (b) *Reasonable Efforts.* During the Closing Period, each Party shall use all reasonable efforts (i) to take, or cause to be taken, all actions necessary to comply promptly with all requirements under this Agreement and all legal requirements which may be imposed on such Party to consummate the Transaction as promptly as practicable, including making any necessary filings, and (ii) to obtain (and to cooperate with the other Party to obtain) any Consent of any Governmental Authority or any other public or private third party which is required to be obtained or made by such Party in connection with the consummation of the Transaction. Each Party shall promptly cooperate with and promptly furnish information to the other Party at such other Party's reasonable request in connection with any such efforts by, or requirement imposed upon, any of them in connection with the foregoing.
- (c) *Injunctions.* If any Governmental Authority of competent jurisdiction issues a preliminary or permanent injunction or temporary restraining order or other order before the Time of Closing which would prohibit or materially restrict or hinder the Closing, each Party shall use all reasonable efforts to have such injunction, decree or order dissolved or otherwise eliminated or to eliminate the condition that formed the basis for such injunction or order, in each case as promptly as possible and, in any event, prior to the Time of Closing.
- (d) *Operation of the Utility System.* During the Closing Period, the University shall operate the Utility System in the ordinary course in a manner consistent with past practice, which shall include using all reasonable efforts to preserve the goodwill of the Utility System and to maintain good business relationships with Persons having business dealings with respect to the Utility System, to maintain the Utility System in its existing operating condition and repair in accordance with past practice (ordinary wear and tear excepted), to perform (or cause to be performed) in all material respects all of the University's obligations under the Utility System Contracts, not to incur any Encumbrances on the Utility System (other than Permitted University Encumbrances) that are not satisfied by the Closing Date, and to cause the Utility System to be operated in all material respects in accordance with all applicable Laws (except to the extent any non-compliance is being contested in good faith by appropriate proceedings), all to the end that the Utility System as a going concern shall be unimpaired and delivered to the Concessionaire at the Time of Closing in a condition not materially worse than the condition as of the Setting Date, except for any damage by casualty or condemnation. The University, shall, up to and including the Time of Closing, be entitled to all of the cash or cash equivalents in or generated by the Utility System. The Concessionaire acknowledges that all receivables related to the Utility System in existence at the Time of Closing shall remain the property of the University and the Concessionaire shall promptly transfer to the

University any such receivables, existing up to and including the Time of Closing, received after the Closing Date. Without limiting the foregoing, the University shall not (i) terminate, amend, modify or agree to a waiver of the terms of any Authorization related to the Utility System after the date hereof and before the Time of Closing, (ii) amend, modify, terminate or execute any Utility System Contracts other than Supply Contracts, provided that the University shall provide the Concessionaire written notice of termination or material modification of any Supply Contract at least 30 Days prior to the effective date of such termination or material modification or (iii) commence any Material Changes to the Utility System that are not Ongoing Utility System Projects, in either case without the Concessionaire's consent, which consent shall not be unreasonably withheld, conditioned or delayed.

(e) *Utility System Contracts.* The Utility System Contracts shall be assigned by the University to, and assumed by, the Concessionaire at the Time of Closing. All other contracts, including those listed on Schedule 6, related to the operation of the Utility System shall either be retained by the University following the Closing Date (so long as such retained contracts do not interfere with the operation of the Utility System) or be terminated by the University, effective at the Time of Closing; provided, however, that any liability under or related to any contract related to the Utility System (other than the Utility System Contracts) that is retained by the University following the Closing Date or terminated by the University on the Closing Date (including any liability resulting from the termination thereof), and any liability under or related to any Utility System Contract attributable to periods prior to the effectiveness of the assignment thereof to the Concessionaire, shall be solely for the account of the University.

(f) *Disclosure of Changes.*

(i) During the Closing Period, each Party shall immediately disclose in writing to the other Party any matter which becomes known to it which is inconsistent in any material respect with any of the representations or warranties contained in Article 9. No such disclosure, however, shall cure any misrepresentation or breach of warranty for the purposes of Section 2.4 or Article 12; and

(ii) During the Closing Period, the University may supplement or amend the Disclosure Schedules hereto, including one or more supplements or amendments to correct any matter which would constitute a breach of any representation, warranty, covenant or obligation contained herein. No such supplement or amendment shall be deemed to cure any breach for purposes of Section 2.4(a) or, subject to the following sentence, for any other purpose. Notwithstanding the previous sentence, if the Closing occurs, then, subsequent to the Closing, any such supplement or amendment provided to the Concessionaire at least 10 Business Days prior to the Closing with respect to any representation or warranty contained in Section 9.1(d), Section 9.1(i), or Section 9.1(j) relating to a matter arising

after the date hereof but before the Closing will be effective to cure and correct for all purposes any inaccuracy in, or breach of, such representation or warranty which would exist if the University had not made such supplement or amendment, and all references to any Disclosure Schedule hereto which is supplemented or amended as provided in this Section 2.5(f)(ii) shall (subject to the foregoing limitation) for all purposes after the Closing be deemed to be a reference to such Disclosure Schedule as so supplemented or amended.

- (g) *Access to Information and Pre-Closing Inspections.* During the Closing Period, but subject to confidentiality obligations binding on the University with respect to any Person (provided that the University has disclosed to the Concessionaire the existence of the applicable Document that is subject to such confidentiality limitation in order to enable the Concessionaire to evaluate the materiality and significance of the lack of disclosure based on such limitations), the University shall (i) give the Concessionaire and its Representatives reasonable access during normal business hours and on reasonable notice to the Utility System to perform inspections on the Utility System, subject to the University's policies and regulations regarding safety and security and any other reasonable conditions imposed by the University, (ii) permit the Concessionaire and its Representatives to make such inspections as they may reasonably request in order to facilitate the transition of the use, operation, possession and control of the Utility System to the Concessionaire and (iii) furnish the Concessionaire and its Representatives with such financial and operating data and other information that is available with respect to the Utility System as they may from time to time reasonably request; provided that no inspections or the results thereof shall permit the Concessionaire to terminate this Agreement. The Concessionaire shall hold and will cause its Representatives to hold in strict confidence all Documents and information concerning the Utility System to the extent and in accordance with the terms and conditions of the confidentiality agreement between the University and the Concessionaire in connection with the Transaction. After the Closing Date, the Concessionaire shall, at the request of the University, in connection with claims or actions brought by or against third parties based upon events or circumstances concerning the Utility System, (A) provide reasonable assistance in the collection of information or Documents and (B) make the Concessionaire's employees available when reasonably requested by the University; provided, however, that the University shall reimburse the Concessionaire for all out-of-pocket and documented costs and expenses incurred by the Concessionaire in providing said assistance and will not unduly interfere with Concessionaire's operations.
- (h) *Transition.* During the Closing Period, the Parties shall cooperate with each other to ensure the orderly transition of control, possession, custody, operation, management and maintenance of the Utility System at the Time of Closing and to provide the services required to be performed under this Agreement. Such cooperation shall include the University making its employees reasonably available to the Concessionaire to assist in such transition at no out-of-pocket



cost to the University. In order to assure such orderly transition and to provide information and Documents related to the Utility System Operations to the Concessionaire, the University shall use commercially reasonable efforts to exercise its rights under existing service agreements with service providers. After the Closing, the Parties shall continue to cooperate to ensure the orderly transition of control, custody, operation, management and maintenance of the Utility System, provided that no University employees shall work to operate the Utility System after the Closing, except to the extent expressly agreed by the University and the Concessionaire.

- (i) *Casualty Loss Prior to Closing.* If between the Setting Date and the Time of Closing, a casualty loss, destruction or damage to the Utility System has occurred, unless this Agreement has been terminated under Section 2.4(d), then the University shall, at its option, either (i) promptly and diligently repair and rebuild the affected parts of the Utility System to restore them to at least the same condition in which they were before the occurrence of such casualty loss, destruction or damage, provided that if the affected parts of the Utility System cannot prior to the Closing Date be repaired or rebuilt to restore them to at least the same condition in which they were before the occurrence of such casualty loss, destruction or damage, the University shall make such repairs or restoration as can reasonably be completed prior to the Closing Date and shall provide to the Concessionaire a plan for the completion of such repairs or restoration following the Time of Closing at the University's expense and shall then complete such repairs or restoration in accordance with such plan, or (ii) authorize the Concessionaire to repair the Utility System and assign to the Concessionaire all insurance and other proceeds (if any) payable by third-party insurers or other third parties in respect of such casualty loss, destruction or damage and enforce (with the cooperation of the Concessionaire) all of its rights, remedies and privileges under any applicable insurance policies with third-party insurers, the costs of which shall not be included in the Variable Fee Component or the Utility Fee; provided that if no insurance exists or such insurance proceeds are not sufficient to repair and rebuild the affected parts of the Utility System to its prior condition, then the University shall reimburse the Concessionaire for that amount representing the difference between the out-of-pocket cost to repair and the amount of any insurance proceeds received by the Concessionaire. It shall not be a Concessionaire Default for the inability of the Concessionaire to meet any obligation hereunder as a direct result of such casualty loss, destruction or damage unless the University has elected to authorize the Concessionaire to repair the Utility System pursuant to clause (ii) of this Section 2.5(i) and the Concessionaire is not diligently repairing or restoring the Utility System.
  
- (j) *Policies of Insurance.* During the Closing Period, the University shall continue in force all applicable policies of insurance maintained by the University in respect of the Utility System. Except to the extent the University is required to maintain such policies of insurance in accordance with Article 13, at the Time of Closing, all such policies of insurance shall terminate and the Concessionaire

shall be responsible for obtaining insurance for the Utility System in accordance with the terms hereof.

- (k) *Employees.* Prior to the Time of Closing, the Concessionaire shall use its best efforts to or cause the Operator to interview all University Utility System Employees who apply for a position with the Concessionaire or the Operator, as the case may be. If either the Concessionaire or the Operator makes any offer of employment to any such individual, such offer shall contain only the terms and conditions of employment that the Concessionaire or the Operator, as the case may be, deems to be appropriate in its discretion, except that the Concessionaire or the Operator, as the case may be, shall include wages, benefits and other terms and conditions of employment that are at a minimum, comparable to other similarly-situated employees of the Concessionaire or the Operator, as the case may be, reasonably adjusted based upon the metropolitan statistical area of Columbus, Ohio. All employment offers will comply with the requirements of Ohio Rev. Code Ann. § 145.01(A)(2), to the extent it is applicable to such employee. Pursuant to Ohio Rev. Code Ann. § 145.037, any employees of the Concessionaire or the Operator shall not be “public employees” for purposes of Ohio Rev. Code Ann. § 145, except to the extent such employees are “public employees” pursuant to Ohio Rev. Code Ann. § 145.01(A)(2). For any employees who elect to, and a have a right to, continue to participate in the public employees retirement system pursuant to Ohio Rev. Code Ann. § 145.034, and are not otherwise excluded from participation in such retirement system by the State of Ohio’s public employee retirement board, the Concessionaire shall directly pay the employer contribution rate for such employee’s earnable salary. Any and all employees of the Concessionaire and the Operator shall have met all reasonable background inspection and security requirements of the University, as promulgated from time to time. Nothing in this Agreement shall be construed or is otherwise intended to create joint employment by the University and the Concessionaire and/or the Operator, as the case may be, of the employees of the Concessionaire or the Operator; the Concessionaire or the Operator, as the case may be, shall have the right and obligation to supervise and direct the work of its employees.
- (l) *Office / Storage Space.* To the extent requested by the Concessionaire in writing prior to the Closing Date, the Parties shall use reasonable efforts to enter into a commercially reasonable lease agreement prior to the Closing Date with respect to the lease of office and/or storage space by the University to the Concessionaire within a location on the Columbus Campus at the then applicable University rental rates as established by the University Department of Planning and Real Estate (PARE) from time to time, subject to availability of such space as determined by the University in its sole discretion; provided, however, that the execution and delivery of such lease agreement shall not be a condition precedent to Closing.
- (m) *Ongoing Utility System Projects.* The University shall continue the construction of the Ongoing Utility System Projects, in accordance with applicable Law, until

they have been completed in substantial accordance with the plans for such Ongoing Utility System Projects as of the Setting Date, provided that the University may, upon written notice to the Concessionaire, abandon or modify any or all Ongoing Utility System Projects. To the extent that the construction or completion of any Ongoing Utility System Project requires access to any of the Utility System, the Concessionaire hereby grants a non-exclusive license to the University to so access the Utility System as necessary to complete such Ongoing Utility System Projects. Upon completion of an Ongoing Utility System Project, the University shall (i) deliver the Concessionaire written notice thereof, and, at such time, that Ongoing Utility System Project shall become part of the Utility System and the Concessionaire shall be granted a leasehold interest therein and (ii) either (A) assign the Concessionaire (or one or more third parties at the Concessionaire's direction,) all contractors' warranties held by the University with respect to such Ongoing Utility System Project or (B) to the extent the University chooses not to so assign such warranties or such warranties are not so assignable, cooperate with the Concessionaire to provide the benefit of such warranties to the Concessionaire (or one or more third parties at the Concessionaire's direction). The University shall name the Concessionaire as an additional insured on its insurance policies with respect to those Ongoing Utility System Projects. If the University elects to abandon an Ongoing Utility System Project, the Capped O&M Index shall be increased by the additional annual O&M Costs that the Concessionaire is required to incur due to the abandonment of such Ongoing Utility System Project, provided the Concessionaire provides reasonable proof of such additional O&M Costs and that such O&M Costs were unavoidable. For the avoidance of doubt, Ongoing Utility System Projects shall not be considered New Approved Capital Improvements.

## **Section 2.6. Intended Treatment for Federal and State Income Tax Purposes.**

### **(a) Tax Treatment.**

- (i) The Parties intend for United States federal and state income Tax purposes that (A) the Closing Consideration will be treated as a payment and consideration for (I) the sale of the Utility System Assets and Utility Facilities, (II) a lease of the Utility System Land to the Concessionaire and (III) the grant to the Concessionaire of the exclusive right to provide the Utility Services to the Columbus Campus in accordance with this Agreement; and (B) the Utility Fee is a separate fee and payment from the Closing Consideration and is not a payment for the sale of assets and lease described in Section 2.6(a)(i)(A) or otherwise but is in consideration of the services provided hereunder by the Concessionaire to the University.
- (ii) Notwithstanding Section 2.6(a)(i), this Section 2.6 only sets forth the intentions and agreements of the Parties with respect to United States federal and state income Tax purposes, and no provision of this Agreement is intended to, or shall in any way, transfer any fee interest in real property or improvements comprising the Utility System to the

Concessionaire for purposes of the provisions of the Ohio Revised Code governing legal title to real property or the common law of Ohio or any other purpose whatsoever other than for United States federal and state income Tax purposes as described above.

- (iii) The Parties believe that the Closing Consideration is a reasonable payment for the sale and lease of the assets and the grant of the right referred to in Section 2.6(a)(i)(A) based on the fair market value of those assets and such right and that the Utility Fee is a reasonable fee based upon the fair market value of the services provided hereunder by the Concessionaire to the University with respect to operating, maintaining and improving the Utility System and is in consideration thereof.
  - (iv) Subject to and consistent with Section 2.6(b) and Section 2.6(c), the University and the Concessionaire agree that the Closing Consideration will be allocated among the assets and rights that the Concessionaire is obtaining the use of pursuant to this Agreement using the residual allocation provisions of Section 1060 of the Code as provided therein and otherwise consistent in all respects with the schedule referenced in Section 2.6(c).
  - (v) Any Concession Compensation paid to the Concessionaire hereunder shall be deemed an adjustment to the Utility Fee for tax purposes and shall not be deemed to be an adjustment to the Closing Consideration related to the sale and lease of the assets described in Section 2.6(a)(i)(A).
  - (vi) The Parties intend that this Agreement will be treated as a service contract pursuant to Section 7701 of the Code with respect to the services provided hereunder by the Concessionaire to the University with respect to the Utility System, and the Parties shall use commercially reasonable efforts to cause such treatment under Section 7701 of the Code and shall not file any tax returns inconsistent with such treatment, except as required by Law.
  - (vii) The Parties intend that the University shall be considered the owner of all Capital Improvements made pursuant to this Agreement for GAAP accounting purposes, provided that the Parties intend that the Concessionaire shall be treated as having a depreciable interest in all such Capital Improvements made by the Concessionaire during the Term for federal and state income Tax purposes.
- (b) *Payment.* For purposes of Section 467 of the Code, and the Treasury Regulations promulgated thereunder, on the Bid Date the Concessionaire has provided to the University a schedule, which will be for federal income tax purposes only, (i) allocating the Closing Consideration attributable to the lease of the Utility System Land and the Utility Facilities described in Section 2.6(a)(i)(A)(II) in equal amounts for each annual rental period; and (ii)

demonstrating that such amounts bear “adequate interest” within the meaning of Treasury Regulation Section 1.467-2(b)(1)(ii) for each rental period, and prior to the execution of this Agreement, the University and the Concessionaire have agreed on such schedule, which shall not thereafter be modified or altered by the Concessionaire without the Approval of the University. Such schedule shall constitute a specific allocation of such amounts for purposes of Section 467 of the Code. The University and the Concessionaire hereby agree to reasonably cooperate to modify the schedule referred to above if the amount of rental payments on which such schedule is based changes after the date such schedule is Approved or there is any other modification to the lease after the date thereof for which it would be advisable in the Concessionaire’s reasonable discretion (after good faith consultation and discussion with the University) to modify such schedule. Notwithstanding the foregoing allocation, all such rental payments shall for all purposes other than federal income tax purposes constitute a rental paid under a triple net lease which is non-refundable. If the University files a tax return for federal income tax purposes, the University shall, for federal income tax purposes only, treat the Closing Consideration in a manner consistent with the allocation set forth in this Section 2.6(b).

- (c) *Allocation.* The Concessionaire has provided to the University, on the Bid Date, a schedule reflecting a reasonable allocation of the Closing Consideration (and all other capitalized costs) among the acquired assets in accordance with Section 1060 of the Code and the applicable Treasury Regulations for the University’s Approval, and prior to the execution of this Agreement, the University and the Concessionaire have agreed on such schedule, which shall not thereafter be modified or altered by the Concessionaire without the Approval of the University. The University shall file all federal and state income tax returns in a manner consistent with the allocation set forth in the schedule agreed to by the Parties. Each of the Concessionaire and the University acknowledges that the leasing of certain assets included in the Utility System as provided under this Agreement may result in the transfer of the tax ownership of such assets from the University to the Concessionaire.

**Section 2.7. Closing Deliveries.** At the Time of Closing, each Party shall execute and deliver all assets, agreements, bills of sale, assignments, endorsements, instruments and Documents as are reasonably necessary in the opinion of the other Party to effect the Transaction (and in form and substance that are reasonably satisfactory to such other Party).

**Section 2.8. Memorandum of Lease.** At the Time of Closing, the Parties shall execute and deliver a memorandum of lease (the “Memorandum of Lease”) in the form attached hereto as Schedule 13, which shall be recorded in the Franklin County Recorder’s Office. To the extent that changes are made to this Agreement with respect to the Term, leased property or other material matters set forth in the recorded Memorandum of Lease, the Parties shall timely execute, deliver and record an amendment to the recorded Memorandum of Lease reflecting such changes. The Parties agree not to record this Agreement itself.

**Section 2.9. No Return of Closing Consideration.** The Concessionaire shall have no right to have the Closing Consideration returned to it or refunded at any time after Closing, provided that, for the avoidance of doubt, this Section 2.9 shall not prohibit, preclude or adversely affect the Concessionaire's rights to compensation expressly set forth herein, including the right to receive the full Utility System Concession Value in those instances expressly set forth herein.

### **ARTICLE 3 TERMS OF THE CONCESSION**

#### **Section 3.1. Quiet Enjoyment and Present Condition.**

- (a) *Quiet Enjoyment.* The University agrees that, subject to the University's remedies upon a Concessionaire Default, the Concessionaire shall, at all times during the Term, be entitled to and shall have quiet enjoyment of the Utility System and the rights and privileges granted to the Concessionaire hereunder, subject to the provisions contained in this Agreement and the rights of other parties to use the Tunnels. The University and the Concessionaire acknowledge that the Concessionaire's rights to use, control and possess the Utility System and to collect and retain the Utility Fee are subject to the right of the University, in accordance with the terms of this Agreement, to monitor compliance with this Agreement to ensure that the Utility System is used and operated as required by this Agreement. Any entry by the University or its Representatives onto the Utility System required or permitted under this Agreement shall not constitute a reentry, trespass or a breach of the covenant for quiet enjoyment contained in this Agreement. The University shall, at all times during the Term, defend its fee or leasehold interest title, as the case may be, to the Utility System, the Concessionaire's leasehold interest in and to the Utility System and the rights granted to the Concessionaire hereunder, or any portion thereof, against any Person claiming any interest adverse to the University or the Concessionaire in the Utility System, or any portion thereof, except where such adverse interest arises as a result of the act, omission, negligence, misconduct or violation of Law of the Concessionaire, its Affiliates or their respective Representatives.
- (b) *Present Condition.* Subject to Section 2.5(i) and except as specifically set forth herein, the Concessionaire understands, agrees and acknowledges that the Concessionaire (i) by the execution of this Agreement, agrees to accept the Utility System "AS IS" at the Time of Closing and (ii) has inspected the Utility System and is aware of its condition and acknowledges that the University neither has made nor is making any representation or warranty, other than as expressly set forth herein, express or implied, regarding the condition of the Utility System (or any part thereof) or its suitability for the Concessionaire's proposed use, provided that nothing in this Section 3.1(b) shall preclude the Concessionaire from making repairs or replacements or Capital Improvements to the Utility System in accordance with the terms of this Agreement (including, for the avoidance of doubt, the provisions regarding Approval of Capital Improvements set forth in Section 4.3 and the provisions regarding inclusion of

New Approved Capital Improvements and O&M Costs in the calculation of the Utility Fee in accordance with Schedule 5) as a result of the Utility System's condition at the Time of Closing.

- (c) *Legal Title to Real Property and Improvements.* For the avoidance of doubt, and notwithstanding anything to the contrary contained in Section 2.6, all real estate and improvements now or hereafter forming part of the Utility System shall be the fee-owned property of and owned solely by the University for GAAP and state law purposes and are subject to the terms and conditions of this Agreement.

### **Section 3.2. Utility System Operations.**

- (a) *Use.* Except as otherwise specifically provided herein, the Concessionaire shall, at all times during the Term, (i) be responsible for all aspects of the Utility System Operations, including providing the Utilities from temporary sources for construction projects and special events as identified by the University and (ii) maintain and operate the Utility System and cause the Utility System Operations to be performed in accordance with the provisions of this Agreement, including the Performance Standards, Prudent Industry Practices and applicable Law. In connection with such maintenance, the Concessionaire may contract with a third party for certain tasks, such as janitorial services. Except for such additional purposes permitted pursuant to Section 3.15(c), the Concessionaire shall, at all times during the Term, cause the Utility System to be used exclusively for the Utility System Purposes and continuously open and operational for the Utility System Purposes in accordance with the Performance Standards. Notwithstanding the foregoing, the Concessionaire may cease keeping the Utility System or a portion thereof continuously open and operational for the Utility System Purposes (A) as specifically permitted under this Agreement, (B) as required by applicable Law, (C) as necessary to comply with any other requirement of this Agreement (including closures related to the performance of Capital Improvements or maintenance or repair activities as required by the Performance Standards), (D) as necessary for a Delay Event or (E) as necessary for temporary closures required to address Emergencies or public safety; provided, however, that in the event of any temporary suspension of Utility System Operations pursuant to any of clauses (A) through (E) of this Section 3.2(a), such suspension shall be limited as much as practicable so as to allow all other Utility System Operations to continue.
- (b) *Columbus Campus.* Notwithstanding anything to the contrary contained herein, the Concessionaire shall operate the Utility System and provide the Utility Services in a manner that does not interfere with or impair the operation of the Columbus Campus, including any special events conducted on the Columbus Campus. Except in the case of an Emergency, if the Concessionaire, in performing the Utility System Operations, determines it is reasonably necessary to disturb any portion of the Columbus Campus including the Tunnels but excluding the Utility System Land, it shall, to the extent possible given the circumstances, provide the University at least 10 Business Days' prior written

notice and the Concessionaire shall comply with any reasonable requirements or restrictions on such disturbance imposed by the University, including limiting the time in which the Concessionaire can so disturb the portion of the Columbus Campus to specific hours. In accessing any portion of the Columbus Campus pursuant to its rights hereunder, the Concessionaire shall also abide by any restrictions and requirements generally imposed by the University on such access, as communicated to the Concessionaire from time to time. To the extent that, in operating and maintaining the Utility System, the Concessionaire damages any portion of the University's real or personal property, including the landscape of the Columbus Campus, the University's outdoor lighting, traffic signals, irrigation equipment and communications equipment and such damage was not (i) Approved by the University in accordance with this Agreement or (ii) included as part of the scope of work Approved by the University related to such operations and maintenance, the Concessionaire shall promptly cause such property to be repaired to substantially the same or better condition that existed prior to such damage, and the cost incurred therewith shall not be included in O&M Costs or otherwise recovered as a part of the Utility Fee.

- (c) *Costs and Expenses.* Except as otherwise specifically provided herein, the Concessionaire shall, at all times during the Term, pay or cause to be paid all costs and expenses of the Utility System Operations as and when the same are due and payable.
  
- (d) *Assumed Liabilities and Excluded Liabilities.* The Concessionaire agrees to assume and discharge or perform when due all debts, liabilities and obligations whatsoever relating to the Utility System or the Utility System Operations that occur, arise out of or relate to, or are based on facts or actions occurring during the Term but only to the extent such debts, liabilities or obligations do not arise from or relate to any breach by the University of any covenant, representation or warranty set forth in this Agreement (collectively, the "Assumed Liabilities"); provided, however, that the Assumed Liabilities shall not include, and the University shall perform or cause to be performed and discharge or cause to be discharged as and when due, any debts, liabilities and obligations (i) with respect to the University's obligations under this Agreement, (ii) arising out of the Utility System or any Utility System Operations (including with respect to any Utility System Contracts) prior to the Time of Closing, (iii) except as expressly set forth in Section 2.5(k), resulting from any employee of the Concessionaire or the Operator that was previously a University Utility System Employee being a "carry over employee" under any Law of the State of Ohio, (iv) arising under any Environmental Law and related to (1) the ownership, operation or condition of the Utility System prior to the Time of Closing or (2) the Release on or from, presence on or in, or other existence on the Utility System or its subsurface of any Hazardous Substance at any time prior to the Time of Closing and including (A) the abatement, handling, disposal or removal of any asbestos present at the Time of Closing in the Utility System as required by any Environmental Law in connection with the repair, maintenance, operation or construction activities permitted or required to be performed under this Agreement and (B) any known



or unknown environmental conditions relating to the Utility System or its subsurface that existed prior to the Time of Closing the manifestation of which occurs following the Time of Closing, which environmental obligations the University shall perform and discharge when due, except in any case to the extent exacerbated by the Concessionaire or its Representatives or caused by any action of the Concessionaire or its Representatives, (v) arising out of the University's rights under this Agreement to test, inspect, audit, repair, maintain or operate the Utility System without impairment of the University's remedies for a Concessionaire Default and (vi) with respect to the Ongoing Utility System Projects that have not yet become a part of the Utility System (collectively, the "Excluded Liabilities").

- (e) *Right of Entry and Access to the Public Way.* Subject to Section 3.19, the University hereby grants to the Concessionaire and its Representatives a license to enter upon, in, under, over and across the Public Way to such extent and at such times as shall be necessary or desirable for the Concessionaire to access the Utility System in order to conduct Utility System Operations, including operating, maintaining, inspecting, repairing and managing Utility System properties, including the Utility System Assets and all supporting structures and appurtenances thereto, and installing monitoring or observation technology or equipment reasonably necessary for Utility System Operations. The rights granted pursuant to this Section 3.2(e) do not include the right to block, impede or otherwise obstruct traffic on the Public Way, and the Concessionaire shall, enter, access and perform work in, on or over the Public Way in accordance with the Performance Standards. The rights granted to the Concessionaire under this Section 3.2(e) neither create an interest in real property nor do they create a priority in favor of the Concessionaire over any other user of such areas and are subject to the Performance Standards and all provisions of Law relating to the conduct of a private business or franchise in the Public Way.
- (f) *Mapping and Marking.* The Concessionaire shall be responsible for marking and mapping all portions of the Utility System in accordance with the Performance Standards.
- (g) *ECM Provider.* The Concessionaire shall use ENGIE Services Inc. as its sole and exclusive advisor providing advice and support to the Concessionaire, in its capacity as the design-builder under the Design-Build Agreement, and the Concessionaire may change such Person only with the Approval of the University.

### **Section 3.3. Operator.**

- (a) *Engagement.* The Utility System Operations shall, at all times during the Term, be under the direction and supervision of an active operator with the expertise, qualifications, experience, competence, skills and know-how to perform the Utility System Operations in accordance with this Agreement and Prudent Industry Practices (an "Operator") who may be (but is not required to be) the

Concessionaire itself. The Operator on the first Day of the Term shall be the Concessionaire unless the Concessionaire has designated another Person to be the Operator and such Person has been Approved in accordance with Section 3.3(b). The Concessionaire shall not engage or appoint a replacement Operator unless the University has Approved such Operator; provided, however, that a Change in Control of an Operator shall be deemed to be the appointment of a replacement Operator subject to the University's Approval; provided, further, that for purposes of this Section 3.3(a), the definition of "Equity Participant" and clauses (a) through (g) of the definition of "Change in Control" shall be read and apply as though "Operator" were substituted for "Concessionaire"; provided, further, that if the University does not provide the Concessionaire with the relevant Approval, the Concessionaire shall be entitled to appoint an interim Operator for a period of up to 180 Days from the date of appointment of such interim Operator. This interim Operator may be selected without Approval by the University so long as the Concessionaire reasonably determines that the interim Operator meets the following criteria: (A) the interim Operator has experience in operating Comparable Utility Systems and (B) the interim Operator (or any guarantor of its obligations) has a tangible net worth reasonably sufficient to carry out its obligations and responsibilities as Operator. The Concessionaire shall not extend the term of any interim Operator beyond 6 consecutive months or appoint a successor interim Operator after such 6-month period. The Operator shall at all times be subject to the direction, supervision and control (by ownership, contract or otherwise) of the Concessionaire, and any delegation to an Operator shall not relieve the Concessionaire of any obligations, duties or liability hereunder. The Concessionaire shall immediately notify the University upon the termination or resignation of an Operator. The rights of the Operator regarding the continued operation of the Utility System shall terminate without penalty at the election of the University or the Operator upon 5 Business Days' notice to such Operator or the University, as applicable, upon the termination of this Agreement. Except as otherwise expressly set forth herein, the Operator shall have no interest in or rights under this Agreement or the Utility System unless the Operator is the Concessionaire itself.

- (b) *Approval.* The University's Approval of a proposed replacement Operator may be withheld only if the University reasonably determines that the engagement of such proposed Operator is prohibited by applicable Law or such proposed Operator is not capable of performing the Utility System Operations in accordance with this Agreement and Prudent Industry Practices, which determination shall be based solely upon one or more of the following factors: (i) the ability of the Operator to operate the Utility System in a manner that complies with the Performance Standards; (ii) the financial strength, capitalization and integrity of the proposed Operator, its direct or indirect beneficial owners and some or all of their respective Affiliates providing a guaranty of the Operator's obligations; (iii) the experience of the proposed Operator in operating Comparable Utility Systems; (iv) the background and reputation of the proposed Operator, its direct or indirect beneficial owners, each of their respective officers, directors and employees and each of their respective

Affiliates (including the absence of criminal, civil or regulatory claims or actions against any such Person and the quality of any such Person's past or present performance on other projects); and (v) the proposed terms of the engagement of the Operator.

(c) *Removal.*

- (i) If the Operator fails to operate the Utility System in compliance with the Performance Standards or fails to meet the Target for any Key Performance Indicator, and
  - (A) such failure is the material breach of a material requirement of the Performance Standards other than a requirement that is also a Key Performance Indicator, the University may provide written notice to the Operator and the Concessionaire setting forth such failure. If the Operator does not cure such failure within 30 Days of said written notice (or, if such cure or correction cannot reasonably be accomplished during such 30-Day period, within such longer period as is reasonably required to accomplish such cure or correction, provided the Concessionaire has commenced such cure or correction within 30 Days of said written notice and diligently prosecutes the same to completion), then (i) the University may, upon notice to the Concessionaire, (A) cure any such failure and (B) the Concessionaire shall reimburse the University any and all costs related to such cure and/or correction; and (ii) the University may direct that the Concessionaire remove the Operator pursuant to the written order of senior University officials designated by the Board in writing for such purpose or otherwise with respect to assessing the performance of the Operator (the "Senior Officials"); or
  - (B) such failure results in an Emergency, then the University may, upon notice to the Concessionaire, (i) immediately cure any such failure after endeavoring to provide the Concessionaire notice appropriate under the circumstances (which may include telephone notice) and (ii) the Concessionaire shall reimburse the University any and all costs related to such cure and/or correction.
- (ii) Notwithstanding the foregoing, if (A) within any Operator Evaluation Period, at least 3 Repetitive Failures occur, (B) a Major KPI Event for the same Key Performance Indicator occurs for 3 consecutive Fiscal Years or (C) 3 Major KPI Events occur in any given Fiscal Year, the University, in addition to its right to KPI Compensation, may direct that the Concessionaire remove the Operator pursuant to the written order of the Senior Officials.

- (iii) The University shall provide the Concessionaire and the Operator with no less than 30 Days' prior written notice of the time, date, place and subject matter of any meeting of the Senior Officials at which a resolution to remove the Operator will be considered, and both the Concessionaire and the Operator shall be afforded a reasonable opportunity to present testimony and evidence at such meeting and to present to the Senior Officials written objections to any proposed removal determination. Any written order of the Senior Officials removing the Operator shall contain written determinations as to the reasons for removal of the Operator. Within 45 Days following the effective date of such resolution, the Concessionaire shall remove the then current Operator and replace such Operator with either (A) a new Operator that is Approved by the University pursuant to Section 3.3(b) or (B) to the extent the Concessionaire was not the removed Operator, the Concessionaire.
- (d) *Sole Remedy.* Other than the University's right to KPI Compensation pursuant to Article 15, notwithstanding anything to the contrary contained herein, the University's right to remove the Operator pursuant to Section 3.3(c) shall constitute the Concessionaire's sole and exclusive liability and the University's sole and exclusive remedy relating to a failure to meet a requirement of the Performances Standards, a KPI Event or a breach of Section 5.4(a) or Section 7.5(a).
- (e) *OUPS Membership.* The Concessionaire shall cause the Operator, at all times, to maintain an active membership in the Ohio Utility Protection Service ("OUPS") pursuant to Ohio Rev. Code Ann. § 3781.26(A) and to abide by all requirements described therein, and the University shall use commercially reasonable efforts to assist in connection with applications related to such membership. While it is recommended that the Operator maintain full voting membership, or any successor form of membership, in OUPS, such membership shall at no time be less than a limited basis membership, or any successor form of membership. If the University reasonably expects to incur any out-of-pocket costs in connection with providing assistance to the Operator as provided in the preceding sentence, it shall have no obligation to provide such assistance until the Concessionaire or the Operator commits to the prompt reimbursement of such out-of-pocket costs in writing.

#### **Section 3.4. Authorizations; Qualifications.**

- (a) *Compliance.* The Concessionaire shall obtain, comply with, promptly renew and maintain in good standing all Authorizations, and the University shall use commercially reasonable efforts to assist the Concessionaire in obtaining, complying with, renewing and maintaining in good standing all such Authorizations, including those that the University was not required to obtain in connection with its operation of the Utility System prior to the Time of Closing. If the University reasonably expects to incur any out-of-pocket costs in connection with providing assistance to the Concessionaire as provided in the

preceding sentence, it shall have no obligation to provide such assistance until the Concessionaire commits to the prompt reimbursement of such out-of-pocket costs in writing. Nothing in this Agreement, including Section 2.1, shall be deemed to waive or modify any Authorization required to be obtained by the Concessionaire or any other Person in connection with the Utility System, the Utility System Operations or any activities generating the Utility Fee.

- (b) *Qualifications.* The Concessionaire shall, at all times during the Term, maintain in full force and effect its existence and all qualifications necessary to carry on its business pertaining to the Utility System Operations, including all rights, franchises, licenses, privileges and qualifications required in connection with the Utility System Operations.

### **Section 3.5. No Encumbrances.**

- (a) *By the Concessionaire.* The Concessionaire shall not do any act or thing that will create any Encumbrance (other than a Permitted Concessionaire Encumbrance) against the Utility System and shall promptly remove any Encumbrance (other than a Permitted Concessionaire Encumbrance) against the Utility System, unless the Encumbrance came into existence as a result of an act of or omission by the University or a Person claiming through it which in turn was not caused by an act or omission of the Concessionaire. The Concessionaire shall not be deemed to be in default hereunder if the Concessionaire continuously, diligently and in good faith contests any such Encumbrance, or the validity thereof (or causes such contest), by appropriate legal proceedings that shall operate to prevent the foreclosure of any such Encumbrance; provided that the Concessionaire has (i) given advance notification to the University that it is the intent of the Concessionaire to contest the validity or collection thereof or cause such contest and (ii) unless a bond or other security is provided in connection with such proceedings, given a satisfactory indemnity to the University or deposited with the University a Letter of Credit, indemnity bond, surety bond, cash or Eligible Investment reasonably satisfactory to the University in an amount equal to the amount of the claim or Encumbrance, plus such interest and penalties, court costs, or other charges as the University may reasonably estimate to be payable by the Concessionaire at the conclusion of such contest or as is required to provide insurance over any potential Encumbrance; provided, however, that unless the Concessionaire is required by GAAP to maintain any security in favor of a purported beneficiary of such Encumbrance, in the event such Letter of Credit bond, cash or Eligible Investment shall be so deposited, the same shall be held by the University until such claim or other imposition shall have been released and discharged and shall thereupon be promptly returned to the Concessionaire, less any amounts reasonably expended by the University to procure such release or discharge or any loss, cost, damage, reasonable attorneys' fees or expense incurred by the University by virtue of the contest of such Encumbrance.

- (b) *By the University.* The University shall not do any act or thing that will create any Encumbrance (other than a Permitted University Encumbrance) against the Utility System and shall promptly remove any Encumbrance (other than a Permitted University Encumbrance) against the Utility System that came into existence as a result of an act of or omission by the University or a Person claiming through the University. The University shall not be deemed to be in default hereunder if the University continuously, diligently and in good faith contests any such Encumbrance, or the validity thereof (or causes such contest), by appropriate legal proceedings that shall operate to prevent the foreclosure of any such Encumbrance; provided that the University has given advance notification to the Concessionaire that it is the intent of the University to contest the validity or collection thereof or cause such contest.
- (c) *Removal.* Each Party, if requested by the other Party and at such other Party's costs and expense, shall use its reasonable efforts to assist such other Party in attempting to remove any Encumbrance that has come into existence as a result of an act of or omission by such other Party (other than a Permitted University Encumbrance or a Permitted Concessionaire Encumbrance); provided that nothing herein shall obligate the University to waive, modify or otherwise limit or affect the enforcement by the University of any applicable rule, procedure or policy of the University whether or not with respect to the Utility System.

**Section 3.6. Single Purpose Covenants; Credit Rating.** Subject to Section 3.15(c), the Concessionaire shall, at all times during the Term, (i) be formed and organized solely for the purpose of (A) owning the Concessionaire Interest, (B) owning, operating, improving, using, possessing and otherwise dealing with the Utility System, (C) collecting from the University the Utility Fee in consideration of providing the services hereunder to the University, (D) financing its interest in the Utility System, and (E) carrying out the Utility Services and other activities permitted pursuant to this Agreement (and any activities reasonably incidental thereto), (ii) not engage in any business unrelated to clause (i) above, (iii) not have any assets other than those related to its activities in accordance with clauses (i) and (ii) above, (iv) except as appropriate for Tax reporting purposes, maintain its own separate books and records and its own accounts, (v) observe all corporate, limited partnership or limited liability company, as applicable, formalities and do all things necessary to preserve its existence, (vi) not guarantee or otherwise obligate itself with respect to the debts of any other Person, (vii) except as expressly permitted hereby or by any Leasehold Mortgage, or in connection in the ordinary course of business of the Utility System, not pledge its assets for the benefit of any other Person, and (viii) maintain adequate capital in light of its contemplated business operations. In addition, if the Concessionaire issues or refinances any Leasehold Mortgage Debt after the Closing Date, at the time of such issuance, refinancing or entry, such Leasehold Mortgage Debt shall have an investment grade credit rating, as determined by at least one of the Credit Rating Agencies, and shall provide written evidence of such rating to the University at the same time as such issuance, refinance or entry.

**Section 3.7. Rights of the University to Access and Perform Work on the Utility System and Utilize Space for Energy Resources and Research Purposes.**

- (a) *Reservation of Rights.* The University reserves (for itself and any of its Representatives, grantees, tenants, contractors, mortgagees, licensees, concessionaires and others claiming by, through or under the University) and shall, at all times during the Term, have the right to enter the Utility Facilities and have access to the Utility System in response to any of the following events or circumstances or for any of the following purposes, provided that (x) with respect to Section 3.7(a)(i) and Section 3.7(a)(ii), such right is to be exercised at all reasonable times upon reasonable prior notice to the Concessionaire, (y) with respect to Section 3.7(a)(iii), such right is to be exercised at all reasonable times upon reasonable prior notice to the Concessionaire if practicable under the circumstances, and (z) with respect to Section 3.7(a)(iv), Section 3.7(a)(v) and Section 3.7(a)(vi), such right is to be exercised at all reasonable times with the University to request, with reasonable prior notice, the Concessionaire's consent to the exercise of such right, which consent shall not be unreasonably withheld, conditioned or delayed, provided that if the Concessionaire has not responded to such request within 5 Business Days, it shall be deemed to have consented to such exercise:
- (i) to inspect the Utility System or determine whether or not the Concessionaire is in compliance with its obligations under this Agreement or applicable Law pursuant to Section 8.3;
  - (ii) if a Concessionaire Default then exists, subject to the cure rights of any Leasehold Mortgagee under Section 19.3, to make any necessary repairs to the Utility System and perform any work therein pursuant to Section 16.1(b)(iii) in accordance with Prudent Industry Practices;
  - (iii) in the event of an Emergency or danger that threatens to cause injury to individuals (or damage to property) or to materially impair the continuous operation of the Utility System and if the Concessionaire is not then taking all necessary steps to rectify or deal with said Emergency or danger, to take actions as may be reasonably necessary to rectify such Emergency or danger in accordance with Prudent Industry Practices, in which event the University shall promptly give the Concessionaire written notice of such measures taken by the University;
  - (iv) at its own cost and expense, to (A) install, design, manage, maintain, repair and rehabilitate any existing or future safety measures for the Columbus Campus (whether provided by the University or third parties at the University's instruction) in, on, under, across, over or through the Utility System (including surveillance equipment and other safety equipment), (B) grant easements and rights on, over, under or within the Utility System for the benefit of suppliers or owners of any such measures and (C) use the Utility System in connection with any such installation, design, management, maintenance, repair or rehabilitation (provided that notwithstanding the foregoing clauses (A), (B) and (C), the Concessionaire shall have the right, at all times during the Term, to install,

design, manage, maintain, repair and rehabilitate safety measures for its own account (and not for lease, resale or service to third parties) to the extent that the said safety measures are necessary for the Utility System Operations or as otherwise permitted under this Agreement);

- (v) at its own cost and expense, to (A) install, design, manage, maintain, repair and rehabilitate any existing or future utilities or similar services (whether provided by the University or third parties at the University's instruction) that are not part of the Utility System and do not provide Utilities in, on, under, across, over or through the Utility System (including water lines, sewer lines, fiber optic cable, other communications and other equipment), and (B) grant easements and rights on, over, under or within the Utility System for the benefit of suppliers or owners of any such utilities or services that are not part of the Utility System (provided that notwithstanding the foregoing clauses (A) and (B), the Concessionaire shall have the right, at all times during the Term, to install, design, manage, maintain, repair and rehabilitate utilities or other services for its own account (and not for lease, resale or service to third parties) to the extent that the said utilities or services are necessary for the Utility System Operations); and
- (vi) at its own cost and expense (except as otherwise expressly provided in this Agreement) and solely in accordance with the terms hereof, to do any other act or thing that the University may be obligated to do or have a right to do under this Agreement;

provided, however, that the University shall (A) not be obligated to make any payments to the Concessionaire for such access (other than Concession Compensation to the extent required hereunder) and the University shall use reasonable efforts to minimize interference with the Utility System Operations in connection with any entry on the Utility System pursuant to this Section 3.7(a), (B) not have access to any software or other intangibles of the Concessionaire and (C) comply with the Concessionaire's reasonable safety protocols and requirements to the extent provided in writing in advance to the University. The University shall pay to the Concessionaire the Concession Compensation resulting from any entry to or action on the Utility System pursuant to clauses (iv), (v) and (vi) of this Section 3.7(a) in accordance with Section 15.3.

- (b) *Access Rights.* The University and any of its Representatives, grantees, tenants, contractors, mortgagees, licensees, concessionaires and others claiming by, through or under the University, during the progress of any work referred to in this Section 3.7 shall have all necessary easement and access rights to the Utility System. To the extent that the University undertakes work or repairs in the Utility System under this Section 3.7 or any other provision of this Agreement, such work or repairs shall be commenced and diligently completed in a good and professional manner, in accordance with any applicable Performance Standards



and in such a manner as not to unreasonably interfere with the Concessionaire's conduct of business in or use of such space.

- (c) *Renewable and Other Energy Resources.* The Concessionaire and the University recognize the value of exploring the use of renewable energy, energy storage and other energy resources, and, consistent therewith, the University reserves the right to use portions of the Utility System for the installation, operation, replacement and repair of energy apparatus, equipment, or improvements, including solar panels as well as collection and distribution facilities in accordance with Prudent Industry Practices and applicable Law. With respect to the installation or replacement of any such energy apparatus, equipment, or improvement, if such energy apparatus, equipment, or improvement is not being installed or replaced for a pilot program or was not donated or granted to the University, then the University shall provide the Concessionaire with written notice that it intends to install or replace such energy apparatus, equipment, or improvement, which notice shall include the plans, specifications, schedule (including the liquidated damages for failure to meet such schedule) and cost therefor, and the Concessionaire shall have the right to elect to install or replace such energy apparatus, equipment, or improvement in accordance with the notice provided by the University by providing written notice of such election to the University within 15 Business Days of receipt of the University's written notice. If the Concessionaire so elects to install or replace such energy apparatus, equipment, or improvement, (i) it shall do so in accordance with the terms and conditions of the University's notice, (ii) to the extent such energy apparatus, equipment, or improvement is a Capital Improvement, it shall, to the extent the costs therefor are incurred by the Concessionaire, be deemed to be a Capital Improvement Approved in accordance with Section 4.3(c)(i) (including the budgeted costs and liquidated damages set forth in such notice), and, once installed, shall be deemed part of the Utility System and (iii) to the extent such energy apparatus, equipment, or improvement involves construction activities, the Concessionaire shall comply with the Wage and Hour Laws, if applicable, and Chapter 153 if the estimated cost of such construction (inclusive of professional fees and expenses for services associated with the preparation of plans, permit costs, testing costs and other fees associated with the work, plus a contingency reserve) is equal to or more than the threshold as determined pursuant to Ohio Rev. Code Ann. § 153.53. The Concessionaire shall not subdivide the construction activities into component parts or separate projects in order to avoid the thresholds set forth in this Section 3.7(c). If the Concessionaire fails to respond within 15 Business Days of receipt of the University's written notice, it shall be deemed to have elected not to install or replace such energy apparatus, equipment, or improvement, and the University shall have the right to install or replace such energy apparatus, equipment, or improvement in accordance with this Section 3.7(c). Any such access contemplated by this Section 3.7(c) shall comply with the access right requirements set forth above in Section 3.7(b). In connection therewith, upon the request of the University, the Concessionaire agrees that it shall cause any such energy apparatus, equipment, or improvement to be connected to, or become part

of, the Utility System in a manner that complies with the Concessionaire's reasonable interconnection and generation standards and is in accordance with Prudent Industry Practices and applicable Law, and that the Concessionaire will use any energy resources generated or stored by such apparatus, equipment, or improvement in the operation of the Utility System to the extent such energy is made available for use in the Utility System. To the extent the costs incurred for such interconnection (including any costs of installation, operation, replacement and repair) do not qualify as O&M Costs, such costs shall be reimbursed to the Concessionaire as Concession Compensation.

- (d) *Effect of Reservation.* Any reservation of a right by the University and any of its Representatives, grantees, tenants, contractors, mortgagees, licensees, concessionaires and others claiming by, through or under the University to enter the Utility System and to make or perform any repairs, alterations, Restoration or other work in, to, above, or about the Utility System which is the Concessionaire's obligation pursuant to this Agreement, shall not be deemed to (i) impose any obligation on the University to do so, (ii) render the University liable to the Concessionaire or any other Person for the failure to do so or (iii) relieve the Concessionaire from any obligation to indemnify the University as otherwise provided in this Agreement. Nothing in this Agreement shall impose any duty upon the part of the University to do any work required to be performed by the Concessionaire hereunder and performance of any such work by the University and any of its Representatives, grantees, tenants, contractors, mortgagees, licensees, concessionaires and others claiming by, through or under the University shall not constitute a waiver of the Concessionaire's default in failing to perform the same.
- (e) *Energy Research and Education.* The Concessionaire acknowledges that energy research and education is a significant focus of the University. The University and its energy industry research partners recognize the value of conducting applied energy research in real-world settings, and, consistent therewith, the University reserves the right to use portions of the Utility Facilities for the installation, evaluation, testing, operation, and replacement of energy apparatus, equipment, or improvements to serve research and academic purposes. Any such access contemplated by this Section 3.7(e) shall (i) comply with the access right requirements set forth above in Section 3.7(b), (ii) be in accordance with Prudent Industry Practices and applicable Law and (iii) comply with the Concessionaire's reasonable safety protocols and procedures to the extent provided in writing in advance to the University. In connection therewith, upon the request of the University, the Concessionaire agrees that it shall cooperate and take all reasonable actions to cause any such energy research apparatus, equipment, or improvement to be connected to the Utility Systems, including associated data collection apparatus, equipment, or improvement, in a manner that complies with the Concessionaire's reasonable interconnection standards, provided that the University shall maintain any information received by the University in connection therewith confidential in accordance with Section 8.2(b) if the Concessionaire has identified such information as a trade secret. To the extent

the costs incurred for such connections do not qualify as O&M Costs, such costs shall be reimbursed to the Concessionaire as Concession Compensation. The Concessionaire also acknowledges that as part of the University's research, the University may request information regarding the Utility System, which information shall be provided pursuant to Section 3.12(a).

**Section 3.8. Payment of Taxes.** The Concessionaire shall pay when due all Taxes payable during the Term in respect of the use of, operations at, occupancy of or conduct of business in or from the Utility System, including any Property Taxes in respect of the Utility System, subject to this Section 3.8. The Parties acknowledge that, as of the Bid Date, the Utility System is exempt from Property Taxes. To the extent the Utility System or any portion thereof becomes not exempt from any Property Taxes due to any cause other than acts or omissions of the Concessionaire or its Representatives (other than those actions or inactions that the Concessionaire is directed or obligated to take pursuant to this Agreement, including in order to comply with the Performance Standards, and the execution of this Agreement), the actual costs of any resulting Property Taxes payable during the Term shall be included in Uncapped O&M Costs. The Concessionaire shall use commercially reasonable efforts to reduce the amount of Taxes required to be paid by it or the University. The University reserves the right, without being obligated to do so, to pay the amount of any such Taxes not timely paid by the Concessionaire and which are not being contested by the Concessionaire, and the amount so paid by the University shall be deemed additional consideration hereunder, due and payable by the Concessionaire within 20 Business Days after written demand by the University. The Concessionaire may contest any Taxes for which it is responsible pursuant to this Section 3.8 provided that (i) no such contest may involve a reasonable possibility of forfeiture or sale of the Utility System, and (ii) upon the final determination of any such contest, if the Concessionaire has not already done so, the Concessionaire shall pay any amount found to be due, together with any costs, penalties and interest. The University shall, at no out-of-pocket cost to the University, reasonably cooperate with the Concessionaire in any reasonable attempt by the Concessionaire to reduce or eliminate the Concessionaire's Tax liability.

**Section 3.9. Utilities.**

- (a) *Charges.* Unless otherwise directed by the University in writing, the Concessionaire shall ensure that contracts for utilities (other than those utilities subject to a Supply Contract and water, which is addressed in Section 7.4(d)) provide that invoices for all charges (including all applicable Taxes and fees) for such utilities and services used in the Utility System Operations during the Term are remitted to the Concessionaire, which the Concessionaire shall pay and shall be included as Capped O&M Costs. The University shall pay, and the Concessionaire shall not be responsible for, stormwater charges assessed by the City of Columbus, Ohio, except to the extent that such stormwater charges increase as a result of an action or inaction of the Concessionaire (other than those actions or inactions that the Concessionaire is directed or obligated to take or omit pursuant to this Agreement, including in order to comply with the Performance Standards), as determined by the University in its reasonable discretion. Upon request of the University, the Concessionaire shall forward to the University, within 15 Days following the respective due dates, official

receipts, photocopies thereof or other evidence satisfactory to the University, of the payment required to be made by the Concessionaire in accordance with this Section 3.9. The University does not warrant that any utility services will be free from interruptions caused by war, insurrection, civil commotion, riots, acts of God, government action, terrorism, repairs, renewals, improvements, alterations, strikes, lockouts, picketing, whether legal or illegal, accidents, inability to obtain fuel or supplies or any other causes, and any such interruption of utility services in and of itself shall never be deemed an Adverse Action or an eviction or disturbance of the Concessionaire's use of the Utility System or any part thereof, or render the University liable to the Concessionaire for damages or, unless the same constitutes a Delay Event, relieve the Concessionaire from performance of the Concessionaire's obligations under this Agreement.

- (b) *Utility Coordination.* Subject to Section 7.4, the Concessionaire shall coordinate all Utility System Operations with utilities and Persons having service lines, pipelines, transmission lines and other equipment, cables, systems and other apparatus in, on, under, over, adjacent to or otherwise interconnecting with the Utility System. The Concessionaire shall notify the University in writing prior to communicating with any such utilities or Persons and shall take the University's direction in connection therewith, provided such direction is in accordance with Prudent Industry Practices and applicable Law. If the Concessionaire follows the direction of the University pursuant to the immediately preceding sentence, it shall be deemed to have satisfied its obligations with respect to this Section 3.9(b) solely with respect to the matter to which such direction by the University relates. In connection with its obligations under this Section 3.9(b), the Concessionaire shall cause provision to be made for the removal or temporary or permanent relocation and restoration of utilities and other services and any lines, equipment, cables, systems and other apparatus not used in connection with Utility System Operations that intersect, interfere with, interface with or otherwise affect the Utility System Operations and shall arrange for temporary rights of entry and access to utilities and other services to be made available that are necessary in connection with the Utility System Operations or as may exist under this Agreement or applicable Law; provided that the University shall cooperate with the Concessionaire with respect to the Concessionaire's obligations under this Section 3.9(b).
- (c) *No Interference.* The Parties understand and agree that nothing in Section 3.9(b) is in any way intended to interfere with the Utility System Operations by the Concessionaire, and the University shall cooperate with the Concessionaire in minimizing any effect that the obligations of the Concessionaire under Section 3.9(b) and this Section 3.9(c) may have on the Utility System Operations, including reasonable efforts to schedule any such works outside of the academic term or on weekends.
- (d) *Sewer Credits.* The Concessionaire shall cause the points of interaction between the Utility System and the City of Columbus' sewer system to be monitored by deduct meters and shall provide to the University the information from such

meters promptly after it becomes available, in a format reasonably acceptable to the University.

- (e) *Communications Systems.* To the extent that the Concessionaire utilizes or connects with the University's communications systems, the Concessionaire shall be responsible for the operation and maintenance of its telecommunications systems up until the point of connection with the University's system in accordance with the Performance Standards.

### **Section 3.10. Notices of Defaults and Claims.**

- (a) *Notice by the Concessionaire.* The Concessionaire shall promptly give notice to the University (i) if the Concessionaire becomes aware that a Concessionaire Default has occurred under this Agreement (provided, however, that the failure to give such notice shall not constitute an independent Concessionaire Default) and (ii) of all material claims, proceedings, disputes (including labor disputes) or litigation in respect of the Concessionaire pertaining to the Utility System, the Utility System Operations or the University (whether or not such claim, proceeding or litigation is covered by insurance) of which the Concessionaire is aware (other than as a result of a notice to the Concessionaire from the University). The Concessionaire shall provide the University with all reasonable information requested by it from time to time concerning the status of such claims, proceedings or litigation.
- (b) *Notice by the University.* The University shall promptly give notice to the Concessionaire (i) if the University becomes aware that a University Default has occurred under this Agreement (provided, however, that the failure to give such notice shall not constitute an independent University Default) and (ii) of all material claims, proceedings, disputes (including labor disputes) or litigation in respect of the University pertaining to the Utility System, the Utility System Operations or the Concessionaire (whether or not such claim, proceeding or litigation is covered by insurance) of which the University is aware (other than as a result of a notice to the University from the Concessionaire). The University shall provide the Concessionaire with all reasonable information requested by it from time to time concerning the status of such claims, proceedings or litigation.

### **Section 3.11. Intellectual Property.**

- (a) Subject to Section 3.11(h), the Concessionaire shall deliver to the University copies of all Proprietary Intellectual Property owned by the Concessionaire which it uses in relation to the Utility System or the Utility System Operations prior to its use in connection with the Utility System or the Utility System Operations. Except as otherwise provided herein, all Proprietary Intellectual Property shall remain exclusively the property of the Concessionaire or its Affiliates or Contractors that supply the same, notwithstanding any delivery of copies thereof to the University.

- (b) The University shall have and is hereby granted a perpetual, nonexclusive, transferable (subject to Section 3.11(d)), royalty-free, irrevocable, worldwide, fully paid-up right and license to use, reproduce, modify, adapt and disclose, and sublicense others to use, reproduce, modify, adapt and disclose, the Proprietary Intellectual Property of the Concessionaire used solely or primarily in connection with the Utility System, Utility System Operations, Capital Improvements, ECMs and Material Changes; provided, that the University shall have the right to exercise such license only at the following times:
  - (i) From and after the expiration or earlier termination of the Term for any reason whatsoever;
  - (ii) During any time that the University is exercising its rights to remedy a Concessionaire Default under this Agreement for so long as such Concessionaire Default is continuing and has not been cured; and
  - (iii) During any time that the Leasehold Mortgagee (or its designee or nominee) has replaced the Concessionaire pursuant to Section 19.8(d) of this Agreement.
- (c) The University shall have no right to sell any Proprietary Intellectual Property of the Concessionaire or its Affiliates or Contractors or use, reproduce, modify, adapt and disclose, or allow any party to use, reproduce, modify, adapt and disclose, any such Proprietary Intellectual Property for any purpose other than as set forth in Section 3.11(b), and must ensure that any Person to which it discloses any Proprietary Intellectual Property of the Concessionaire pursuant to the licenses granted under this Section 3.11 agrees to be bound by reasonable confidentiality obligations on access to and use of confidential and proprietary information.
- (d) The right to transfer the license is limited to any Person that succeeds to the University's interests in all or any portion of the Utility System, or to the power and authority of the University generally or with respect to all or any portion of the Utility System. The license is divisible in the event of a transfer of or with respect to a portion of the Utility System.
- (e) The right to sublicense is limited to any Representatives that are retained by or on behalf of the University in connection with the Utility System or the Utility System Operations. All such sublicenses shall be subject to Section 3.11(f).
- (f) The University shall:
  - (i) Not disclose any Proprietary Intellectual Property of the Concessionaire to any Person other than authorized transferees and sublicensees who agree to be bound by any confidentiality obligations of the University relating thereto, except to the extent such disclosure is required by Law;

- (ii) Enter into a commercially reasonable confidentiality agreement if reasonably requested by the Concessionaire with respect to the licensed Proprietary Intellectual Property; and
  - (iii) Include in the contract with the sublicensee its covenant to employ sound business practices no less diligent than those used for its own confidential information, and no less diligent than required by commercially reasonable standards of confidentiality, to protect all Proprietary Intellectual Property of the Concessionaire and other materials provided under the sublicense against disclosure to third parties not in receipt of a sublicense, and to use the sublicense only for the permitted purposes.
- (g) The Concessionaire shall continue to have a full and complete right to use any and all duplicates or other originals of its Proprietary Intellectual Property in any manner it chooses. The following provisions shall apply with respect to any Proprietary Intellectual Property owned by a Person, including the Concessionaire's Affiliates, other than the Concessionaire, except for mass-marketed software products (sometimes referred to as "shrink wrap software") owned by such a Person where such a license cannot be extended to the University using commercially reasonable efforts:
- (i) For such Proprietary Intellectual Property used exclusively or primarily in connection with the Utility System, Utility System Operations, Capital Improvements, ECMs or Material Changes or which is not commercially available, the Concessionaire shall obtain from the owner of such Proprietary Intellectual Property, concurrently with the execution of any contract, subcontract or purchase order with such owner or with the first use or adaptation of the Proprietary Intellectual Property, whichever comes first, both for the Concessionaire and the University a perpetual, non-exclusive, transferable, royalty-free, irrevocable, worldwide, fully paid-up license to use, reproduce, modify, adapt and disclose such Proprietary Intellectual Property solely in connection with the Utility System, Utility System Operations, Capital Improvements, ECMs or Material Changes or any ancillary use thereto.
  - (ii) For such Proprietary Intellectual Property not used exclusively or primarily in connection with the Utility System, Utility System Operations, Capital Improvements, ECMs or Material Changes and which is commercially available, the Concessionaire shall obtain from such owner, concurrently with execution of any contract, subcontract or purchase order with such owner or with the first use or adaptation of the Proprietary Intellectual Property in connection with the Utility System, to the extent commercially reasonably available, both for the Concessionaire and the University, nonexclusive and transferable license to use, reproduce, modify, adapt and disclose such Proprietary Intellectual Property solely in connection with the Utility System, Utility System

Operations, Capital Improvements, ECMs or Material Changes or any ancillary use thereto.

- (iii) The limitations on sale, transfer, sublicensing and disclosure by the University set forth in this Section 3.11 shall also apply to the University's licenses in such Proprietary Intellectual Property.
- (iv) For Proprietary Intellectual Property subject to Section 3.11(g)(i), the Concessionaire shall also either cause to be delivered to the University copies of such Proprietary Intellectual Property or obtain from such owner consent to have the relevant Proprietary Intellectual Property deposited into an Intellectual Property Escrow, which Intellectual Property Escrow shall be released under similar circumstances as described in Section 3.11(h).

(h) *Intellectual Property Escrow.*

- (i) The University and the Concessionaire acknowledge that the Concessionaire and its Contractors that supply software, including related modifications, updates, revisions, replacements and upgrades, specifications, plans, drawings, information, documentation and any other intellectual property (including business systems and patents) (collectively, such "Proprietary Intellectual Property") with respect to the Utility System, may not wish to deliver this Proprietary Intellectual Property directly to the University, as public disclosure could deprive the Concessionaire and/or its Contractors of commercial value. The Concessionaire further acknowledges that the University nevertheless must be given access to such Proprietary Intellectual Property at any time, and that such Proprietary Intellectual Property owned by the Concessionaire shall be released and delivered to the University in either of the following circumstances:
  - (A) this Agreement is terminated for Concessionaire Default,
  - (B) a business failure (including voluntary or involuntary bankruptcy, and insolvency) of the Concessionaire occurs,
  - (C) the Concessionaire is dissolved or liquidated or
  - (D) the Concessionaire fails or ceases to provide services as necessary to permit continued use of such Proprietary Intellectual Property pursuant to the license or any sublicense thereof; or
- (ii) In lieu of delivering such Proprietary Intellectual Property directly to the University, the Concessionaire may elect to deposit it with a neutral custodian. In such event, the Concessionaire shall (a) select, subject to the University's prior Approval, one or more escrow companies or other neutral custodian (each an "Intellectual Property Escrow Agent") engaged



in the business of receiving and maintaining escrows of Proprietary Intellectual Property, and (b) establish one or more escrows (each an “Intellectual Property Escrow”) with the Intellectual Property Escrow Agent on terms and conditions reasonably acceptable to the University and the Concessionaire for the deposit, retention, upkeep and release of such Proprietary Intellectual Property. The location of such escrows for deposit of materials in physical form (if any) is limited to Columbus, Ohio or another location the University Approves in writing in its sole discretion. Intellectual Property Escrows also may include Affiliates and Contractors as parties and may include deposit of such Proprietary Intellectual Property owned by Affiliates and Contractors. The University shall not be responsible for the fees and costs of the Intellectual Property Escrow Agent, and the Concessionaire shall not be permitted to include the costs thereof as an O&M Cost.

- (iii) If the Concessionaire elects to deliver such Proprietary Intellectual Property to an Intellectual Property Escrow, the Concessionaire shall make such delivery to the Intellectual Property Escrow Agent not later than the time such Proprietary Intellectual Property is used in connection with the Utility System or Utility System Operations.
  - (iv) The University shall be a named, intended third-party beneficiary of each escrow agreement and each Intellectual Property Escrow with direct rights of enforcement against the Concessionaire and the Intellectual Property Escrow Agent. Each escrow agreement shall provide that neither the Concessionaire nor the Intellectual Property Escrow Agent shall have any right to amend or supplement it, or waive any provision thereof, without the University’s prior Approval, which may be withheld in its sole discretion.
  - (v) Intellectual Property Escrows shall provide rights for verification of each deposit into the Intellectual Property Escrow including an inventory of items deposited and completion of an escrow deposit questionnaire by the Concessionaire, which is reasonably acceptable to the University, and which will be promptly delivered to the University.
  - (vi) The Intellectual Property Escrows shall survive Closing and expiration or earlier termination of this Agreement regardless of the reason, until such time as both Parties mutually agree, in their respective sole discretion, that the Proprietary Intellectual Property contained therein is of no further use or benefit to the Project.
- (i) The University acknowledges that the Proprietary Intellectual Property may also be assigned as security to a Leasehold Mortgagee and that each of the University and such Leasehold Mortgagee shall be entitled to use the Proprietary Intellectual Property in enforcing their respective security as provided herein.

- (j) The University agrees that (i) it shall bear all risks associated with the use of the Proprietary Intellectual Property, (ii) it may not rely on the Proprietary Intellectual Property, and (iii) under no circumstances will the Concessionaire be liable in any way with respect to the University's use of, or for any loss or damage of any kind incurred as a result of the use of, the Proprietary Intellectual Property.

**Section 3.12. Use of Information and Records.**

- (a) Unless prohibited by applicable Law and to the extent reasonably necessary, the University shall be entitled to access all reasonable records, electronic data and other information collected and retained by the Concessionaire with respect to the Utility System and the Utility System Operations, including utility usage data, consumption pattern information and other utility data, and the Concessionaire shall maintain such records, data and other information in a format that is readily accessible to the University in order to facilitate the University's efforts with respect to energy efficiency, sustainability, environmental impact and research. The University shall use commercially reasonable efforts to provide at least 2 Business Days' written notice prior to accessing such records. The Concessionaire shall maintain all records related to the operation and maintenance of the Utility System for at least 36 months after such records are created. The University covenants and agrees that it will implement safeguards to protect against the disclosure or misuse of any such Concessionaire information that is in its care or custody and will promptly inform the Concessionaire if there is any breach or suspected breach of security related to such information, subject to Section 8.2(b).
- (b) Unless prohibited by applicable Law, the Concessionaire shall be entitled to access all reasonable records, electronic data and other information collected and retained by the University to the extent reasonably required for, and only for the purpose of, the Concessionaire's performance of its obligations under this Agreement and the Performance Standards, including the maintenance of any Authorization. The University shall promptly make such records, data and information available to the Concessionaire as reasonably requested by the Concessionaire. Unless disclosure is required by applicable Law, the Concessionaire shall keep confidential any information obtained from the University or its Representatives. The Concessionaire covenants and agrees that it will implement safeguards to protect against the disclosure or misuse of any such University information that is in its care or custody and will promptly inform the University if there is any breach or suspected breach of security related to such information.

**Section 3.13. Standard of Operation and Maintenance of the Utility System.** The Concessionaire shall be required to maintain and operate the Utility System in accordance with the Performance Standards and Prudent Industry Practices.

**Section 3.14. Payments by the University.** The Concessionaire acknowledges and agrees that if the University is required under applicable Law of general application to withhold a portion of any payment that the University is obligated to make to the Concessionaire under this Agreement and to pay such amount to a Governmental Authority, the University will be deemed to have satisfied such payment obligation to the Concessionaire to the extent of such withholding by the University and payment to the appropriate Governmental Authority. If any such withheld amounts are permitted to be paid to the Concessionaire, the University shall pay such amounts to the Concessionaire whenever permitted by Law. Any items and payment amounts that, to the Actual Knowledge of the University 10 Business Days prior to the Closing Date, it is legally required to withhold from the Concessionaire as of the Closing Date will be listed in Schedule 14 and agreed to by the Concessionaire, acting reasonably, prior to Closing as a condition of Closing, provided that regardless of whether any payment is listed on Schedule 14, the University shall always have the right to withhold payments pursuant to this Section 3.14 if required by Law and shall not be in breach of this Agreement. Prior to withholding any portion of any payment hereunder, the University shall give reasonable prior notice to the Concessionaire of the proposed withholding, and the Concessionaire shall promptly notify the University of any challenge by the Concessionaire to such proposed withholding. For the avoidance of doubt, any payment obligation of a University's department, office or center required by this Agreement is a payment obligation of the University for purposes of this Agreement, and the University shall either cause such department, officer or center to pay the payment obligation or shall satisfy the payment obligation itself.

**Section 3.15. Naming and Signage Rights, Other Revenue Activities and Commercial Advertisements and Activities.**

- (a) Due to the importance of having uniform signage on the Columbus Campus for safety and aesthetic purposes, the Concessionaire shall have no right to name or modify the name of the Utility System or any portion thereof or, unless required to do so by applicable Law, to install signage of any kind thereon, without the University's Approval, which may be withheld in its sole discretion.
- (b) The University shall have the right, in its discretion, to install, replace, display and maintain signage that relates to identification or naming of the Utility System, the Utility Facilities, portions thereof, or surrounding areas; provided that (i) the Concessionaire shall have no obligation under the Performance Standards to replace or maintain any signage installed by the University for advertising purposes, and (ii) the University shall not install any signage that relates to naming of the Utility System, the Utility Facilities, portions thereof, or surrounding areas for a Person that competes directly with the Concessionaire or the Operator.
- (c) The Concessionaire shall be entitled to investigate opportunities to develop additional sources of revenue in connection with the Utility System, including providing utility services to customers other than the University and making market-based sales of electricity, provided that the Concessionaire shall not perform any such revenue producing activities unless and until: (i) the Concessionaire provides reasonable proof to the University for the University's

Approval that such activities will not adversely affect (A) the University or its students, employees or Representatives, including causing any increase in costs to the University pursuant to Article 7, or (B) the ability of the Concessionaire and its Affiliates to comply with the terms and conditions of this Agreement; (ii) the University is granted the right to receive a portion of the gross revenue from such additional sources of revenue to compensate the University for the unreimbursed actual costs incurred by the University with respect to such additional sources of revenue; (iii) the Concessionaire has received all relevant Authorizations from Governmental Authorities; and (iv) the Concessionaire provides reasonable proof to the University for the University's Approval that such activities will comply with Prudent Industry Practices and applicable Laws. For the avoidance of doubt, notwithstanding the foregoing, the University shall not incur any costs in connection with such additional sources of revenues unless such costs are fully reimbursed by the Concessionaire.

- (d) Notwithstanding anything to the contrary contained herein, due to the importance to the University of having uniform nutritional choices on the Columbus Campus, the University hereby reserves the right to install and operate vending machines in any portion of the Utility System and to access the Utility System for the purposes thereof, and the University shall be entitled to the revenue generated by such vending machines.
- (e) The University and the Concessionaire agree that they shall use commercially reasonable efforts in good faith to execute on or before the Closing a trademark license agreement reasonably acceptable to both Parties, whereby the University grants to the Concessionaire a license during the Term to use the name "Ohio State" in the name of the Concessionaire in connection with the Utility System Operations.

**Section 3.16. Reversion of Utility System.** On the Reversion Date, the Concessionaire shall surrender and deliver to the University all of its rights, title and interest in the Utility System (including all improvements to the Utility System, the Utility System Assets and all tangible and intangible personal property of the Concessionaire (including inventories) that is included in the Utility System and used in connection with the Utility System Operations) subject, however, as to any intellectual property included in the Utility System, to any restrictions or prohibitions to disclosure, transfer or sharing thereof and any other rights of third parties with respect thereto, all in accordance with the provisions of Section 16.3. With respect to any third party or proprietary software utilized by the Concessionaire in the operation of the metered Utility System at the time of the Reversion Date, the Concessionaire and the University will negotiate in good faith appropriate license rights and terms for the University's continued use of the software following reversion, except as otherwise set forth in Section 3.11(g).

**Section 3.17. Police, Fire, Emergency and Public Safety Access Rights.** Notwithstanding any other provision of this Agreement, at all times during the Term and without notice or compensation to the Concessionaire (i) any police, fire and emergency services and any other security or emergency personnel retained by or on behalf of the University shall have access, as required by such services or personnel, to the Utility System; (ii) the University shall

have access to the Utility System as necessary for the protection of public safety; and (iii) any Governmental Authority with jurisdiction over the Utility System shall have access to the Utility System as necessary for inspection, emergency management and homeland security purposes, including the prevention of or response to a public safety emergency (so long as any exercise of such jurisdiction, to the extent effected by the University, shall be strictly in accordance with the terms hereof).

**Section 3.18. Negotiations with Third Parties.** Prior to entering into any agreement with any third party, including any Governmental Authority, in connection with the Utility System Operations (a “Third Party Agreement”) that extends or could extend beyond the Term or pursuant to which the University may incur any liability whatsoever thereunder, the Concessionaire shall submit such Third Party Agreement for Approval by the University (which Approval may be withheld, conditioned, or delayed in the sole discretion of the University) prior to the execution and delivery thereof (except with respect to Third Party Agreements the absence of which may cause the Concessionaire or Utility System Operations to fail to be in compliance with applicable Law or this Agreement, in which case the Concessionaire may enter into such Third Party Agreement upon notice to the University provided that the Concessionaire indemnifies the University for any Losses relating thereto).

**Section 3.19. Administration of the Public Way.** The Concessionaire acknowledges and accepts that the University holds and administers the Public Way for the non-discriminatory benefit of all Persons and interests, including the Concessionaire and the Concessionaire Interest. The rights granted to the Concessionaire under this Agreement do not create a priority in favor of the Concessionaire over any other user of the Public Way, and such rights are subject to the Performance Standards and all provisions of Law.

**Section 3.20. Rights to Adjacent Space.** The University hereby reserves, and is not demising or leasing to the Concessionaire, the right or easement to construct and reconstruct and forever maintain the air rights with respect to the Utility Facilities and other property within the Utility System and the right to construct, use or occupy any of the space not directly occupied by the Utility System, including (i) any and all space located above, below or adjacent to any such property, and (ii) any and all space located above, below or adjacent to any improvements within the Utility System as of the date hereof, provided that such construction, use or occupancy does not materially impair the Utility System Operations. For the avoidance of doubt, to the extent that any Utility Facility is buried below the surface of any part of the Columbus Campus, the University shall have the right to construct any building, structure or other improvement on that part of Columbus Campus, provided such construction does not damage or alter such buried Utility Facilities. The University’s exercise of its rights hereunder shall not be subject to any of the terms and conditions of Section 3.7(a).

**Section 3.21. Sole Utility Provider.** The University covenants that, during the Term, it will not, and it will not contract or agree with any third party to, provide any Utility or Utility Services on the Columbus Campus, except in the following circumstances: (i) as of the Bid Date, a third party is providing the relevant Utility or Utility Services to a portion of that Columbus Campus, in which case the University may continue to have that third party or a successor thereto or a replacement thereof provide such Utility or Utility Services during the Term on only that portion of the Columbus Campus or (ii) as of the Bid Date, any district utility

systems within the Columbus Campus which are generating or distributing Utilities beyond the lines of demarcation identified in the Performance Standards or (iii) the University installs systems, equipment or materials for the distribution of Utilities beyond the lines of demarcation identified in the Performance Standards, which shall be performed by or on behalf of the University. For the avoidance of doubt, if the University does not own or lease a building, facility, other improvement or land within the Columbus Campus, the University shall have no obligation with respect to causing the Concessionaire to be the sole provider of Utilities or Utility Services with respect to such building, facility, other improvement or land, and there shall be no Concession Compensation payable in connection therewith, except as expressly set forth in Section 5.3.

**Section 3.22. Repair and Maintenance of the Tunnels.** The Concessionaire covenants that, during the Term, it shall cause any intentional or unintentional damage to the Tunnels or the Release of any Hazardous Substances in the Tunnels caused, directly or indirectly, by the Concessionaire, the Operator or any of their respective Representatives or the Utility System to be promptly restored and repaired to the same or better condition that existed prior to such damage. The Concessionaire or the Operator shall contract with a Contractor to perform such restoration or repair, which Contractor must either be on a list of pre-approved contractors provided by the University or otherwise Approved by the University in its sole discretion. To the extent that the Concessionaire or the Operator becomes aware of any repair or maintenance that needs to be performed in connection with the Tunnels that is not the Concessionaire's responsibility hereunder, it shall promptly provide notice thereof to the University or a person or department designated by the University. Other than the Concessionaire's responsibilities pursuant to this Section 3.22 and the Performance Standards and its responsibility to maintain any Utility Facility or any other portion of the Utility System, the University shall be responsible for the repair and maintenance of the Tunnels and the equipment therein in accordance with Prudent Industry Practices. Except to the extent caused by any act or omission of the Concessionaire, the Operator or any of their respective Representatives, the University shall manage, remediate or otherwise address the presence or potential presence of any Hazardous Substances in the Tunnels in accordance with applicable Laws (including Environmental Laws) and Prudent Industry Practices. If the University fails to repair and maintain the Tunnels in accordance with Prudent Industry Practices and such failure creates an Emergency, the Concessionaire shall have the right to take such action as is necessary to remedy such Emergency, and the out-of-pocket cost thereof shall be Concession Compensation, provided that the Concessionaire shall, where practical, provide the University advance written notice of such action.

**Section 3.23. Adjustments to the Location or Configuration of the Utility System.** The University shall have the right, upon notice to the Concessionaire, to cause the Concessionaire to alter the location or configuration of the Utility System or to designate alternative real property for the Utility System Land to the extent the University deems it necessary or useful in the operation and use of the Columbus Campus. To the extent such alteration or designation of alternative real property is a Capital Improvement, it shall be considered a New Approved Capital Improvement for a budgeted cost and an increase in the Capped O&M Index reasonably approved by the Concessionaire and the University, but, to the extent such alteration or designation of alternative real property is not a Capital Improvement, the costs incurred by the Concessionaire or the Operator as a result of the University's exercise

of its right under this Section 3.23 shall be considered an Uncapped O&M Cost in accordance with the definition thereof. If the University directs the Concessionaire to relocate the Utility System to a location to which it does not have a right to access pursuant to this Agreement, the University shall grant occupancy rights to the Concessionaire sufficient for the Concessionaire to meet its obligations hereunder. If the University designates alternative real property for the Utility System Land, then, upon such designation, (i) such alternative real property shall be deemed Utility System Land for purposes of this Agreement, (ii) the Concessionaire shall return the prior Utility System Land and all improvements and Utility Facilities thereon to the University in the condition required under Section 16.3, at no additional cost to the University, other than out-of-pocket costs incurred by the Concessionaire in connection with such transfer (including the cost of recording the conveyance documentation and the cost of a title policy for the alternative real property for the Utility System Land in the event that the Concessionaire received a title policy with respect to the original Utility System Land), and (iii) in accordance with the University's designation of alternative real property, the Concessionaire shall relocate the Utility Facilities then existing on the prior Utility System Land to the alternative real property. The Concessionaire shall have the right to amend the Memorandum of Lease to reflect any changes resulting from the University's exercise of its right under this Section 3.23, and the University shall reasonably cooperate in such amendment and shall pay the out-of-pocket costs incurred by the Concessionaire in connection therewith.

**Section 3.24. Sales to Individual Customers on the Columbus Campus.** The Concessionaire shall not be permitted to sell any compressed natural gas or other fuels to individual customers on the Columbus Campus. To the extent that the Concessionaire supplies natural gas or other fuels to the University for distribution to individual customers, the University shall control the distribution of such natural gas or other fuels. The Concessionaire shall have no interests or rights to charge or collect any payments from the University or such individual customers for the provision of such natural gas or other fuels.

**Section 3.25. Compressed Air.** Notwithstanding the fact that compressed air is not a Utility, the Concessionaire shall be responsible for operating, maintaining, repairing and replacing, as necessary, the compressed air generators located in McCracken Power Plant as of the date hereof and the distribution system attached thereto up to and including until the 3" and 4" shut-off valves located inside McCracken Power Plant, just before the pipelines enter the north McCracken Power Plant Tunnel (the "Concessionaire Compressed Air System") until such time as the University provides the Concessionaire notice to the contrary, such that the Concessionaire Compressed Air System is operated in accordance with the Performance Standards for the Concessionaire Compressed Air System. In connection therewith, the Concessionaire shall promptly install air meters to the Concessionaire Compressed Air System after the Closing Date, the cost of which shall be Approved by the University in advance and shall be a New Approved Capital Improvement Cost. The University shall be responsible for the operation, maintenance, repair and replacement of any portion of the compressed air system on the Columbus Campus that is not part of the Concessionaire Compressed Air System.

**Section 3.26. University Business Continuity Plan.** The Concessionaire shall reasonably cooperate with the University in connection with the University's business continuity plan and shall attend any University meetings regarding such plan if requested by the University.

**Section 3.27. Utility System Tours.** The Concessionaire shall provide tours of the Utility System or any portion thereof to the University and its Representatives upon reasonable request by the University, provided that (i) the Concessionaire shall have the right to refuse to give any tour if such tour would unreasonably interfere with the operation of the Utility System or any of the Concessionaire's other obligations hereunder and (ii) all tour participants shall be required to comply with the Concessionaire's reasonable safety protocols and requirements to the extent provided in writing to the University.

**Section 3.28. Uniforms.** To aid the University's provision of security and safety measures to the Columbus Campus, Concessionaire and Operator personnel working on the Columbus Campus shall wear a uniform that is standard across the Utility System and clearly identifies such personnel as Concessionaire and Operator personnel.

**Section 3.29. Gashouses.** Prior to engaging in any formal or informal discussions regarding the operation, location or management of the Gashouses with any third party that is not an Affiliate of the Concessionaire, the Concessionaire or the Operator shall provide the University the opportunity to participate in such discussions, which shall be held at times and places that are reasonably acceptable to the University, provided that the right to participate in such discussions shall not grant the University any rights or responsibilities other than those expressly set forth in this Agreement. In addition thereto, the Concessionaire shall promptly provide the University with copies of any written correspondence regarding same with such third parties after it receives or sends such correspondence.

#### **ARTICLE 4 CAPITAL IMPROVEMENTS, ECMS AND MATERIAL CHANGES**

**Section 4.1. Concessionaire Responsibility for Capital Improvements.** Other than the Ongoing Utility System Projects, the Concessionaire shall be responsible for all Capital Improvements with respect to the Utility System required to be completed during the Term in accordance with the terms of this Agreement, including as required by the Performance Standards.

**Section 4.2. Authorizations Related to Capital Improvements.** The Concessionaire's obligation to perform Capital Improvements shall be subject to the issuance by Governmental Authorities and the University of any and all Authorizations required to be issued by such parties with respect thereto, and the University agrees (i) not to unreasonably withhold, condition or delay the issuance of any Authorization to be issued by the University for an Approved Capital Improvement and (ii) to use its reasonable efforts to assist the Concessionaire in obtaining any Authorizations required to be issued by Governmental Authorities. Without limiting the generality of the foregoing, the University agrees that it will reasonably assist and cooperate with the Concessionaire in obtaining any and all Authorizations (including any required rights of access over real property that is owned or controlled by the University) in order for the Concessionaire to perform an Approved Capital Improvement, which assistance shall include providing the Concessionaire reasonable access to the areas of the Columbus Campus where the Approved Capital Improvement will be located, subject to the reasonable conditions and restrictions of the University.



**Section 4.3. Approval of Capital Improvements, ECMs and Material Changes.**

- (a) The Concessionaire shall not have the right to make any (i) Capital Improvements, (ii) ECMs on the Utility System Land, Utility Facilities or Non-Utility Campus, or (iii) Material Changes, except those Capital Improvements, ECMs or Material Changes which are Approved pursuant to Section 4.3(c).
- (b) The Concessionaire shall have the right to request Approval of (I) a proposed Capital Improvement, ECM or Material Change or (II) a change in the scope or cost of a previously Approved Capital Improvement, ECM or Material Change at any time (and shall identify whether an item requested for Approval or any portion thereof is a Capital Improvement, ECM or Material Change or a combination thereof and allocate any portion of the proposed cost that is intended to reduce the Energy Use Intensity), but the University shall not be obligated to consider any such requests for Approval except those requests (i) (A) contained in a proposed Five-Year Plan submitted in accordance with Section 7.3(b) after review thereof by the EAC and (B) proposed to be commenced in the first full Fiscal Year in such proposed Five-Year Plan; (ii) required to address an Emergency, a change in Law or a change in a Performance Standard; (iii) required in connection with a University Directive; or (iv) required due to Force Majeure, all of which the University shall consider in good faith.
- (c) The Concessionaire shall request Approval of one or more proposed Capital Improvements, ECMs or Material Changes or Approval of a proposed change in the scope or cost of a previously Approved Capital Improvement, ECM or Material Change by (1) submitting a request to the University, or an office or person designated by the University Liaison, containing a detailed description of each proposed Capital Improvement, ECM or Material Change or proposed change in the scope or cost of a previously Approved Capital Improvement, ECM or Material Change or (2) submitting a proposed Five-Year Plan in accordance with Section 7.3(b) after review thereof by the EAC containing a detailed description of each proposed Capital Improvement, ECM or Material Change proposed to be commenced in the first full Fiscal Year in such proposed Five-Year Plan or each proposed change in the scope or cost of a previously Approved Capital Improvement, ECM or Material Change, provided that, in each case, such detailed description shall include: (A) total costs for construction and installation thereof; (B) forecasted annual operations and maintenance costs therefor; (C) any proposed modification to the Recovery Period (if applicable) for such Capital Improvement, regardless of whether the Recovery Period would otherwise extend beyond the Term; (D) in the case of a proposed ECM, projected savings calculations and payback schedules, inclusive of O&M Costs, associated with such ECM, including a breakdown of costs and savings by individual ECM; (E) an explanation of all relevant assumptions, variables, and data sources, used to develop the proposal; (F) in the case of a proposed ECM, an explanation of the reasoning behind the prioritization of any ECM proposals; and (G) the proposed schedules, process, and other technical

and logistics details associated with the proposed Capital Improvement, ECM, and/or Material Change proposal, including any liquidated damages if the Concessionaire fails to meet the proposed schedule; provided that, to the extent any of the details set out in clauses (A) through (G) above are unavailable or inapplicable, the Concessionaire shall describe the reason for such unavailability or inapplicability. To the extent the University elects to, or is required to, consider a request for Approval of a proposed Capital Improvement, ECM or Material Change or a change in the scope or cost of a previously Approved Capital Improvement, ECM or Material Change, the University shall review such request and, in its sole discretion:

- (i) Approve such request in accordance with the terms of such request after having undertaken all such necessary action and secured all authorizations, consents and approvals required to be obtained with respect to such Approval at such time, unless the Concessionaire's written request submitted to the University explicitly requested that the University respond only pursuant to Sections 4.3(c)(ii), (iii) or (iv); or
- (ii) provide a written response requiring that the Concessionaire (1) perform additional work with respect to such proposed Capital Improvement, ECM, or Material Change or proposed change in the scope or cost of a previously Approved Capital Improvement, ECM or Material Change to provide further information regarding the scope, design or cost thereof and/or multiple alternative designs therefor to the University, which additional work may include procuring design services or a quotation for a guaranteed maximum price or lump sum contract from a contractor or multiple contractors for the proposed Capital Improvement, ECM, or Material Change or proposed change in the scope or cost of a previously Approved Capital Improvement, ECM or Material Change or procuring any details set out in clauses (A) through (G) of Section 4.3(c) that were previously unavailable, provided that the cost of such additional work shall be subject to the University's prior Approval, and (2) after performing such additional work, submit a revised request for Approval by the University pursuant to this Section 4.3(c), which revised request, if the initial request was made in connection with the submission of a proposed Five-Year Plan, the University shall consider with respect to the same proposed Five-Year Plan, if submitted within 15 Days before the commencement of the first Fiscal Year of such Five-Year Plan; or
- (iii) (1) provide the Concessionaire with comments on such proposed Capital Improvement, ECM or Material Change or proposed change in the scope or cost of a previously Approved Capital Improvement, ECM or Material Change, including comments on any details provided in the Concessionaire's proposal, which may include comments from the University intended to align the proposal with the larger Columbus Campus capital improvement plans existing at such time or disagreeing with its characterization as a Capital Improvement, ECM or Material

Change or the amount of the cost thereof allocated to reduce Energy Use Intensity, and (2) require that the Concessionaire incorporate such comments and submit a revised request for Approval pursuant to this Section 4.3(c); provided that if the University elects to exercise its rights under this Section 4.3(c)(iii), then the Concessionaire shall have the right, upon written notice to the University, to withdraw its request for Approval; or

- (iv) (1) reject such proposed Capital Improvement, ECM or Material Change or proposed change in the scope or cost of a previously Approved Capital Improvement, ECM or Material Change and (2) if such proposed Capital Improvement, ECM or Material Change or change to the scope of a previously Approved Capital Improvement, ECM or Material Change is necessary to comply with Prudent Industry Practices, applicable Law, or the Performance Standards, provide the Concessionaire with a reasonably detailed explanation for such rejection, provided that the University shall not be permitted to reject such proposal under this Section 4.3(c)(iv) if (w) such proposal is required to cause the Utility System to comply with any new Law or change in Law existing as of the Setting Date and the Concessionaire has received written notice from the applicable Governmental Authority that the Utility System is not in compliance therewith, (x) the Concessionaire has reasonably investigated any potential alternatives to such proposal and provided the University with reasonable evidence of such investigation, (y) the Concessionaire has discussed in good faith with the University and reasonably considered any potential viable alternatives to such proposal and (z) the University has provided no reasonable alternative that would address such new or changed Law that the University has confirmed that it would Approve.

Notwithstanding anything to the contrary in the foregoing, if a single request for Approval pursuant to this Section 4.3(c) includes multiple discrete proposed Capital Improvements, ECMs or Material Changes or changes in the scope or cost of a previously Approved Capital Improvement, ECM or Material Change, the University shall have the right to provide different responses with respect to each proposal included in such request.

- (d) To the extent a proposed Capital Improvement, ECM or Material Change or a proposed change in the scope or cost of a previously Approved Capital Improvement, ECM or Material Change is Approved, the Concessionaire shall be obligated to complete such Capital Improvement, ECM or Material Change in the timeframe set forth in the Approval thereof, which timeframe may not be more stringent than the schedule included in the Concessionaire's most recent request for Approval thereof. As a condition of its Approval of any proposed Capital Improvement, ECM or Material Change or proposed change in the scope or cost of a previously Approved Capital Improvement, ECM or Material Change, the University may require certain payments of liquidated damages by the Concessionaire to the University if the Concessionaire does not meet such

timeframe, but only to the extent such liquidated damages are proposed in the Concessionaire's most recent request for Approval thereof.

- (e) To the extent a proposed Capital Improvement or proposed change in a previously Approved scope or cost of a Capital Improvement is Approved, the Concessionaire shall have the right to (i) deem the cost of such Capital Improvement (up to the Approved amount) or the change in such cost (up to the Approved amount), as applicable, a New Approved Capital Improvement Cost in accordance with Schedule 5 and (ii) include the out-of-pocket costs incurred by the Concessionaire in connection with preparing and submitting a revised request for Approval of such Capital Improvement pursuant to Section 4.3(c)(ii) (if applicable) as part of such New Approved Capital Improvement Cost. The Approved out-of-pocket costs incurred by the Concessionaire pursuant to Section 4.3(c)(ii)(1) in connection with a proposed Capital Improvement or a proposed change in the scope or cost of a previously Approved Capital Improvement that is not Approved shall be included in Uncapped O&M Costs. For any proposed Material Change or ECM that is not a Capital Improvement or any proposed change in the scope or cost of a previously Approved Material Change or ECM that is not a Capital Improvement, the out-of-pocket costs incurred by the Concessionaire pursuant to Section 4.3(c)(ii) shall be included in Uncapped O&M Costs (whether or not such ECM or Material Change or change in the scope or cost of such previously Approved ECM or Material Change is Approved).
- (f) After Approval of a proposed Capital Improvement, ECM or Material Change or a proposed change in the scope or cost of a previously Approved Capital Improvement, ECM or Material Change, the Concessionaire shall make such Capital Improvement, ECM or Material Change in accordance with this Agreement, including but not limited to the Wage and Hour Laws specified in Section 11.3.
- (g) The Concessionaire may perform Design-Build ECMs and Non-Construction ECMs on the Non-Utility Campus only in accordance with the terms and conditions of this Section 4.3(g).
  - (i) For any Approved Non-Construction ECM, the Concessionaire may implement such Approved Non-Construction ECM in accordance with this Agreement.
  - (ii) The Concessionaire shall perform, or contract for the performance of, energy audits or any testing or investigation necessary to develop any ECM. The Concessionaire shall share the results of any such audit, testing or investigation with the University promptly after the Concessionaire's receipt thereof.
  - (iii) The Concessionaire may perform Design-Build ECMs on the Non-Utility Campus only as specified in this Section 4.3(g)(iii). For purposes of any

proposed Design-Build ECM, the University and the Concessionaire agree as follows:

(A) The University shall, on the Closing Date, select the Concessionaire as a “design-build firm” in accordance with, and as defined in, Chapter 153. If required by law, in the University’s sole determination, on the Closing Date, the University and the Concessionaire shall enter into a design-build agreement, substantially in the form attached hereto as Schedule 23 (the “Design-Build Agreement”) with respect to all Design-Build ECMs.

(1) The terms of the Design-Build Agreement control solely the activities performed pursuant to the Design-Build Agreement and shall not modify or alter the Concessionaire’s obligations under this Agreement. This Agreement and the Design-Build Agreement shall be read together, to the extent possible. In the event of a conflict between the terms of this Agreement and any portion of the Design-Build Agreement, and any amendments thereto, the terms of this Agreement shall control.

(2) In the event the University determines the Concessionaire is in breach of its obligations under the Design-Build Agreement, such breach shall not constitute a “Concessionaire Default” as defined by Section 16.1(a)(1) unless such breach is otherwise a breach of an independent obligation under this Agreement. The rights and remedies of the University in such event may be exercised only as to the Design-Build ECM giving rise to the breach as well as any other Design-Build ECM contained within the Approval of the Design-Build ECM giving rise to the breach of the Design-Build Agreement. Notwithstanding the foregoing, the University may terminate all or a portion of the Design-Build Agreement if the Concessionaire commits a breach of the Design-Build Agreement by disregarding laws, ordinances, or rules, regulations, or orders of a public authority with jurisdiction over the work.

(3) The University and Concessionaire hereby agree that, where the Design-Build Agreement or any other contract document constituting the substance of the contract between the University and Concessionaire for the Design-Build ECMs (including but not limited to the GMP Documents, Drawings, Specifications, Addenda, Contracting Definitions, General Conditions, Wage Rate Requirements, Project Manual, Modifications, and all exhibits) define or reference, in any way, payment of money by the University to the design builder under the Design-Build Agreement, whether as payment, compensation, fee, sum, cost, expense, or any other term indicating such payment, then such payment is specified solely and exclusively for the purpose of accounting for, tracking or identifying all costs

related to the Design-Build ECMs in compliance with the open book pricing method defined in Ohio Rev. Code Ann. §153.65(J) and does not create any obligation by the University to pay or compensate the Concessionaire in any amount greater than the Utility Fee.

(4) For any Design-Build ECM, the Concessionaire shall not subdivide the construction activities into component parts or separate projects in order to avoid the thresholds set forth in Chapter 153. Where the Concessionaire combines or bundles together more than one Design-Build ECM for Approval, the Concessionaire shall not subdivide such Design-Build ECMs in order to avoid the thresholds set forth in this Section 4.3(g).

(B) Prior to execution of the Design-Build Agreement, the Concessionaire shall satisfy the following conditions, which apply solely to the Design-Build Agreement.

(1) The Concessionaire shall furnish the bonds specified in Ohio Admin. Code § 153:1-4-02 and the rules adopted by the Executive Director of the Ohio Facilities Construction Commission. The Concessionaire shall submit with each executed bond a certified copy of the authority to act (power of attorney) of the agent signing the bond on behalf of the surety and a current and signed Certificate of Compliance under Ohio Rev. Code Ann. § 9.311 issued by the Ohio Department of Insurance showing the surety is licensed to do business in Ohio.

(2) The Concessionaire shall provide written evidence to the University that the Concessionaire is enrolled in and shall remain in good standing in the Ohio Bureau of Workers' Compensation Drug-Free Safety Program or a comparable program approved by the Ohio Bureau of Workers' Compensation that meets the requirements specified in Ohio Rev. Code Ann. § 153.03.

(3) The Concessionaire shall provide written evidence to the University that the Concessionaire is covered by and shall maintain government-controlled workers compensation coverage or other policy of workers compensation coverage meeting the requirements of applicable Law.

(4) The Concessionaire shall provide written evidence to the University that the Concessionaire is covered by and shall maintain policies of insurance of the types and in the amounts specified in the Design-Build Agreement.

(5) The Concessionaire shall provide to the University the Concessionaire's certified statement of commitment to the

“Encouraging Diversity, Growth and Equity” Program (as described in Ohio Rev. Code Ann. § 123) by subcontracting with, and using one or more, businesses certified as an “EDGE business enterprise” in accordance with, and as defined in, Ohio Rev. Code Ann. § 123.

(6) The University may serve as the “criteria architect or engineer” (as defined in Chapter 153) for any Design-Build ECM.

(7) For any proposed Design-Build ECM, after Approval, the Concessionaire may implement the Design-Build ECM, provided the Concessionaire complies with all terms of this Agreement and all relevant Laws, including but not limited to the Wage and Hour Laws.

(8) In the event federal funds are used to fund any portion of an Approved Design-Build ECM, the parties shall amend this Agreement to include all necessary provisions to effectuate the use of such funds.

(C) Pursuant to a separate assignment agreement on substantially the terms set forth in this Section 4.3(g)(iii)(C), the Concessionaire may assign to the ECM provider the Concessionaire’s obligations with respect to Design-Build ECMs under this Agreement and, if the University and the Concessionaire enter into a Design-Build Agreement, assign such agreement and the Concessionaire’s obligations thereunder provided that: (1) the Concessionaire shall remain liable to the University for the performance of any assigned obligations under this Agreement and the Design-Build Agreement; (2) the ECM provider shall agree to perform such obligations in compliance with this Agreement and the Design-Build Agreement; and (3) no such assignment shall result in or be deemed to create any obligation of the University to pay any fee or other compensation for designing and implementing any Design-Build ECM directly or indirectly (other than payments to the Concessionaire required under this Agreement) to such ECM provider.

(h) The Concessionaire shall have the right, as its sole remedy, with respect to any Approvals or rejections by the University pursuant to this Section 4.3, to submit a claim through the procedures set forth in Article 18 that the University unreasonably withheld, conditioned or delayed its Approval of a proposed Capital Improvement, ECM or Material Change or a proposed change in the scope or cost of a previously Approved Capital Improvement, ECM or Material Change, notwithstanding that the University is not required to be reasonable in granting or withholding its Approval under this Section 4.3, and the Concessionaire shall have no further remedy with respect to any such Approvals or rejections by the University. If it is determined pursuant to Article 18 that the University unreasonably withheld, conditioned or delayed its Approval of a proposed Capital Improvement, ECM or Material Change or a proposed change in the scope or cost of a previously Approved Capital Improvement, ECM or Material Change, (i) the University and the Concessionaire shall cooperate in

good faith to make any reasonably necessary adjustments to the Key Performance Indicators, the Performance Standards and the requirements of Section 7.5(a) associated with such proposed Capital Improvement, ECM or Material Change and (ii) if the proposed Capital Improvement, ECM or Material Change or the proposed change in the scope or cost of a previously Approved Capital Improvement, ECM or Material Change was intended to cause the Utility System or Utility System Operations to comply with Law or to remedy an Emergency (other than an Unplanned Outage), then the University shall waive any claim for a Concessionaire Default for failure to comply with such Law or failure to remedy such Emergency (other than an Unplanned Outage) to the extent such failure would not have occurred but for the University having unreasonably withheld, conditioned or delayed its Approval, provided the Concessionaire shall diligently attempt, in good faith, to develop and implement an alternative solution to cause the Utility System or the Utility System Operations to comply with the applicable Law or to cause such Emergency (other than an Unplanned Outage) to be remedied.

- (i) Notwithstanding anything to the contrary contained in this Section 4.3, to the extent that the Concessionaire incurs any out-of-pocket costs as O&M Costs, it shall have the right to request that the University Approve those costs as a Capital Improvement and that those costs be considered as such, and such request shall be considered a request for Approval of a proposed Capital Improvement.

**Section 4.4. Recovery Period of Capital Improvements.** If the Recovery Period of a Capital Improvement is for a period of time beyond the Term, then, at the time such Capital Improvement is Approved in accordance with Section 4.3(c) or the University directs the Concessionaire to construct such Capital Improvement as a University Directive, the Concessionaire may elect to either (i) construct such Capital Improvement, in which case the Recovery Period shall be utilized for purposes of calculating the Utility Fee in accordance with Schedule 5, subject to Section 15.3(g) or (ii) not construct such Capital Improvement. If the Concessionaire elects to not construct the Capital Improvement, then the University shall have the right to fund the cost of constructing such Capital Improvement and not include the cost of such Capital Improvement as a New Approved Capital Improvement, but the Capped O&M Index shall be increased by the Approved operation and maintenance cost for such Capital Improvement.

**Section 4.5. University's Capital Plan.** The Concessionaire shall reasonably cooperate with the University in the development, modification, and discussions of the University's capital plans and energy conservation initiatives, including participating with the University's capital planning and capital plan forecasting processes, attending planning meetings, and, as requested by the University, attending and participating in University meetings related to the University's capital plans.



## ARTICLE 5 MODIFICATIONS

**Section 5.1. University Directives.** The University may, at any time during the Term, issue a University Directive to the Concessionaire, which shall include the construction of Capital Improvements and the addition to or removal from the Utility System of buildings or other improvements owned, leased or operated by the University or its Affiliates. No University Directive shall have the effect of reducing the components of the Variable Fee Component or Fixed Fee. Subject to the Concessionaire having obtained (with the cooperation of the University) all relevant Authorizations from all relevant Governmental Authorities required for the relevant work, the Concessionaire shall perform the work required to implement such University Directive. Utility Facilities constructed as the result of a University Directive shall be (a) deemed to be part of the Utility System for purposes of this Agreement and (b) included in the Utility System to be operated by the Concessionaire under the terms of this Agreement. To the extent any University Directive requires the construction of a Capital Improvement, the cost of such Capital Improvement shall be included as a New Approved Capital Improvement Cost up to the Approved cost of such Capital Improvement set forth in the University Directive. To the extent any University Directive does not require the construction of a Capital Improvement, the costs associated therewith shall be Uncapped O&M Costs in accordance with the definition thereof. In addition, with respect to any University Directive, the Concessionaire and the University shall determine in good faith the forecasted annual ongoing operations and maintenance costs associated with such University Directive, and the Capped O&M Index shall be increased by such amount.

**Section 5.2. Performance of Modifications.** Subject to the other provisions of this Article 5, the Concessionaire shall ensure that University Directives are performed in a good and professional manner and diligently complied with and implemented in accordance with Prudent Industry Practices.

**Section 5.3. Addition, Removal and Lease of Property.**

- (a) If, after the Closing Date, the University sells, conveys, leases for a period of time longer than the remaining Term or otherwise transfers ownership of any real property within the Columbus Campus to a third party unaffiliated with the University, then, contemporaneously with such transfer, the Concessionaire shall disconnect such real property from the Utility System and shall not be permitted to serve such real property, except if Approved in accordance with Section 3.15(c). If such disconnection causes a Capital Improvement that is or had been a New Approved Capital Improvement to be removed from the Utility System, the Capital Improvement shall continue to be included in the Variable Fee Component in accordance with this Agreement as if not removed from the Utility System. The Concessionaire shall reasonably cooperate with the University and the transferee of such real property in such disconnection. In connection therewith, the University and the Concessionaire shall cooperate in good faith to make any reasonably necessary adjustments to the Key Performance Indicators and the Performance Standards as a result of such sale, conveyance or lease.

- (b) Due to the fact that the Concessionaire is agreeing to service the Columbus Campus throughout the Term, if, after the Closing Date, the University currently or thereafter leases, sub-leases, or otherwise provides a leasehold interest in real property served by the Utility System for less than or equal to the period of time remaining in the Term to a third party unaffiliated with the University, then, to the extent that it would not be prohibited by Law, the Concessionaire shall continue to provide Utilities to such real property in accordance with this Agreement, and the University shall remain obligated to pay the Utility Fee attributable to such real property. The Concessionaire is only entitled to the continued receipt of the Utility Fee attributable to such real property and shall have no interests or rights to charge or collect additional payments from the University, the lessees or sub-lessees for the provision of Utilities to such real property.
- (c) The University, at its sole discretion, may, pursuant to a University Directive, cause the Concessionaire to provide Utility Services to any portion of the Columbus Campus not served by the Utility System at that time and may expand the definition of the Columbus Campus.

#### **Section 5.4. Networked Smart Meters.**

- (a) Within 48 months after the Closing Date, the Concessionaire shall, at its sole cost and expense, which cost and expense shall not be recoverable by the Concessionaire as an O&M Cost or otherwise included in the Utility Fee, deploy a system to meter and display, in real-time, the usage of electricity, natural gas, chilled water, geothermal power, steam and any heating hot water systems fueled by steam from the central steam plants for all buildings on the Columbus Campus. The Concessionaire shall deploy to each building connected to the Utility System networked smart meters for the entire Utility System for electricity, natural gas, chilled water, geothermal power, steam and any heating hot water systems fueled by steam from the central steam plants, such that all such smart meters, at the time of initial installation: (i) meet applicable industry standards for revenue grade meters; (ii) communicate electronically in real-time to metering data collection systems that are accessible to the University; (iii) communicate electronically to a Concessionaire-provided public interface system (e.g., a “dashboard”) to display near real-time data of building specific data as described in more detail in Section 5.4(b); (iv) are capable of calculating and communicating instantaneous and totalized data; (v) meet utility grade custody transfer requirements; (vi) operate independently from the building control systems and control system components; (vii) have defined calibration and preventive maintenance schedules and sequences; (viii) are installed with proper security measures and in locations to prevent unauthorized access; (ix) are powered from a dedicated electrical circuit; (x) maintain all settings and values after power loss and return to service when power is restored; and (xi) are capable of restoring programmed values through software interface upon equipment failure. The Concessionaire shall ensure that such networked smart meters are all accessible on a master system, which shall be readily accessible to

the University. For the avoidance of doubt, the operation and maintenance of the networked smart meters described in this Section 5.4 after their installation may be Capped O&M Costs, to the extent such costs are included in the definition of “Capped O&M Costs”.

- (b) The Concessionaire shall develop and deploy a digital dashboard to display the Columbus Campus building energy usage data in real-time, which dashboard shall have a web-based interactive public interface that will display individual building data.
- (c) For buildings on the Columbus Campus that are not connected to the Utility System and are served by third party utility provider commercial electricity and/or natural gas accounts, the Concessionaire shall take the measures necessary to obtain the real-time electricity and/or natural gas usage data (or if such real-time data is not available, then such data as is close to real-time as is practicable) from such buildings and integrate that data into the total Columbus Campus dashboard.
- (d) After the date hereof and prior to the Closing, the Concessionaire shall reasonably collaborate in good faith with the University to determine the final meter deployment counts and schedules that will be the subject of this Section 5.4, which counts and schedules must be Approved by the University.

## **ARTICLE 6 PERFORMANCE STANDARDS**

**Section 6.1. Compliance with Performance Standards.** The Concessionaire shall, at all times during the Term, cause the Utility System Operations to comply with and implement the Performance Standards in all material respects (including any changes or modifications to the Performance Standards pursuant to the terms of this Agreement); provided that the Concessionaire shall have a reasonable period of time to comply with the introduction of changes or modifications to the Performance Standards that are made from time to time in accordance with the terms of this Agreement. The Concessionaire shall have in place during the Term an Operations Plan. Except as specifically set forth herein, the Concessionaire shall perform all work required to comply with and implement the Performance Standards (including the Capital Improvements described therein) as part of the Utility System Operations and at its sole cost and expense.

**Section 6.2. Proposed Performance Standards.** If the Concessionaire, at its cost and expense, wishes to implement and use performance standards for the operation of the Utility System other than the Performance Standards, the Concessionaire must provide notice of such proposed performance standards to the University for Approval. The Concessionaire’s proposed performance standards must be accompanied by an explanation of the Concessionaire’s rationale for making its proposal and all relevant supporting information, certificates, reports, studies, investigations and other materials as are necessary to demonstrate that the Concessionaire’s proposed performance standards are reasonably designed to achieve or improve upon the intent of the applicable Performance Standards and are in compliance with Prudent Industry Practices

and applicable Laws. The University may request any additional supporting information, certificates, reports, studies, investigations and other materials as are reasonably required by the University to determine if the Concessionaire's proposed performance standards are reasonably designed to achieve or improve upon the objectives of the applicable Performance Standards. Until the University provides its Approval for the implementation of the Concessionaire's proposed performance standards, the Concessionaire shall not implement the proposed performance standards and shall implement and comply with the Performance Standards. The Concessionaire's proposed performance standards shall be deemed incorporated into the Performance Standards upon Approval by the University in accordance with the terms hereof. It shall be unreasonable for the University to withhold its Approval if the proposed performance standards are reasonably designed to achieve or improve upon the intent of the applicable Performance Standards in a manner that does not unreasonably increase the cost to the University. If the University refuses to Approve any proposed performance standards and the Concessionaire disagrees with such refusal, the Concessionaire's sole remedy shall be to submit such dispute to the procedures set forth in Article 18.

### **Section 6.3. Modified Performance Standards.**

- (a) The Parties acknowledge that the services provided hereunder by the Concessionaire to the University may impact the quality of life on the Columbus Campus. Because of the importance to the University of maintaining high standards with respect to such campus life, the University shall have the right, at any time during the Term, to modify or change the Performance Standards upon notice to the Concessionaire to (i) comply with any new Law or change in Law applicable to the Utility System Operations or (ii) conform the Performance Standards to standards or practices generally adopted with respect to Comparable Utility Systems or Prudent Industry Practices; any such modification shall not constitute a Compensation Event. In the event the University modifies the Performance Standards in accordance with the immediately preceding sentence, the Concessionaire shall promptly perform all work required to implement and shall comply with all such modifications and changes and in no event shall the Concessionaire be excused from compliance with any such modification or change, except as otherwise expressly provided in this Agreement, the cost of which shall be included in Uncapped O&M Costs (but only to the extent of the costs incurred to cause the Utility System to initially comply with such modification or change) or New Approved Capital Improvement Costs (if such modifications or changes are Capital Improvements); provided that the cost of ongoing compliance with any such modification or change may be included in Capped O&M Costs, if such costs would be included in the definition thereof. If (x) any such modification or change is a New Approved Capital Improvement, then the Concessionaire and the University shall determine in good faith the forecasted annual operations and maintenance costs for such New Approved Capital Improvement or (y) such modification or change is not a New Approved Capital Improvement but the Concessionaire and the University determine, in good faith, that it will require additional ongoing Capped O&M Costs after the completion of such modification or change, then, in each case, the Capped O&M Index shall increase by such amount. The Concessionaire shall have the right to

challenge, pursuant to Article 18, any modified Performance Standard on the grounds that it does not meet the requirement of this Section 6.3(a). In connection with a change in the Performance Standard under this Section 6.3(a), the University and the Concessionaire shall cooperate in good faith to make any reasonably necessary adjustments to the Key Performance Indicators and any other Performance Standards as a result thereof.

- (b) If, during the Term, the University is of the opinion that a modification or change to the Performance Standards is necessary or desirable but such modification or change is not required by Section 6.3(a), the University may upon reasonable written notice to the Concessionaire modify or change the Performance Standards; provided, however, that any such change(s) or modification(s) in the aggregate in a Fiscal Year shall constitute a Compensation Event only if such change(s) or modification(s) (i) are not in response to any action or omission on the part of the Concessionaire or the Operator and (ii) result in an increase, during any Fiscal Year, in operating expenses attributable to compliance with such change(s) or modification(s) (taking into account all such previous changes or modifications applicable in such Fiscal Year or any previous Fiscal Year) in excess of \$100,000 (annually Adjusted for Inflation) which cannot be charged through to the University as part of O&M Costs or recovered as a New Approved Capital Improvement Cost. At the University's request, the Concessionaire shall perform all work required to implement and shall comply with all such modifications and changes, and in no event shall the Concessionaire be excused from compliance with any such modification or change.
- (c) The University shall have the right to undertake the work necessary to ensure implementation of and compliance with any such modification or change to the Performance Standards if the Concessionaire fails to do so within a reasonable period of time; provided, however, that to the extent that such work is undertaken by the University, the Concessionaire shall pay to the University within 10 Business Days following demand therefor, or the University may offset from amounts owing to the Concessionaire in connection with such modification or change, (i) with respect to changes pursuant to Section 6.3(a) all costs to comply with such Performance Standard and (ii) with respect to Section 6.3(b), the costs of the portion of the work performed in order to comply with the Performance Standards existing immediately prior to such modification or change, and the University shall be responsible only for the incremental costs of the additional work required in order to implement such proposed modification or change to the Performance Standards and, without duplication with the foregoing, the Concession Compensation with respect to such modification or change.

**ARTICLE 7**  
**UTILITY FEE, FIVE-YEAR PLAN, ENERGY SUPPLY AND ENERGY USE**  
**INTENSITY REDUCTION**

**Section 7.1. Utility Fee.**

- (a) As compensation for the services provided hereunder by the Concessionaire to the University in connection with the Utility System, the University shall pay to the Concessionaire the Utility Fee for each Fiscal Year or portion thereof during the Term as determined in accordance with the formula described in Schedule 5 and in the manner set forth in this Section 7.1. At least 180 Days prior to the commencement of any Fiscal Year during the Term, the Concessionaire shall provide a forecast of the Utility Fee to the University for the upcoming Fiscal Year (the “Forecast Utility Fee”), provided that the Concessionaire shall, until 30 Days prior to the commencement of such Fiscal Year, adjust such Forecast Utility Fee if necessary based on the portion of the Approved Five-Year Plan applicable to such Fiscal Year. The University shall pay the Forecast Utility Fee in 12 equal monthly installments, payable on the first Day of every month during the Fiscal Year. The Forecast Utility Fee for the first Fiscal Year of the Term shall be \$54,200,000 prorated based on the number of Days remaining in the first Fiscal Year after the Closing and payable in equal monthly installments over the number of months remaining in such Fiscal Year.
- (b) Within 60 Days after the end of each Fiscal Year, the Concessionaire shall deliver to the University a statement (the “Reconciliation Statement”) which states the actual Utility Fee for the preceding Fiscal Year and provides a detailed accounting of each component of the Utility Fee calculated in a form and with such detail as may be reasonably requested by the University for the determination of the Utility Fee set forth in the Reconciliation Statement. If the Reconciliation Statement reveals that the Utility Fee for a Fiscal Year is more than the Forecast Utility Fee for that Fiscal Year, the University agrees to pay the Concessionaire the difference in a lump sum within 30 Days after receipt of the Reconciliation Statement. If the Reconciliation Statement reveals that the Utility Fee for such Fiscal Year is less than the Forecast Utility Fee for that Fiscal Year, the Concessionaire will pay the University the difference in a lump sum within 30 Days after receipt of the Reconciliation Statement.
- (c) The records that the Concessionaire maintains with respect to the calculation of the actual Utility Fee shall be retained by the Concessionaire for a period of 5 Fiscal Years following the Fiscal Year to which such Utility Fee applied. The University shall have the right, through its Representatives, to examine, copy and audit such records at reasonable times, upon not less than 5 Business Days’ prior notice, at such place within the City of Columbus as the Concessionaire shall reasonably designate from time to time for the keeping of such records. All costs of any such audit shall be borne by the University; provided, however, that if such audit establishes that the Utility Fee for the applicable Fiscal Year was lower than the final determination thereof as set forth in the Reconciliation

Statement, by at least 1.0%, then the Concessionaire shall pay the cost of such audit. If, as a result of such audit, it is determined that the University has overpaid the Concessionaire on account of the Utility Fee, then the Concessionaire shall reimburse the University for the payments due within 30 Days after such determination. If the Concessionaire disputes the results of an audit conducted pursuant to this Section 7.1(c), the Concessionaire's sole remedy shall be to submit such dispute to the procedures set forth in Article 18.

- (d) In addition, if an audit conducted pursuant to Section 7.1(c) establishes that the Utility Fee for the applicable Fiscal Year was lower than the final determination thereof, as set forth in the Reconciliation Statement, by at least 5.0%, then in addition to paying the cost of such audit and reimbursing the University for the payments in accordance with Section 7.1(c), the Concessionaire shall pay, as liquidated damages, 3 times the amount of the difference between the Utility Fee and the amount set forth in the Reconciliation Statement. The University and the Concessionaire agree that it would be impracticable and extremely difficult to fix the actual damage to the University if the actual Utility Fee was lower than the amount shown in the Reconciliation Statement by at least 5.0%. The University and the Concessionaire therefore agree that, in such instance, 3 times the amount of the difference between the Utility Fee and the amount set forth in the Reconciliation Statement is a reasonable estimate of the University's damages and that the University shall be entitled to said sum as liquidated damages. If the Concessionaire disputes the results of an audit conducted pursuant to Section 7.1(c), the Concessionaire's sole remedy shall be to submit such dispute to the procedures set forth in Article 18.

## **Section 7.2. Updates to the Utility Fee and O&M Costs.**

- (a) The Parties acknowledge the importance of documenting and discussing best practices and Prudent Industry Practices for Comparable Utility Systems to determine whether the Parties should consider modifying the Performance Standards or the components of the Utility Fee. In connection therewith, the University shall form an EAC to liaise with the Concessionaire so that the University and the Concessionaire have an open dialogue with respect to such matters.
- (b) The EAC shall meet during the 4th Fiscal Year of the Term and at least every 5 Fiscal Years thereafter during the Term (provided that the University shall have the right to reasonably cause the EAC to meet more frequently) to assess the methodology of calculating the Utility Fee, including the determination of the adjustment to the Return on Equity Factor, and the Concessionaire may, through its Representative(s) on the EAC, at such meeting propose any changes in the methodology of the Utility Fee. The University and the Concessionaire shall consider, in good faith, any adjustments to the Utility Fee recommended by the EAC or the Concessionaire's Representative(s) at an EAC meeting. The obligation of the University and the Concessionaire is to consider any such

changes in good faith and no change may be made to the methodology of calculating the Utility Fee without the written consent of both Parties.

- (c) The EAC shall meet during the 9th Fiscal Year of the Term and at least every 10 Fiscal Years thereafter during the Term (provided that the University shall have the right to reasonably cause the EAC to meet more frequently) to conduct a full review of the categories of O&M Costs and the components thereof being included in the Utility Fee and the Capped O&M Ceiling and to determine if such categories of O&M Costs, the components of each category of O&M Costs or the Capped O&M Ceiling should be adjusted, and the Concessionaire may, through its Representative(s) on the EAC, at such meeting, propose any changes to the categories of O&M Costs and the components thereof being included in the Utility Fee and the Capped O&M Index. The University and the Concessionaire shall consider, in good faith, any adjustments to the categories of O&M Costs recommended by the EAC or the Concessionaire's Representative(s) at an EAC meeting. The obligation of the University and the Concessionaire is to consider any such changes in good faith and no change to the categories of O&M Costs may be made without the written consent of both Parties.
- (d) If either Party believes that the other Party did not consider any recommendation under Section 7.2(b) or Section 7.2(c) in good faith, such Party may submit such claim of bad faith to the dispute resolution process set forth in Article 18.

### **Section 7.3. Five-Year Plan.**

- (a) The Concessionaire shall submit to the University a proposed Initial Five-Year Plan on or before the first December 30 following the Closing Date and shall thereafter submit to the University a proposed Five-Year Plan at least 180 Days prior to the end of each Fiscal Year during the Term. Each proposed Five-Year Plan shall include the Capital Improvements, ECMs and Material Changes (and shall identify whether an item requested for Approval is a Capital Improvement, ECM or Material Change or a combination thereof) that the Concessionaire proposes to make in each Fiscal Year in such proposed Five-Year Plan as well as anticipated O&M Costs, delineated between Capped O&M Costs and Uncapped O&M Costs, and anticipated Supply Costs for each such Fiscal Year. The initial Five-Year Plan can include, and the University will consider in accordance with Section 4.3, proposed Capital Improvements and Material Changes to the Utility System to address any conditions of the Utility System existing prior to the Closing Date. Each proposed Five-Year Plan shall be submitted in a format reasonably acceptable to the University as of the date of submission.
- (b) The University shall convene the EAC after receipt of the proposed Five-Year Plan. The EAC shall review and provide comments to the Concessionaire on such proposed Five-Year Plan within 30 Days after receipt by the University thereof. The EAC's comments on such proposed Five-Year Plan shall not be binding on the University. The Concessionaire shall incorporate those comments



from the EAC that the Concessionaire elects to incorporate and shall then submit its proposed Five-Year Plan to the University at least 120 Days prior to the end of the Fiscal Year (or, in the case of the proposed Initial Five-Year Plan, as soon as reasonably practicable after receipt of the EAC's comments).

- (c) The University shall review and provide comments to the Concessionaire on the proposed Five-Year Plan, provided that to the extent pertaining to proposed Capital Improvements, ECMs or Material Changes relating to the first full Fiscal Year in the proposed Five-Year Plan, such review and comments shall be conducted and provided in accordance with Section 4.3(c), and provided further that, subject to Section 7.3(d), if the University shall have previously Approved any such Capital Improvement, ECM or Material Change included in the proposed Five-Year Plan, the University shall not have the right to modify or rescind such prior Approval to the extent of such prior Approval. The Concessionaire shall promptly incorporate and use the University's comments on the proposed Five-Year Plan to prepare a revised version thereof and submit such revised version to the University. This process shall continue until the University Approves the proposed Five-Year Plan.
- (d) The proposed Five-Year Plan Approved by the University shall become the Approved Five-Year Plan as of the commencement of the first Fiscal Year in such proposed Five-Year Plan (or, in the case of a proposed Initial Five-Year Plan, as of the date of the University's Approval); provided, however, that no portion of an Approved Five-Year Plan related to the 2nd through 5th full Fiscal Years therein shall be deemed Approved by the University, except to the extent that a Capital Improvement, ECM or Material Change is scheduled pursuant to such Approved Five-Year Plan to be started in the first full Fiscal Year and completed in the 2nd through 5th full Fiscal Years therein. For the avoidance of doubt, the Approval of a Five-Year Plan that includes a Capital Improvement, ECM or Material Change that is not scheduled to be commenced until the 2<sup>nd</sup> Fiscal Year therein at the earliest shall not be deemed an Approval of such Capital Improvement, ECM or Material for purposes of Article 4.
- (e) If the Concessionaire does not accommodate or otherwise resolve any comment provided by the University pursuant to Section 7.3(c), the Concessionaire shall deliver to the University, within 10 Days after receipt of the University's comments, a written explanation as to why accommodation or other resolution of such comment would not allow the Concessionaire to meet the requirements of Section 3.2(a)(ii). The explanation shall include the facts, analyses and reasons that support the conclusion regarding such comment. Any dispute between the Concessionaire and the University over such comment shall be resolved pursuant to the procedures set forth in Article 18.
- (f) If a proposed Five-Year Plan or a portion thereof is not Approved by the commencement of the first Fiscal Year in such proposed Five-Year Plan, the Approved Five-Year Plan or relevant portion thereof shall continue in effect until a new proposed Five-Year Plan is Approved, provided that in the case of the

proposed Initial Five-Year Plan, no Approved Five-Year Plan shall be in effect until the proposed Initial Five-Year Plan is Approved, and provided further that nothing in this Section 7.3 shall permit the Concessionaire to make a Capital Improvement, ECM or Material Change except if it is Approved in accordance with Section 4.3(c). Until the initial Five-Year Plan is Approved following the Closing Date, the Concessionaire shall operate the Utility System in accordance with this Agreement and otherwise in substantially the same manner it had been operated immediately prior to Closing provided that nothing in this Section 7.3 shall permit the Concessionaire to make a Capital Improvement, ECM or Material Change except if it is Approved in accordance with Section 4.3(c).

- (g) For the avoidance of doubt, the Concessionaire's right to receive the Utility Fee, subject to the limitations contained herein and in Schedule 5, shall not be modified or superseded by the Approved Five-Year Plan.
- (h) Except as otherwise provided in Section 7.3(c), the contents of any Approved Five-Year Plan shall not be binding on any future Five-Year Plan.
- (i) Notwithstanding anything to the contrary in this Agreement, the Parties acknowledge and agree that all payments to the Operator pursuant to any agreement between the Concessionaire and the Operator to operate the Utility System that have been previously Approved by the University on or prior to the Closing Date, shall be deemed Approved and shall require no further Approval for any Five-Year Plan, provided that such payments do not materially differ from the payments or payment mechanics that were Approved by the University in its Approval of the Operator or otherwise.

#### **Section 7.4. Energy and Water Supply.**

- (a) The Concessionaire shall assist the University with the procurement of sufficient electricity, natural gas or other energy supply inputs necessary to fully operate the Utility System as set forth in the Performance Standards (the "Supplies"). At the University's direction, assistance may include, but not be limited to, identification and development of Supply procurement opportunities, provision of market analysis and advice regarding the same, acting on behalf of the University to negotiate or assist in negotiating Supply purchases, acting on behalf of the University or assisting the University in the operation of bidding mechanisms to procure competitive retail Supplies. The University shall be responsible for paying all Supply Costs directly to the vendor of such Supplies. The University, in connection with its commitment to sustainability, minimization of environmental impact, responsible energy procurement, and its rights and responsibilities as the energy Supply customer of record, shall enter into any contracts with a third party for providing Supplies to the Utility System (each, a "Supply Contract"). The University shall determine the types and sources of the Supplies and the appropriate entity (among the Concessionaire, the Operator and the University) to execute each Supply Contract, with the Concessionaire or Operator executing pursuant to a power of attorney. In any

case, regardless of which entity executes a Supply Contract, the University will be considered as the exclusive customer of the Supplies procured pursuant to this Section 7.4(a) or used for the operation of the Utility System. Notwithstanding the foregoing, the Parties acknowledge that as of the Time of Closing, there shall be in place certain Supply Contracts to provide Supplies as described in Schedule 6, and the Concessionaire's obligations under this Section 7.4(a) with respect to the Supplies which are the subject of such Supply Contract shall be met by managing those Supply Contracts until their expiration or termination, at which time the Concessionaire shall be responsible for assisting the University with the procurement of those Supplies for the Columbus Campus as provided herein immediately following the expiration or termination of those Supply Contracts. For the avoidance of doubt, if the third-party supplier of the Supplies fails to deliver such Supplies pursuant to the applicable Supply Contract, (i) such failure shall be a Delay Event (except with respect to any failure to deliver Supplies on University locations outside of the Columbus Campus) and (ii) the Concessionaire acting on behalf of the University shall use commercially reasonable efforts to cause such third-party supplier to deliver such Supplies as soon as reasonably practicable, and (iii) as necessary, assist the University with the prompt replacement of such third-party supplier.

- (b) The Concessionaire shall, upon written notice from the University, be responsible for assisting the University with the procurement, billing and/or management of Supplies to the University or its Affiliates on University locations outside of the Columbus Campus, and such assistance with the procurement, billing and/or management of Supplies shall be deemed part of the Utility System Operations. For clarification purposes, the Concessionaire shall be responsible for assisting the University with the management of Supplies under any existing Supply Contract described in Schedule 6 as provided in Section 7.4(a).
- (c) The Concessionaire shall ensure that Supply Contracts provide that invoices are remitted to the Concessionaire, if so requested by the University in writing, or to such other entity as identified by the University. Promptly after receipt of such an invoice for Supply Costs from a third party but in no event more than 5 Business Days after receipt thereof, the Concessionaire shall forward the Supplier's invoice to the University, and the Concessionaire shall have no obligation to pay such Supply Costs.
- (d) The University shall supply to the Utility System, the water reasonably necessary for the Concessionaire to operate the Utility System and perform its obligations hereunder. The water supplied to the Utility System may be supplied through either a public water system or other private water source. All water supplied to the Utility System shall be of a quality that meets or exceeds the standards required by the United States Safe Drinking Water Act (42 U.S.C. § 300f *et seq.*) and the State of Ohio Safe Drinking Water Standards (Ohio Rev. Code. Ann. § 6109). Any failure to provide water to the Utility System by the University shall not be deemed a University Default; however, failure to provide sufficient

water shall be a Delay Event. The Concessionaire acknowledges that the University receives and pays for the water used to supply the Utility System from a third party, which, as of the Bid Date, is the City of Columbus.

**Section 7.5. Energy Use Intensity Reduction.**

- (a) The Concessionaire shall cause the Energy Use Intensity for the Fiscal Year ending on June 30, 2028 to be equal to or less than 75% of the Energy Use Intensity for the Fiscal Year ending on June 30, 2017. Throughout the Term, the Concessionaire shall also cause, at the end of each Fiscal Year, the arithmetic average Energy Use Intensity for that Fiscal Year and the immediately preceding 2 Fiscal Years to be the same or less than the arithmetic average Energy Use Intensity for the 3 immediately preceding Fiscal Years, provided that the University hereby waives any rights or remedies it may have under this Agreement for the Concessionaire's failure to do so in the first 2 Fiscal Years after the Fiscal Year in which the Closing took place. For exemplary purposes only, the Concessionaire shall, in Fiscal Year 2021, cause the arithmetic average Energy Use Intensity for Fiscal Years 2019 through 2021 to be the same or less than the arithmetic average Energy Use Intensity for Fiscal Years 2018 through 2020. The Concessionaire shall provide its plan to maintain or reduce Energy Use Intensity to the University 180 Days prior to the Fiscal Year for the University's Approval. To the extent that the Concessionaire elects to use Capital Improvements or ECMs to meet the requirements in this Section 7.5(a), any such Capital Improvement or ECM shall be subject to Article 4 and no Capital Improvement or ECM may be constructed or implemented without the Approval of the University pursuant to Section 4.3. The EAC shall meet at least every 10 Fiscal Years, commencing on the 8th Fiscal Year of the Term, to discuss and agree upon any additional energy conservation measures that the Concessionaire will be directed to take by the University and to discuss the University's overall energy usage and ECMs.
- (b) Within 2 Years after the Closing Date, the University shall have the right to request in writing that the Concessionaire diligently prepare and provide to the University a detailed study with recommendations and proposals for opportunities to reduce the energy use intensity of certain regional campuses owned by the University, and the Concessionaire shall in good faith discuss with the University the Concessionaire implementing such recommendations and proposals.
- (c) Within 60 Days after the determination of the Energy Use Intensity for the Fiscal Year ending on June 30, 2028, the University shall pay to the Concessionaire the first installment of the EUI bonus pursuant to the table on Schedule 21, if applicable. Such bonus, if any, shall be equal to the amount shown in the cell of the table on Schedule 21, where the column heading is the number closest to and greater than the 10-Year ECM Costs and the row heading is a number closest to and less than the 10-Year EUI Reduction. The EUI bonus will be paid in 10 equal annual installments. After the first installment paid in accordance with

Schedule 21, each subsequent installment will be paid to the Concessionaire on or before June 30 of each of the next nine years.

**Section 7.6. CHP Feasibility Study.** At the reasonable request of the University, the Concessionaire shall promptly conduct a detailed feasibility study and recommendation regarding the construction of a combined heat and power plant as part of the Utility System and provide such study and recommendation to the University to the extent the University Approves the O&M Costs related thereto in advance.

**Section 7.7. Water Conservation Feasibility Study.** At the reasonable request of the University, the Concessionaire shall promptly conduct and provide to the University a detailed feasibility study and recommendation regarding opportunities for the University to reduce its consumption of water in the Utility System on the Columbus Campus to the extent the University Approves the O&M Costs related thereto in advance.

## **ARTICLE 8 REPORTING; AUDITS; INSPECTIONS**

### **Section 8.1. Reports.**

- (a) *Incident Management and Notifications.* The Concessionaire shall (i) provide notice to the University of all Emergencies as promptly as possible, and, in any event, not later than 6 hours after the Concessionaire or the Operator becomes aware of the Emergency, and (ii) promptly provide notice to the University of all material accidents and incidents occurring with respect to the Utility System and of all claims in excess of \$25,000 annually made by or against the Concessionaire or potential claims in excess of \$25,000 annually that the Concessionaire reasonably expects to make against, or to be made against it by, third parties.
- (b) *Environmental Incident Management and Notifications.* The Concessionaire shall provide notice to the University as promptly as possible, and, in any event, not later than 6 hours after the Concessionaire becomes aware of the Release (accidental or otherwise) of any reportable quantity, as defined under applicable Environmental Law, of Hazardous Substances occurring with respect to the Utility System or otherwise on the Columbus Campus, which notice shall include the time of such Release, the agencies involved, the damage that has occurred and the remedial action taken. The Concessionaire shall be financially responsible and shall pay the costs and expenses of any remediation required as a result of any such Release of Hazardous Substances caused by the willful misconduct or negligent action of, or permitted by the negligent inaction of, the Concessionaire or any of its Representatives, which costs shall not be recoverable by the Concessionaire as part of the Utility Fee or otherwise pursuant to this Agreement. The Concessionaire shall not be financially responsible for the actions or inactions of third parties except for (i) those actions or inactions with respect to which the Concessionaire or any of its Representatives shall have had prior knowledge of and could have used

commercially reasonable efforts to prevent or mitigate and (ii) those actions or inactions consented to by the Concessionaire or any of its Representatives.

- (c) *Financial Reports.* The Concessionaire shall deliver to the University within 120 Days after the end of each Fiscal Year a copy of the audited balance sheets of the Concessionaire at the end of each such Fiscal Year and the related audited statements of income, changes in equity and cash flows for such Fiscal Year, including, in each case, the notes thereto, together with the report thereon of the independent certified public accountants of the Concessionaire, in each case in a manner and containing information consistent with the Concessionaire's current practices and certified by the Concessionaire's chief financial officer that such financial statements fairly present the financial condition and the results of operations, changes in equity and cash flows of the Concessionaire as at the respective dates of and for the periods referred to in such financial statements, all in accordance with GAAP.
- (d) *Regular Reports.* The Concessionaire shall deliver to the University all reports and information as set forth in the Performance Standards in the time and format described in the Performance Standards.

**Section 8.2. Information.**

- (a) *Furnish Information.* At the request of the University, the Concessionaire shall, at the Concessionaire's cost and expense and at any and all reasonable times during the Term not more frequently than once each Quarter: (i) make available or cause to be made available (and, if requested by the University, furnish or cause to be furnished) to the University all information relating to the Utility System Operations, this Agreement or the Utility System as may be specified in such request and as shall be in the possession or control of the Concessionaire or its Representatives, and (ii) permit the University, after giving 10 Business Days' prior notice to the Concessionaire (which notice shall identify the Persons the University requests to be present for an interview and describe with reasonable specificity the subject matter to be raised in the interview) to request the Concessionaire's approval, which approval shall not be unreasonably withheld, conditioned, or delayed, to discuss the obligations of the Concessionaire under this Agreement with any of the directors, officers, employees or managers of the Concessionaire, the Operator or their respective Representatives at times and places on the Columbus Campus acceptable to all attendees (it being agreed that the Concessionaire shall have the right to be present during any such discussions with the Operator or Representatives of the Concessionaire or the Operator), for the purpose of enabling the University to determine whether the Concessionaire is in compliance with this Agreement. For the avoidance of doubt, this Section 8.2(a) does not impose a requirement to retain information not otherwise retained in the normal course of business or required to be retained by applicable Law.
- (b) *Confidentiality.* Unless disclosure is required by applicable Law, the University shall keep confidential any information obtained from the Concessionaire or its

Representatives that constitutes a “trade secret” as defined in Ohio Rev. Code Ann. § 1333.61. In the event that the Concessionaire seeks to defend an action seeking the disclosure of information that the Concessionaire determines to be confidential pursuant to this Section 8.2(b), the University shall use commercially reasonable efforts to cooperate in such action at no out-of-pocket cost to the University, provided that the University shall not be required to institute any legal action against the requesting party. Notwithstanding anything to the contrary herein, the University and the Concessionaire may disclose the United States federal tax treatment and tax structure of the Transaction.

### **Section 8.3. Inspection, Audit and Review Rights of the University.**

- (a) *Audit Right.* In addition to the rights set out in Section 7.1(c) and Section 8.2, the University may, at all reasonable times, upon 10 Business Days’ prior notice, cause a Representative designated by it to carry out an Audit and Review of the information required to be maintained or delivered by the Concessionaire under this Agreement in connection with the performance of the Utility System Operations for the purpose of verifying the information contained therein verifying Utility System Operations and to otherwise track utility usage patterns and shall be entitled to make copies thereof and to take extracts therefrom, at the University’s expense but, in any event, subject to Section 8.2(b). The Concessionaire shall, at reasonable times, make available or cause to be made available to the University or its designated Representative such information and material as may reasonably be required by the University or its designated Representative for its purposes and otherwise provide such cooperation as may be reasonably required by the University in connection with the same; provided, however, that such Audit and Review rights are limited to one Audit and Review per Fiscal Year.
- (b) *Inspection Right.* The University and its Representatives shall, at all reasonable times and upon reasonable prior notice and subject to the Concessionaire’s reasonable safety requirements and protocols, have access to the Utility System and every part thereof, and the Concessionaire, at the reasonable cost and expense of the Concessionaire, shall and shall cause its Representatives to furnish the University with every reasonable assistance for inspecting the Utility System and the Utility System Operations for the purpose of Auditing the information relating to the Utility System Operations or ascertaining compliance with this Agreement and applicable Law subject to reasonable restrictions on access to confidential and proprietary information as determined by the Concessionaire.
- (c) *Tests.* The University and its Representatives shall, with the prior consent of the Concessionaire, which consent shall not be unreasonably withheld, conditioned or delayed, be entitled, at the sole cost and expense of the University and at any time and from time to time, to perform or cause to be performed, in accordance with Prudent Industry Practices, any test, study or investigation in connection with the Utility System or the Utility System Operations as the University may

reasonably determine to be necessary in the circumstances, and the Concessionaire, at the cost and expense of the Concessionaire, shall, and shall cause its Representatives to, furnish the University or its Representatives with reasonable assistance in connection with the carrying out of such tests, procedures, studies and investigations.

- (d) *No Waiver.* Failure by the University or its Representatives to inspect, review, test or Audit the Concessionaire's responsibilities under this Agreement or any part thereof, or the performance by the Concessionaire of the Utility Services, or the information relating to the Utility System Operations, shall not constitute a waiver of any of the rights of the University hereunder or any of the obligations or liabilities of the Concessionaire hereunder. Inspection, review, testing or Audit not followed by a notice of Concessionaire Default shall not constitute a waiver of any Concessionaire Default or constitute an acknowledgement that there has been or will be compliance with this Agreement and applicable Law.
- (e) *No Undue Interference.* In the course of performing its inspections, reviews, tests and Audits hereunder, the University shall minimize the effect and duration of any disruption to or impairment of the Utility System Operations or the Concessionaire's rights or responsibilities under this Agreement, having regard to the nature of the inspections, reviews, tests and Audits being performed, except as necessary in the case of investigations of possible criminal conduct or University ordinance violations.

**Section 8.4. Audits, Assistance, Inspections and Approvals.** Wherever in this Agreement reference is made to the University or its Representatives providing assistance, services, Approvals or consents to or on behalf of the Concessionaire or its Representatives or to the University or its Representatives performing an Audit or inspecting, testing, reviewing or examining the Utility System, the Utility System Operations or any part thereof or the books, records, Documents, budgets, proposals, requests, procedures, certificates, plans, drawings, specifications, contracts, agreements, schedules, reports, lists or other instruments of the Concessionaire or its Representatives, such undertaking by the University or its Representatives shall not relieve or exempt the Concessionaire from, or represent a waiver of, any requirement, liability, Concessionaire Default, covenant, agreement or obligation under this Agreement or at law or in equity and shall not create or impose any requirement, liability, covenant, agreement or obligation (including an obligation to provide other assistance, services or Approvals) on the University or its Representatives not otherwise created or imposed pursuant to the express provisions of this Agreement.

## **ARTICLE 9 REPRESENTATIONS AND WARRANTIES**

**Section 9.1. Representations and Warranties of the University.** The University makes the following representations and warranties to the Concessionaire and acknowledges that the Concessionaire and its Representatives are relying upon such representations and warranties in entering into this Agreement:



- (a) *Organization.* The University is an instrumentality of the State of Ohio duly organized and existing under the laws of the State of Ohio.
- (b) *Power and Authority.* The University has (i) duly authorized and approved the execution and delivery of this Agreement and (ii) duly authorized and approved the performance by the University of its obligations contained in this Agreement. The University has the power and authority to enter into this Agreement and to do all acts and things and execute and deliver all other documents as are required hereunder to be done, observed or performed by it in accordance with the terms hereof.
- (c) *Enforceability.* This Agreement has been duly authorized, executed and delivered by the University and constitutes a valid and legally binding obligation of the University, enforceable against the University in accordance with the terms hereof, subject only to applicable bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors generally and to general principles of equity.
- (d) *Title.* At the Time of Closing, the University will have good and sufficient title (or good and sufficient title will be had for the benefit of the University) to the Utility Facilities, the Utility System Land, the Utility System Assets and the Tunnels necessary for the Utility System Operations pursuant to this Agreement, subject only to Permitted University Encumbrances, and will be able to transfer or grant such interest to the Concessionaire as provided in this Agreement. Subject to any and all Permitted University Encumbrances existing at the Time of Closing and to the Actual Knowledge of the University, there is no recorded or unrecorded agreement, contract, option, commitment, right, privilege or other right of another binding upon, or which at any time in the future may become binding upon, the University to sell, transfer, convey, subject to lien, charge, grant a security interest in or in any other way dispose of or materially encumber the Utility System. Subject to any and all Permitted University Encumbrances and to the Actual Knowledge of the University, the recorded or unrecorded restrictions, exceptions, easements, rights of way, reservations, limitations, interests and other matters that affect title to the Utility System (or any portion thereof) do not materially adversely affect the Concessionaire's ability to operate the Utility System in accordance with the terms hereof. No indebtedness for borrowed money of the University is or will be secured by any right or interest in the Utility System or the revenues or income therefrom, and no Person will have any claim or right to, or interest in, any income, profits, rents or revenue derived by the Concessionaire from or generated with respect to the Utility System (other than the Concessionaire and any claims, rights or interests granted by or otherwise relating to the Concessionaire); provided, however, the foregoing shall not apply to (i) revenues to which the University is or may be entitled to under this Agreement, (ii) revenues or income derived after the End Date, (iii) revenues or income received by the University from students or (iv) revenues or income received by the University from third parties as reimbursement for Utilities received by such parties.

- (e) *No Conflicts.* The execution and delivery of this Agreement by the University, the consummation of the Transaction (including the operation of the Utility System in accordance with the terms of this Agreement) and the performance by the University of the terms, conditions and provisions hereof have not and will not contravene or violate or result in a breach of (with or without the giving of notice or lapse of time, or both) or acceleration of any material obligations of the University under (i) any applicable Law, (ii) any agreement, instrument or document to which the University is a party or by which it is bound or (iii) the University's governing documents.
- (f) *Consents.* No Consent is required to be obtained by the University from, and no notice or filing is required to be given by the University to or made by the University with, any Person (including any Governmental Authority) in connection with the execution, delivery and performance by the University of this Agreement or the consummation of the Transaction.
- (g) *Compliance with Law; Litigation; Environmental Matters.*
  - (i) The University has operated and is operating the Utility System in compliance, in all material respects, with all applicable Laws, and the University is not in breach of any applicable Law that would reasonably be expected to have a Material Adverse Effect or a material adverse effect on the Concessionaire. To the Actual Knowledge of the University, (A) the University is in compliance, in all material respects, with the terms and conditions of all Authorizations from Governmental Authorities, (B) no claim has been made by any Governmental Authority to the effect that an Authorization that the University has not obtained is necessary in respect of the operation of the Utility System, and (C) no additional Authorizations from any Governmental Authority are necessary for the operation of the Utility System as currently being operated.
  - (ii) There is no action, suit or proceeding, at law or in equity, or before or by any Governmental Authority, pending nor, to the Actual Knowledge of the University, threatened against the University prior to or at the Time of Closing, which would reasonably be expected to have a Material Adverse Effect or a material adverse effect on the Concessionaire. As of the date hereof, there is no action, suit or proceeding, at Law or in equity, or before or by any Governmental Authority, pending nor, to the Actual Knowledge of the University, threatened against the University which could materially affect the validity or enforceability of this Agreement.
  - (iii) There has been no Release of Hazardous Substances at, on or under the Utility Facilities that would reasonably be expected to have a Material Adverse Effect or a material adverse effect on the Concessionaire, except as cured to the satisfaction of the applicable Governmental Authority. To the Actual Knowledge of the University, (a) there is no pending investigation by a Governmental Authority concerning any Release of

Hazardous Substances in connection with the Utility System or the Utility Facilities and (b) there has been no Release of Hazardous Substances in connection with the Utility System or the Utility Facilities that could reasonably result in liability to the Concessionaire.

- (h) *Financial Information.* The financial information of the University relating to the Utility System attached hereto as Schedule 9, which includes operations and maintenance costs and expenditures for Capital Improvements for the periods ended June 30, 2012 through June 30, 2016, fairly presents the financial information disclosed thereon with respect to the Utility System for the periods stated in such financial information based on the University's internal policies.
- (i) *Utility System Contracts.* The University provided to the Concessionaire the true, correct and complete copies of each of the Utility System Contracts as of the Setting Date, and none of those Utility System Contracts have been terminated, amended, modified, supplemented or otherwise changed since the Setting Date. Each Utility System Contract is capable of being assigned to the Concessionaire, except as noted in Schedule 4, and is in full force and effect. The University is not in material breach of its obligations under any Utility System Contract, and no act or event has occurred which, with notice or lapse of time, or both, would constitute a material breach thereof, and, to the Actual Knowledge of the University, no other party to any Utility System Contract is in material breach of its obligations under any Utility System Contract, and no act or event has occurred with respect to any such party, which with notice or lapse of time, or both, is or would reasonably be expected to constitute a material breach thereof.
- (j) *Absence of Changes.* Since June 30, 2016, there has not been any transaction or occurrence that has resulted or is reasonably likely to result in a Material Adverse Effect or a material adverse effect on the University. Since June 30, 2016 through the Closing, the University and the University's Contractors have operated the Utility System in a manner consistent with past practice and have not, for example, intentionally increased or decreased efforts and resources related to operations, maintenance or enforcement so as to reduce the value of the Concessionaire Interest.
- (k) *Brokers.* Except for Barclays Capital Inc. ("Barclays"), whose fees will be paid by the University, there is no investment banker, broker, finder or other intermediary which has been retained by or is authorized to act on behalf of the University who might be entitled to any fee or commission from the University in connection with the Transaction. There is also no investment banker, broker, finder or other intermediary which has been retained by or is authorized to act on behalf of the University who might be entitled to any fee or commission from the Concessionaire in connection with the Transaction.
- (l) *Accuracy of Information.* To the Actual Knowledge of the University, the factual and past historical information regarding the Utility System that the

University provided to the Concessionaire in the virtual data room labeled “Project Pinta” hosted by IntraLinks, Inc. was accurate in all material respects at the time such information was prepared, except to the extent the University removed, revised or replaced such information prior to the Setting Date.

- (m) *Undisclosed Defects.* To the Actual Knowledge of the University, there are no material defects of the Utility System that could reasonably be expected to prevent the Utility System from being operated in accordance with the Performance Standards and Prudent Industry Practices.
- (n) *Tax Representations.* Any Tax-Advantaged Bond of the University, the proceeds of which have been allocated to expenditures for any portion of the Utility System, either (i) has been retired in accordance with its terms and is no longer outstanding, (ii) has been remediated pursuant to and in accordance with the provisions of Treasury Regulations Section 1.141-12 or (iii) has not had its proceeds allocated to expenditures for the Utility System in an amount equal to or in excess of that which would cause such Tax-Advantaged Bond to be a “private activity bond” within the meaning of Section 141 of the Code.

**Section 9.2. Representations and Warranties of the Concessionaire.** The Concessionaire makes the following representations and warranties to the University (and acknowledges that the University is relying upon such representations and warranties in entering into this Agreement):

- (a) *Organization.* The Concessionaire is duly organized, validly existing and in good standing under the laws of the state of its organization. The capital stock, units, partnership or membership interests and other equity interests or securities of the Concessionaire (including options, warrants and other rights to acquire any such equity interests) are owned by the Persons set forth in the written certification that the Concessionaire delivered to the University prior to the date hereof.
- (b) *Power and Authority.* The Concessionaire has the power and authority to enter into this Agreement and to do all acts and things and execute and deliver all other documents as are required hereunder to be done, observed or performed by it in accordance with the terms hereof.
- (c) *Enforceability.* This Agreement has been duly authorized, executed and delivered by the Concessionaire and constitutes a valid and legally binding obligation of the Concessionaire, enforceable against it in accordance with the terms hereof, subject only to applicable bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors generally and to general principles of equity.
- (d) *No Conflicts.* The execution and delivery of this Agreement by the Concessionaire, the consummation of the Transaction and the performance by the Concessionaire of the terms, conditions and provisions hereof have not and

will not contravene or violate or result in a material breach of (with or without the giving of notice or lapse of time, or both) or acceleration of any material obligations of the Concessionaire under (i) any applicable Law, (ii) any material agreement, instrument or document to which the Concessionaire is a party or by which it is bound or (iii) the articles, bylaws or governing documents of the Concessionaire.

- (e) *Consents.* No Consent is required to be obtained by the Concessionaire from, and no notice or filing is required to be given by the Concessionaire to, or made by the Concessionaire with, any Person (including any Governmental Authority) in connection with the execution, delivery and performance by the Concessionaire of this Agreement or the consummation of the Transaction, except for such consents which have been or will be obtained and notices which have been or will be given as of the Closing Date.
- (f) *Compliance with Law; Litigation.* The Concessionaire is not in breach of any applicable Law that could have a Material Adverse Effect. Neither the Concessionaire nor any Affiliate of the Concessionaire is listed on any of the following lists maintained by the Office of Foreign Assets Control of the U.S. Department of the Treasury, the Bureau of Industry and Security of the U.S. Department of Commerce or their successors or on any other list of Persons with which the University may not do business under applicable Law: the Specially Designated Nationals List, the Denied Persons List, the Unverified List, the Entity List, and solely with respect to the Concessionaire and its parent, the Debarred List. There is no action, suit or proceeding, at law or in equity, or before or by any Governmental Authority, pending nor, to the best of the Concessionaire's knowledge, threatened against the Concessionaire prior to or at the Time of Closing, which will have a material adverse effect on (i) the Transaction or (ii) the validity or enforceability of this Agreement.
- (g) *Accuracy of Information.* To the actual knowledge of the Concessionaire, all information regarding the Concessionaire or the Operator provided to the University by or on behalf of the Concessionaire or the Operator was accurate in all material respects at the time such information was provided.
- (h) *Operator.* To the extent the Operator is not the Concessionaire, the Concessionaire represents and warrants as follows: To the best knowledge of the Concessionaire: (i) the Operator is duly organized, validly existing and in good standing under the laws of the state of its organization; (ii) the capital stock or other equity interests of the Operator (including options, warrants and other rights to acquire capital stock) is owned by the Persons set forth in the written certification that the Concessionaire delivered to the University prior to the date hereof; (iii) the Operator has the power and authority to do all acts and things and execute and deliver all other documents as are required hereunder to be done, observed or performed by it in connection with its engagement by the Concessionaire; (iv) the Operator has all necessary expertise, qualifications, experience, competence, skills and know-how to perform the Utility System

Operations in accordance with this Agreement; (v) the Operator is not in breach of any applicable Law that would have a Material Adverse Effect; and (vi) is authorized to do business in the State of Ohio.

- (i) *Brokers.* Except for Royal Bank of Canada, whose fees will be paid by the Concessionaire or its Affiliates, there is no investment banker, broker, finder or other intermediary which has been retained by or is authorized to act on behalf of the Concessionaire or any of its Affiliates who might be entitled to any fee or commission in connection with the Transaction which could become a claim on, a liability of, or an Encumbrance on, the Utility System.

**Section 9.3. Non-Waiver.** No investigations made by or on behalf of any Party at any time shall have the effect of waiving, diminishing the scope of or otherwise affecting any representation or warranty made by the other Party in this Agreement or pursuant to this Agreement. No waiver by a Party of any condition, in whole or in part, shall operate as a waiver of any other condition.

**Section 9.4. Survival.**

- (a) *University's Representations and Warranties.* The representations and warranties of the University contained in Section 9.1 shall survive and continue in full force and effect for the benefit of the Concessionaire as follows: (i) as to the representations and warranties contained in Sections 9.1(a) through 9.1(g), inclusive, without time limit; and (ii) as to all other matters, for a period of 24 months following the Closing Date unless a bona fide notice of a Claim shall have been given, in writing, in accordance with Section 22.1, prior to the expiry of that period, in which case the representation and warranty to which such notice applies shall survive in respect of that Claim until the final determination or settlement of that Claim, provided such determination or settlement is being pursued diligently and in good faith by the applicable Party.
- (b) *Concessionaire's Representations and Warranties.* The representations and warranties of the Concessionaire contained in Section 9.2 shall survive and continue in full force and effect for the benefit of the University as follows: (i) as to the representations and warranties contained in Sections 9.2(a) through 9.2(h), inclusive, without time limit; and (ii) as to all other matters, for a period of 24 months following the Closing Date unless a bona fide notice of a Claim shall have been given, in writing, in accordance with Section 22.1, before the expiry of that period, in which case the representation and warranty to which such notice applies shall survive in respect of that Claim until the final determination or settlement of that Claim, provided such determination or settlement is being pursued diligently and in good faith by the applicable party.
- (c) *Modification of Statutes of Limitations.* The survival periods set forth in this Section 9.4 shall apply with respect to all Claims notwithstanding any statute of limitations that would be applicable to such Claims under applicable Law. The Parties acknowledge and agree that they intend to modify the statutes of

limitations with respect to all Claims to the extent such statutes of limitations would conflict with the provisions set forth in this Section 9.4.

## **ARTICLE 10 FINANCE OBLIGATIONS**

**Section 10.1. Concessionaire's Obligations.** The Concessionaire shall be responsible for obtaining any financing for the performance of its obligations under this Agreement, which financing shall comply with all requirements of this Agreement, except with respect to the University's funding of costs and expenses related to any Capital Improvements for which the University has elected to fund the cost of construction pursuant to Section 4.4, or as otherwise specifically set forth herein. The Concessionaire shall be permitted to issue additional Leasehold Mortgage Debt or refinance existing Leasehold Mortgage Debt at any time during the Term provided that, as a condition thereof, the Concessionaire must comply with Section 3.6 in connection therewith.

**Section 10.2. University's Obligations.** The University shall, to the extent consistent with applicable Law and at the sole cost and expense of the Concessionaire, cooperate with the Concessionaire with respect to documentation reasonably necessary to obtain, maintain and replace financing for the performance of the obligations of the Concessionaire hereunder. The University's cooperation may include reviewing, Approving and executing documents which substantiate the terms of this Agreement (including any consents or agreements necessary to confirm that the debt evidenced by the relevant financing constitutes a Leasehold Mortgage Debt) and making information and material relating to the Utility System Operations available to any of the Concessionaire's lenders or proposed lenders to facilitate financing to the extent permitted by applicable Law and contractual obligations with third parties and to the extent reasonable in the circumstances. If requested in writing to do so by the Concessionaire, the University shall, at the sole cost and expense of the Concessionaire, use its commercially reasonable efforts to cause the University's independent public accountants to reasonably cooperate in connection with the Concessionaire's public or private offering of securities, as the case may be. In addition, the University shall, promptly upon the request of the Concessionaire or any Leasehold Mortgagee, execute, acknowledge and deliver to the Concessionaire, or any of the parties specified by the Concessionaire, standard consents and estoppel certificates with respect to this Agreement which may be qualified, after reasonable diligence, to the best of the knowledge and belief of a designated Representative of the University. Nothing herein shall require the University to incur any additional obligations or liabilities (unless the University shall have received indemnification, as determined in the University's discretion, with respect thereto) or to take any action, give any consent or enter into any document inconsistent with the provisions of this Agreement.

**Section 10.3. Concessionaire's Obligation for Estoppel Certificates.** The Concessionaire shall, promptly upon the request of the University, execute and deliver to the University, or any of the parties specified by the University, standard consents and estoppel certificates with respect to this Agreement which may be qualified to the best of the knowledge and belief of a designated Representative of the Concessionaire. Nothing herein shall require the Concessionaire to incur any additional obligations or liabilities or to take any action, give any

consent or enter into any document inconsistent with the provisions of this Agreement or applicable Law.

**Section 10.4. Prohibited Tax Shelter Transactions.** The Concessionaire covenants and agrees that it shall not enter into any lease, sublease, concession, management agreement, operating agreement or other similar arrangement or other transaction that would cause the University to become a party to a “prohibited tax shelter transaction” within the meaning of Section 4965 of the Code (it being agreed that, for purposes of this Section 10.4, the University shall not be treated as having become a party to any such transaction solely by virtue of the execution of this Agreement or any lease, sublease, concession, management agreement, operating agreement or other similar arrangement or other transaction to which the University has consented). A violation of this Section 10.4 by the Concessionaire shall entitle the University to (a) recover from the Concessionaire, to the extent permitted by applicable Law, the amount of any Tax liability to which the University or any University official is subject and (b) require the Concessionaire, at the Concessionaire’s expense, to prepare timely all statements and returns, and to maintain all lists and similar information that the University becomes obligated to disclose, file or maintain with any taxing authority or participant or otherwise as a result of such transaction.

## **ARTICLE 11 COMPLIANCE**

**Section 11.1. Compliance with Laws.** The Concessionaire must at all times at its own cost and expense (but subject to the Concessionaire’s express rights hereunder with respect to such costs and expenses, including its right to include the reasonable cost of compliance with any Law enacted after the Setting Date in the Uncapped O&M Costs in accordance with the definition thereof) observe and comply, in all material respects, and cause the Utility System Operations to observe and comply, in all material respects, with all applicable Laws now existing or later in effect, including those Laws expressly enumerated in this Article 11, and those that may in any manner apply with respect to the performance of the Concessionaire’s obligations under this Agreement. The Concessionaire shall cause any contractor or subcontractor engaged in connection with the Utility Services to represent that it is not debarred from contract awards in accordance with Ohio Rev. Code. Ann. §§ 125.25 and 153.02. The Concessionaire shall and shall cause any contractor or subcontractor engaged in connection with the Utility Services to comply with and to submit the filings required by Ohio Rev. Code. Ann. § 125.111. The Concessionaire acknowledges that to the extent any funds subject to appropriation are used for the payment of the University’s obligations under this Agreement, those obligations shall be subject to Ohio Rev. Code Ann. § 126.07. The Concessionaire shall notify the University within 7 Days after receiving written notice from a Governmental Authority that the Concessionaire may have violated any Laws.

### **Section 11.2. Non-Discrimination.**

- (a) *Non-Discrimination Requirements.* The Concessionaire shall comply with, and maintain employment policies in a manner consistent with, all applicable Laws regarding equal employment opportunity and non-discrimination in employment, including: (i) the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.* (1981);



(ii) the Civil Rights Act of 1991, P.L. 102-166; (iii) Executive Order Number 11246, 30 Fed. Reg. 12,319 (1965), reprinted in 42 U.S.C. § 2000(e) note, as amended by Executive Order Number 11375, 32 Fed. Reg. 14,303 (1967) and by Executive Order Number 12086, 43 Fed. Reg. 46,501 (1978); (iv) the Age Discrimination Act, 42 U.S.C. §§ 6101-6106 (1981); (v) the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1967); (vi) the Rehabilitation Act of 1973, 29 U.S.C. §§ 793-794 (1981); (vii) the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (1990); (viii) the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301 *et seq.*; (ix) the Ohio Fair Employment Practices Law, Ohio Rev. Code Ann. § 4112.01 *et seq.*; (x) the Ohio Equal Pay Act, Ohio Rev. Code Ann. §§ 4111.13, 4111.17 and 4111.99; and (xi) the Ohio Pregnancy Discrimination/Maternity Leave Act, Ohio ADC § 4112-5-05.

- (b) *Contract Provisions.* The Concessionaire shall cause all Contractors to comply with each of the federal laws and Ohio laws referenced in this Section 11.2, and shall include a provision to such effect in each contract entered into with any Contractor.

**Section 11.3. Compliance with Wage and Hour Laws.** The Concessionaire shall comply with all applicable Laws governing employment and/or employee wages and hours, including: (i) the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*; (ii) the Ohio Wage Payment Law, Ohio Rev. Code Ann. § 4113.15 *et seq.*; (iii) the Ohio Minimum Wage Law, Ohio Rev. Code Ann. § 4111.01 *et seq.*; and (iv) the Ohio Prevailing Wage Law, Ohio Rev. Code Ann. § 4115 *et seq.* (collectively, the “Wage and Hour Laws”). Specifically in connection with Ohio Prevailing Wage Law and in no way limiting the obligation of Concessionaire to otherwise comply with applicable Laws, Concessionaire shall supply or shall cause to be supplied to the University’s prevailing wage coordinator, all schedules, affidavits, certified payroll reports, and any other items required by Ohio Rev. Code Ann. § 4115.071 in the time and manner provided for therein.

**Section 11.4. Safety Laws.** The Concessionaire shall comply with and maintain employment policies in a manner consistent with all applicable Laws regarding workplace safety, including the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.*

**Section 11.5. Immigration Laws.** The Concessionaire shall comply with and maintain employment policies in a manner consistent with all applicable Laws regarding lawful employment of U.S. citizens and non-U.S. citizens, including taking reasonable steps to verify the employment eligibility of all employees as required under such Laws.

**Section 11.6. Labor Disputes.** The Concessionaire shall take all reasonable steps to resolve any alleged or actual labor dispute between it or the Operator and any representative of its or the Operator’s employees; further, any work stoppage or strike resulting from such labor dispute shall not excuse the Concessionaire’s performance under this Agreement. The Concessionaire shall use good faith efforts and take immediate steps to effect the limitation and/or removal, by lawful means, of any pickets or picketing that are the result of an alleged or actual labor dispute between it and any representative of its employees; provided however, if

such pickets or picketing results in the obstruction of ingress or egress of any Public Way or University facility, the Concessionaire shall immediately seek injunctive relief to terminate such pickets or picketing that may be available under applicable Laws.

**Section 11.7. Employee Conduct and Performance.** The Concessionaire shall ensure that it and the Operator have workplace conduct policies for their employees providing services under this Agreement that are at least as stringent as substantially similar policies and enforcement provisions as those of the University's general policies for conduct in the workplace and are in accordance with Prudent Industry Practices. These policies shall include policies related to workplace behavior; anti-harassment; weapons; confidentiality; security and safety; possession of alcohol; illegal drugs or weapons in the workplace; violation of criminal statutes that have a direct relationship to work performed by the employee; negligent or incompetent performance of work hereunder; gross misconduct related to work; conduct or interactions with University employees, students or visitors that impair or prejudice the University or its relationship with such persons; and unsafe practices or work performance that create a risk of harm to the employee, other persons or property.

**Section 11.8. Non-Collusion.** By signing this Agreement, the Concessionaire duly swears, affirms and warrants that it is the contracting party, and that it has not, nor has any other member, employee, Representative, agent or officer of the firm, company, corporation or partnership represented by it, directly or indirectly entered into or offered to enter into any combination, conspiracy, collusion or agreement to receive or pay any sum of money or other consideration for the execution of this Agreement other than that which appears upon the face of this Agreement.

**Section 11.9. Conflict of Interest.** The Concessionaire certifies and warrants to the University that neither it nor any of its agents, Representatives or employees who will participate in any way in the performance of Concessionaire's obligations hereunder has or, for so long as any such person continues in such capacity, will have any conflict of interest, direct or indirect, with University during the performance of this Agreement, other than in respect of any disputes that may arise hereunder or in connection herewith.

**Section 11.10. Drug-Free Workplace Certification.**

- (a) The Concessionaire hereby covenants and agrees to make a good faith effort to provide and maintain a drug-free workplace. The Concessionaire will give written notice to the University within 7 Days after receiving actual notice that the Concessionaire or an employee of the Concessionaire has been convicted of a criminal drug violation occurring in the Concessionaire's workplace. The Concessionaire must at all times at its own cost and expense (but subject to its right to include the cost of compliance with any Law enacted after the Setting Date in the Uncapped O&M Costs in accordance with the definition thereof) observe and comply, in all material respects, and cause the Utility System Operations to observe and comply, in all material respects, with all applicable Laws now existing or later in effect that are applicable to it or such Utility System Operations, including those Laws expressly enumerated in this Article 11, and those that may in any manner apply with respect to the performance of

the Concessionaire's obligations under this Agreement. The Concessionaire must notify the University within 7 Days after receiving notice from a Governmental Authority that the Concessionaire may have violated any Laws as described above.

- (b) The Concessionaire shall require all Contractors with whom the Concessionaire is in contract for a public improvement to be enrolled in and be in good standing in the State of Ohio's Bureau of Workers' Compensation's (the "Bureau") Drug-Free Workplace Program or a comparable program approved by the Bureau that meets the requirements specified in Ohio Rev. Code Ann. § 153.03 prior to a subcontractor providing labor at the project site of the public improvement.
- (c) The Concessionaire shall cause each subcontractor engaged by the Contractor to require all lower-tier subcontractors with whom the subcontractor is in contract for a public improvement to be enrolled in and be in good standing in the Bureau's Drug-Free Workplace Program or a comparable program approved by the Bureau that meets the requirements specified in Ohio Rev. Code Ann. § 153.03 prior to a lower-tier subcontractor providing labor at the project site of the public improvement.
- (d) Failure of the Concessionaire to require a subcontractor to be enrolled in and be in good standing in the Bureau's Drug-Free Workplace Program or a comparable program approved by the Bureau that meets the requirements specified in Ohio Rev. Code Ann. § 153.03 prior to the time that the subcontractor provides labor at the project site will result in the Concessionaire being found in breach of this Agreement and that breach shall be used in the responsibility analysis of the Concessionaire or the subcontractor who was not enrolled in a program for future contracts with the State of Ohio for 5 years after the date of the breach.
- (e) Failure of a subcontractor to require a lower-tier subcontractor to be enrolled in and be in good standing in the Bureau's Drug-Free Workplace Program or a comparable program approved by the Bureau that meets the requirements specified in Ohio Rev. Code Ann. § 153.03 prior to the time that the lower-tier subcontractor provides labor at the project site will result in the subcontractor being found in breach of the contract with the Concessionaire and a breach of this Agreement by that Concessionaire, and that breach shall be used in the responsibility analysis of that subcontractor or the lower-tier subcontractor who was not enrolled in a program for future contracts with the State of Ohio for 5 years after the date of the breach.

**Section 11.11. Minority-Owned and Women-Owned Business Enterprises.** The Concessionaire shall use good faith efforts during the Term to obtain the participation of M.B.E./W.B.E. in its Utility System Operations, including requiring the Operator to participate in such programs. In order to demonstrate this good faith efforts commitment, the Concessionaire shall, and shall cause all Contractors to, complete and submit to the University (i) a M.B.E./W.B.E. Solicitation and Commitment Statement, which shall detail the efforts of the Concessionaire or the Contractor, as applicable, to obtain such participation or (ii) a

M.B.E./W.B.E. Commitment Waiver Request, which shall detail the reasons why no M.B.E./W.B.E. participation could be obtained. Further, within 30 Days after the University's request (made not more than twice in any Fiscal Year), the Concessionaire and the Contractor, as applicable, shall submit a report detailing the actual levels of M.B.E./W.B.E. participation.

**Section 11.12. University Accreditation.** The Concessionaire shall ensure that the Utility System provides a sufficient quantity of Utilities in a timeframe sufficient such that the University, or any portion thereof, may maintain any third-party accreditation or other third-party standard of which the University has provided the Concessionaire notice prior to the Setting Date.

**Section 11.13. Title V Permit.** The Concessionaire acknowledges and agrees that, in connection with the Title V permit for Utility System sources issued by the Ohio Environmental Protection Agency (the "Title V Permit"): (i) the University will continue to be the "owner" identified in the Title V Permit during the Term; (ii) the Concessionaire will become the "operator" of permitted emission sources from the Utility System identified in the Title V Permit during the Term; (iii) the Concessionaire shall be responsible for operating all emission sources in compliance with all permit and regulatory requirements and meeting all monitoring, recordkeeping and reporting requirements related to such permitted emission sources; and (iv) the Concessionaire shall provide to the University (a) complete drafts of all required reports for the University to review and Approve at least 15 Business Days prior to the deadline to submit such reports, (b) any information regarding utility operations required for Campus-wide reports by the later of (1) 10 Days after the end of the applicable reporting period and (2) (A) 30 Days prior to the applicable submission deadline or (B) 10 Days after a University request not related to a submission deadline, (c) information to be submitted in connection with the renewal of the regulatory permits or any portion thereof within the time period reasonably established by the University and (d) applications for new permits or Title V modifications for review and Approval at least 30 Days prior to submission to a regulatory agency.

**Section 11.14. Financial and Audit Standards.** The Concessionaire shall comply, and its financial statements shall be prepared in accordance, with GAAP.

**Section 11.15. Affirmative Action Program.** The Concessionaire represents that it has a written affirmative action program for the employment and effective utilization of economically disadvantaged persons pursuant to Ohio Rev. Code. Ann. § 125.111(B) and has filed an Affirmative Action Program Verification form with the Equal Employment Opportunity and Affirmative Action Unit of the Department of Administrative Services. The Concessionaire shall maintain such program during the Term and shall cause the Operator and any other Contractor, before performing any action under this Agreement, to maintain a written affirmative action program for the employment and effective utilization of economically disadvantaged persons pursuant to Ohio Rev. Code. Ann. § 125.111(B) and file an Affirmative Action Program Verification form with the Equal Employment Opportunity and Affirmative Action Unit of the Department of Administrative Services.

**Section 11.16. University Payments.** All financial obligations of the University under this Agreement are payable solely from the then-current revenues of the University legally available for such purpose and the Concessionaire shall have no right to receive payment from

moneys raised by taxation or state appropriations. The failure of the University to comply with its financial obligations hereunder shall not preclude the Concessionaire from bringing a claim therefor pursuant to the express provisions hereof.

**Section 11.17. Anti-Boycott Requirement.** As required by Ohio Rev. Code. Ann. § 9.76, the Concessionaire hereby declares, represents and warrants that it is not boycotting any jurisdiction with whom the State of Ohio can enjoy open trade, including Israel, and hereby covenants not to do so during the Term hereof.

## **ARTICLE 12 PAYMENT OBLIGATIONS**

**Section 12.1. Certain Payment Obligations of the Concessionaire.** To the extent permitted by Law, the Concessionaire shall have a payment obligation to the University and each of its Representatives with respect to the full amount of any Losses actually suffered or incurred (as they are suffered or incurred) by the University or any such Representative, based upon, arising out of, related to, occasioned by or attributable to (i) any failure by the Concessionaire, the Operator or each of their respective Representatives to comply with, observe or perform any of the covenants, obligations, agreements, terms or conditions in this Agreement or, subject to the expiration of the survival period specified in Section 9.4(b), any breach by the Concessionaire of its representations or warranties set forth herein, (ii) any Assumed Liabilities, (iii) any Tax or recording charge attributable to any Transfer of the Concessionaire Interest or any part thereof by the Concessionaire, (iv) any increase in Property Taxes payable by the University that is not included in the definition of Uncapped O&M Costs or (v) any claim for brokerage commissions, fees or other compensation by any Person who acted on behalf of the Concessionaire or its Representatives in connection with this Agreement, any Transfer of the Concessionaire Interest or any part thereof or any other matter affecting the Utility System; provided, however, that, except with respect to Claims resulting from Third Party Claims, Claims shall be made in writing within a period of 3 Years following the expiration of the Term or earlier termination of this Agreement or within such shorter period as may be prescribed by the applicable statute of limitations. The Parties agree that the Representatives of the University are intended to be third party beneficiaries of the obligations of Concessionaire pursuant to this Article 12.

**Section 12.2. Certain Payment Obligations of the University.** To the extent permitted by Law, and without limiting any other remedy under this Agreement (including Concession Compensation or AA-Compensation as provided in this Agreement) the University shall have a payment obligation to the Concessionaire and each of its Representatives with respect to any Losses actually suffered or incurred by the Concessionaire or any such Representative, based upon, arising out of, related to, occasioned by or attributable to (i) any failure by the University or its Representatives to comply with, observe or perform any of the covenants, obligations, agreements, terms or conditions in this Agreement or, subject to the expiration of the relevant survival period specified in Section 9.4(a), any breach by the University of its representations or warranties set forth herein, (ii) any Excluded Liabilities, (iii) any claim for brokerage commissions, fees or other compensation by any Person who acted on behalf of the University or its Representatives in connection with this Agreement or any other matter affecting the Utility System or (iv) any payment of Property Taxes with respect to the Utility System that are not the

result of the actions or omissions of the Concessionaire; provided, however, that, except with respect to Claims resulting from Third Party Claims, Claims are made in writing within a period of 3 Years following the expiration of the Term or earlier termination of this Agreement or within such shorter period as may be prescribed by the applicable statute of limitations. The Parties agree that the Representatives of the Concessionaire are intended to be third party beneficiaries of the obligations of University pursuant to this Article 12.

**Section 12.3. Agency for Representatives.** Each of the University and the Concessionaire agrees that it accepts each payment obligation contemplated in this Article 12 in favor of any of its Representatives as agent and trustee of that Representative and agrees that each of the University and the Concessionaire may enforce a payment obligation in favor of its Representatives on behalf of that Representative. For purposes of this Section 12.3, the term “Representative”, in the case of the Concessionaire, includes the Leasehold Mortgagee.

**Section 12.4. Third Party Claims.**

- (a) *Notice of Third Party Claim.* If an Obligee receives notice of the commencement or assertion of any Third Party Claim, the Obligee shall give the Obligor reasonably prompt notice thereof, but in any event no later than 30 Days after receipt of such notice of such Third Party Claim. Such notice to the Obligor shall describe the Third Party Claim in reasonable detail (and include a copy of any complaint or related documents) and shall indicate, if reasonably practicable, the estimated amount of the Loss that has been or may be sustained by the Obligee.
- (b) *Defense of Third Party Claim.* The Obligor may participate in or assume the defense of any Third Party Claim by giving notice to that effect to the Obligee not later than 30 Days after receiving notice of that Third Party Claim (the “Notice Period”). The Obligor’s right to do so shall be subject to the rights of any insurer or other Party who has potential responsibility with respect of that Third Party Claim. The Obligor agrees to pay all of its own expenses of participating in or assuming each defense. The Obligee shall cooperate in good faith in the defense of each Third Party Claim, even if the defense has been assumed by the Obligor and may participate in such defense assisted by counsel of its own choice at its own expense. If the Obligee has not received notice within the Notice Period that the Obligor has elected to assume the defense of such Third Party Claim, the Obligee may assume such defense, assisted by counsel of its own choosing and the Obligor shall be responsible for all reasonable costs and expenses paid or incurred in connection therewith and any Loss suffered or incurred by the Obligee with respect to such Third Party Claim. Notwithstanding the foregoing, to the extent that the Obligor is the Concessionaire or its Representative, the assumption of such defense shall be subject to the approval of the Ohio Attorney General.
- (c) *Assistance for Third Party Claims.* The Obligor and the Obligee will use all reasonable efforts to make available to the Party which is undertaking and controlling the defense of any Third Party Claim (the “Defending Party”), (i)

those employees whose assistance, testimony and presence is necessary to assist the Defending Party in evaluating and in defending any Third Party Claim, and (ii) all Documents, records and other materials in the possession of such Party reasonably required by the Defending Party for its use in defending any Third Party Claim, and shall otherwise co-operate with the Defending Party. The Obligor shall be responsible for all reasonable expenses associated with making such Documents, records and materials available and for all expenses of any employees made available by the Obligee to the Obligor hereunder, which expense shall not exceed the actual cost to the Obligee associated with such employees.

- (d) *Settlement of Third Party Claims.* If an Obligor elects to assume the defense of any Third Party Claim in accordance with Section 12.4(b), the Obligor shall not be responsible for any legal expenses subsequently incurred by the Obligee in connection with the defense of such Third Party Claim. However, if the Obligor fails to take reasonable steps necessary to defend diligently such Third Party Claim within 30 Days after receiving notice from the Obligee that the Obligee bona fide believes on reasonable grounds that the Obligor has failed to take such steps, the Obligee may, at its option, elect to assume the defense of and to compromise or settle the Third Party Claim assisted by counsel of its own choosing and the Obligor shall be responsible for all reasonable costs and expenses paid or incurred in connection therewith. However, the Obligee shall not settle or compromise any Third Party Claim without obtaining the prior written consent of the Obligor unless such settlement or compromise is made without any responsibility to, and does not require any action on the part of, the Obligor and does not in any way affect the Obligor. In the event that the Obligee is the University, in no event may the Obligor settle or compromise any Third Party Claim without obtaining the prior written consent of the Obligee, which shall require the consent of the State of Ohio's Attorney General or his or her designee.

**Section 12.5. Direct Claims.** Any Direct Claim shall be asserted by giving the Obligor reasonably prompt notice thereof, but in any event not later than 60 Days after the Obligee becomes aware of such Direct Claim. The Obligor shall then have a period of 30 Days within which to respond in writing to such Direct Claim. If the Obligor does not so respond within such 30-Day period, the Obligor shall be deemed to have rejected such Direct Claim, and in such event the Obligee may submit such Direct Claim to the dispute resolution process set forth in Article 18.

**Section 12.6. Failure to Give Timely Notice.** A failure to give timely notice in accordance with this Article 12 shall not affect the rights or obligations of any Party except and only to the extent that, as a result of such failure, a Party which was entitled to receive such notice was deprived of its right to recover any payment under its applicable insurance coverage or was otherwise directly and materially damaged as a result of such failure. However, this Section 12.6 shall have no effect whatever on the survival provisions set out in Section 9.4 and the rights of the Parties with respect thereto.

**Section 12.7. Reductions and Subrogation.** If the amount of any Loss incurred by an Obligee at any time subsequent to the making of a payment hereunder on account of such Losses (an “Obligation Payment”) is reduced by any recovery, settlement or otherwise under or pursuant to any insurance coverage, or pursuant to any claim, recovery, settlement or payment by or against any other Person, the amount of such reduction (less any costs, expenses (including Taxes) or premiums incurred in connection therewith), together with interest thereon from the date of such recovery, settlement or reduction at the Bank Rate, shall promptly be repaid by the Obligee to the Obligor. Upon making a full Obligation Payment, the Obligor shall, to the extent of such Obligation Payment, be subrogated to all rights of the Obligee against any third party in respect of the Loss to which the Obligation Payment relates. Until the Obligee recovers full payment of its Loss, any and all claims of the Obligor against any such third party on account of such Obligation Payment shall be postponed and subordinated in right of payment to the Obligee’s rights against such third party.

**Section 12.8. Payment and Interest.** All amounts to be paid by an Obligor hereunder shall bear interest at a rate per annum equal to the Bank Rate, calculated annually and payable monthly, both before and after judgment, from the date that the Obligee disbursed funds, suffered damages or losses or incurred a loss or expense in respect of a Loss for which the Obligor is responsible to make payment pursuant to this Article 12, to the date of payment by the Obligor to the Obligee.

**Section 12.9. Limitation on Certain Claims.** To the extent permitted by Law and without limiting any other remedy under this Agreement (including Concession Compensation or AA-Compensation as provided in this Agreement), the maximum aggregate liability of the University to the Concessionaire or its Representatives, in respect of Losses pursuant to this Article 12 shall not exceed 50% of the Closing Consideration; provided further that this Section 12.9 shall not apply to Claims for (i) breach of the representations or warranties in Sections 9.1(a), (b), (c), (d), (e), (f), and (g); (ii) fraud, intentional misrepresentation or intentional breach of the representations or warranties in Section 9.1; (iii) for any Excluded Liabilities referred to in Section 3.2(d)(iv); (iv) payment of the Utility System Concession Value and (v) payment of the Utility Fee. To the extent permitted by Law and without limiting any other remedy under this Agreement, the maximum aggregate liability of the Concessionaire to the University and its Representatives, in respect of Losses pursuant to this Article 12 shall not exceed 50% of the Closing Consideration; provided further that this Section 12.9 shall not apply to Claims for the breach of the representations or warranties in Section 9.2(a), (b), (c), (d), (e), (f), and (g) or Section 12.1(iv) or to Claims for fraud, intentional misrepresentation or intentional breach of the representations or warranties in Section 9.2. Neither Party shall have any liability to the other Party or its Representatives for Losses to the extent resulting from fraudulent actions of the other Party or its Representatives or the gross negligence of the other Party or its Representatives.

**Section 12.10. Other Matters.**

- (a) *Waiver of Limits.* With respect to claims by the Concessionaire’s employees, the Concessionaire waives its immunity, if any, to which it is entitled or would be entitled, as a complying employer under the applicable worker’s compensation law, but only to the extent that such immunity would bar or affect recovery under or enforcement of Concessionaire’s obligations to defend, indemnify, hold



harmless or contribute to any sums due under any Losses, including any claim by any employee of Concessionaire, that may be subject to Section 35, Article II of the Ohio Constitution and Ohio Rev. Code Ann. § 4123.74.

- (b) *Losses Net of Insurance.* For purposes of this Article 12, the amount of any Losses for which payment is provided hereunder shall be net of any amounts recovered by the Obligee under insurance policies with respect to such Losses, it being understood that the obligations of the Obligee hereunder shall not be so reduced to the extent that any such recovery results in an increase in the Obligee's insurance premiums, or results in any other additional cost or expense to any such Obligee.

**Section 12.11. Offset Rights; Limitations on Certain Damages.**

- (a) Each Party's obligations under this Agreement are subject to, and each Party shall have the benefit of, all defenses, counterclaims, rights of offset or recoupment or other claims and rights, including the right to deduct payments due to the other Party hereunder that are not subject to dispute (collectively, "Offsets") which such Party may have at any time against such other Party (or any of their respective successors and assigns) or any transferee or assignee of any such other Party's rights as against such Party or any part thereof or interest therein contingent or otherwise, and no transfer or assignment of this Agreement or any other obligation of such other Party, or of any rights in respect thereof, pursuant to any plan of reorganization or liquidation or otherwise shall affect or impair the availability to each Party of the Offsets.
- (b) In no event shall any Party be liable to the other Party under this Agreement for consequential, indirect, exemplary or punitive damages (except for claims for fraud or for intentional misrepresentation or intentional breach).

**Section 12.12. Governmental Immunity.** Notwithstanding anything herein to the contrary, the Parties acknowledge and agree that the University and its officers, directors, employees, agents and Representatives are relying on, and do not waive or intend to waive by any provision of this Agreement, the monetary limitations or any other rights, immunities, and protections provided by the Ohio Court of Claims under Ohio Rev. Code Ann. § 2743 *et seq.*, or as otherwise set forth or incorporated into Ohio Rev. Code Ann. § 2743 *et seq.*, or otherwise available to the University and its officers, directors, employees, agents and Representatives.

**Section 12.13. Survival.** This Article 12 shall remain in full force and effect in all circumstances and shall not be terminated by any breach (fundamental, negligent or otherwise) by any Party of its representations, warranties or covenants hereunder or by any termination or rescission of this Agreement by any Party.

**ARTICLE 13  
INSURANCE**

**Section 13.1. Insurance Coverage Required – Concessionaire.** The Concessionaire shall provide and maintain at the Concessionaire's own expense, or cause to be maintained,

during the Term and during any time period following expiration if the Concessionaire is required to return and perform any additional work, commercially reasonable insurance coverage in accordance with Prudent Industry Practices, including, at a minimum, the insurance coverages and requirements specified below, insuring the Utility System, all Utility System Operations and all Design-Build ECMs (the “Concessionaire Required Coverages”).

- (a) *Workers’ Compensation and Employer’s Liability.* The Concessionaire shall provide or cause to be provided Workers’ Compensation Insurance, as prescribed by applicable Law, covering all employees who agree to provide a service under this Agreement and Employer’s Liability Insurance coverage with limits of not less than \$1,000,000 for each accident or illness or disease.
- (b) *Commercial General Liability (Primary and Umbrella).* The Concessionaire shall provide or cause to be provided Commercial General Liability Insurance or equivalent with limits of not less than \$10,000,000 per occurrence and \$25,000,000 in the annual aggregate for bodily injury, personal injury and property damage liability. Coverage shall include the following: all premises and operations, including products/completed operations, explosion, collapse, mobile equipment not suitable for roadways, underground, separation of insureds, defense of terrorism (to the extent commercially available) and contractual liability (with no limitation endorsement) and shall be written on ISO form CG 00 01 04 13 or its equivalent. The University shall be included as an additional insured on a primary, non-contributory basis for any liability arising under or in connection with this Agreement.
- (c) *Automobile Liability (Primary and Umbrella).* When any motor vehicles (owned, non-owned or hired) are used in connection with work to be performed, the Concessionaire shall provide or cause to be provided Automobile Liability Insurance with limits of not less than \$10,000,000 combined single limit each accident for bodily injury and property damage. The University shall be included as an additional insured on a primary, non-contributory basis.
- (d) *Professional Liability.* When any architects, engineers, construction managers, professional services providers or any other professional consultants perform work in connection with this Agreement, the Concessionaire shall require such architects, engineers, construction managers or other professional consultants to maintain Professional Liability Insurance covering their respective negligent acts, errors or omissions with limits which are reasonable and commensurate with the work being performed, with limits not less than \$5,000,000 per claim and in the aggregate. Should the Concessionaire self-perform any work of the nature noted in this Section 13.1(d), evidence of Professional Liability Insurance meeting the standards for such work set forth above shall be required.
- (e) *Network Security and Privacy Insurance.* The Concessionaire shall also maintain Cyber Liability Insurance for network security and privacy with limits of not less than \$5,000,000 per claim and in the aggregate inclusive of event management. When policies are renewed or replaced, the policy retroactive date shall coincide

with, or precede, start of work in connection with this Agreement. A claims-made policy which is not renewed or replaced shall have an extended reporting period of 5 Years.

- (f) *Railroad Protective Liability.* When any work is to be done adjacent to or on railroad or transit property and if such insurance is required, the Concessionaire shall provide, with respect to the operations that the Concessionaire or Contractors perform, Railroad Protective Liability Insurance in the name of the applicable railroad or transit entity. The policy shall have limits of not less than the requirement of the operating railroad for losses arising out of injuries to or death of all persons, and for damage to or destruction of property, including the loss of use thereof. If such work is subcontracted out to Contractors, then the Concessionaire shall not be required to maintain such insurance but may instead require its Contractors performing the work adjacent to or on railroad or transit property to carry such railroad liability insurance.
- (g) *Pollution Legal Liability.* The Concessionaire shall provide Pollution Legal Liability Insurance or Site Pollution Insurance or cause to be provided Pollution Legal Liability Insurance or Site Pollution Insurance or equivalent, in each case with limits of not less than \$5,000,000 per claim and \$10,000,000 in the annual aggregate for environmental and pollution damage liability arising out of pollution events occurring after the Closing Date. The University is to be included as an additional insured on a primary, non-contributory basis for any liability arising under or in connection with this Agreement.
- (h) *Property.* The Concessionaire shall obtain All Risk Property Insurance at full replacement cost, covering all loss, damage or destruction to the Utility System (including improvements and betterments) and any Design-Build ECMs, which insurance may be provided on a blanket basis with reported building values, which shall include the value of the coverage for the Utility System and any Design-Build ECMs required hereunder; provided, however, that the limits of such coverage may be based on replacement cost value agreed by the University and the Concessionaire acting reasonably or on a probable maximum loss analysis, subject to the University's Approval of such probable maximum loss analysis by an independent third party that is reasonably acceptable to the University. Coverage shall include the following, but not be limited to: equipment breakdown, collapse, water including overflow, leakage, sewer backup or seepage, utility interruption, debris removal, business ordinance or law for increased cost of construction, extra expense, boiler and machinery, valuable papers and, to the extent commercially available, terrorism, earthquake and named wind. Coverage shall include flood insurance with a sublimit of not less than \$10,000,000 in the aggregate. The University and any Leasehold Mortgagee shall be named as additional insureds and as loss payees. The Concessionaire shall be responsible for any loss or damage to University property under this Agreement at full replacement cost. The Concessionaire shall be responsible for all loss or damage to personal property (including

materials, fixtures/contents, equipment, tools and supplies) of the Concessionaire unless caused by the University.

- (i) *Builder's Risk.* When the Concessionaire undertakes, pursuant to this Agreement, any construction, maintenance or repairs to the Utility System (including Capital Improvements, ECMs, Material Changes and betterments) or any ECMs that are not part of the Utility System, the Concessionaire shall provide or cause to be provided, All Builder's Risk Insurance at replacement cost for materials, supplies, equipment, machinery and fixtures that are or will be part of the Utility System or are or will be part of ECMs implemented by the Concessionaire. This requirement may be satisfied through the All Risk Property Insurance obtained pursuant to Section 13.1(h). Coverage shall include, but not be limited to, the following: right to partial occupancy, boiler and machinery, business income, valuable papers and other consequential loss, when applicable with aggregate sublimits for catastrophic perils of earthquake, flood and named wind which are the best available on commercially reasonable terms. The Concessionaire and any Leasehold Mortgagee shall be named as additional insureds and as loss payees.

**Section 13.2. Insurance Coverage Required – University.** The University shall provide and maintain at the University's own expense, or cause to be maintained, during the Term and during any time period following expiration if the Concessionaire is required to return and perform any additional work, the following insurance coverages and requirements specified below (the "University Required Coverages" together with the Concessionaire Required Coverages, the "Required Coverages").

- (a) *Workers' Compensation and Employer's Liability.* The University shall provide or cause to be provided Workers' Compensation Insurance, as prescribed by applicable Law, covering all employees who agree to provide a service under this Agreement and Employer's Liability Insurance coverage with limits of not less than \$1,000,000 for each accident or illness or disease.
- (b) *Commercial General Liability (Primary and Umbrella).* The University shall provide or cause to be provided Commercial General Liability Insurance or equivalent with limits of not less than \$10,000,000 per occurrence and \$25,000,000 in the annual aggregate for bodily injury, personal injury and property damage liability. Coverage shall include the following: all premises and operations, including products/completed operations, explosion, collapse, underground, separation of insureds, defense of terrorism (to the extent commercially available) and contractual liability (with no limitation endorsement). The Concessionaire shall be included as an additional insured.
- (c) *Property.* The University shall obtain All Risk Property Insurance at full replacement cost, covering all loss, damage or destruction to the University's owned property (other than any property leased to the Concessionaire hereunder), including improvements and betterments, which insurance may be provided on a blanket basis with reported building values, which shall include

the value of the coverage for the University's owned property required hereunder; provided, however, that the limits of such coverage may be based on replacement cost value. Coverage shall include the following: equipment breakdown, collapse, water including overflow, leakage, sewer backup or seepage, utility interruption, debris removal, business ordinance or law for increased cost of construction, extra expense, boiler and machinery, valuable papers and, to the extent commercially available, terrorism, earthquake and named wind. Coverage shall include flood insurance with limits which are commercially available. The Concessionaire shall be responsible for the property deductible for any loss or damage to University property. The Concessionaire shall be responsible for all loss or damage to personal property (including materials, fixtures/contents, equipment, tools and supplies) of the Concessionaire unless caused by the University.

### **Section 13.3. Additional Requirements.**

- (a) *Evidence of Insurance.* The Parties shall deliver or cause to be delivered to each other's Representative designated in writing by each Party, original standard ACCORD form Certificates of Insurance, or equivalent documentation acceptable to the Parties, evidencing the Concessionaire Required Coverages or University Required Coverages, as applicable, on or before the Closing Date, and shall provide or cause to be provided, promptly following renewal and not more than 14 Business Days following renewal of the then current coverages (or such other period as is agreed to by the Parties), Renewal Certificates of Insurance, or such similar evidence, if such coverages have an expiration or renewal date occurring during the Term. The receipt of any certificate does not constitute agreement by the receiving Party that the insurance requirements in this Agreement have been fully met or that the insurance policies indicated on the certificate are in compliance with all requirements of this Agreement. The failure of either Party to obtain certificates or other insurance evidence from the other Party shall not be deemed to be a waiver by such Party. Non-conforming insurance shall not relieve either Party of the obligation to provide insurance as specified herein. Except as otherwise expressly set forth herein, each of the Required Coverages may be reviewed by the Parties for compliance with the terms of this Agreement. The Party responsible for a Required Coverage shall place such Required Coverage with insurers licensed to do business in the State of Ohio; provided that all such insurers, at a minimum, shall have a rating of "A minus (VIII)" or better by A.M. Best Company (unless the other Party consents to waive this requirement). At the request of a Party, the other Party shall provide the requesting Party with complete copies of policies and all policy endorsements commencing on the date hereof and thereafter if there is a material change.
- (b) *Notice of Cancellation or Violation.* The Concessionaire shall use commercially reasonable efforts to notify the University 30 Days (or in the case of cancellation for non-payment of premiums, 10 Days) prior to cancellation of any Concessionaire Required Coverages. Each Party shall be permitted (but not

obligated) to pay any delinquent premiums before the cancellation date specified by the insurer in any notice of cancellation for non-payment of premium in order to maintain such coverage in full force and effect and each Party shall reimburse the other Party for any delinquent premiums paid by such Party on demand without any Days of grace and without prejudice to any other rights and remedies of the Parties hereunder. Each Party shall maintain the Required Coverage for which they are responsible hereunder during the Term.

- (c) *Deductibles.* All Required Coverages may contain deductibles or self-insured retentions not to exceed amounts reasonably acceptable to the Party not responsible for such Required Coverage taking into account the deductibles or self-insured retentions for the required insurance coverages for comparable property. Any and all deductibles or self-insured retentions on Required Coverages shall be borne by the purchasing Party or its Contractors, who shall be responsible for its own deductibles and/or self-insured retentions unless the Party is at fault for a loss to the other Party in which case the at fault party will pay the other Party's deductible or self-retention.
- (d) *Post-Termination Effectiveness.* Any Required Coverage written on a claims made basis and the products/completed operations portion of the Commercial General Liability Insurance shall be continued for at least 5 Years following the termination of this Agreement and evidence of such insurance shall be provided to the Party not responsible for such Required Coverage at least annually.
- (e) *Adjustment of Insurance Coverages.* The amounts of coverage required by Section 13.1 and Section 13.2 shall be reasonably adjusted, as agreed by the University and the Concessionaire, based on limits maintained for comparable property each succeeding fifth anniversary of the Closing Date, but in no event shall the amounts of coverage be less than specified in Section 13.1 and Section 13.2.
- (f) *Waiver of Subrogation by Insurers.* Each of the Required Coverages provided by either Party shall, where legally or customarily permitted, include a waiver by the insurer of its rights of subrogation against the other, its employees, elected officials, agents or Representatives. Concessionaire agrees to waive all rights of subrogation against the University and its employees, elected or appointed officials, agents and Representatives, and Concessionaire shall cause each of its Subcontractors to waive all their rights of subrogation against the University
- (g) *Each Party's Right to Insure.* If either Party fails to obtain and maintain or cause to be obtained and maintained the insurance required to be maintained by such Party by this Article 13, the other Party shall have the right (without any obligation to do so), upon 2 Business Days' notice to the other Party in a non-emergency situation or forthwith in an emergency situation and without assuming any obligation in connection therewith, to effect such insurance and all costs and expenses of the Party effecting the coverage in connection therewith shall be payable by the other Party on demand without any Days of grace and

without prejudice to any other rights and remedies of the Parties hereunder. Such insurance taken out by the effecting Party shall not relieve the other Party of its obligations to insure hereunder and the effecting Party shall not be liable for any loss or damage suffered by the other Party in connection therewith.

- (h) *No Limitation as to Concessionaire Liabilities.* The Concessionaire expressly understands and agrees that any coverages and limits furnished by the Concessionaire shall in no way limit the Concessionaire's liabilities and responsibilities specified within this Agreement or by Law.
- (i) *No Contribution by University.* The Concessionaire expressly understands and agrees that any insurance or self-insurance programs maintained by the University shall not contribute with insurance provided by the Concessionaire under this Agreement.
- (j) *Insurance Not Limited by Indemnification.* The required insurance shall not be limited by any limitations expressed in the payment obligation language herein or any limitation placed on the obligation therein given as a matter of law.
- (k) *Insurance Requirements of Contractors.* The Concessionaire shall require in each contract with any Contractor that such Contractor obtain coverages reasonably comparable to the Concessionaire Required Coverages that are reasonably appropriate in their limits and other terms and conditions to the nature of the contract with the Contractor. Such coverages shall insure the interests of the University, its employees, elected officials and Representatives, the Concessionaire and any other Contractors in respect of the applicable work being performed and shall be subject to the same (or comparable) coverage and administrative requirements as are imposed on the Concessionaire pursuant to this Agreement, specifically requiring such Contractor to name the University as an additional insured and requiring such Contractor's insurance to include a waiver of subrogation as described in Section 13.3(f). When requested to do so by the University, the Concessionaire shall provide or cause to be provided to the University Certificates of Insurance with respect to such insurance coverages or such other evidence of insurance, as may be reasonably acceptable in form and content to the University.
- (l) *Cooperation.* The University and the Concessionaire shall do all acts, matters and things as may be reasonably necessary or required to expedite the adjustment of any loss or damage covered by insurance hereunder so as to expedite the release and dedication of proceeds of such insurance in the manner and for the purposes herein contemplated.
- (m) *Joint Venture and Limited Liability Company Policies.* If the Concessionaire or any Contractor required to obtain an insurance policy hereunder is a joint venture or limited liability company, all insurance policies required to be obtained by the Concessionaire or such Contractor shall specifically name the joint venture or limited liability company as a named insured. If the Concessionaire contracts

operations to a third party, the Concessionaire will be an additional named insured on any liability policy.

- (n) *Other Insurance Obtained by Concessionaire.* If the Concessionaire or its Contractors desire coverages in addition to the Concessionaire Required Coverages, the Concessionaire and each Contractor shall be responsible for the acquisition and cost of such additional coverages. If the Concessionaire or its Contractors obtain any property, liability or other insurance coverages that will relate to the Utility System or the Utility System Operations in addition to the Concessionaire Required Coverages (“Additional Coverages”), then the Concessionaire or its Contractors shall (i) notify the University as to such Additional Coverages at least 10 Business Days in advance of purchasing such Additional Coverages and make such modifications as the University may reasonably require so that such Additional Coverage does not conflict with the University’s insurance coverages, (ii) provide the University with any documentation relating to the Additional Coverages, including Certificates of Insurance, that the University reasonably requests and (iii) at the University’s election, acting reasonably, cause the University and its employees, elected or appointed officials, agents and Representatives to be named as additional insureds under such Additional Coverages, if that is normally allowed in accordance with good industry practice and the University reimburses the Concessionaire for any additional expense incurred as a result of naming the University and such persons (or any of them) as additional insureds thereunder.
- (o) *University’s Right to Modify.* The University shall have the right, acting reasonably, to request to modify, delete, alter or change insurance coverage requirements set forth in Section 13.1 and this Section 13.2. Notwithstanding anything to the contrary herein, (i) any change to the types or limits of contractually required insurance coverage shall be subject to mutual agreement of the Parties, and (ii) if any insurance (including the limits or deductibles thereof) required to be maintained under this Agreement shall not be available at commercially reasonable rates, the Concessionaire’s obligation to obtain or maintain such insurance shall be waived by the University for as long as such insurance shall not be available at commercially reasonable rates, provided that during the period of such waiver, the Concessionaire maintains the maximum amount of such insurance otherwise available at commercially reasonable rates.
- (p) *Commercial Availability.* To the extent any of the Concessionaire Required Coverages are not available on a commercially reasonable basis or on commercially reasonable terms, the Concessionaire shall obtain insurance that is available on a commercially reasonable basis or on commercially reasonable terms that best approximates the Concessionaire Required Coverages, but said substitute coverage shall, at the University’s request, be subject to review of an independent insurance consultant, and such independent insurance consultant shall have delivered to the University and the Concessionaire its opinion to the effect that the substitute coverages meet the above-stated criteria.



- (q) *Payment for Insurance Coverage.* To the extent that the University and the Concessionaire determine that it would be in the best interests of both Parties for any of the Concessionaire Required Coverages to be purchased by and held in the name of the University, then the University shall be responsible for purchasing those certain Concessionaire Required Coverages, which shall satisfy the Concessionaire's obligation to do so hereunder. The University shall name the Concessionaire and the Leasehold Mortgagee as additional insureds thereunder.

#### **Section 13.4. Damage and Destruction.**

- (a) *Obligations of Concessionaire.* If all or any part of any of the Utility System shall be destroyed or damaged during the Term in whole or in part by fire or other casualty of any kind or nature (including any casualty for which insurance was not obtained or obtainable), ordinary or extraordinary, foreseen or unforeseen, the Concessionaire shall:
- (i) give the University notice thereof promptly after the Concessionaire receives actual notice of such casualty;
  - (ii) at its sole cost and expense, whether or not insurance proceeds, if any, shall be equal to the estimated cost of repairs, alterations, restorations, replacement and rebuilding (the "Casualty Cost"), which for the avoidance of doubt shall not be included in the Utility Fee, proceed diligently to repair, restore or rebuild the same to the condition existing prior to the happening of such fire or other casualty (any such activity being a "Restoration"); and
  - (iii) deposit all insurance proceeds received by the Concessionaire in connection with any Restoration with a Depositary; provided, however, that if at any time the Casualty Cost exceeds the net insurance proceeds actually deposited with the Depositary, then the Concessionaire shall also deposit with the Depositary such cash as is sufficient to cover the difference between the Casualty Cost and the net insurance proceeds (collectively, with any interest earned thereon, the "Restoration Funds"); provided further that the procedures of this Section 13.4(a)(iii) shall apply only to casualty events in which the cost of Restoration exceeds \$5,000,000.

Any Restoration undertaken pursuant to this Section 13.4 shall be undertaken in accordance with and subject to the terms of this Agreement. Prior to the commencement of Restoration work, the Concessionaire shall submit to the University for Approval by the University the plans for the Restoration work and such work shall not be undertaken unless the plans for such work have been Approved by the University.

- (b) *Rights of University.* If (i) the Concessionaire shall fail or neglect to commence the diligent Restoration of the Utility System or the portion thereof so damaged or destroyed, (ii) having so commenced such Restoration, the Concessionaire shall fail to diligently complete the same in accordance with the terms of this Agreement or (iii) prior to the completion of any such Restoration by the Concessionaire, this Agreement shall expire or be terminated in accordance with the terms of this Agreement, the University may, but shall not be required to, complete such Restoration at the Concessionaire's expense and shall be entitled to be paid out of the Restoration Funds, but such payment shall not limit the Concessionaire's obligation to pay the University's reasonable Restoration expenses, less amounts received by the University from such Restoration Funds. In any case where this Agreement shall expire or be terminated prior to the completion of the Restoration, the Concessionaire shall (x) account to the University for all amounts spent in connection with any Restoration which was undertaken, (y) pay over or cause the Depository to pay over to the University within 30 Days after demand therefor, the remainder, if any, of the Restoration Funds received by the Concessionaire prior to such termination or cancellation and (z) pay over or cause the Depository to pay over to the University, for allocation between the University, within 30 Days after receipt thereof, any Restoration Funds received by the Concessionaire or the Depository subsequent to such termination or cancellation. The Concessionaire's obligations under this Section 13.4(b) shall survive the expiration or termination of this Agreement.
- (c) *Payment of Restoration Funds to Concessionaire.* Subject to the satisfaction by the Concessionaire of all of the terms and conditions of this Section 13.4, the Depository shall pay to the Concessionaire from time to time, any Restoration Funds, but not more than the amount actually collected by the Depository upon the loss, together with any interest earned thereon, after reimbursing itself therefrom, as well as the University, to the extent, if any, of the reasonable expenses paid or incurred by the Depository and the University in the collection of such monies, to be utilized by the Concessionaire solely for the Restoration, such payments to be made as follows:
- (i) prior to commencing any Restoration, the Concessionaire shall furnish the University with an estimate of the cost of such Restoration, prepared by an architect or engineer;
- (ii) the Restoration Funds shall be paid to the Concessionaire in installments as the Restoration progresses, subject to Section 13.4(c)(iii), based upon requisitions to be submitted by the Concessionaire to the Depository and the University in compliance with Section 13.4(d), showing the cost of labor and materials purchased for incorporation in the Restoration, or incorporated therein since the previous requisition, and due and payable or paid by the Concessionaire; provided, however, that if any lien (other than a Permitted Concessionaire Encumbrance) is filed against the Utility System or any part thereof in connection with the Restoration, the Concessionaire shall not be entitled to receive any further installment until

such lien is satisfied or discharged (by bonding or otherwise); provided further that notwithstanding the foregoing, but subject to the provisions of Section 13.4(c)(iii), the existence of any such lien shall not preclude the Concessionaire from receiving any installment of Restoration Funds so long as such lien will be discharged with funds from such installment and at the time the Concessionaire receives such installment the Concessionaire delivers to the University and the Depository a release of such lien executed by the lien or and in recordable form;

- (iii) the amount of any installment to be paid to the Concessionaire shall be the amount of Restoration Funds incurred by the Concessionaire in connection therewith, less 10% of such amount as a retainage (which 10% retainage shall (i) be reserved without duplication of any retainage reserved by the Concessionaire under its contracts for the Restoration work and (ii) shall be released to the Concessionaire upon completion of the Restoration work), except that such retainage shall not include any amounts for architects' or engineers' fees or permitting or other governmental fees in connection with the Restoration or with respect to each Contractor upon the final completion of each such Contractor's respective work, provided that the unapplied portion of the funds held by the Depository are sufficient to complete the Restoration; provided, however, that all disbursements to the Concessionaire shall be made based upon an architect's or engineer's certificate for payment in accordance with industry standards, and disbursements may be made for advance deposits for material and Contractors to the extent that such disbursements are customary in the industry and provided that the unapplied portion of the funds held by the Depository are sufficient to complete the Restoration; and
  - (iv) except as provided in Section 13.4(b), upon completion of and payment for the Restoration by the Concessionaire, subject to the rights of any Leasehold Mortgagee, the Depository shall pay the balance of the Restoration Funds, if any, to the Concessionaire; provided, however, that if the insurance proceeds are insufficient to pay for the Restoration (or if there shall be no insurance proceeds), the Concessionaire shall nevertheless be required to make the Restoration and provide the deficiency in funds necessary to complete the Restoration as provided in Section 13.4(a)(iii).
- (d) *Conditions of Payment.* The following shall be conditions precedent to each payment made to the Concessionaire as provided in Section 13.4(c):
- (i) at the time of making such payment, no Concessionaire Default exists, except if such Concessionaire Default is the result of the damage or destruction for which such payment is being made;

- (ii) the Restoration shall be carried out under the supervision of the architect or engineer, and there shall be submitted to the Depository and the University the certificate of the architect or engineer (or other evidence reasonably satisfactory to the University) stating that (A) the materials and other items which are the subject of the requisition have been delivered to the Utility System (except with respect to requisitions for advance deposits permitted under Section 13.4(c)(iii)), free and clear of all Encumbrances, and no unsatisfied or unbonded mechanic's or other liens have been claimed, except for any mechanic's lien for claims that will be discharged, by bonding or otherwise, with funds to be received pursuant to such requisition (provided that a release of such lien is delivered to the Depository in accordance with Section 13.4(c)(ii)), or insured over by title insurance reasonably acceptable to the University, (B) the sum then requested to be withdrawn either has been paid by the Concessionaire or is due and payable to Contractors, engineers, architects or other Persons (whose names and addresses shall be stated), who have rendered or furnished services or materials for the work and giving a brief description of such services and materials and the principal subdivisions or categories thereof and the several amounts so paid or due to each of such Persons in respect thereof, and stating in reasonable detail the progress of the work up to the date of such certificate, (C) no part of such expenditures has been made the basis, in any previous requisition (whether paid or pending), for the withdrawal of Restoration Funds or has been made out of the Restoration Funds received by the Concessionaire, (D) the sum then requested does not exceed the value of the services and materials described in the certificate, (E) the work relating to such requisition has been performed in accordance with this Agreement, (F) the balance of the Restoration Funds held by the Depository will be sufficient upon completion of the Restoration to pay for the same in full, and stating in reasonable detail an estimate of the cost of such completion and (G) in the case of the final payment to the Concessionaire, the Restoration has been completed in accordance with this Agreement.
- (e) *Payment and Performance Bonds.* If the Concessionaire obtains payment or performance bonds related to a Restoration (which the Concessionaire may or may not obtain in its discretion), the Concessionaire shall name the University and the Concessionaire and the Leasehold Mortgagee, as their interests may appear, as additional obligees, and shall deliver copies of any such bonds to the University promptly upon obtaining them. The claims of any such additional obligee with respect to such payment or performance bonds shall rank *pari passu* in priority of payment with the claims of all other additional obligees.
- (f) *Benefit of University.* The requirements of this Section 13.4 are for the benefit only of the University, and no Contractor or other Person shall have or acquire any claim against the University as a result of any failure of the University actually to undertake or complete any Restoration as provided in this Section

13.4 or to obtain the evidence, certifications and other documentation provided for herein.

- (g) *Investment of Restoration Funds.* Restoration Funds deposited with a Depository shall be invested and reinvested in Eligible Investments at the direction of the Concessionaire, and all interest earned on such investments shall be added to the Restoration Funds.
- (h) *Rights of Leasehold Mortgage.* The Parties acknowledge and agree that any Restoration Funds not applied to a Restoration as provided in this Section 13.4 shall be subject to the lien or liens of any Leasehold Mortgage.

## **ARTICLE 14 ADVERSE ACTIONS**

### **Section 14.1. Adverse Action.**

- (a) An “Adverse Action” shall occur if the City of Columbus, Ohio, the County of Franklin, Ohio, the State of Ohio, or any agency, political division or unit or commission thereof, or the University, at any time during the Term, takes any action or actions and the effect of such action or actions, individually or in the aggregate, is reasonably expected (i) to be principally borne by the Concessionaire (or principally borne by the Concessionaire and the concessionaire under the Parking Agreement) and (ii) to have a material adverse effect on the fair market value of the Concessionaire Interest (whether as a result of a decrease in the Utility Fee or other revenues, increased expenses that cannot be recovered pursuant to this Agreement, or both), except where such action is in response to any act or omission on the part of the Concessionaire that is illegal (other than an act or omission rendered illegal by virtue of the Adverse Action) or such action is otherwise permitted under this Agreement; provided, however, that none of the following shall be an Adverse Action: (A) the development, redevelopment, construction, modification or change in the operation of any existing or new utility facility (other than any Utility Facility) or utility (including a new source of energy or power) (other than the Utilities) whether or not it results in the reduction of the Variable Fee Component over time, (B) the imposition of a state or local Tax of general application or federal Tax or an increase in state or local Taxes of general application or federal Taxes and (C) any action of the Public Utilities Commission of Ohio or the Federal Energy Regulatory Commission, or their respective successors, that subjects the Concessionaire to such agency’s regulatory jurisdiction due solely to the Utility System Operations performed in accordance with this Agreement. For the avoidance of doubt, any action described in the foregoing clause (C) may be a Compensation Event in accordance with the definition thereof.
- (b) If an Adverse Action occurs, the Concessionaire may elect, subject to Section 14.2 and Section 14.3, to either (i) be paid by the University the Concession Compensation with respect thereto (such Concession Compensation, the “AA-

Compensation”) or (ii) terminate this Agreement and be paid by the University the Termination Damages, in either case by giving notice in the manner described in Section 14.1(c).

- (c) If an Adverse Action occurs, the Concessionaire shall give written notice (the “AA-Preliminary Notice”) to the University within 30 Days following the date on which the Concessionaire first became aware of the Adverse Action stating that an Adverse Action has occurred. Within 180 Days following the date of delivery of the AA-Preliminary Notice, the Concessionaire shall give the University another notice (the “AA-Notice”) setting forth (i) the details of the effect of the occurrence that is principally borne by the Concessionaire, (ii) details of the material adverse effect of the said occurrence on the fair market value of the Concessionaire Interest, (iii) a statement as to which right in Section 14.1(b) the Concessionaire elects to exercise, and (iv) if the Concessionaire elects to exercise the right to AA-Compensation under Section 14.1(b), the amount claimed as AA-Compensation and details of the calculation thereof. The University shall, after receipt of the AA-Notice, be entitled by notice delivered to the Concessionaire no later than 30 Days following the date of receipt of the AA-Notice, to require the Concessionaire to provide such further supporting particulars as the University may reasonably consider necessary. If the University wishes to dispute the occurrence of an Adverse Action or the amount of AA-Compensation, if any, claimed in the AA-Notice, the University shall give written notice of dispute (the “AA-Dispute Notice”) to the Concessionaire within 30 Days following the date of receipt of the AA-Notice stating in reasonable detail the grounds for such dispute. If neither the AA-Notice nor the AA-Dispute Notice has been withdrawn within 30 Days following the date of receipt of the AA-Dispute Notice by the Concessionaire, the matter shall be submitted to the dispute resolution procedure in Article 18.
- (d) If the Concessionaire has elected to exercise its right to AA-Compensation pursuant to Section 14.1(b), the University shall pay such AA-Compensation as Concession Compensation in accordance with Article 15.
- (e) Payment of the entire sum of the Termination Damages or the AA-Compensation, as the case may be, by the University to the Concessionaire, shall constitute full and final satisfaction of all amounts that may be claimed by the Concessionaire for and in respect of the occurrence of an Adverse Action, as the case may be, and, upon such payment, the University shall be released and forever discharged by the Concessionaire from any and all liability in respect of such Adverse Action, except if the Concessionaire elects to be paid AA-Compensation and the effect of the applicable Adverse Action continues to be borne after the Compensation Calculation Measuring Period in which it took place, in which case, the Concessionaire may make a claim for AA-Compensation in subsequent Compensation Calculation Measuring Periods to the extent the Concessionaire is affected by such Adverse Action in such Compensation Calculation Measuring Period.

## **Section 14.2. Termination.**

- (a) If the Concessionaire has elected to exercise its right to terminate this Agreement in connection with an Adverse Action pursuant to Section 14.1(b) and Section 14.1(e), then this Agreement, subject to Section 14.3, shall terminate 60 Days following the date of receipt of the AA-Notice by the University, and the University shall pay an amount equal to the aggregate of (i) the Utility System Concession Value as of the date of such termination (which shall be determined as if no Adverse Action has occurred), *plus* (ii) without duplication, the out-of-pocket and documented costs and expenses incurred by the Concessionaire (which costs and expenses shall include reasonable payments due and payable by the Concessionaire to the Operator or other Contractors pursuant to an Operating Agreement or similar agreement) or the Operator as a result of such termination, *plus* (iii) the Concession Compensation calculated for the period between the date of the Adverse Action and the date of termination *less* (iv) any insurance or condemnation proceeds received by the Concessionaire in respect of all or any portion of the Utility System as a result of such Adverse Action (collectively, the "Termination Damages"), together with any Taxes payable by the Concessionaire on the gross amount of such Termination Damages, to the Concessionaire on the Reversion Date or, if the Termination Damages are determined on a date subsequent to the Reversion Date, then not later than 60 Days following the date of determination of the Termination Damages; provided that, subject to the right of the Concessionaire to receive interest at the Bank Rate on the payment owed by the University from the date of receipt of the AA-Dispute Notice to the date on which payment is made, the University may defer any such payment for an additional 120 Days in the University's discretion; provided, however, that any amounts received by the Concessionaire or any Leasehold Mortgagee from any insurance policies payable as a result of damage or destruction to the Utility System that has not been remedied prior to the Reversion Date, shall, to the extent not used to remedy such effects, be deducted from the amount payable by the University to the Concessionaire, so long as the University has not received any such amounts pursuant to Section 13.4.
- (b) Any dispute arising out of the determination of the Termination Damages shall be submitted to the dispute resolution procedure in Article 18.
- (c) This Agreement shall not terminate pursuant to Section 14.2(a) unless the Concessionaire has first obtained and delivered to the University the written consent of the Leasehold Mortgagee to such termination.

**Section 14.3. Right of the University to Remedy.** If the University wishes to remedy the occurrence of an Adverse Action (other than an Adverse Action by the University that constitutes a breach of this Agreement, to which this Section 14.3 shall have no application without the written consent of the Concessionaire), including by reimbursing the Concessionaire such funds as are necessary to compensate the Concessionaire for the material adverse economic effect on the Concessionaire of such Adverse Action, the University shall give written notice thereof to the Concessionaire within 30 Days following the date of receipt of the AA-Notice. If

the University gives such notice it must remedy the applicable Adverse Action within 120 Days following the date of receipt of the AA-Notice or, if a AA-Dispute Notice has been given, within 120 Days following the final determination pursuant to Article 18 that an Adverse Action occurred; provided, however, that in the event of a remedy involving payment of funds to the Concessionaire, the University shall be deemed to have remedied the applicable Adverse Action as of the date that the University provides a written commitment to the Concessionaire to pay such funds from time to time as are necessary to compensate the Concessionaire as it is financially adversely affected by the applicable Adverse Action from time to time. If the University elects to remedy the occurrence of an Adverse Action within the applicable period of time, the right of the Concessionaire shall be limited to a claim for AA-Compensation with respect to such Adverse Action.

**Section 14.4. Other Actions by Governmental Authorities.** In the event that any Governmental Authority proposes to take any action at any time during the Term (including enacting any Law) and the effect of such action is reasonably expected (i) to be principally borne by the Concessionaire (and not by others) and (ii) to have a Material Adverse Effect, except where such action is in response to any act or omission on the part of the Concessionaire that is illegal (other than an act or omission rendered illegal by virtue of an Adverse Action or such action by any such Governmental Authority), then at the request of the Concessionaire, the University shall use its reasonable efforts to oppose and challenge such action by any such Governmental Authority; provided, however, that all reasonable out-of-pocket costs and expenses incurred by the University in connection with such opposition or challenge shall be borne by the Concessionaire.

**Section 14.5. Regulatory Filings.** The Parties acknowledge and agree that they share a common interest in any regulatory proceedings that involve the Utility System Operations. Consistent therewith, the Parties agree that, to the extent that the Concessionaire or the University is required to make any regulatory filing or submission with respect to a tariff or rate for the Utility System or the Utility Fee, the Concessionaire and the University shall reasonably cooperate in connection with such required filing or submission and shall, collectively, only make one filing or submission with the applicable regulatory agency. Such cooperation shall include appearing at, and participating in, any regulatory proceeding at the request of the other Party. The Concessionaire and the University shall also reasonably cooperate with respect to any required regulatory filings or submissions not involving a tariff or rate for the Utility System or the Utility Fee, to the extent practicable.

## **ARTICLE 15**

### **DELAY EVENTS; CONCESSION COMPENSATION AND KPI COMPENSATION**

#### **Section 15.1. Delay Events.**

- (a) If the Concessionaire is affected by a Delay Event, it shall give written notice as soon as practicable but in no event later than 10 Business Days following the date on which it first became aware of the effect of such Delay Event on the Concessionaire (provided that in the case of such Delay Event being a continuing cause of delay, only one notice shall be necessary), which notice shall include (i) a statement of which Delay Event the claim is based upon, (ii) details of the



circumstances from which the delay arises and (iii) an estimate of the delay in the performance of obligations under this Agreement attributable to such Delay Event and information in support thereof, if known at that time. The University shall, after receipt of any such notice, be entitled by notice to require the Concessionaire to provide such further supporting particulars as the University may reasonably consider necessary.

- (b) The Concessionaire shall notify the University within 5 Business Days following the date on which it first became aware that a Delay Event has ceased.
- (c) Subject to the Concessionaire giving the notice required in Section 15.1(a), a Delay Event shall excuse the Concessionaire from whatever performance is prevented by the Delay Event referred to in such notice and, to the extent applicable, for such appropriate number of Days as the University and the Concessionaire jointly determine, each acting reasonably. If the University and the Concessionaire cannot agree upon the period of extension, then either Party shall be entitled to refer the matter to the dispute resolution procedure in Article 18. This Section 15.1(c) shall not excuse the Concessionaire from the performance and observance under this Agreement of all obligations and covenants not affected by the Delay Event. While a Delay Event is occurring, the Utility Fee shall be reduced by an amount equal to the Utility Fee multiplied by the percentage of the Utility System that is inoperable as a result of the Delay Event, as determined by the University in its reasonable discretion (as determined by the reduction in delivery capacity as compared to the delivery capacity immediately preceding such Delay Event), provided that such Delay Event shall be deemed a Compensation Event. Notwithstanding the occurrence of a Delay Event, the Concessionaire shall continue its performance and observance under this Agreement of all of its obligations and covenants to the extent that it is reasonably able to do so and shall use its reasonable efforts to minimize the effect and duration of the Delay Event. Nothing herein shall permit or excuse noncompliance with a change to applicable Laws.
- (d) Except as provided in the immediately following sentence, (i) if a Delay Event occurs that has the effect of causing physical damage or destruction to a material part of the Utility System that results in the Utility System being substantially unavailable for the provision of Utility Services and such effect continues for a period in excess of 120 continuous Days or 120 non-continuous Days within a 360-Day period and has a Material Adverse Effect, or (ii) if insurance policies payable (or that should have been payable but for the breach of an obligation to take out and maintain such insurance policy by the Concessionaire) or condemnation or other similar proceeds are insufficient to restore the Concessionaire to the same economic position as it would have been in the absence of such event, then, notwithstanding Section 2.1, in either case, the Concessionaire shall have the right, but not the obligation, by written notice to the University within 30 Days after the Delay Event Remedy is permitted to be elected, to extend the Term for a period that would be sufficient to compensate the Concessionaire and restore it to the same economic position as it would have

been in had such Delay Event not occurred (a “Delay Event Remedy”); provided, however, in no event shall the Term be extended if such extension is prohibited by Law or if the extended Term, when taking into account such extension, would subject the Concessionaire or the University to a leasehold tax, conveyance fee or similar charge under applicable Law. If the Concessionaire elects to exercise the right to the Delay Event Remedy but such exercise is prohibited by Law or would subject the Concessionaire or the University to a leasehold tax, conveyance fee or similar charge under applicable Law, (i) the Delay Event Remedy shall be modified such that the Term is extended only for such period as would not cause exercise of the Delay Event Remedy to be prohibited by Law or to subject the Concessionaire or the University to a leasehold tax, conveyance fee or similar charge under applicable Law, and (ii) the relevant Delay Event shall be a Compensation Event to the extent necessary to compensate the Concessionaire and restore it to the same economic position as it would have been in, absent the modification to the Delay Event Remedy pursuant to clause (i) of this sentence.

- (e) If the Concessionaire elects to exercise the right to the Delay Event Remedy, within 5 Business Days following the date on which the Concessionaire first became aware of its right to the Delay Event Remedy pursuant to Section 15.1(d)(i) or Section 15.1(d)(ii), the Concessionaire shall give written notice (a “Delay Event Notice”) to the University setting forth (i) the details of the relevant Delay Event and its effect on either causing physical damage or destruction to the Utility System that results in the Utility System being substantially unavailable for the provision of Utility Services, (ii) the amount claimed to be required to restore the Concessionaire to the same economic position as it would have been in had such Delay Event not occurred (including the details of the calculation thereof) and (iii) the details of the relationship between such amount and the Concessionaire’s proposed extension of the Term. The University shall, after receipt of the Delay Event Notice, be entitled by notice to require the Concessionaire to provide such further supporting particulars as the University may reasonably consider necessary. If the University wishes to dispute the occurrence of a Delay Event or the Delay Event Remedy claimed in the Delay Event Notice, the University shall give written notice to dispute (the “Delay Event Dispute Notice”) to the Concessionaire within 30 Days following the date of receipt of the Delay Event Notice stating the grounds for such dispute, and if neither the Delay Event Notice nor the Delay Event Dispute Notice has been withdrawn within 30 Days following the date of receipt of the Delay Event Dispute Notice by the Concessionaire, the matter shall be submitted to the dispute resolution procedure in Article 18. For the avoidance of doubt, if the conditions set forth in Section 15.1(d)(i) and Section 15.1(d)(ii) occur with respect to the same Delay Event, the Concessionaire may have 2 opportunities to provide a Delay Event Notice.

**Section 15.2. Notice of Compensation Events and KPI Events.** Except as provided elsewhere in this Agreement, if a Compensation Event occurs, the Concessionaire shall give written notice to the University within 30 Days following the date on which the Concessionaire

first became aware of the Compensation Event stating that a Compensation Event has occurred. Except as provided elsewhere in this Agreement, if a KPI Event occurs, the University shall give written notice to the Concessionaire within 30 Days following the date on which the University first became aware of the KPI Event stating that a KPI Event has occurred.

**Section 15.3. Payments of Concession Compensation and KPI Compensation.**

- (a) Within 30 Days after each Compensation Calculation Date, the Concessionaire shall send the University notice setting forth all Concession Compensation due for the immediately preceding Compensation Calculation Measuring Period, and the University shall send the Concessionaire notice setting forth all KPI Compensation due for the immediately preceding Compensation Calculation Measuring Period. Each such notice shall set forth (i) the amount claimed and details of the calculation thereof; (ii) details of the Compensation Event(s), Adverse Action(s) and KPI Event(s), as applicable, as a result of which Concession Compensation and KPI Compensation, respectively, is claimed therein, including an explanation of the reasons that such event(s) constitute Compensation Event(s), Adverse Action(s) and KPI Event(s), respectively, under the terms of this Agreement; and (iii) the amount claimed as Concession Compensation and KPI Compensation, respectively, with respect to each such Compensation Event, Adverse Action and KPI Event, respectively, and details of the calculation thereof.
- (b) If either Party wishes to dispute the occurrence of any Compensation Event(s), Adverse Action(s) or KPI Event(s) set forth in the notices described in Section 15.3(a) or the amounts claimed thereunder, then such Party shall give written notice of dispute (the “Dispute Notice”) to the other Party within 30 Days following the date of receipt of the relevant notice stating the grounds for such dispute. If the Dispute Notice has not been withdrawn or the dispute otherwise resolved by the Parties within 30 Days following the date of receipt of the Dispute Notice, the matter shall be submitted to the dispute resolution procedure set forth in Article 18.
- (c) The University and the Concessionaire shall cooperate and assist in good faith in the determination of the Concession Compensation and KPI Compensation in accordance with this Section 15.3, including making available, to the extent reasonably necessary, books, records, work papers and personnel at such reasonable times as any Party shall request and permitting (at the expense of the requesting Party) the copying of any records or extracts thereof reasonably requested.
- (d) The University shall have the right, prior to any payment of the Concession and KPI Compensation Balance, to include any Concession Compensation in the applicable Utility Fee as (i) a New Approved Capital Improvement if the Concession Compensation was incurred in connection with the construction of a Capital Improvement or (ii) an Uncapped O&M Cost payable over the next Fiscal Year.

- (e) If, following the final determination of the Concession Compensation and KPI Compensation for any Compensation Calculation Date other than the End Date, the Concession and KPI Compensation Balance for such Compensation Calculation Measuring Period is finally determined in accordance with this Section 15.3, to be less than \$1,000,000, neither Party shall make a payment pursuant to this Section 15.3, and, instead, such amount shall be carried forward to the succeeding determination of the Concession and KPI Compensation Balance in accordance with the definition thereof.
- (f) If, following the final determination of the Concession Compensation and KPI Compensation, the Concession and KPI Compensation Balance for such Compensation Calculation Measuring Period as finally determined in accordance with this Section 15.3, exceeds \$1,000,000 (whether owed to the University or to the Concessionaire) or if the relevant Compensation Calculation Date is the End Date, then, (i) if the Concession and KPI Compensation Balance is positive, then the University shall pay, within 15 Business Days of such final determination, to the Concessionaire, the Concession and KPI Compensation Balance or add such amount to the immediately succeeding payment of the Utility Fee, if applicable or (ii) if the Concession and KPI Compensation Balance is negative, then the Concessionaire shall pay, within 15 Business Days of such final determination, to the University, the absolute amount of the Concession and KPI Compensation Balance or offset such amount against the immediately succeeding payment of the Utility Fee, if applicable.
- (g) For the determination of the Concession and KPI Compensation Balance for the Compensation Calculation Date that is the End Date, the Concession Compensation shall also include the Unrecovered Balances as of the End Date, unless this Agreement is terminated as a result of a Concessionaire Default, in which case no Unrecovered Balances shall be included in the Concession and KPI Compensation Balance.

**Section 15.4. KPI Compensation.** Other than the University's right to cause the Concessionaire to remove the Operator pursuant to Section 3.3(c), the payment of KPI Compensation by the Concessionaire shall constitute the Concessionaire's sole and exclusive liability and the University's sole and exclusive remedy for any KPI Event.

## **ARTICLE 16 DEFAULTS**

### **Section 16.1. Default by the Concessionaire.**

- (a) *Events of Default.* The occurrence of any one or more of the following events during the Term shall constitute a "Concessionaire Default" under this Agreement:
  - (i) if the Concessionaire fails to comply with, perform or observe any material obligation, covenant, agreement, term or condition in this

Agreement other than a breach of the Performance Standards, Section 5.4(a) or Section 7.5(a) by the Concessionaire or a KPI Event, and such failure continues unremedied for a period of 90 Days following notice thereof (giving particulars of the failure in reasonable detail) from the University to the Concessionaire or for such longer period as may be reasonably necessary to cure such failure, provided, in the latter case, that the Concessionaire has demonstrated to the satisfaction of the University, that (A) it is proceeding, and will proceed, with all due diligence to cure or cause to be cured such failure, (B) its actions can be reasonably expected to cure or cause to be cured such failure within a reasonable period of time acceptable to the University, and (C) such failure is, in fact, cured within such period of time;

- (ii) if this Agreement or all or any portion of the Concessionaire Interest is Transferred in contravention of Article 17 and such Transfer or action continues unremedied for a period of 10 Business Days following notice thereof from the University to the Concessionaire;
- (iii) if the Concessionaire fails to comply with the requirements or directives of a final award in a matter submitted to dispute resolution in accordance with Article 18, and such failure continues unremedied for a period of 30 Days following notice thereof from the University to the Concessionaire, or for such longer period as may be reasonably necessary to cure such failure, provided, in the latter case, that the Concessionaire has demonstrated to the satisfaction of the University, that (A) it is proceeding, and will proceed, with all due diligence to cure or cause to be cured such failure, (B) its actions can be reasonably expected to cure or cause to be cured such failure within a reasonable period of time acceptable to the University, and (C) such failure is, in fact, cured within such period of time;
- (iv) if the Concessionaire (A) admits, in writing, that it is unable to pay its debts as such become due, (B) makes an assignment for the benefit of creditors, (C) files a voluntary petition under Title 11 of the United States Code, or if such petition is filed against it and an order for relief is entered, or if the Concessionaire files any petition or answer seeking, consenting to or acquiescing in any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under the present or any future United States Bankruptcy Code or any other present or future applicable Law, or shall seek or consent to or acquiesce in or suffer the appointment of any trustee, receiver, custodian, assignee, sequestrator, liquidator or other similar official of the Concessionaire or of all or any substantial part of its properties or of the Utility System or any interest therein, or (D) takes any corporate action in furtherance of any action described in this Section 16.1(a)(iv);

- (v) if within 90 Days after the commencement of any proceeding against the Concessionaire seeking any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under the present or any future United States Bankruptcy Code or any other present or future applicable Law, such proceeding has not been dismissed, or if, within 90 Days after the appointment, without the consent or acquiescence of the Concessionaire, of any trustee, receiver, custodian, assignee, sequestrator, liquidator or other similar official of the Concessionaire or of all or any substantial part of its properties or of the Utility System or any interest therein, such appointment has not been vacated or stayed on appeal or otherwise, or if, within 90 Days after the expiration of any such stay, such appointment has not been vacated;
- (vi) if a levy under execution or attachment has been made against all or any part of the Utility System or any interest therein as a result of any Encumbrance (other than a Permitted Concessionaire Encumbrance) created, incurred, assumed or suffered to exist by the Concessionaire or any Person claiming through it, and such execution or attachment has not been vacated, removed or stayed by court order, bonding or otherwise within 60 Days after the Concessionaire becomes aware of such levy, unless such levy resulted from actions or omissions of the University or its Representatives; or
- (vii) the Concessionaire repudiates in writing any of its material obligations under this Agreement.

Notwithstanding the foregoing, a Concessionaire Default shall not include any failure by the Concessionaire to perform its obligations under this Agreement (other than payment obligations) to the extent such failure is the result of Force Majeure.

- (b) *Remedies of the University upon Concessionaire Default.* Upon the occurrence, and during the continuance, of a Concessionaire Default, the University may, by notice to the Concessionaire, declare the Concessionaire to be in default and may, subject to the provisions of Article 18 and Article 19, do any or all of the following as the University, in its discretion, shall determine:
  - (i) the University may terminate this Agreement by giving 30 Days' prior notice to the Concessionaire upon the occurrence of any Concessionaire Default; provided, however, that the Concessionaire shall be entitled to cure a Concessionaire Default pursuant to Section 16.1(a)(i) by (i) agreeing within such 30-Day period to pay any Losses sustained as a result of such Concessionaire Default and (ii) providing the University with a written work plan within such 30-Day period outlining the actions by which the Concessionaire will ensure future compliance with either (x) the obligation, covenant, agreement, term or condition in this Agreement or (y) the requirements or directives of the issued final award in accordance with Article 18 that the Concessionaire failed to perform or observe,

which work plan is Approved by the University, but any failure of the Concessionaire to comply in any material respect with such Approved work plan (other than as a result of a Delay Event) following 30 Days' notice of such failure from the University to the Concessionaire shall be deemed to be a Concessionaire Default described in Section 16.1(a)(i) and the entitlement of the Concessionaire to cure such Concessionaire Default by the delivery of an Approved work plan shall not apply thereto;

- (ii) if the Concessionaire Default is by reason of the failure to pay any monies to another Person, the University may (without obligation to do so) make payment on behalf of the Concessionaire of such monies unless such non-payment is due to a bona fide dispute, and any amount so paid by the University shall be payable by the Concessionaire to the University within 3 Business Days after demand therefor;
- (iii) subject to the cure rights of the Leasehold Mortgagee set forth in Section 19.3, the University may cure the Concessionaire Default (but this shall not obligate the University to cure or attempt to cure a Concessionaire Default or, after having commenced to cure or attempted to cure a Concessionaire Default, to continue to do so), and all costs and expenses reasonably incurred by the University in curing or attempting to cure the Concessionaire Default, shall be payable by the Concessionaire to the University within 3 Business Days after written demand therefor; provided, however, that (A) the University shall not incur any liability to the Concessionaire for any act or omission of the University or any other Person in the course of remedying or attempting to remedy any Concessionaire Default unless resulting from the University's recklessness, gross negligence or willful misconduct; (B) the University's cure of any Concessionaire Default shall not affect the University's rights against the Concessionaire by reason of the Concessionaire Default; and (C) the University may seek specific performance, injunction or other equitable remedies, it being acknowledged that damages are an inadequate remedy for a Concessionaire Default;
- (iv) the University may seek to recover its Losses arising from such Concessionaire Default and any amounts due and payable under this Agreement and, in connection therewith, exercise any recourse available to any Person who is owed damages or a debt;
- (v) with respect to those Concessionaire Defaults that entitle the University to terminate this Agreement pursuant to Section 16.1(b)(i), the University may terminate the Concessionaire's right to use, operate, maintain, possess, and rehabilitate the Utility System and the Concessionaire's right to collect from the University and retain the Utility Fee, and in such event, the University or the University's agents and servants may immediately or at any time thereafter take possession and control of the Utility System, by any available action under Law or proceeding at law or in equity, and with

or without terminating this Agreement, and undertake any and all of the Utility System Operations; provided, however, that no such action by the University shall be construed as an election on its part to terminate this Agreement unless a notice of such intention is given to the Concessionaire; and

- (vi) the University may exercise any of its other rights and remedies provided for hereunder or at law or equity.

**Section 16.2. Default by the University.**

- (a) *Events of Default.* The occurrence of any one or more of the following events during the Term shall constitute a “University Default” under this Agreement:
  - (i) if the University fails to pay the Utility Fee, the Forecast Utility Fee or the Concession and KPI Compensation Balance to the extent the University is required to do so pursuant to Section 15.3(f), each in accordance herewith and such failure continues unremedied for a period of 5 Business Days following notice thereof (giving particulars of the failure in reasonable detail) from the Concessionaire to the University;
  - (ii) if the University fails to comply with or observe any material obligation, covenant, agreement, term or condition in this Agreement (other than an Adverse Action or the payment of the Utility Fee, the Forecast Utility Fee or the Concession and KPI Compensation Balance to the extent the University is required to do so pursuant to Section 15.3(f)) and such failure continues unremedied for a period of 90 Days following notice thereof (giving particulars of the failure in reasonable detail) from the Concessionaire to the University or for such longer period as may be reasonably necessary to cure such failure, provided, in the latter case, that the University has demonstrated to the satisfaction of the Concessionaire, that (A) it is proceeding with all due diligence to cure or cause to be cured such failure, and (B) its actions can be reasonably expected to cure or cause to be cured such failure within a reasonable period of time acceptable to the Concessionaire, and (C) such failure is, in fact, cured within such period of time;
  - (iii) if the University fails to comply with the requirements or directives of a final award in a matter submitted to dispute resolution in accordance with Article 18 and such default continues unremedied for a period of 30 Days following notice thereof from the Concessionaire to the University, or for such longer period as may be reasonably necessary to cure such failure, provided, in the latter case, that the University has demonstrated to the satisfaction of the Concessionaire, acting reasonably, that (A) it is proceeding, and will proceed, with all due diligence to cure or cause to be cured such failure, (B) its actions can be reasonably expected to cure or cause to be cured such failure within a reasonable period of time



acceptable to the Concessionaire, acting reasonably and (C) such failure is, in fact, cured within such period of time;

- (iv) if a levy under execution or attachment has been made against all or any part of the Utility System or the Concessionaire Interest as a result of any Encumbrance (other than a Permitted University Encumbrance) created, incurred, assumed or suffered to exist by the University or any Person claiming through it, and such execution or attachment has not been vacated, removed or stayed by court order, bonding or otherwise within a period of 60 Days, unless such levy resulted from actions or omissions of the Concessionaire or its Representatives or if all or a material part of the Utility System shall be subject to a condemnation or similar taking by the University or any agency thereof;
- (v) if the University (A) admits, in writing, that it is unable to pay its debts as such become due, (B) makes an assignment for the benefit of creditors, (C) files a voluntary petition under Title 9 of the United States Code, or if such petition is filed against it and an order for relief is entered, or if the University files any petition or answer seeking, consenting to or acquiescing in any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under the present or any future United States Bankruptcy Code or any other present or future applicable Law, or shall seek or consent to or acquiesce in or suffer the appointment of any trustee, receiver, custodian, assignee, sequestrator, liquidator or other similar official of the University, or of all or any substantial part of its properties (in each case, to the extent applicable to a municipality), or (D) takes any action in furtherance of any action described in this Section 16.2(a)(v); or if within 90 Days after the commencement of any proceeding against the University seeking any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under the present or any future United States Bankruptcy Code or any other present or future applicable Law, such proceeding has not been dismissed, or if, within 90 Days after the appointment, without the consent or acquiescence of the University, of any trustee, receiver, custodian, assignee, sequestrator, liquidator or other similar official of the University or of all or any substantial part of its properties (in each case, to the extent applicable to a municipality), such appointment has not been vacated or stayed on appeal or otherwise, or if, within 90 Days after the expiration of any such stay, such appointment has not been vacated; or
- (vi) the University repudiates in writing any of its material obligations under this Agreement.

Notwithstanding the foregoing, a University Default shall not include any failure to perform its obligations under this Agreement (other than payment obligations) to the extent such failure is the result of Force Majeure.

- (b) *Remedies of Concessionaire Upon University Default.* Upon the occurrence, and during the continuance, of a University Default, the Concessionaire may by notice to the University declare the University to be in default and may, subject to the provisions of Article 18, do any or all of the following as the Concessionaire, in its discretion, shall determine:
- (i) terminate this Agreement by giving 60 Days' prior notice to the University; provided, however, that the University shall be entitled to cure a University Default pursuant to Section 16.2(a)(ii) or Section 16.2(a)(iii) by (i) agreeing within such 60-Day period to pay any Losses sustained as a result of such University Default or (ii) providing the Concessionaire with a written work plan within such 60-Day period outlining the actions by which the University will ensure future compliance with either (x) the obligation, covenant, agreement, term or condition in this Agreement that the University failed to perform or observe or (y) the requirements or directives of the final award issued in accordance with Article 18 that the University failed to perform or observe, which work plan is approved by the Concessionaire, but any failure of the University to comply in any material respect with such approved work plan following 30 Days' notice of such failure from the Concessionaire to the University shall be deemed to be a University Default described in Section 16.2(a)(ii) and the entitlement of the University to cure such University Default by the delivery of an approved work plan shall not apply thereto; and upon such termination, the University shall be obligated to pay to the Concessionaire the Utility System Concession Value plus, without duplication, the unpaid Concession and KPI Compensation Balance and the out-of-pocket and documented costs and expenses incurred by the Concessionaire as a result of such termination;
  - (ii) exercise any of its rights or remedies at law or in equity;
  - (iii) seek to recover its Losses and any amounts due and payable under this Agreement and, in connection therewith, exercise any recourse available to any Person who is owed damages or a debt; and
  - (iv) seek specific performance, injunction or other equitable remedies, it being acknowledged that damages are an inadequate remedy for a University Default.

**Section 16.3. Consequences of Termination or Reversion.** Upon the termination or expiration of this Agreement, notwithstanding any claims the Parties may have against each other and subject to Section 16.2(b)(iii), the following provisions shall apply:

- (a) the Concessionaire shall, without action whatsoever being necessary on the part of the University, surrender, transfer and deliver to the University the Utility System (including all improvements to the Utility System), the Utility System Assets (to the extent they have not been disposed of in the ordinary course of

business) and all tangible and intangible personal property of the Concessionaire (including inventories) that is included in the Utility System and used in connection with the Utility System Operations, in good order, condition and repair (reasonable wear and tear excepted), determined reasonably in accordance with the then applicable Performance Standards, free and clear of all Encumbrances other than (w) Permitted Concessionaire Encumbrances set forth in clauses (iv) and (vii) of the definition of that term, (x) Permitted University Encumbrances, (y) those created by or suffered to exist or consented to by the University or any Person claiming through it, and (z) with respect to any property added to the Utility System after the Time of Closing, title defects affecting such property in existence on the date such property is added to the Utility System; provided that the Concessionaire may satisfy any obligation to surrender rights to Proprietary Intellectual Property in accordance with Section 3.11;

- (b) the Concessionaire hereby waives any notice now or hereafter required by Law with respect to transfer of the Utility System on the Reversion Date;
- (c) the University shall, as of the Reversion Date, assume full responsibility for the Utility System Operations, and as of such date, the Concessionaire shall have no liability or responsibility for Utility System Operations occurring after such date;
- (d) the Concessionaire shall be liable for all costs, expenses and other amounts for which it is liable or responsible hereunder incurred up to but not including the Reversion Date, and the University shall be liable for all costs, expenses and amounts incurred in connection with the Utility System Operations on and after the Reversion Date;
- (e) the University shall have the option, subject to the rights of any Leasehold Mortgagee, or its designee or nominee, to enter into a New Agreement, by providing notice to the Concessionaire of requiring that the Concessionaire assign, without warranty or recourse to the Concessionaire, to the fullest extent permitted by Authorizations and applicable Law, all of its right, title and interest in, to and under (in each of the following cases, to the extent assignable) all or any of the Operating Agreements then in effect and all Authorizations to the University or its nominee for the remainder of their respective terms; provided, however, that if the University exercises such option, the right, title and interest of the Concessionaire in, to and under such Operating Agreements and Authorizations shall be assigned to the University or its nominee as of the Reversion Date and the Concessionaire shall surrender the Utility System to the University and shall cause all Persons claiming under or through the Concessionaire to do likewise, and the University shall assume in writing, pursuant to an assumption agreement satisfactory to the Concessionaire, the Concessionaire's obligations under the Operating Agreements that arise in respect of, or relate to, any period of time falling on and after the Reversion Date; provided further, that if the University does not exercise such option, the Concessionaire shall take such steps as are necessary to terminate the Operating

Agreements to the extent permitted thereunder and in accordance with the terms thereof;

- (f) the Concessionaire, at its sole cost and expense, shall promptly deliver to the University copies of all records and other documents relating to the Utility Fee that are in the possession of the Concessionaire or its Representatives and all other then existing records and information relating to the Utility System as the University, acting reasonably, may request;
- (g) the Concessionaire shall execute and deliver to the University transfer of title documents and other instruments reasonably required by the University to evidence such termination;
- (h) the Concessionaire shall assist the University in such manner as the University may require to ensure the orderly transition of control, operation, management, maintenance and rehabilitation of the Utility System, and shall, if appropriate and if requested by the University, take all steps as may be necessary to enforce the provisions of the Operating Agreements pertaining to the surrender of the Utility System;
- (i) the University and the Concessionaire shall make appropriate adjustments, including adjustments relating to any Operating Agreements assigned to the University, Utility Fee and other similar charges collected on and after the Reversion Date that are incurred prior to the Reversion Date, and utilities, and any adjustments and payment therefor shall be made by the appropriate Party on the Reversion Date, but shall be subject to readjustment if necessary because of error in matters such as information, calculation, payments and omissions that are identified within the period of 180 Days following the Reversion Date; provided, however, that the University and the Concessionaire acknowledge that certain adjustments or readjustments may have to be made when a third party provides to the University or the Concessionaire a final adjustment amount in respect of a matter, and for such matters the adjustment and readjustment date shall each be correspondingly extended;
- (j) if this Agreement is terminated as a result of an Adverse Action, the payment by the University to the Concessionaire of the amounts required under Article 14 or Article 18 shall constitute full and final settlement of any and all Claims the Concessionaire may have against the University for and in respect of the termination of this Agreement and upon such payment, the Concessionaire shall execute and deliver all such releases and discharges as the University may reasonably require to give effect to the foregoing; and
- (k) all plans, drawings, specifications and models prepared in connection with construction at the Utility System and in the Concessionaire's possession and all "as-built" drawings shall become the sole and absolute property of the University, and the Concessionaire shall promptly deliver to the University all such plans, drawings, specifications and models and all such as-built drawings

(but may keep copies of those plans, drawings, specifications and models that were developed by the Concessionaire or its Representatives).

This Section 16.3 shall survive the expiration or any earlier termination of this Agreement.

**Section 16.4. Termination Other than Pursuant to Agreement.** If this Agreement is terminated by the University other than pursuant to Section 16.1, or is canceled, rescinded or voided during the Term for any reason over the objection and without action by the Concessionaire, the University shall pay to the Concessionaire the Utility System Concession Value as of the date of such termination, cancellation, rescinding or voiding, plus, without duplication, the out-of-pocket and documented costs and expenses incurred by the Concessionaire or the Operator as a direct result of such termination, cancellation, rescinding or voiding. The University hereby acknowledges and agrees that it may only terminate this Agreement in accordance with the express terms hereof and shall not, in any event, have the right to terminate this Agreement for convenience. The Concessionaire hereby acknowledges and agrees that it may only terminate this Agreement in accordance with the express terms hereof and shall not, in any event, have the right to terminate this Agreement for convenience or to challenge the validity or enforceability of this Agreement.

**Section 16.5. Option to Extend the Term.**

- (a) If the Term has not terminated earlier than the anticipated expiration of this Agreement on the 50th anniversary of the Closing Date, as may be extended by a Delay Event Remedy (the “Initial Term Expiration Date”), then the University shall have the right, by written notice delivered to the Concessionaire anytime between the date that is 5 Years before the Initial Term Expiration Date and the date that is 3 Years before the Initial Term Expiration Date, to elect to terminate the Concessionaire’s Extension Option by purchasing the Concessionaire Interest for an amount equal to the Residual Asset Value, which shall be payable to the Concessionaire on the End Date (the “Extension Purchase Option”). If the University exercises its Extension Purchase Option, the Term shall expire in accordance with this Agreement, subject to any early termination pursuant to the terms of this Agreement, and such payment shall be in addition to, and not in lieu of, the inclusion of the Unrecovered Balances in the Concession and KPI Compensation Balance described in Section 15.3(g) and any other right or obligation under this Agreement.
- (b) If, and only if, the University does not elect to exercise the Extension Purchase Option, then during the 6 month period commencing on the earlier of (i) the date that the University delivers affirmative written notice to the Concessionaire that the University is not exercising the Extension Purchase Option and (ii) the last date that the University had the right to exercise the Extension Purchase Option, the Concessionaire shall have the right, by written notice delivered to the University during such 6-month period, to exercise its Extension Option so that the Term shall expire on the 10<sup>th</sup> anniversary of the Initial Term Expiration Date (such 10-year period, the “Extended Term”) and this Agreement shall remain in

full force and effect during such Extended Term, except that the calculation of the Utility Fee shall be modified, commencing on the first day of the Extended Term, as follows: (x) the Fixed Fee shall be \$0; (y) the University shall pay the Concessionaire a fixed fee payable in equal monthly installments during the Extended Term, and the present value of the sum of those payments shall equal (as of the commencement of the Extended Term) the Residual Asset Value, using a 5% discount rate; and (z) the amount of the Unrecovered Balances existing on the day immediately before the Extended Term shall be reduced to \$0 and the amount of such Unrecovered Balances shall be re-characterized as New Approved Capital Improvement Costs incurred by the Concessionaire on the day immediately before the Extended Term with a Recovery Period that commences on the commencement of the Extended Term and expires at the end of the Extended Term. For the avoidance of doubt, if the Concessionaire exercises its Extension Option, the Unrecovered Balances existing as of the Initial Term Expiration Date shall not be included in the Concession and KPI Compensation Balances on the Initial Term Expiration Date, but any Unrecovered Balances existing as of the expiration of the Term, as extended, shall, subject to Section 15.3(g), be included in the Concession and KPI Compensation Balance.

- (c) If the Concessionaire does not elect to exercise its Extension Option, then this Agreement shall terminate in accordance with the terms hereof, including the inclusion, subject to Section 15.3(g), of any Unrecovered Balances existing as of the expiration of the Term in the Concession and KPI Compensation Balance.
- (d) If at any time before the Initial Term Expiration Date this Agreement is terminated, regardless of whether the Extension Option or Extension Purchase Option has been exercised, this Section 16.5 shall be deemed null and void, and neither Party shall have any rights or obligations with respect thereto.

## ARTICLE 17 RESTRICTIONS ON TRANSFERS

### Section 17.1. Transfers by the Concessionaire.

- (a) Subject in all respects to the collateral assignment of the Concessionaire Interest to the Leasehold Mortgagee, and exercise by the Leasehold Mortgagee of its rights pursuant to such assignment, including by foreclosure, as set forth in Article 19, the Concessionaire shall not Transfer, or otherwise permit the Transfer, of any part of the Concessionaire Interest to or in favor of a Transferee (other than a Transferee that is an Affiliate or a Leasehold Mortgagee under Article 19) that would result in the Concessionaire directly owning 50% or less of the Concessionaire Interest granted to the Concessionaire as of the date hereof unless (i) the University has Approved (based upon a determination in accordance with Section 17.1(b)) such proposed Transferee and (ii) the proposed Transferee (other than a Transferee that is an Affiliate or a Leasehold Mortgagee under Article 19) enters into an agreement with the University in form and substance satisfactory to the University, acting reasonably, wherein the

Transferee acquires the rights and assumes the obligations of the Concessionaire and agrees to perform and observe all of the obligations and covenants of the Concessionaire under this Agreement. Any Transfer made in violation of the foregoing provision shall be null and void ab initio and of no force and effect.

- (b) Approval of a proposed Transfer may be withheld if the University reasonably determines that (i) such proposed Transfer is prohibited by applicable Law, (ii) such proposed Transferee's entering into this Agreement with the University is prohibited by Law, (iii) such proposed Transfer would result in a violation of Law, (iv) such proposed Transfer would result in a Tax liability to the University (unless the University shall have received indemnification, as determined in the University's discretion, with respect thereto) or (v) such proposed Transferee is not capable of performing the obligations and covenants of the Concessionaire under this Agreement. Such determination shall be based upon and take into account the following factors, in each case assessed as of the date of such determination but after giving effect to the proposed Transfer together with any related transactions (including the proposed transfer of employees and other resources to such Transferee in connection with such proposed Transfer and related transactions): (a) the financial strength and integrity of the proposed Transferee, its direct or indirect beneficial owners, any proposed managers or operating partners and each of their respective Affiliates; (b) the experience of the proposed Transferee or the Operator to be engaged by the proposed Transferee in operating a utility system and performing other relevant projects; (c) the background and reputation of the proposed Transferee, its direct or indirect beneficial owners, any proposed managers or operating partners, each of their respective officers, directors and employees and each of their respective Affiliates (including the absence of criminal, civil or regulatory claims or actions against any such Person and the quality of any such Person's past or present performance on other projects); and (d) the Operator engaged by the proposed Transferee, including the ability of the Operator to meet the Performance Standards. If the Concessionaire disputes the University's determination under this Section 17.1(b), such dispute shall be resolved in accordance with Article 18
- (c) If requested by the Concessionaire, the University shall, on a confidential basis and at the Concessionaire's sole cost and expense, evaluate one or more proposed Transferees as provided in Section 17.1(b) and notify the Concessionaire within 30 Business Days of its Approval or withholding of Approval with respect to such proposed Transferee(s).
- (d) No Transfer of all or any of the Concessionaire Interest (except for a Transfer to a Leasehold Mortgagee or its nominee upon its exercise of remedies under the Leasehold Mortgage and any subsequent transfer to the transferee of the Leasehold Mortgagee that has been Approved under Section 17.1(b)) shall be made or have any force or effect if, at the time of such Transfer there has occurred a Concessionaire Default that has not been remedied or an event that with the lapse of time, the giving of notice or otherwise would constitute a Concessionaire Default.

- (e) A Change in Control of the Concessionaire (other than a Change in Control occasioned by the exercise by any Leasehold Mortgagee of its remedies under any pledge of shares, limited liability company interest or partnership interest) shall be deemed to be a Transfer of the Concessionaire Interest for purposes of the foregoing provisions and shall be evaluated by the University as provided in Section 17.1(b) and Section 17.1(c).
- (f) Nothing contained in the foregoing shall be deemed to prohibit or limit the Concessionaire from changing its name, organizational form or status (including a change from a limited liability company to a corporation or limited partnership), provided that such change in name, organizational form or status does not result in a Change in Control of the Concessionaire.
- (g) Neither (i) a change of ownership that is attributable to a lease, sublease, concession, management agreement, operating agreement or other similar arrangement that is subject and subordinate in all respects to the rights of the University under this Agreement so long as (A) no “Change in Control” occurs with respect to the Concessionaire and (B) the Concessionaire remains obligated under this Agreement, nor (ii) the creation of a trust or any other transaction or arrangement that is solely a transfer of all or part of the Concessionaire’s economic interest under this Agreement to another entity shall be deemed to be a Transfer of the Concessionaire Interest for purposes of Section 17.1(a).
- (h) Notwithstanding anything to the contrary contained herein, if the Concessionaire is not permitted by applicable Law to disclose a proposed Change in Control of the Concessionaire prior to its effectiveness, then the Concessionaire shall not be in breach of this Section 17.1 if the new Equity Participant and any new beneficial owners of an existing Equity Participant resulting from such Change in Control: (i) have a minimum total net worth, measured in accordance with GAAP, equal to the greater of (x) \$1,250,000,000 and (y) 25% of the total net position of the University at the time of such Change in Control, which total net position shall be measured in accordance with the standards of the Governmental Accounting Standards Board or its successor; (ii) have a credit rating of at least investment grade at the issuer level as determined by at least one of the Credit Rating Agencies; (iii) are not included on the List of Specially Designated Nationals and Blocked Persons maintained by the United States Treasury Department’s Office of Foreign Assets Control (“OFAC”); (iv) do not reside or have places of business in a country or territory named on an OFAC list; and (v) have at least 2 years’ experience in operating a Comparable Utility System; provided, that within 2 Business Days after the Concessionaire is permitted by applicable Law to disclose such Change in Control, it shall provide the University with written notice thereof and the University shall have the right to Approve such Change in Control in accordance with Section 17.1(a). If the University does not Approve such Change in Control in accordance with Section 17.1(a), it shall be deemed a Concessionaire Default if the Concessionaire does not cause a Transfer or Change in Control that is Approved by the University in



accordance with Section 17.1(a) to be effectuated within 120 Days after the University's disapproval.

**Section 17.2. Assignment by the University.** The University shall have the right to Transfer any or all of the University's interest in the Utility System and this Agreement, provided that it shall be jointly and severally liable with the Transferee for the performance and observance of the obligations and covenants of the University under this Agreement, and any agreement entered into by the University under this Agreement (including agreeing directly with any Leasehold Mortgagee to be bound by the agreement entered into in accordance with Section 19.3) and that any such Transfer by the University shall not materially limit or reduce any of the Concessionaire's other rights, benefits, remedies or privileges under this Agreement nor shall it materially impair the University's ability to meet its obligations under this Agreement and, provided further, any such Transfer shall be subject to the rights and Encumbrances of the Concessionaire and of the Leasehold Mortgagee under any Leasehold Mortgagee.

## **ARTICLE 18 DISPUTE RESOLUTION**

**Section 18.1. Scope.** Any dispute arising out of, relating to, or in connection with this Agreement shall be resolved as set forth in this Article 18.

**Section 18.2. Informal Dispute Resolution Procedures.** The Parties shall attempt in good faith to resolve such dispute within 15 Business Days following receipt by one Party of notice of such dispute from the other Party. If the Parties are unable to resolve the dispute within such period of 15 Business Days, and upon notice by either Party to the other, the dispute shall be referred to the Designated Senior Person of each Party. The Designated Senior Persons shall negotiate in good faith to resolve the dispute, conferring as often as they deem reasonably necessary. Statements made by Representatives of the Parties during the dispute resolution procedures set forth in this Section 18.2 and in Section 18.3 and documents specifically prepared for such dispute resolution procedures shall be considered part of settlement negotiations and shall not be admissible as evidence in any litigation proceeding between the Parties without the mutual consent of the Parties.

**Section 18.3. Mediation.** Mediation of a dispute under this Agreement may not be commenced until the earlier of: (i) such time as both of the Designated Senior Persons, after following the procedures set forth in Section 18.2, conclude in good faith that amicable resolution through continued negotiation of the matter does not appear likely; or (ii) 15 Business Days after the notice referring the dispute to the Designated Senior Persons, pursuant to Section 18.2. If, after such time period, the dispute remains unresolved, the Parties shall attempt to resolve the dispute through mediation administered by the AAA under its Commercial Mediation Procedures before resorting to litigation, as provided by Section 18.4. The Parties agree that any period of limitation applicable to the assertion of a claim shall be deemed tolled during the conduct of informal dispute resolution under Section 18.2 and mediation under this Section 18.3, and that any claim of any Party shall be deemed not to have accrued until the mediation is terminated.

**Section 18.4. Litigation.** Unless the Parties otherwise agree, if mediation as set forth in Section 18.3 does not resolve the dispute within 30 Business Days following a reference to mediation or such longer period as the Parties may mutually agree, then the Parties shall present the dispute to such court of competent jurisdiction as set forth in Section 22.7.

**Section 18.5. Provisional Remedies.** No Party shall be precluded from initiating a proceeding in a court of competent jurisdiction for the purpose of obtaining any emergency or provisional remedy to protect its rights that may be necessary and that is not otherwise available under this Agreement or to enforce or execute upon a judgment entered in accordance with this Agreement, including temporary, preliminary and permanent injunctive relief and restraining orders, writs of mandamus, and the appointment of a receiver or receiver and manager in connection with the collection and retention of the Utility Fee.

**Section 18.6. Tolling.** If a Party receiving a notice of default under this Agreement contests, disputes or challenges the propriety of such notice by making application to the dispute resolution procedure in this Article 18, any cure period that applies to such default shall be tolled for the time period between such application and the issuance of a final award or determination.

## **ARTICLE 19 LENDERS**

**Section 19.1. Leasehold Mortgages.** The Concessionaire shall have the right, at its sole cost and expense, to grant one or more Leasehold Mortgages, secured by the Concessionaire Interest or the Utility Fee if at the time any such Leasehold Mortgage is executed and delivered to the Leasehold Mortgagee, no Concessionaire Default exists and upon and subject to the following terms and conditions:

- (a) a Leasehold Mortgage may not cover any property of, or secure any debt issued or guaranteed by, any Person other than the Concessionaire or the Concessionaire's Parent, but may cover shares or equity interests in the capital of the Concessionaire and any cash reserves or deposits held in the name of the Concessionaire;
- (b) no Person other than an Institutional Lender shall be entitled to the benefits and protections accorded to a Leasehold Mortgagee in this Agreement; provided, however, that lessors and lenders to the Concessionaire (and lenders to a Leasehold Mortgagee that is a Lessor) may be Persons other than Institutional Lenders so long as any Leasehold Mortgage securing the loans made by such Persons is held by an Institutional Lender acting as collateral agent or trustee;
- (c) no Leasehold Mortgage or other instrument purporting to mortgage, pledge, encumber, or create a lien, charge or security interest on or against any or all of the Concessionaire Interest shall extend to or affect the fee simple interest in the Utility System, the University's interest hereunder or the University's reversionary interests and estates in and to the Utility System or any part thereof; in addition, any foreclosure or termination of this Agreement by the University shall simultaneously terminate the Leasehold Mortgage, provided that such

termination shall not affect, modify or terminate the Concessionaire's obligations to the Leasehold Mortgagee with respect to the Leasehold Mortgage Debt;

- (d) the University shall have no liability whatsoever for payment of the principal sum secured by any Leasehold Mortgage, or any interest accrued thereon or any other sum secured thereby or accruing thereunder, and, except for violation by the University of express obligations set forth herein or in any other agreement with the Leasehold Mortgagee, the Leasehold Mortgagee shall not be entitled to seek any damages or other amounts against the University for any or all of the same;
- (e) the University shall have no obligation to any Leasehold Mortgagee in the enforcement of the rights and remedies of the University under this Agreement or by Law, except as expressly set forth in this Agreement or in any agreement with the Leasehold Mortgagee and unless such Leasehold Mortgagee has provided the University with notice of its Leasehold Mortgage in accordance with the Leasehold Mortgagee Notice Requirements;
- (f) each Leasehold Mortgage shall provide that if the Concessionaire is in default under the Leasehold Mortgage and the Leasehold Mortgagee gives notice of such default to the Concessionaire, then the Leasehold Mortgagee shall give written notice of such default to the University;
- (g) subject to the terms of this Agreement and the terms of any direct consent agreement executed by and between the University and Leasehold Mortgagee, all rights acquired by a Leasehold Mortgagee under any Leasehold Mortgage shall be subject and subordinate to all of the provisions of this Agreement and to all of the rights of the University hereunder and the Leasehold Mortgagee shall agree to be bound by the terms of this Agreement to the extent applicable to the Leasehold Mortgagee;
- (h) notwithstanding any enforcement of the security of any Leasehold Mortgage, the Concessionaire shall remain liable to the University for the payment of all sums owing to the University under this Agreement and the performance and observance of all of the Concessionaire's covenants and obligations under this Agreement; and
- (i) a Leasehold Mortgagee shall not, by virtue of its Leasehold Mortgage, acquire any greater rights or interest in the Utility System than the Concessionaire has at any applicable time under this Agreement, other than such rights granted expressly to such Leasehold Mortgagee pursuant to this Article 19, and each Leasehold Mortgagee, the University and the Concessionaire shall enter into a consent agreement in a form acceptable to all parties; provided that such consent agreement shall be in a customary form and shall include the rights and protections provided to the Leasehold Mortgagees in this Agreement.

While any Leasehold Mortgage is outstanding, the University shall not agree to any amendment or modification of this Agreement that could reasonably be expected to have a material adverse effect on the rights or interests of the Leasehold Mortgagee or agree to a voluntary surrender or termination of this Agreement by the Concessionaire without the consent of the Leasehold Mortgagee.

**Section 19.2. Notices and Payments to Leasehold Mortgagees.** Whenever a Leasehold Mortgage exists as to which the University has been provided notice by the holder thereof in accordance with the Leasehold Mortgagee Notice Requirements, the University shall, simultaneously with providing the Concessionaire any required notice under this Agreement, provide a copy of such notice to such Leasehold Mortgagee, and no such notice to the Concessionaire shall be effective against the Leasehold Mortgagee until a copy thereof is duly provided to such Leasehold Mortgagee at its address specified in its notice given to the University in accordance with the Leasehold Mortgagee Notice Requirements (or any subsequent change of address notice given to the University pursuant to the requirements of Section 22.1). With respect to a Leasehold Mortgage regarding which the University has been provided notice in accordance with the Leasehold Mortgagee Notice Requirements, unless the Leasehold Mortgagee has otherwise advised the University in writing, all payments to the Concessionaire to be made by the University under this Agreement shall be made to the institution acting as the collateral agent or depository under the financing secured by such Leasehold Mortgage to the extent the University has been provided the name and mailing address of such institution.

**Section 19.3. Leasehold Mortgagee's Right to Cure.** The Leasehold Mortgagee shall have a period of 90 Days with respect to any Concessionaire Default beyond any cure period expressly provided to the Concessionaire herein, in which to cure or cause to be cured any such Concessionaire Default; provided, however, that such 90-Day period shall be extended if the Concessionaire Default may be cured but cannot reasonably be cured within such period of 90 Days, and the Leasehold Mortgagee begins to cure such default within such 90-Day period (or if possession is necessary in order to effect such cure, the Leasehold Mortgagee files the appropriate legal action to commence foreclosure on the liens of the Leasehold Mortgage (or takes other appropriate action to effect a transfer of title to the property subject to such liens) and take possession of the Utility System within such period) and thereafter proceeds with all due diligence to cure such Concessionaire Default (including by proceeding with all due diligence to effect such foreclosure and during such foreclosure action (to the extent practicable) and thereafter to effect such a cure) within a reasonable period of time acceptable to the University, acting reasonably; provided further that if a Leasehold Mortgagee's right to cure a Concessionaire Default has not expired, and the Leasehold Mortgagee is acting to cure such Concessionaire Default in accordance with this Section 19.3, then the University shall not exercise its right to terminate this Agreement by reason of such Concessionaire Default. In furtherance of the foregoing, the University shall permit the Leasehold Mortgagee and its Representatives the same access to the Utility System as is permitted to the Concessionaire hereunder. The University shall accept any such performance by a Leasehold Mortgagee as though the same had been done or performed by the Concessionaire. Any payment to be made or action to be taken by a Leasehold Mortgagee hereunder as a prerequisite to keeping this Agreement in effect shall be deemed properly to have been made or taken by the Leasehold Mortgagee if such payment is made or action is taken by a nominee, agent or assignee of the rights of such Leasehold Mortgagee. Any exercise of the Leasehold Mortgagee's rights to cure

hereunder shall not result in the assumption by such Leasehold Mortgagee of the Concessionaire's obligations hereunder.

#### **Section 19.4. Rights of the Leasehold Mortgagee.**

- (a) Subject to the provisions of this Agreement, a Leasehold Mortgagee may (i) enforce its Leasehold Mortgage in any lawful way, (ii) acquire the Concessionaire Interest in any lawful way or (iii) take possession of in any lawful way and manage the Utility System in accordance with the terms of this Agreement. Upon foreclosure of (or without foreclosure upon exercise of any contractual or statutory power of sale under such Leasehold Mortgage or a deed in lieu) and subject to the provisions of Article 17 (applied to the Leasehold Mortgagee as if it were the Concessionaire, except that Section 17.1(c) will not apply), a Leasehold Mortgagee may Transfer the Concessionaire Interest; provided, however, that no Transfer by a Leasehold Mortgagee shall be effective unless the Transfer is made in accordance with Section 17.1. Any Person to whom the Leasehold Mortgagee Transfers the Concessionaire Interest (including such Leasehold Mortgagee) shall take the Concessionaire Interest subject to any of the Concessionaire's obligations under this Agreement.
  
- (b) Except as provided in Section 19.3, unless and until a Leasehold Mortgagee (i) forecloses or has otherwise taken ownership of the Concessionaire Interest or (ii) has taken possession or control of the Concessionaire Interest, whether directly or by an agent as a mortgagee in possession or a receiver or receiver and manager has taken possession or control of the Concessionaire Interest by reference to the Leasehold Mortgage, the Leasehold Mortgagee shall not be liable for any of the Concessionaire's obligations under this Agreement or be entitled to any of the Concessionaire's rights and benefits contained in this Agreement, except by way of security; provided, however, that the Leasehold Mortgagee shall be entitled to cure any Concessionaire Default that requires payment of money by paying such money on the Concessionaire's behalf, prior to the Leasehold Mortgagee taking possession, control or ownership of the Concessionaire Interest. If the Leasehold Mortgagee itself or by an agent or a receiver or a receiver and manager is the owner, or is in control or possession of, the Concessionaire Interest, it shall be bound by all liabilities and obligations of the Concessionaire under this Agreement (including the obligation to engage an Operator). Once the Leasehold Mortgagee goes out of possession or control of the Concessionaire Interest or Transfers the Concessionaire Interest to another Person in accordance with the provisions of this Agreement, the Leasehold Mortgagee shall cease to be liable for any of the Concessionaire's obligations under this Agreement accruing thereafter and shall cease to be entitled to any of the Concessionaire's rights and benefits contained in this Agreement, except, if the Leasehold Mortgage remains outstanding, by way of security.

## **Section 19.5. Termination of this Agreement; New Agreement.**

- (a) Without prejudice to the rights of a Leasehold Mortgagee under Section 19.3, if this Agreement is terminated prior to the expiration of the Term due to a Concessionaire Default (in which case the University shall notify the Leasehold Mortgagee of such termination) or if this Agreement is rejected or disaffirmed pursuant to any bankruptcy Law or proceeding or other similar Law or proceedings affecting creditors' rights generally with respect to a bankruptcy proceeding relating to the Concessionaire or otherwise, the University agrees to enter into a new concession and lease agreement of the Utility System with the Leasehold Mortgagee (or its designee or nominee, provided that such designee or nominee either is controlled by the Leasehold Mortgagee (or by the holders of the Leasehold Mortgage Debt)) or is Approved by the University as Transferee under Section 17.1) for the remainder of the original stated Term upon all of the covenants, agreements, terms, provisions and limitations of this Agreement (the "New Agreement"), effective as of the date of such termination, but only on and subject to the satisfaction of all of the following requirements and conditions: (i) such Leasehold Mortgagee commits in writing to the University, in a notice delivered to the University, within 30 Days after the University delivers the termination notice to Leasehold Mortgagee (or, if later, upon the termination of any cure period granted to the Leasehold Mortgagee pursuant to Section 19.3) or within 30 Days after the effective date of such rejection or disaffirmance, as the case may be, that the Leasehold Mortgagee (or its designee or nominee) will enter into the New Agreement, which notice is accompanied by a copy of such New Agreement, duly executed and acknowledged by the Leasehold Mortgagee (or its designee or nominee); (ii) the Leasehold Mortgagee (or its designee or nominee) pays or causes to be paid to the University, at the time of the execution and delivery of the New Agreement, all amounts which, at the time of the execution and delivery thereof, would have been past-due or due and payable in accordance with the provisions of this Agreement but for such termination; (iii) provided the University furnishes a statement or invoice for such costs the Leasehold Mortgagee pays or causes to be paid to the University all reasonable costs and expenses (including legal fees), Taxes, fees, charges and disbursements paid or incurred by the University in connection with such Concessionaire Defaults and termination, the recovery of possession from the Concessionaire, and in connection with the preparation, execution and delivery of the New Agreement and related agreements and documents specified in such statement or invoice; and (iv) such Leasehold Mortgagee (or its designee or nominee), at the time of such written request, cures all Concessionaire Defaults under this Agreement (curable by the payment of money) existing immediately prior to the termination of this Agreement, or, if such Concessionaire Defaults cannot be cured by the payment of money, such Leasehold Mortgagee (or its designee or nominee) commits to the University in the New Agreement to proceed both promptly and diligently, upon the execution of the New Agreement, to cure all such other Concessionaire Defaults to the extent such Concessionaire Defaults are capable of cure by a Person other than the original Concessionaire and, if possession is necessary in order to cure such other Concessionaire Defaults, to

proceed both promptly and diligently to obtain the possession required to cure any such other Concessionaire Defaults (and such cure shall be a covenant in the New Agreement).

- (b) Nothing contained in this Section 19.5 shall be deemed to limit or affect the University's interests in and to such Utility System upon the expiration of the Term of the New Agreement. The provisions of this Section 19.5 shall survive the termination of this Agreement and shall continue in full force and effect thereafter to the same extent as if this Section 19.5 were a separate and independent contract made by the University, the Concessionaire and the Leasehold Mortgagee and, if the Leasehold Mortgagee satisfies the conditions to execute a New Agreement, from the effective date of such termination of this Agreement to the date of execution and delivery of the New Agreement, the Leasehold Mortgagee may use and enjoy the leasehold estate created by this Agreement without hindrance by the University, but only on and subject to the terms and provisions of this Agreement.
- (c) If the circumstances described in Section 19.5(a) occur, and the University determines, based on the written legal advice of counsel, that termination of this Agreement and the entry into a New Agreement by and among the University and the Leasehold Mortgagee could violate applicable provisions of the Laws of the State of Ohio governing procurement by the University then, in lieu of entering in a New Agreement and in satisfaction of its obligations under this Section 19.5, the University agrees to enter into an Assignment and Assumption Agreement pursuant to Section 19.8.

**Section 19.6. Recognition of Leasehold Mortgagee.** If there is more than one Leasehold Mortgagee, only that Leasehold Mortgagee, to the exclusion of all other Leasehold Mortgagees, whose notice was earliest received by the University pursuant to the Leasehold Mortgagee Notice Requirements, shall have the rights as a Leasehold Mortgagee under this Article 19, unless such Leasehold Mortgagee has designated in writing another Leasehold Mortgagee to exercise such rights. Such Leasehold Mortgagee may act as agent for a group or syndicate of one or more Institutional Lenders and such Leasehold Mortgagee and Institutional Lenders may freely assign or sell interests and/or participations in the loans to any other Institutional Lender.

**Section 19.7. University's Right to Purchase Leasehold Mortgages.**

- (a) If any default by the Concessionaire has occurred under a Leasehold Mortgage and has not been cured within applicable cure periods, or any act, condition or event has occurred which would permit a Leasehold Mortgagee to declare all or part of the indebtedness secured by a Leasehold Mortgage to be immediately due and payable (or, in the case of a Leasehold Mortgage that is a lease, to terminate the lease), then the University shall have 30 Days after the date on which such Leasehold Mortgagee shall serve notice upon the University in writing ("Leasehold Mortgagee's Notice") that such Leasehold Mortgagee intends to commence proceedings to foreclose the Leasehold Mortgage or, in the case of a

Leasehold Mortgagee that is a Lessor to terminate the lease with the Concessionaire (stating the calculation of the purchase price pursuant to Section 19.7(c)), during which 30-Day period the University shall have the right and option (the “University’s Option”) to purchase from all Leasehold Mortgagees their Leasehold Mortgages, upon the terms and subject to the conditions contained in this Section 19.7.

- (b) The University’s Option shall be exercised by notice served upon the Concessionaire and all Leasehold Mortgagees within such 30-Day period. If the University’s Option is duly and timely exercised, the University shall purchase and all Leasehold Mortgagees shall assign their Leasehold Mortgages to the University (or its designee) on the date which is 60 Days after the date on which a Leasehold Mortgagee’s Notice is served upon the University. The closing shall take place at a mutually convenient time and place.
- (c) The purchase price payable by the University shall be equal to the aggregate amounts secured by such Leasehold Mortgages (including principal, interest, fees, premiums, Breakage Costs and other costs, expenses (including attorneys’ fees) and any other amounts secured thereby) as of the closing date of the purchase. The purchase price shall be paid in full in cash at closing by wire transfer or other immediately available funds. The purchase price shall be paid by the University to each respective Leasehold Mortgagee, to be applied by the Leasehold Mortgagee to the amounts secured by the Leasehold Mortgage owed to such Leasehold Mortgagee, subject to the priorities of lien of such Leasehold Mortgages.
- (d) At the closing and upon payment in full of the purchase price each Leasehold Mortgagee shall assign its Leasehold Mortgage to the University, together with any security interest held by it in the Concessionaire Interest, without recourse, representations, covenants or warranties of any kind, provided that such Leasehold Mortgages and security interests shall be deemed modified to secure the amount of the aggregate purchase price paid by the University to all Leasehold Mortgagees (rather than the indebtedness theretofore secured thereby) payable on demand, with interest and upon the other items referred to in this Section 19.7(d). Each such assignment shall be in form for recordation or filing, as the case may be. The University shall be responsible for paying any Taxes payable to any Governmental Authority upon such assignment. Such assignment shall be made subject to such state of title of the Utility System as shall exist at the date of exercise of the University’s Option.
- (e) Any Leasehold Mortgage shall contain an agreement of the Leasehold Mortgagee to be bound by the provisions of this Section 19.7, and the University shall have the right to receive all notices of default under any Leasehold Mortgage.

**Section 19.8. Assignment and Assumption Agreement.**



- (a) The provisions of this Section 19.8 shall be in effect whenever either (i) the University has made the determination contemplated by Section 19.5(c) or (ii) the University, with the written consent of the Leasehold Mortgagee, has determined to proceed under this Section 19.8 in lieu of under Section 19.5.
- (b) Without prejudice to the rights of a Leasehold Mortgagee under Section 19.3, if either (i) the University has given a notice of termination of this Agreement due to Concessionaire Default pursuant to Section 16.1(b), or (ii) this Agreement is rejected or disaffirmed pursuant to any bankruptcy Law or proceeding or other similar Law or proceedings affecting creditors' rights generally with respect to a bankruptcy proceeding relating to the Concessionaire or otherwise, the University agrees to cooperate with a Leasehold Mortgagee in order to effectuate such Leasehold Mortgagee's rights under the Leasehold Mortgage to step-in, assume or assign this Agreement, in accordance with the procedures, terms and conditions of this Section 19.8.
- (c) Upon notification and satisfaction of all of the conditions and requirements in Section 19.8(d), the University agrees that this Agreement shall not be deemed terminated, but may be assumed by a Leasehold Mortgagee or by a designee or nominee of such Leasehold Mortgagee who is either controlled by the Leasehold Mortgagee (or by the holders of the Leasehold Mortgage Debt) or is Approved by the University as a Transferee under Section 17.1, for the remainder of the original stated Term of this Agreement, and as evidence of such assignment and assumption the University agrees to execute an amended and restated concession and lease agreement for the Utility System upon all of the covenants, agreements, terms, provisions and limitations of this Agreement (the "Assignment and Assumption Agreement").
- (d) This Agreement may be so assigned and assumed pursuant to an Assignment and Assumption Agreement upon and subject to satisfaction of all of the following requirements and conditions:
  - (i) Such Leasehold Mortgagee must commit in writing to the University, in a notice delivered to the University within the later of 30 Days after the University delivers the termination notice to Leasehold Mortgagee or upon the termination of any cure period granted to such Leasehold Mortgagee pursuant to Section 19.3, or within 30 Days after the effective date of any rejection or disaffirmance of this Agreement in a bankruptcy proceeding, as the case may be, that such Leasehold Mortgagee (or its designee or nominee) will assume this Agreement and enter into the Assignment and Assumption Agreement, which notice is accompanied by a copy of such Assignment and Assumption Agreement duly executed and acknowledged by such Leasehold Mortgagee (or its designee or nominee).
  - (ii) Such Leasehold Mortgagee (or its designee or nominee) shall pay or cause to be paid to the University, at the time that the Assignment and Assumption Agreement is fully executed, all amounts which, at the time

of the execution and delivery thereof, would have been past-due or due and payable in accordance with the provisions of this Agreement.

- (iii) Such Leasehold Mortgagee (or its designee or nominee) shall pay or cause to be paid to the University all reasonable costs and expenses (including legal fees), Taxes, fees, charges and disbursements paid or incurred by the University in connection with such defaults and notice of termination, the recovery of possession from the Concessionaire, and in connection with the preparation, execution and delivery of the Assignment and Assumption Agreement and related agreements and documents. The University shall provide an invoice to such Leasehold Mortgagee of such costs, and the Leasehold Mortgagee or its designee or nominee shall pay such invoiced costs within 5 Days of the receipt of such invoice.
- (iv) Such Leasehold Mortgagee (or its designee or nominee), at the time of the notice provided under Section 19.8(d)(i), shall cure all Concessionaire Defaults under this Agreement (including all such Concessionaire Defaults curable by the payment of money) existing immediately prior to the notice of termination issued pursuant to Section 16.1(b), or, if such Concessionaire Defaults cannot be cured by the payment of money, such Leasehold Mortgagee (or its designee or nominee) shall commit to the University in the Assignment and Assumption Agreement to proceed both promptly and diligently, upon the execution of the Assignment and Assumption Agreement, to cure all such other defaults to the extent such defaults are capable of cure by a Person other than the original Concessionaire and, if possession is necessary in order to cure such other Concessionaire Defaults, to proceed both promptly and diligently to obtain the possession required to cure any such other defaults (and such obligation to cure shall be a covenant in the Assignment and Assumption Agreement).
- (e) If a Leasehold Mortgagee gives the University a notice as provided in Section 19.8(d)(i), the University and Leasehold Mortgagee agree to cooperate with respect to taking any appropriate actions required to regain and transfer possession of the Utility System and the Utility System Assets, including (i) seeking surrender of possession in any bankruptcy proceedings; (ii) seeking relief from any automatic stay in bankruptcy provisions and pursuit of state law remedies to obtain possession and to foreclose on the Leasehold Mortgage interest and assume the Concessionaire's position as provided in Section 19.4 of this Agreement; provided that any costs incurred by the University under this provision shall be reimbursed by the Leasehold Mortgagee (or its designee or nominee) as provided in Section 19.8(d)(iii).

**Section 19.9. Right to Dispute Resolution.** In each case specified in this Agreement in which resort to dispute resolution is authorized, a Leasehold Mortgagee shall have the right and privilege if an event of default under the Leasehold Mortgage then exists and notice has been given to the University as contemplated by Section 19.1(f), in the Concessionaire's name, place

and stead, to obtain and participate in such dispute resolution upon notice to the University in accordance with Article 18; provided that the Leasehold Mortgagee agrees to be bound by the outcome of the dispute resolution process.

## ARTICLE 20 UNIVERSITY ACADEMIC COLLABORATION PROGRAM

**Section 20.1. University Academic Collaboration Program.** The Concessionaire agrees to provide the compensation, contributions and opportunities set forth on Schedule 22, in accordance with the terms and conditions set forth therein and in this Section 20.1.

(a) Visionary Project.

- (i) *Development and Construction of the Visionary Project.* The University shall consult with the Concessionaire regarding the development of plans and specifications for the visionary project described in Schedule 22 (the “Visionary Project”), which shall be based on the description submitted by the Concessionaire and attached to Schedule 22, and the Concessionaire shall provide assistance with developing such plans and specifications and operating the Visionary Project as may be reasonably requested by the University, provided that any out-of-pocket costs incurred by the Concessionaire associated therewith shall be deemed Uncapped O&M Costs to the extent Approved by the University prior to being incurred and not otherwise reimbursed by the University. Following completion of the plans and specifications for the Visionary Project by the University, in its sole discretion, the University shall cause the Visionary Project to be constructed, and the Concessionaire shall directly pay all contractors performing work on the Visionary Project promptly following receipt of invoices for such work to the extent such invoices are approved by the University, provided that, in no event, shall the Concessionaire’s liability for such payments exceed the amount set forth for the Visionary Project on Schedule 22. If the Concessionaire fails to timely pay any such contractors, the University shall have the right to make such payments and be reimbursed by the Concessionaire on demand. Within 20 Business Days following issuance of a certificate of occupancy for the Visionary Project, the Concessionaire shall pay to the University (A) the amount set forth in Schedule 22 for other research investments related to the Visionary Project, which the University shall use to fund research projects associated with the Visionary Project and (B) an amount, if positive, equal to \$50,000,000 less the sum of (x) the amounts paid to the contractors by the Concessionaire for construction of the Visionary Project pursuant to this Section 20.1(a)(i) and (y) the amount paid to the University set forth in Section 20.1(a)(i)(A), such that the Concessionaire’s total payments under this Section 20.1(a)(i) equal \$50,000,000.
- (ii) *Governance and Operation of the Visionary Project.* The Concessionaire shall support the Visionary Project as described in the materials submitted

by the Concessionaire and attached to Schedule 22, and, at the University's discretion, the University may request that the Concessionaire and the University execute an agreement that refines the plans, operations or other aspects of the Visionary Project. The Visionary Project will have an advisory committee (the "VP Advisory Committee"), whose composition will be determined by the University in consultation with the Concessionaire but must include, at all times, at least 1 representative appointed by the Concessionaire and 1 representative appointed by the University from the City of Columbus community, who will not be employed by or represent the University or the Concessionaire. The VP Advisory Committee shall be established by the University before the completion of the plans and specifications for the Visionary Project. The VP Advisory Committee shall make decisions or take actions on a majority basis, provided that the VP Advisory Committee cannot make any decisions or take any actions that violate or contradict the VP Advisory Committee's charter, this Agreement, applicable Law, including any Law that requires the University to take a particular action, or the University's policies and procedures. Further, the VP Advisory Committee must have a quorum in order to make any decision or take any action, which quorum must include a Concessionaire representative. The VP Advisory Committee shall have a charter, which shall be promulgated by the University, which shall, among other things, expressly set forth the scope of those matters on which the VP Advisory Committee's decision is binding, and such charter shall not be amended, modified, waived or revoked except by the University, provided that the University shall provide the Concessionaire at least 10 Business Days' prior written notice of any proposed change before such change is made effective. The VP Advisory Committee shall establish rules and procedures for how often it will meet and other procedural matters, to the extent they are not addressed in the charter. The University shall also appoint an executive director for the day-to-day operation of the Visionary Project, who shall have such authority regarding the Visionary Project as granted by the University provided such authority does not conflict with the charter of the VP Advisory Committee.

- (iii) *Ownership of Visionary Project and its Assets.* The University shall be the owner of the Visionary Project, and any non-intellectual assets generated by, or in connection with, the operation of the Visionary Project shall be owned by the University. Any intellectual property rights generated by, or in connection with, the operation of the Visionary Project will be owned according to applicable intellectual property laws. Ownership of patent rights follows inventorship, so inventions solely invented by employees of one Party shall be solely owned by that Party and inventions jointly invented by employees of both parties shall be jointly owned by both Parties.

- (b) At Closing, the Concessionaire shall contribute to the University, in the same manner as the Closing Consideration, the sum of the amount allocated pursuant to Schedule 22 for (i) undergraduate student scholarships, (ii) graduate and professional student scholarships, (iii) faculty endowments, (iv) sustainability commitment, and (v) curriculum and staff development commitment, and the University agrees that it shall use the funds contributed by the Concessionaire for the purposes for which they were designated.
- (c) By April 30 of each Fiscal Year, the Concessionaire shall contribute to the University-related philanthropic organizations the amount set forth to be contributed annually to University-related philanthropic organizations pursuant to Schedule 22 annually, which obligation shall terminate after the Concessionaire has made the number of annual contributions set forth on Schedule 22. On or before April 30 of each Fiscal Year, the Concessionaire shall provide to the University with evidence reasonably acceptable to the University of such contributions.
- (d) The Concessionaire shall provide the number of paid internships to University students as specified on Schedule 22 and shall, prior to the end of each Fiscal Year, provide the University with evidence of such internships. The Concessionaire will consult with the University (i) when establishing educational objectives of the internship and (ii) to identify quality candidates that are an appropriate fit for the student internship positions. The University and the Concessionaire agree to share what has worked and not worked in the past in an effort to provide the best experience for both the Concessionaire and student interns and to inform one another of changes reasonably relevant to the purpose of the internships. The Concessionaire shall provide to the University Liaison the criteria to be considered when evaluating the candidates. In exercising its discretion pursuant to this provision, the Concessionaire agrees not to discriminate with regard to race, creed, color, marital or veteran status, sexual orientation, sex, age, pregnancy, disability, religion, citizenship status, ancestry or handicap.

## **ARTICLE 21**

### **INTERACTION WITH PARKING SYSTEM CONCESSIONAIRE**

**Section 21.1. Coordination.** To the extent the Concessionaire reasonably determines that the Utility System Operations require the temporary closure of any parking spaces or access to any parking facility or parking space subject to the Long-Term Lease and Concession Agreement for the University Parking System, dated as of June 28, 2012 (as amended, the "Parking Agreement"), the Concessionaire shall provide the University written notice thereof at least 5 Business Days in advance of the proposed closure or access, except in the case of an Emergency. The University shall then use commercially reasonable efforts to exercise its rights under the Parking Agreement to provide the Concessionaire such temporary closure and access as is reasonably necessary for the Utility System Operations. The University shall pay any costs or expenses incurred in exercising its rights under the Parking Agreement, provided that the University may, in its reasonable discretion, elect not to exercise such rights if it determines that

(i) the cost associated therewith is unreasonably disproportionate to the benefit received or (ii) there is a reasonable alternative method. Notwithstanding the foregoing, in the event any access or temporary closure is required due to any negligent act or omission of the Concessionaire, then the Concessionaire shall reimburse the University for any such costs or expenses incurred in so exercising its rights.

**Section 21.2. Parking Passes.** The Concessionaire shall be entitled to permit its Representatives to park in the parking spaces designated by the University from time to time, in its sole discretion, for use in connection with the Utility System. Any additional parking passes purchased by the Concessionaire or by the Representatives shall be at the sole cost and expense of the Concessionaire or its Representatives and which shall not be considered an O&M Cost.

## **ARTICLE 22 MISCELLANEOUS**

**Section 22.1. Notice.** All notices, other communications and approvals required or permitted by this Agreement shall be in writing, shall state specifically that they are being given pursuant to this Agreement and shall be delivered, sent by facsimile (with hard copy sent via mail), nationally recognized overnight courier service, certified or registered mail (return receipt requested and postage prepaid), addressed as follows:

- (a) in the case of the University:

The Ohio State University  
Finance Department  
108 Bricker Hall  
190 N. Oval Mall  
Columbus, Ohio 43210  
Attention: Chief Financial Officer

With a copy to:

The Ohio State University  
Office of the General Counsel  
1590 N High Street, Suite 500  
Columbus, Ohio 43201  
Attention: General Counsel

With a copy to:

Ohio Attorney General  
Education Section  
30 E. Broad Street  
Columbus, Ohio 43215  
Attention: Section Chief

- (b) in the case of the Concessionaire:

Ohio State Energy Partners LLC  
c/o Axium Infrastructure US Inc.  
410 Park Avenue, Suite 510  
New York, New York 10022  
Attention: Paulo Arencibia

With a copy to:

Ohio State Energy Partners LLC  
c/o GDF SUEZ Energy Development NA, Inc.  
1990 Post Oak Blvd., Suite 1900  
Houston, Texas 77056  
Attention: Andre Cangucu

With a copy to:

GDF SUEZ Energy Development NA, Inc.  
1990 Post Oak Blvd., Suite 1900  
Houston, Texas 77056  
Attention: General Counsel

With a copy to:

Allen & Overy LLP  
1221 Avenue of the Americas  
New York, New York 10020  
Attention: Kent Rowey

or such other persons or addresses as either Party may from time to time designate by notice to the other. A notice, other communication or approval shall be deemed to have been sent and received (i) on the Day it is delivered, or if such Day is not a Business Day or if the notice is received after ordinary office hours (time of place of receipt), the notice, other communication or approval shall be deemed to have been sent and received on the next Business Day, or (ii) on the 4th Business Day after mailing if sent by U.S. registered or certified mail. Each Party shall use commercially reasonable efforts to deliver an electronic copy of each notice, other communication or approval provided in accordance with the foregoing via email to (A) in the case of the University, potter.138@osu.edu or (B) in the case of the Concessionaire, andre.cangucu@na.engie.com and parencibia@axiuminfra.com.

**Section 22.2. Entire Agreement.** This Agreement constitutes the entire agreement between the Parties pertaining to the subject matter hereof and supersedes all prior agreements, negotiations, discussions and understandings, written or oral, between the Parties. There are no representations, warranties, conditions or other agreements, whether direct or collateral, or express or implied, that form part of or affect this Agreement, or that induced any Party to enter into this Agreement or on which reliance is placed by any Party, except as specifically set forth in this Agreement. The Parties acknowledge and agree that (i) each has substantial business experience and is fully acquainted with the provisions of this Agreement, (ii) the provisions and language of this Agreement have been fully negotiated and (iii) no provision of this Agreement

shall be construed in favor of any Party or against any Party by reason of such provision of this Agreement having been drafted on behalf of one Party rather than the other.

**Section 22.3. Amendment.** This Agreement may be amended, changed or supplemented only by a written agreement signed by the Parties.

**Section 22.4. Waiver of Rights.** Any waiver of, or consent to depart from, the requirements of any provision of this Agreement shall be effective only if it is in writing and signed by the Party giving it, and only in the specific instance and for the specific purpose for which it has been given. No failure on the part of any Party to exercise, and no delay in exercising, any right under this Agreement shall operate as a waiver of such right. No single or partial exercise of any such right shall preclude any other or further exercise of such right or the exercise of any other right.

**Section 22.5. Severability.** Each provision of this Agreement shall be valid and enforceable to the fullest extent permitted by applicable Law. The invalidity of any one or more phrases, sentences, clauses or sections contained in this Agreement shall not affect the remaining portions of this Agreement or any part thereof. If any provision of this Agreement or the application thereof to any Person or circumstance is held or deemed to be or determined to be invalid, inoperative or unenforceable in any particular case in any particular jurisdiction or jurisdictions because it conflicts with any other provision or provisions hereof or of any applicable Law, or public policy, or for any other reason, (i) such circumstance shall not have the effect of rendering the provision in question inoperative or unenforceable in any other case or circumstance, or rendering any other provision or provisions herein contained invalid, inoperative or unenforceable to any extent whatever, and (ii) the Parties shall negotiate in good faith to amend this Agreement to implement the provisions set forth herein. If the Parties cannot agree on an appropriate amendment, either Party may refer the matter for determination pursuant to the dispute resolution procedure in Article 18. If, by means of the dispute resolution procedure, the Parties are unable, as a result of applicable Law, to resolve the matter in a manner that effectively entitles the University to have the same rights after the aforesaid determination of invalidity or unenforceability as before, the University shall have the right to enact, and cause to come into force, any Law to provide for the same or substantially the same rights as were determined to be invalid or unenforceable.

**Section 22.6. Governing Law; Waiver of Jury Trial.** This Agreement shall be governed by, and interpreted and enforced in accordance with, the Laws in force in the State of Ohio (excluding any conflict of laws rule or principle which might refer such interpretation to the Laws of another jurisdiction). **EACH OF THE PARTIES HEREBY IRREVOCABLY WAIVES ANY AND ALL RIGHT TO TRIAL BY JURY IN ANY LEGAL PROCEEDING ARISING OUT OF OR RELATED TO THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY.**

**Section 22.7. Submission to Jurisdiction.** Subject to Article 18, any action or proceeding against any Party relating in any way to this Agreement may be brought and enforced in the state courts in the State of Ohio in Franklin County, and each of the Concessionaire and the University hereby irrevocably submits to the jurisdiction of such courts with regard to any such action or proceeding, and irrevocably waives, to the fullest extent permitted by applicable



Law, any objection it may have now or hereafter have to the laying of venue of any such action or proceeding in such courts and any claim that any such action or proceeding brought in any such court has been brought in an inconvenient forum. Service of process on the University may be made, either by registered or certified mail addressed as provided for in Section 22.1. Service of process on the Concessionaire may be made either by registered or certified mail addressed as provided for in Section 22.1 or by delivery to the Concessionaire's registered agent for service of process in the State of Ohio. If the Concessionaire is presented with a request for Documents by any administrative agency or with a subpoena duces tecum regarding any Documents which may be in its possession by reason of this Agreement, the Concessionaire, unless prohibited by Law, shall give prompt notice to the University. The University may contest such process by any means available to it before such Documents are submitted to a court or other third party; provided, however, that the Concessionaire shall not be obligated to withhold such delivery beyond that time as may be ordered by the court or administrative agency or required by Law, unless the subpoena or request is quashed or the time to produce is otherwise extended.

**Section 22.8. Further Acts.** The Parties shall do or cause to be done all such further acts and things as may be reasonably necessary or desirable to give full effect to this Agreement. Without limiting the foregoing, each Party will, at any time and from time to time, execute and deliver or cause to be executed and delivered such further instruments and assurances and take such further actions as may be reasonably requested by the other Party in order to cure any defect in the execution and/or delivery of this Agreement.

**Section 22.9. Costs.** Except as otherwise provided in this Agreement, each Party shall be responsible for its own costs and expenses incurred in connection with performing and observing its obligations and covenants under this Agreement.

**Section 22.10. Interest.** Any amount payable under this Agreement and not paid when due shall bear interest at a variable nominal rate per annum equal on each Day to the Bank Rate then in effect, from the date such payment is due until payment and both before and after judgment.

**Section 22.11. Inurement and Binding Effect.** This Agreement shall inure to the benefit of the Parties and their respective permitted successors and assigns and is binding upon the Parties and their respective successors and assigns.

**Section 22.12. No Partnership or Third Party Beneficiaries.** Except as expressly provided herein to the contrary, nothing contained in this Agreement shall constitute or be deemed to create a partnership, joint venture or principal and agent relationship between the University and the Concessionaire, nor shall any term or provision hereof be construed in any way to grant, convey or create any rights or interests to any Person not a party to this Agreement, other than, in the case of Section 3.11, Section 10.2, Section 12.3, Section 13.4, Section 14.2, Section 16.3, Section 17.1, Section 17.2 and Article 19, any Leasehold Mortgagee.

**Section 22.13. Cumulative Remedies.** The rights, remedies, powers and privileges herein provided are cumulative and not exclusive of any rights, remedies, powers and privileges provided by Law, except for the remedies available to the University for a breach of the Performance Standards, Section 5.4(a) or Section 7.5(a) by the Concessionaire or a KPI Event,

which shall be limited to those expressly set forth herein. Notwithstanding the foregoing, where this Agreement provides for liquidated damages, such liquidated damages shall be the sole exclusive remedy of the University or the Concessionaire, as applicable, and the University and the Concessionaire hereby irrevocably waive any right to assert a claim against the other party based on a legal theory that a remedy provided herein for such breach or act triggering the liquidated damages fails of its essential purpose.

**Section 22.14. Counterparts; Facsimile Execution.** This Agreement may be executed in any number of counterparts which, taken together, shall constitute one and the same agreement. This Agreement shall be effective when it has been executed by each Party and delivered to both Parties. To evidence the fact that it has executed this Agreement, a Party may send a copy of its executed counterpart to the other Party by facsimile transmission. Such Party shall be deemed to have executed and delivered this Agreement on the date it sent such facsimile transmission. In such event, such Party shall forthwith deliver to the other Party an original counterpart of this Agreement executed by such Party.

**Section 22.15. Time of the Essence.** Time is of the essence for this Agreement.

(Intentionally Left Blank)

IN WITNESS WHEREOF, the University and the Concessionaire have caused this Agreement to be signed by their respective officers thereunto duly authorized as of the date first written above.

THE OHIO STATE UNIVERSITY

BY:                     *Gm S C*                      
PRINTED: Geoffrey S. Chatas  
ITS: Senior Vice President of Business &  
Finance and Chief Financial Officer

STATE OF OHIO                    )  
  ) ss:  
COUNTY OF FRANKLIN        )

**BEFORE ME**, a Notary Public, in and for said county and state, personally appeared Geoffrey S. Chatas the Senior Vice President of Business & Finance and Chief Financial Officer of The Ohio State University, who acknowledged before me that he did sign the foregoing instrument on behalf of The Ohio State University.

**IN TESTIMONY WHEREOF**, I have hereunto set my hand and seal this 7<sup>th</sup> day of April, 2017.

                    *Kendra C Baumann*                      
NOTARY PUBLIC



**Kendra C. Baumann**  
Notary Public, State of Ohio  
My Commission Expires 10-29-2020

OHIO STATE ENERGY PARTNERS LLC

BY: OHIO STATE ENERGY PARTNERS HOLDINGS LLC, its sole member

BY: \_\_\_\_\_  
PRINTED: Andro Cangucu  
ITS: Authorized Agent A

BY: \_\_\_\_\_  
PRINTED: THERRY VAUGHN  
ITS: Authorized Agent B

STATE OF Ohio )  
COUNTY OF Franklin ) ss:

**BEFORE ME**, a Notary Public, in and for said county and state, personally appeared Andro Cangucu and Therry Vaughn, each an authorized agent of Ohio State Energy Partners Holdings LLC, a Delaware limited liability company, acting on behalf of Ohio State Energy Partners LLC as its sole member, who acknowledged before me that each did sign the foregoing instrument on behalf of Ohio State Energy Partners Holdings LLC, acting on behalf of Ohio State Energy Partners LLC as its sole member, for the purposes set forth therein.

**IN TESTIMONY WHEREOF**, I have hereunto set my hand and seal this 7<sup>th</sup> day of April, 2017

Kendra C. Baumann  
NOTARY PUBLIC



Kendra C. Baumann  
Notary Public, State of Ohio  
My Commission Expires 10-29-2020

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**SCHEDULES FOR THE  
LONG-TERM LEASE AND CONCESSION AGREEMENT  
FOR THE OHIO STATE UNIVERSITY UTILITY SYSTEM**

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**SCHEDULE 1**  
**FORM OF BOARD RESOLUTION**

[See Attached]

**AUTHORIZATION OF THE LONG-TERM LEASE AND  
CONCESSION AGREEMENT FOR THE OHIO STATE UNIVERSITY UTILITY SYSTEM**

Synopsis: Authorization of that certain Long-Term Lease and Concession Agreement for The Ohio State University Utility System, including authorization of the lessee and concessionaire thereunder, performance of all obligations thereunder and execution and delivery of documents in connection therewith, is proposed.

WHEREAS the Comprehensive Energy Management Project would launch an unprecedented energy efficiency program and modernize our 485-building Columbus campus and create substantial academic benefits for our students, faculty and staff; and

WHEREAS The Ohio State University (the "University") has a long-term commitment to sustainability and the reduction of its impact on the environment, and the Board of Trustees of the University (the "Board") and the president of the University (the "President") believe the Concession Agreement (as defined below), which imposes certain sustainability obligations on the lessee and concessionaire thereunder, is a critical component of that commitment and will enable the University to improve its utility infrastructure for the benefit of all community stakeholders while realizing value to support the University's mission through a substantial up-front payment by the Concessionaire (as defined below) and academic collaboration between the Concessionaire and the University; and

WHEREAS (a) a bidding process with respect to the Concession Agreement was established pursuant to a Request for Proposals dated as of February 9, 2017 (as amended and supplemented by the University, the "RFP"), and conducted by the University (such process, the "Bidding Process") and (b) three (3) bids from such Bidding Process were received for consideration; and

WHEREAS Ohio State Energy Partners LLC, a Delaware limited liability company (the "Concessionaire"), which is ultimately owned by ENGIE North America Inc. and Axium Infrastructure US Inc., submitted a bid in response to the RFP with an upfront payment amount of \$1.015 billion on Form B-1 of the RFP in accordance with the terms thereof, in a form satisfactory to the University; and

WHEREAS University Senate voted to support the university recommendation to the Board that Ohio State enter into a partnership with ENGIE-Axium that would advance and enhance the educational mission of the university; and

WHEREAS pursuant to the Bidding Process, the President, provost of the University (the "Provost") and the senior vice president for business and finance and chief financial officer of the University (the "CFO"), with the endorsement of the President's Cabinet, recommend to the Board that the Concessionaire be chosen as the concessionaire under the Concession Agreement; and

WHEREAS it is proposed that the University enter into a Long-Term Lease and Concession Agreement for The Ohio State University Utility System (the "Concession Agreement") with the Concessionaire, on substantially the same terms and conditions described in the summary of the draft Long-Term Lease and Concession Agreement for The Ohio State University Utility System (the "Draft Concession Agreement Summary") attached hereto as Exhibit A; and

NOW THEREFORE

**AUTHORIZATION OF THE LONG-TERM LEASE AND  
CONCESSION AGREEMENT FOR THE OHIO STATE UNIVERSITY UTILITY SYSTEM (cont'd)**

BE IT RESOLVED, That the Board of Trustees hereby determined that it is in the best interests of the University to enter into the Concession Agreement with the Concessionaire and the Related Documents (as defined below), to perform the obligations arising under, or in connection with, the Concession Agreement and the Related Documents, including, but not limited to, the University's obligation to make the payment of the utility fee (as defined in the Concession Agreement) on a monthly basis (collectively, the "Transaction Obligations"), and to otherwise consummate the transactions contemplated thereby (the "Transaction"); and

BE IT FURTHER RESOLVED, That the Board has reviewed the Bidding Process and accepts the recommendation of the President, Provost, and CFO to select the Concessionaire as the concessionaire under the Concession Agreement; and

BE IT FURTHER RESOLVED, That the Board hereby authorizes the University (1) to enter into the Concession Agreement with the Concessionaire and into any other documents and agreements that the President and CFO ("Authorized Officers"), or either of them, deems necessary, advisable or appropriate in connection with the Concession Agreement (including, without limitation, the Memorandum of Lease (as defined in the Concession Agreement), the Design-Build Agreement (as defined in the Concession Agreement) and one or more consent agreements and estoppel certificates contemplated by the Concession Agreement for the benefit of the Leasehold Mortgagee (as defined in the Concession Agreement)) (collectively, the "Related Documents"), such Authorized Officer's execution thereof to be conclusive evidence of such approval and determination of the necessity, advisability or appropriateness thereof, and (2) to take such actions as any Authorized Officer deems necessary, advisable or appropriate to perform the Transaction Obligations and to otherwise consummate the Transaction, such actions not to be materially inconsistent with the terms of the Draft Concession Agreement Summary, such Authorized Officer's taking of such action to be conclusive evidence of such approval and determination of the necessity, advisability or appropriateness thereof; and

BE IT FURTHER RESOLVED, That the Board hereby authorizes and directs the Authorized Officers, or either of them, upon consultation with the chair of the Finance Committee of the Board, the Senior Vice President for Legal Affairs and General Counsel, any outside counsel or advisors retained for this purpose and such other members of the senior leadership of the University that any Authorized Officer deems necessary, advisable or appropriate, subject to the terms, limitations and conditions prescribed in this resolution, (1) to negotiate, execute, acknowledge and deliver the Concession Agreement and any Related Document on such terms as any Authorized Officer deems necessary, advisable or appropriate, such terms not to be materially inconsistent with the Draft Concession Agreement Summary, with such Authorized Officer's execution thereof to be conclusive evidence of such approval and determination of the necessity, advisability or appropriateness thereof, and (2) to take such actions as any Authorized Officer deems necessary, advisable or appropriate to perform the Transaction Obligations and to otherwise consummate the Transaction, such actions not to be materially inconsistent with the terms of the Draft Concession Agreement Summary, with such Authorized Officer's taking of such action to be conclusive evidence of such approval and determination of the necessity, advisability or appropriateness thereof; and



**AUTHORIZATION OF THE LONG-TERM LEASE AND  
CONCESSION AGREEMENT FOR THE OHIO STATE UNIVERSITY UTILITY SYSTEM (cont'd)**

BE IT FURTHER RESOLVED, That the Board hereby authorizes the CFO to serve as the Senior Official (as defined in the Concession Agreement); and

BE IT FURTHER RESOLVED, That all actions previously taken by any Authorized Officer or employee of the University, by or on behalf of the University in connection with the Transaction (including, without limitation, any such actions related to the RFP, any interest rate management or hedging contract, credit support or enhancement contract), be, and each of the same hereby is, adopted, ratified, confirmed and approved in all respects; and

BE IT FURTHER RESOLVED, That it is found and determined that all formal actions of this Board concerning and relating to the adoption of this resolution were adopted in an open meeting of this Board, and that all deliberations of this Board and of any of its committees that resulted in such formal action were in meetings open to the public, in compliance with all legal requirements including Section 121.22 of the Ohio Revised Code; and

BE IT FURTHER RESOLVED, That this resolution shall take effect and be in force immediately upon its adoption.

EXHIBIT A

Draft Concession Agreement Summary  
[See attached]

**PRIVILEGED AND CONFIDENTIAL**  
**ATTORNEY-CLIENT COMMUNICATION**

**THE OHIO STATE UNIVERSITY**

Re: Summary of Long-Term Lease and Concession Agreement for The Ohio State University Utility System

This memorandum contains an executive summary and a detailed summary of the draft proposed Long-Term Lease and Concession Agreement for The Ohio State University Utility System (the “Agreement”) by and between The Ohio State University (the “University”) and a to-be-determined concessionaire (the “Concessionaire”), which is under consideration.

*Executive Summary*<sup>1</sup>

The University will sell to the Concessionaire utility-related personal property and lease to the Concessionaire utility-related land and facilities on the University’s Columbus campus for a 50-year term, and the Concessionaire will operate, maintain and improve such utility system on the Columbus campus during that term. The utility system for the following utilities are covered under the Agreement: electricity, steam and condensate, chilled water, natural gas and geothermal power. Note that the Concessionaire’s primary obligations are with respect to the utility system’s delivery of these utilities on the Columbus campus and does not include the supply or procurement of any utility commodities. However, the Concessionaire will assist the University with the procurement of utility commodities (e.g., electricity and natural gas) even though it will not be responsible for the supply of such utility commodities. All purchase of such utility commodities shall be made by the University so that it can maintain control of the utility commodity mix. For purposes of Ohio real estate law, the transaction is a lease of the land and facilities for the term, and only title to the personal property, such as vehicles and spare parts, is being transferred to the Concessionaire. For federal income tax purposes, the transaction is intended to be a lease of the land and a sale of the facilities and personal property.

In exchange for the grant of the concession, the Concessionaire shall make an upfront payment to the University of \$1,015,000,000 and shall agree to make payments and grants valued at a minimum of \$150 million as part of its academic collaboration program with the University. During the term, the University shall pay the Concessionaire an annual utility fee for providing the utility services. This utility fee shall consist of (i) a fixed amount of \$45 million (increased 1.5% annually), *plus* (ii) a variable component based on the unrecovered costs of capital improvements made by the Concessionaire, *plus* (iii) an amount representing the annual amortization value of those capital improvements made by the Concessionaire (based on a 20-year amortization period unless otherwise agreed), *plus* (v) an operating fee calculated based on historic operating and maintenance costs, subject to certain limitations and adjustments for additional capital improvements made during the term. The Concessionaire will be eligible for bonus payments based on meeting the 25% energy use intensity reduction goal at a lower cost than anticipated or based on exceeding such goal by at least 5%. Note that the utility fee is not a direct reimbursement to the Concessionaire for its cost of actually performing the utility services

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<sup>1</sup> This summary is for convenience only and should not be used in lieu of the Agreement. Initially capitalized terms used in this summary and not otherwise defined herein have the meanings set forth in the Agreement. All references to schedules in this memorandum refer to the schedules to the Agreement.

but instead approximates what would be the market rate of such utility services provided by a third party utility and in line with the University's current costs.

During the term, the Concessionaire's responsibilities will include operating, maintaining, and repairing the utility system, as well as making capital improvements, all in accordance with prudent industry practices and agreed performance standards. The performance standards are detailed specifications intended to require that the Concessionaire operate and maintain the Utility System by at least substantively the same standards as the University maintains and operates the Utility System today. In addition, the Concessionaire must meet certain key performance indicators during the term related to unplanned outage events and hours, emergency response times, Energy Use Intensity reductions on an annual and 10-year basis, and smart meter deployment, and if the Concessionaire fails to do so, it will be subject to annual compensation payments that, depending on the severity and repetitiveness of such failures, can be as high as the greater of \$10 million and 10% of the Utility Fee.

The Concessionaire may not make any capital improvements without the University's approval, which may be withheld in the University's sole discretion except in very limited circumstances. Any capital improvements made by the Concessionaire will modify the utility fee pursuant to the agreed-upon formula in the Agreement. The utility system operations will be under the direction of an experienced operator selected by the Concessionaire and approved by the University, and the Concessionaire must use an experienced and qualified consultant in connection with design-build construction matters. The University may cause the Concessionaire to remove the operator if such operator materially or habitually breaches the performance standards or key performance indicators described above. The Concessionaire must use best efforts to interview University employees who apply for positions with the Concessionaire prior to the transition of control of the utility system. Any debt issued by the Concessionaire secured by its leasehold debt must have an investment grade credit rating.

The University shall retain the right to access the utility system during the term for purposes such as inspections, emergency repairs, and installation of equipment for academic or research purposes. At the end of the term, the Concessionaire will return the utility system to the University.

*Detailed Summary of Long-Term Lease and Concession Agreement  
for The Ohio State University Utility System<sup>2</sup>*

**Article 1. Definitions and Interpretation.** Article 1 sets forth the defined terms and certain other rules of interpretation used in the Agreement. The following are certain select definitions relating to this summary:

- A. “Capped O&M Costs” means the specifically identified operating and maintenance costs incurred by the Concessionaire or the Operator in operating the Utility System and complying with their respective obligations under this Agreement, which costs are intended to cover the expected and recurring costs that are to be incurred in connection therewith such as (i) utilities, (ii) salaries and employee benefits, (iii) supplies, (iv) delivery charges, (v) repair and maintenance costs, (vi) legal fees, (vii) design, energy auditing and engineering services, (viii) janitorial services, (ix) seminar and training costs for employees, (x) service vehicles, (xi) insurance charges and (xii) lease and rental charges.
- B. “Uncapped O&M Costs” means (i) the specifically identified operating and maintenance costs incurred by the Concessionaire or the Operator in operating the Utility System and complying with their respective obligations under this Agreement, which costs are intended to cover the unexpected costs or costs incurred at the University’s direction: (a) costs incurred due to a Delay Event, (b) costs incurred to modify the Utility System as directed by the University, (c) certain costs incurred by the Concessionaire in connection with the Approval process for a Capital Improvement, if such costs are directed to be incurred by the University and the Capital Improvement is not Approved, (d) costs incurred to disconnect property from the Utility System if required pursuant to the Agreement, (e) costs incurred in connection with a modification to the Performance Standards required by applicable law or Prudent Industry Practices, (f) costs incurred to perform the CHP of water feasibility study at the University’s direction, (g) costs incurred to pay Property Taxes, if such Property Taxes are not the result of the Concessionaire’s actions, (h) costs incurred in connection with Supply procurement assistance, (i) costs resulting from the Concessionaire’s failure to comply with Law if caused by the University’s failure to be reasonable in Approving a Capital Improvement or (j) costs incurred in connection with assistance for the regional campuses; and (ii) an amount equal to the sum of the federal income Taxes and the Ohio state commercial activity Tax on the income generated by the Variable Fee Component, assuming the highest corporate income tax rate.
- C. “Utility” means any of the following specific individual utility services: (i) electricity, (ii) steam and condensate, (iii) chilled water, (iv) natural gas and (v) geothermal power, and “Utilities” means each of them.

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<sup>2</sup> This summary is for convenience only and should not be used in lieu of the Agreement. Initially capitalized terms used in this summary and not otherwise defined herein have the meanings set forth in the Agreement. All references to schedules in this memorandum refer to the schedules to the Agreement.

- D. “Utility Facilities” means the improvements and equipment (a) constituting part of or located on the Columbus Campus, including those identified in Schedule 3, that are directly and exclusively involved in the generation, distribution and return of the Utilities and the operation and maintenance of the Utility System and that are not beyond the line of demarcation for each Utility as set forth in the Performance Standards, including the distribution pipes carrying the Utilities, the trench-boxes and vaults exclusively used in connection with the Utilities, the McCracken Power Plant, the South Campus Central Chiller Plant, the East Regional Chilled Water Plant, the OSU Substation, the Smith Substation, the West Campus Substation, the Gashouses, the Generator Plant, the Water Treatment Plant, the geothermal wells, and electric distribution wires or (b) located on Utility System Land; provided that the definition of “Utility Facilities” does not include (i) any improvements or equipment that are beyond the line of demarcation for each Utility as set forth in the Performance Standards, except for those areas expressly set forth in the Performance Standards as being within said line of demarcation or (ii) any cameras or other public safety equipment installed, maintained or used by the Department of Public Safety.
- E. “Utility System” means (A) the personal property, improvements, fixtures and equipment owned and operated by the University prior to the Time of Closing to provide the Utilities on the Columbus Campus, specifically limited to (i) the Utility System Assets, (ii) the computer systems and software set forth on Schedule 12, (iii) the Utility Facilities and (iv) the Utility System Land; provided, however, that the “Utility System” shall not include, other than expressly referred to above, (x) any utility distribution facilities or other equipment that is beyond the line of demarcation for each Utility, as set forth in the Performance Standards, (y) any interest in the Public Way or similar real property or (z) any utility facilities in a building that is not a building leased by the Concessionaire, up to the Utility System point of demarcation for such building, as described in the Performance Standards; and (B) from and after the Time of Closing, such Utility System as it is reconfigured, replaced, improved or relocated by the Concessionaire or the Operator pursuant to the terms of the Agreement.
- F. “Utility System Assets” means (i) as of the time immediately prior to the Time of Closing, the personal property of the University used in connection with operations of the Utility System and identified on Part I of Schedule 3 as “Personal Property” and (ii) from and after the Time of Closing, the personal property of the Concessionaire or the Operator used in connection with the operations of the Utility System.
- G. “Utility System Land” means those parcels of real property described in Schedule 3 for McCracken Power Plant, South Campus Central Chiller Plant, the East Regional Chilled Water Plant, the OSU Substation, the Smith Substation, the West Campus Substation, the Water Treatment Plant, the Generator Plant, the Gashouses and certain other land as identified on Schedule 3 and further described in the Memorandum of Lease.

**Article 2. The Transaction; Closing; Conditions Precedent; Covenants.**

- A. Section 2.1: Grant of Concession. At Closing, the Concessionaire shall pay the University \$1,015,000,000 in exchange for (i) a 50-year lease of the Utility System Land and Utility Facilities, (ii) the granting of a non-exclusive license to access certain appurtenant lands and facilities, (iii) the granting of the exclusive right to (A) operate the Utility System and to provide Utility Services on the Columbus Campus, including the right to use, possess, control, operate, manage, modify, maintain and rehabilitate the Utility System and (B) charge the Utility Fee, and (iv) the conveyance of the Utility System Assets. At Closing, the University and the Concessionaire shall also execute the McCracken Sublease and, to the extent required by the Agreement, the Design-Build Agreement.
- B. Section 2.2: Closing. The Closing shall take place no later than 90 Days after execution of the Agreement, provided that the Concessionaire can purchase a 30-Day or 60-Day extension for \$10 million or \$25 million, respectively. Upon receipt of the Closing Consideration (as adjusted pursuant to the Agreement), the University shall cancel and return the Closing Deposit and Cash Deposit. All Prorated Items shall be prorated between the University and the Concessionaire as of 11:59 p.m. on the Day immediately preceding the Closing Date. For every 1 basis point change in the LIBOR swap spot curve there will be a corresponding change of \$815,000 in the Closing Consideration, provided that such protection may not exceed 25 basis points without the prior written consent of the Party paying the change.
- C. Section 2.3: Deposit. The Concessionaire shall pay to the University a Cash Deposit and/or Letter of Credit in an amount of \$75 million, which such deposit shall be retained by the University if the Agreement is terminated for failure of any of the conditions precedent to the University's obligation to close the Transaction.
- D. Section 2.4: Conditions Precedent; Termination.
1. This section sets forth the conditions precedent to each Party's obligation to close the Transaction, including as a condition precedent for the University's benefit the requirement that any Leasehold Mortgage Debt issued by the Concessionaire have an investment grade credit rating as well as the termination rights of both Parties. The conditions precedent are standard for a transaction of this nature.
  2. This section also set forth the termination rights of both Parties. The Agreement may be terminated prior to Closing: (a) by mutual consent of the University and the Concessionaire; (b) by either the University or the Concessionaire if any Governmental Authority shall have issued an order or taken other action permanently restraining or prohibiting the Transaction; (c) by the Concessionaire if any condition precedent to the Concessionaire's obligation to close set forth in this section is not

satisfied; (d) by the University if any condition precedent to the University's obligation to close set forth in this section is not satisfied; or (e) by either the University or the Concessionaire if the Closing has not occurred within 5 Business Days after the Closing Date or a later date agreed to by the Parties.

3. If the Concessionaire terminates the Agreement because any of the conditions precedent for its benefit are not satisfied, the University shall pay the Concessionaire its costs up to \$2.5 million, except in circumstances involving a casualty or Adverse Action.

E. Section 2.5: Covenants. This section sets forth certain standard covenants and obligations of the Parties during the period between execution of the Agreement and Closing (the "Closing Period"). This section also sets forth (A) a requirement for the University to make its employees reasonably available to the Concessionaire to assist in the transition of control, possession, custody, operation, management, and maintenance of the Utility System during the Closing Period at no out-of-pocket cost to the University; (B) a requirement for Concessionaire to use its best efforts to interview all University Utility System Employees who apply for potential employment with the Concessionaire and for any employment offers the Concessionaire chooses to make to such employees to include terms and conditions that are at least comparable to other similarly-situated employees of the Concessionaire; and (C) a requirement for the University to complete the Ongoing Utility System Projects in substantial accordance with the plans as of the Setting Date, unless the University provides written notice of abandonment or modification to the Concessionaire.

F. Section 2.6: Intended Treatment for Federal and State Income Tax Purposes. This section sets forth the intended tax treatment of the Transaction for federal and state income tax purposes. For federal income tax purposes, the Transaction is intended to be a sale of the Utility Facilities and Utility System Assets and a lease of the Utility System Land.

### **Article 3. Terms of the Concession.**

A. Section 3.1: Quiet Enjoyment and Present Condition. The Concessionaire shall be entitled to quiet enjoyment of the Utility System, and the Concessionaire's rights to use, control and possess the Utility System are subject to the right of the University to monitor compliance with the Agreement to ensure that the Utility System is used and operated as required by the Agreement. The Concessionaire agrees to accept the Utility System "AS IS" and acknowledges that it has inspected the Utility System, is aware of its condition and acknowledges that the University makes no representation regarding the condition of the Utility System other than as expressly set forth in the Agreement. All real estate and improvements forming part of the Utility System shall be the fee-owned property of and owned solely by the University for GAAP and state law purposes and are subject to the terms and conditions of the Agreement.



B. Section 3.2: Utility System Operations.

1. The Concessionaire shall be responsible for all aspects of the Utility System Operations during the Term, including costs, expenses, debts, liabilities and other obligations relating to the Utility System, and shall continuously operate the Utility System, except for standard rights to not operate the Utility System in limited circumstances. The Concessionaire shall operate the Utility System in a manner that does not interfere with or impair the operation of the Columbus Campus. The Concessionaire may not disturb the Columbus Campus land except upon at least 10 Business Days' prior notice and upon compliance with any requirements of the University.
2. This section also provides a grant to the Concessionaire of a right of entry and access to the Public Way (which right does not permit the Concessionaire to block or impede traffic on the Public Way), a requirement for the Concessionaire to map the Utility System in accordance with the Performance Standards, and a requirement for the Concessionaire to use an advisor designated in the Agreement as its sole and exclusive advisor providing advice and support to the Concessionaire, in its capacity as the design-builder under the Design-Build Agreement. The Concessionaire may change such advisor only with the Approval of the University.

C. Section 3.3: Operator.

1. The Utility System Operations shall be under the direction and supervision of an experienced operator (the "Operator"). The Concessionaire shall not replace the Operator without Approval of the University, which may only be withheld if the proposer operator does not meet certain objective criteria.
2. If the Operator fails to operate the Utility System in compliance with the Performance Standards and such failure is a material breach of a material requirement of the Performance Standards other than a requirement which is also a Key Performance Indicator, then the University, after 30 Days notice to the Operator and the Concessionaire, may cure such failure and direct that Concessionaire remove the Operator. In addition, if (A) at least 3 Repetitive Failures occur during an Operator Evaluation Period, or (B) a Major KPI Event for the same Key Performance Indicator occurs for 3 consecutive Fiscal Years or (C) 3 Major KPI Events occur in any given Fiscal Year, the University may direct that the Concessionaire remove the Operator. Upon the University's direction to remove the Operator, the Concessionaire shall remove the Operator within 45 Days. The above, in addition to KPI Compensation, is the University's sole remedy with respect to a breach of the Performance Standards or a KPI Event.

- D. Section 3.4: Authorizations; Qualifications. The Concessionaire shall obtain and maintain all Authorizations applicable to the Utility System or reasonably required for the Utility System Operations to operate the Utility System and shall maintain its existence and all qualifications necessary to carry on its business pertaining to the Utility System Operations.
- E. Section 3.5: No Encumbrances. Neither the University nor the Concessionaire shall do any act that would create any Encumbrance against the Utility System (other than a Permitted University Encumbrance or a Permitted Concessionaire Encumbrance). Each Party shall use reasonable efforts to assist the other Party in attempting to remove any such Encumbrance that comes into existence as a result of an act or omission by such other Party.
- F. Section 3.6: Single Purpose Covenants; Credit Rating. Subject to the other terms of the Agreement, the Concessionaire shall be formed solely for the purpose of (A) owning the Concessionaire Interest, (B) owning, operating, improving, using, possessing, and otherwise dealing with the Utility System, (C) collecting the Utility Fee, (D) financing its interest in the Utility System, and (E) carrying out the Utility Services and other activities permitted by the Agreement, and shall not engage in any unrelated business or possess any unrelated assets. Any issuance or refinancing of Leasehold Mortgage Debt or other financing arrangement by the Concessionaire after the Closing Date shall have an investment grade credit rating.
- G. Section 3.7: Rights of the University to Access and Perform Work on the Utility System and Utilize Space for Energy Resources and Research Purposes. The University reserves the right to enter and have access to the Utility Facilities in order to inspect the Utility System, make necessary repairs in the event of any Concessionaire Default, to rectify an Emergency or danger, install safety measures, and install or maintain utilities that are not part of the Utility System, among other things, provided that the University (A) shall not be obligated to pay Concession Compensation or receive the Concessionaire's consent for access to inspect the Utility System, make necessary repairs in the event of any Concessionaire Default or rectify an Emergency or danger, (B) shall not have access to any intangibles of the Concessionaire, and (C) shall comply with the Concessionaire's reasonable safety protocols and requirements. The University also reserves the right (1) in connection with renewable energy, energy storage and other energy resources, to use portions of the Utility System for installation of energy apparatus, equipment or improvements, provided that the Concessionaire shall be given the option to perform such installation itself (if it is not part of a pilot program or a donation) and regardless shall be responsible for causing any such energy apparatus equipment, or improvement to be connected to the Utility System, and (2) to use portions of the Utility System for installation of energy apparatus, equipment or improvements to serve research and academic purposes.
- H. Section 3.8: Payment of Taxes. The Concessionaire shall pay Taxes payable in respect of use or operations of the Utility System, including any Property Taxes in

respect of the Utility System. To the extent the Utility System or any portion thereof becomes not exempt from Property Taxes due to any cause other than acts or omissions of the Concessionaire, the actual costs of any resulting Property Taxes payable during the Term shall be included in Uncapped O&M Costs.

- I. Section 3.9: Utilities. The Concessionaire shall pay the charges for any utilities used in the Utility System that are not the subject of a Supply Contract or water, and such charges shall be included as Capped O&M Costs. The Concessionaire shall coordinate all Utility System Operations with other utilities and Persons having equipment around the Utility System, and the University may direct the Concessionaire in such coordination.
  
- J. Section 3.11: Intellectual Property.
  - 1. The Concessionaire shall deliver to the University copies of all Proprietary Intellectual Property owned by the Concessionaire which it uses in relation to the Utility System Operations. The University shall have a perpetual, royalty-free license to use the Proprietary Intellectual Property of the Concessionaire used solely or primarily in connection with the Utility System Operations; provided, that the University shall have the right to exercise such license only (A) from and after the expiration or earlier termination of the Term for any reason whatsoever, (B) during any time that the University is exercising its rights to remedy a Concessionaire Default, or (C) during any time that the Leasehold Mortgagee has replaced the Concessionaire pursuant to the Agreement.
  - 2. The Proprietary Intellectual Property may be delivered in escrow, to be released and delivered to the University, if (I) the Agreement is terminated for Concessionaire Default, (II) a business failure of the Concessionaire occurs, (III) the Concessionaire is dissolved or liquidated or (IV) the Concessionaire fails or ceases to provide services as necessary to permit continued use of such Proprietary Intellectual Property pursuant to the license or any sublicense thereof.
  
- K. Section 3.12: Use of Information and Records. Unless prohibited by applicable Law and to the extent reasonably necessary, the University shall be entitled to access all reasonable records, electronic data and other information collected by the Concessionaire with respect to the Utility System and Utility System Operations. Unless prohibited by applicable Law, the Concessionaire shall be entitled to access all reasonable records, electronic data and other information collected by the University to the extent reasonably required for Concessionaire's performance of its obligations, provided that Concessionaire shall keep such information confidential.
  
- L. Section 3.13: Standard of Operation and Maintenance of the Utility System. The Concessionaire shall maintain and operate the Utility System in accordance with the Performance Standards and Prudent Industry Practices. Such Performance

Standards have been structured so as to require the Concessionaire to maintain and operate the Utility System by at least substantively the same standards as the University maintains and operates the Utility System as of the Setting Date.

M. Section 3.15: Naming and Signage Rights, Other Revenue Activities and Commercial Advertisements and Activities.

1. The Concessionaire shall have no right to name or modify the name of the Utility System or any portion thereof or, unless required to do so by applicable Law, to install signage of any kind thereon, without the University's Approval.
2. The University shall have the right to install signage that relates to identification or naming of the Utility System, the Utility Facilities, portions thereof, or surrounding areas; provided that (i) the Concessionaire shall have no obligation under the Performance Standards to replace or maintain any signage installed by the University for advertising purposes, and (ii) the University shall not install any signage that relates to naming of the Utility System, the Utility Facilities, portions thereof, or surrounding areas for a Person that competes directly with the Concessionaire or the Operator.
3. The Concessionaire may investigate opportunities to develop additional sources of revenue in connection with the Utility System, provided that the Concessionaire shall not perform any such revenue producing activities until (i) the Concessionaire provides reasonable proof to the University for its Approval that such activities will not adversely affect (A) the University or its students or employees, including causing any increase in costs, or (B) the ability of the Concessionaire to comply with the Agreement; (ii) the University is granted the right to receive a portion of the gross revenue from such activities as compensation for the University's actual costs in connection therewith; (iii) the Concessionaire has received all relevant Authorizations; and (iv) the Concessionaire provides reasonable proof to the University for its Approval that such activities will comply with Prudent Industry Practices and applicable Laws.

N. Section 3.16: Reversion of Utility System. On the Reversion Date, the Concessionaire shall return to the University the Utility System.

O. Section 3.17: Police, Fire, Emergency, and Public Safety Access Rights. Any police, fire, and other emergency and security personnel retained by the University shall have access to the Utility System.

P. Section 3.18: Negotiations with Third Parties. Prior to entering into any agreement with a third party that could extend beyond the Term or pursuant to which the University may incur liability, the Concessionaire shall submit such

agreement for Approval by the University, which may be withheld in its sole discretion.

- Q. Section 3.19: Administration of the Public Way. The Concessionaire acknowledges and accepts that the University holds and administers the Public Way for the non-discriminatory benefit of all Persons and interests.
- R. Section 3.20: Rights to Adjacent Space. The University reserves, and does not lease to the Concessionaire, the air rights with respect to the Utility Facilities and other property within the Utility System and the right to use any of the space not directly occupied by the Utility System, including space above, below or adjacent to the Utility System, provided that such use does not materially impair the Utility System Operations.
- S. Section 3.21: Sole Utility Provider. The University may not, and may not contract or agree with any third party to, provide any Utility or Utility Services on the Columbus Campus, except in the following circumstances: (i) as of the Bid Date, a third party is providing the relevant Utility or Utility Services to a portion of that Columbus Campus, (ii) as of the Bid Date, any district utility systems within the Columbus Campus which are generating or distributing Utilities beyond the lines of demarcation identified in the Performance Standards or (iii) the University installs systems, equipment or materials for the distribution of Utilities beyond the lines of demarcation identified in the Performance Standards, which shall be performed by or on behalf of the University. If the University does not own or lease from a third party an improvement on the Columbus Campus, the University shall have no obligation to cause the Concessionaire to be the sole provider of Utilities thereto.
- T. Section 3.22: Repair and Maintenance of the Tunnels. The Concessionaire shall cause any intentional or unintentional damage to the Tunnels or the Release of any Hazardous Substances in the Tunnels caused, directly or indirectly, by the Concessionaire or the Utility System to be promptly restored and repaired using a contractor Approved by the University. Other than the Concessionaire's responsibilities pursuant to this section and the Performance Standards and its responsibility to maintain the Utility System, the University shall be responsible for the repair and maintenance of the Tunnels and the equipment therein in accordance with Prudent Industry Practices.
- U. Section 3.23: Adjustments to the Location or Configuration of the Utility System. The University may cause the Concessionaire, at the University's cost, to alter the location or configuration of the Utility System or to designate alternative real property for the Utility System Land to the extent the University deems it necessary or useful in the operation and use of the Columbus Campus.
- V. Section 3.27: Utility System Tours. The Concessionaire shall provide tours of the Utility System to the University upon reasonable request by the University.

- W. Section 3.28: Uniforms. Concessionaire and Operator personnel working on the Columbus Campus shall wear a uniform that is standard across the Utility System and clearly identifies them as Concessionaire and Operator personnel.
- X. Section 3.29: Gashouses. Prior to engaging in any discussions regarding the Gashouses with any third party, the Concessionaire or the Operator shall provide the University the opportunity to participate in such discussions. The Concessionaire shall also promptly provide the University with copies of any written correspondence regarding same with such third parties.

**Article 4. Capital Improvements, ECMs and Material Changes.**

- A. Section 4.1: Concessionaire Responsibility for Capital Improvements. Other than the Ongoing Utility System Projects, the Concessionaire shall be responsible for all Capital Improvements with respect to the Utility System, including as required by the Performance Standards.
- B. Section 4.2: Authorizations Related to Capital Improvements. The Concessionaire's obligation to perform Capital Improvements shall be subject to the issuance by Governmental Authorities and the University of any and all required Authorizations.
- C. Section 4.3: Approval of Capital Improvements, ECMs and Material Changes.
  - 1. The Concessionaire shall not have the right to make any (i) Capital Improvements, (ii) ECMs on the Utility System Land, Utility Facilities or Non-Utility Campus, or (iii) Material Changes, except those Approved by the University pursuant to the Agreement.
  - 2. The Concessionaire shall have the right to request such Approval at any time, but the University shall not be obligated to consider any such requests for Approval except those requests (i) contained in a proposed Five-Year Plan and proposed to be commenced in the first full Fiscal Year in such proposed Five-Year Plan; (ii) required to address an Emergency, a change in Law or a change in a Performance Standard; (iii) required in connection with a University Directive; or (iv) required due to Force Majeure, all of which the University shall consider in good faith.
  - 3. The Concessionaire shall request Approval by (1) submitting a request to the University or (2) submitting a proposed Five-Year Plan. The University shall review such request and, in its sole discretion: (i) Approve such request in accordance with its terms; (ii) require the Concessionaire to perform additional work with respect to such request (which may include obtaining quotations from contractors), provided that the cost for any such additional work that is expressly requested by the University shall be recoverable by the Concessionaire as part of New Approved Capital Improvement Costs or Uncapped O&M Costs; (iii) provide comments to the Concessionaire regarding the request; or (iv) reject the

request and, if the request related to an item necessary to comply with Prudent Industry Practices, applicable Law, or the Performance Standards, provide an explanation, provided the University may not reject a request if (w) it is required to cause the Utility System to comply with any new Law or change in Law and the Concessionaire has received a non-compliance notice from a Governmental Authority, (x) the Concessionaire has investigated any potential alternatives, (y) the Concessionaire has discussed with the University and considered alternatives and (z) the University has not provided a reasonable alternative.

4. The University may, as a condition of its Approval, require that the Concessionaire pay liquidated damages if it fails to meet a completion deadline for the applicable Capital Improvement, ECM or Material Change that is no more stringent than the deadline proposed by the Concessionaire.
5. After Approval, the Concessionaire shall make the Capital Improvement, ECM or Material Change in accordance with the Agreement, including by paying prevailing wages.
6. The Concessionaire may perform Design-Build ECMs and Non-Construction ECMs on the Non-Utility Campus (defined as the portion of the Columbus Campus not leased to the Concessionaire) only in accordance with the terms and conditions of the Agreement. At Closing, the University shall select the Concessionaire as a “design-build firm” in accordance with and as defined in Chapter 153. The Concessionaire must comply with prevailing wage law in implementing any construction on the Columbus Campus. The Concessionaire must comply with the requirements of Chapter 153 and the prevailing wage law in implementing any Design-Build ECMs on the Non-Utility Campus.
7. The Concessionaire shall have the right, as its sole remedy with respect to any Approvals or rejections by the University pursuant to this section, to submit a claim through the dispute procedures in Article 18 that the University was unreasonable, notwithstanding that the University is not required to be reasonable in connection therewith. If it is determined that the University was unreasonable, (i) the University and the Concessionaire shall cooperate in good faith to make any reasonably necessary adjustments to the Key Performance Indicators, the Performance Standards and the requirements of the Agreement regarding reductions in Energy Use Intensity associated with the proposed Capital Improvement, ECM or Material Change and (ii) the University shall waive any claim for a Concessionaire Default for an associated failure to comply with Law or to remedy an Emergency (other than an Unplanned Outage) to the extent such failure would not have occurred but for the University being unreasonable, provided the Concessionaire shall diligently attempt, in good faith, to develop and implement an alternative solution to cause the

Utility System or the Utility System Operations to comply with Law or to cause such Emergency (other than an Unplanned Outage) to be remedied.

- D. Section 4.4: Recovery Period of Capital Improvements. If the Recovery Period of a Capital Improvement, which is a 20-year period over (or such other period as agreed by the University and the Concessionaire) which the Concessionaire recovers the cost of a Capital Improvement via the Utility Fee, is for a period of time beyond the Term, the Concessionaire may elect to either (i) construct such Capital Improvement, in which case the Recovery Period shall be utilized for purposes of calculating the Utility Fee in accordance with Schedule 5, subject to the Agreement, which requires that the Unrecovered Balance be paid at the end of the Term, unless the Agreement is terminated due to a Concessionaire Default or (ii) not construct such Capital Improvement, in which case the University may construct such Capital Improvement.
- E. Section 4.5: University's Capital Plan. The Concessionaire shall reasonably cooperate with the University in the development, modification, and discussions of the University's capital plans and energy conservation initiatives.

**Article 5. Modifications.**

- A. Section 5.1: University Directives. The University may issue a directive to perform work on the Utility System (a "University Directive") to the Concessionaire at any time during the Term, the cost of which shall be recoverable by the Concessionaire.
- B. Section 5.3: Addition, Removal and Lease of Property. If the University sells, conveys or leases for a period longer than the Term any real property within the Columbus Campus to a third party, the Concessionaire shall disconnect such real property from the Utility System and shall not be permitted to serve such real property unless otherwise Approved. If the University provides a leasehold interest in real property served by the Utility System for less than or equal to the period of time remaining in the Term to a third party, the Concessionaire shall continue to provide Utilities to such real property in accordance with the Agreement, and the University shall remain obligated to pay the Utility Fee attributable to such real property. The University, pursuant to a University Directive, may cause the Concessionaire to provide Utility Services to any portion of the Columbus Campus not served by the Utility System at that time and may expand the definition of the Columbus Campus.
- C. Section 5.4: Networked Smart Meters. Within 48 months after the Closing Date, the Concessionaire, at its sole cost and expense, shall deploy a system to meter and display the usage of electricity, natural gas, chilled water, geothermal power, steam and any heating hot water systems fueled by steam from the central steam plants for all buildings on the Columbus Campus. The cost of installing such smart meters shall not be recoverable through the Utility Fee. The Concessionaire shall develop and deploy a digital dashboard to display the Columbus Campus



building energy usage data, which dashboard shall have a web-based interactive public interface that will display individual building data. The Concessionaire shall obtain electricity and/or natural gas usage data from buildings on the Columbus Campus that are not connected to the Utility System and integrate that data into the total Columbus Campus dashboard.

**Article 6. Performance Standards.**

- A. Section 6.1: Compliance with Performance Standards. The Concessionaire shall, at all times during the Term, cause the Utility System Operations to comply with the Performance Standards in all material respects, provided that the Concessionaire shall have a reasonable period of time to comply with the introduction of changes or modifications to the Performance Standards.
- B. Section 6.2: Proposed Performance Standards. If the Concessionaire wishes to use performance standards other than the Performance Standards, the University must Approve such proposed performance standards.
- C. Section 6.3: Modified Performance Standards. The University has the right to modify the Performance Standards, provided that if such modification is not made in order to comply with Law or conform with standards generally adopted with respect to Comparable Utility Facilities or Prudent Industry Practices, the Concessionaire may be entitled to Concession Compensation (if the costs associated therewith are not otherwise recoverable), but only if the amount of Concession Compensation claimed for all such modifications exceeds \$100,000 Adjusted for Inflation during a Fiscal Year. Any costs for modifications or changes required to comply with Law or to conform with standards generally adopted with respect to Comparable Utility Facilities or Prudent Industry Practices shall be recoverable by the Concessionaire as Uncapped O&M Costs.

**Article 7. Utility Fee, Five-Year Plan, Energy Supply and Energy Use Intensity Reduction.**

- A. Section 7.1: Utility Fee. The University shall pay to the Concessionaire the Utility Fee for each Fiscal Year as determined in accordance with the formula in Schedule 5, and as summarized in the Executive Summary. At least 180 Days prior to the commencement of any Fiscal Year, the Concessionaire shall provide a forecast of the Utility Fee to the University for the upcoming Fiscal Year (the "Forecast Utility Fee"), which may be adjusted up to 30 Days prior to the commencement of such Fiscal Year. The University shall pay the Forecast Utility Fee in 12 equal monthly installments. Within 60 Days after the end of each Fiscal Year, the Concessionaire shall deliver to the University a statement (the "Reconciliation Statement") which states the actual Utility Fee for the preceding Fiscal Year and provides a detailed accounting of each component of the Utility Fee. The appropriate Party shall pay any difference reflected in the Reconciliation Statement in a lump sum within 30 Days after receipt thereof. The

University shall have the right to audit any Reconciliation Statement for up to 5 Fiscal Years after the applicable Fiscal Year.

- B. Section 7.2: Updates to the Utility Fee and O&M Costs. The University shall form an Energy Advisory Committee (“EAC”) (which shall include at least one representative of the Concessionaire) to liaise with the Concessionaire with respect to modifying the Performance Standards or the components of the Utility Fee. The EAC shall meet at least every 5 Fiscal Years to assess the methodology of calculating the Utility Fee (including the determination of any adjustment to the Return on Equity Factor used in the Utility Fee) and at least every 10 Fiscal Years to conduct a full review of the categories of O&M Costs and the components thereof being included in the Utility Fee and the Capped O&M Ceiling. The Concessionaire may propose changes at such meetings through its representative(s) on the EAC. The University and the Concessionaire shall consider, in good faith, any changes recommended by the EAC or the Concessionaire’s representative(s) at an EAC meeting, but neither Party shall have any obligation other than to consider such changes in good faith.
- C. Section 7.3: Five-Year Plan. The Concessionaire shall submit to the University a proposed Five-Year Plan for the budget and plan for the operation of the Utility System and performance of its obligations at least 180 Days prior to the end of each Fiscal Year. Each proposed Five-Year Plan shall include the Capital Improvements, ECMs and Material Changes that the Concessionaire proposes to make as well as anticipated O&M Costs and Supply Costs. The EAC shall review and provide comments on such proposed Five-Year Plan to the Concessionaire within 30 Days after receipt. After incorporating any EAC comments that the Concessionaire elects to incorporate, the Concessionaire shall resubmit the proposed Five-Year Plan to the University at least 120 Days prior to the end of the Fiscal Year. The University shall review and provide comments to the Concessionaire, and the Concessionaire shall promptly use such comments to prepare and submit a revised of the proposed Five-Year Plan. This process shall continue until the University Approves the proposed Five-Year Plan. No portion of an Approved Five-Year Plan shall be binding except for the portion related to the first Fiscal Year and any Capital Improvements Approved to be commenced in such Fiscal Year. If a Five-Year Plan or portion thereof is not Approved by the commencement of the applicable Fiscal Year, the previously Approved Five-Year Plan shall continue in effect.
- D. Section 7.4: Energy and Water Supply. The Concessionaire shall assist the University with the procurement of sufficient electricity, natural gas or other energy supply inputs necessary to fully operate the Utility System as set forth in the Performance Standards (the “Supplies”) and the University shall be responsible for paying all Supply Costs directly to Suppliers. The Concessionaire shall, upon written notice from the University, be responsible for assisting the University with the procurement, billing and/or management of Supplies to the University on University locations outside of the Columbus Campus, and such assistance shall be deemed part of the Utility System Operations. The University

shall supply to the Utility System, the water reasonably necessary for the Concessionaire to operate the Utility System and perform its obligations hereunder.

E. Section 7.5: Energy Use Intensity Reduction.

1. The Concessionaire shall cause the Energy Use Intensity for the Fiscal Year ending on June 30, 2028 to be equal to or less than 75% of the Energy Use Intensity for the Fiscal Year ending on June 30, 2017. The Concessionaire shall also cause, at the end of each Fiscal Year, the arithmetic average Energy Use Intensity for that Fiscal Year and the immediately preceding 2 Fiscal Years to be the same or less than the arithmetic average Energy Use Intensity for the 3 immediately preceding Fiscal Years, provided the University waives any rights with respect to the Concessionaire's failure to do so for the first 2 Fiscal Years after the Closing. The EAC shall meet at least every 10 Fiscal Years to agree upon any additional energy conservation measures that the Concessionaire will be directed to take and to discuss the University's overall energy usage and ECMs.
2. Within 2 Years after the Closing Date, the University shall have the right to request in writing that the Concessionaire provide to the University a detailed study with recommendations for opportunities to reduce the energy use intensity of certain regional campuses owned by the University, and the Concessionaire shall in good faith discuss with the University the Concessionaire implementing such recommendations.
3. The University shall pay to the Concessionaire in 10 equal annual installments any Energy Use Intensity bonus earned by the Concessionaire based on meeting the 25% energy use intensity reduction goal at a lower cost than anticipated or based on exceeding such goal by at least 5% pursuant to the table on Schedule 21, if applicable.

F. Section 7.6: CHP Feasibility Study. At the request of the University, the Concessionaire shall promptly conduct a detailed feasibility study and recommendation regarding the construction of a combined heat and power plant as part of the Utility System.

G. Section 7.7: Water Conservation Feasibility Study. At the request of the University, the Concessionaire shall promptly conduct and provide to the University a detailed feasibility study and recommendation regarding opportunities for the University to reduce its consumption of water.

**Article 8. Reporting; Audits; Inspections.**

A. Section 8.1: Reports. The Concessionaire shall provide notice to the University of all Emergencies and all Releases of Hazardous Substances with respect to the Utility System, within 6 hours after becoming aware of the Emergency or

Release. The Concessionaire also must provide notice to the University of all claims in excess of \$25,000 made by or against the Concessionaire. The Concessionaire shall deliver to the University audited financial reports within 120 Days of the end of each Fiscal Year as well as all reports and information required by the Performance Standards.

- B. Section 8.2: Information. At the request of the University, and at the Concessionaire's cost and expense, the Concessionaire shall make available all information relating to the Utility System but not more frequently than once a quarter, and the University shall keep confidential any such information that constitutes trade secrets.
- C. Section 8.3: Inspection; Audit and Review Rights of the University. The University, upon 10 Business Days' notice, may carry out an Audit and Review of the information required to be maintained or delivered by the Concessionaire under the Agreement. The University shall also have access to the Utility System for inspection and testing, provided the Concessionaire must approve any testing.
- D. Section 8.4: Audits, Assistance, Inspections and Approvals. Any reference to the University providing assistance to the Concessionaire performing an Audit shall not relieve the Concessionaire from any liability under the Agreement.

**Article 9. Representations and Warranties.**

- A. Section 9.1: Representations and Warranties of the University. The Agreement contains representations and warranties typical for the nature of this transaction, which include the following: (i) organization; (ii) power and authority; (iii) enforceability; (iv) title; (v) no conflicts; (vi) consents; (vii) compliance with law; (viii) litigation; (ix) environmental matters; (x) financial information; (xi) Utility System Contracts; (xii) absence of changes; (xiii) brokers; (xiv) accuracy of information; (xv) undisclosed defects; and (xvi) tax matters.
- B. Section 9.2: Representations and Warranties of the Concessionaire. The Agreement contains representations and warranties typical for the nature of this transaction and include the following: (i) organization; (ii) power and authority; (iii) enforceability; (iv) no conflicts; (v) consents; (vi) compliance with law; (vii) litigation; (viii) accuracy of information; (ix) representations regarding the Operator; and (x) brokers.
- C. Section 9.3: Non-Waiver. No investigations made by or on behalf of any Party shall have the effect of waiving any representation or warranty made by the other Party.
- D. Section 9.4: Survival. Representations and warranties survive for 24 months except for those listed in this summary in 9.1(i) – (ix) and 9.2(i) – (ix) which shall last indefinitely. Such survival periods shall apply with respect to all Claims notwithstanding any statute of limitations that would be applicable to such Claims under applicable Law.

**Article 10. Finance Obligations.**

- A. Section 10.1: Concessionaire's Obligations. The Concessionaire shall be responsible for obtaining any financing for the performance of its obligations under the Agreement, except as otherwise specifically set forth. The Concessionaire may issue additional Leasehold Mortgage Debt or refinance existing Leasehold Mortgage Debt during the Term, subject to the requirement that such Leasehold Mortgage Debt be rated at least investment grade.

**Article 11. Compliance.**

- A. Section 11.1: Compliance with Laws. The Concessionaire must observe and comply with all applicable Laws, including those regarding non-discrimination, prevailing wage, safety and immigration, and must notify the University within 7 Days after receiving written notice from a Governmental Authority that the Concessionaire may have violated any Laws. To the extent any funds subject to appropriation are used for the payment of the University's obligations, those obligations shall be subject to Ohio Rev. Code Ann. § 126.07.
- B. Section 11.6: Labor Disputes. The Concessionaire shall take all reasonable steps to resolve any alleged or actual labor dispute between it or the Operator and any representative of its or the Operator's employees. The Concessionaire shall use good faith efforts and take immediate steps to effect the limitation and/or removal, by lawful means, of any pickets or picketing that are the result of an alleged or actual labor dispute between it and any representative of its employees.
- C. Section 11.7: Employee Conduct and Performance. The Concessionaire shall ensure that it and the Operator have workplace conduct policies for their employees providing services under the Agreement that are at least as stringent as the University's general policies for conduct in the workplace and are in accordance with Prudent Industry Practices.
- D. Section 11.10: Drug-Free Workplace Certification. The Concessionaire agrees to make a good faith effort to provide and maintain a drug-free workplace. The Concessionaire shall notify the University within 7 Days after receiving actual notice that Concessionaire or its employees have been convicted of a criminal drug violation in the Concessionaire's workplace.
- E. Section 11.11 Minority-Owned and Women-Owned Business Enterprises. The Concessionaire is required to use good faith efforts to obtain the participation of M.B.E./W.B.E. in its Utility System Operations, including requiring the Operator to participate in such programs.
- F. Section 11.12: University Accreditation. The Concessionaire shall ensure that the Utility System provides a sufficient quantity of Utilities in a timeframe sufficient such that the University, or any portion thereof, may maintain any third-party accreditation or other third-party standard of which the University has provided the Concessionaire notice prior to the Setting Date.

- G. Section 11.14: Financial and Audit Standards. The Concessionaire shall observe and comply, in all material respects, with GAAP.
- H. Section 11.15: Affirmative Action Program. The Concessionaire shall maintain a written affirmative action program for the employment and effective utilization of economically disadvantaged persons pursuant to Ohio Rev. Code. Ann. § 125.111(B) and shall cause the Operator and any other Contractor to do so.
- I. Section 11.16: University Payments. All financial obligations of the University under the Agreement are payable solely from the then-current revenues of the University legally available for such purpose and the Concessionaire shall have no right to receive payment from moneys raised by taxation or appropriations.

**Article 12. Payment Obligations.**

- A. Section 12.1: Certain Payment Obligations of the Concessionaire. The Concessionaire has a payment obligation to the University and its Representatives for losses related to various items including (i) breach of representations and covenants, (ii) Assumed Liabilities, (iii) Taxes attributable to a Transfer of the Concessionaire Interest, (iv) increases in Property Taxes not included in the definition of Uncapped O&M Costs, and (v) brokerage fees.
- B. Section 12.2: Certain Payment Obligations of the University. Without limiting any other remedy available under the Agreement, the University has a payment obligation to the Concessionaire and its Representatives for losses related to various items including (i) breach of representations and covenants, (ii) Excluded Liabilities, (iii) brokerage fees, and (iv) payment of Property Taxes that are not the result of the actions or omissions of the Concessionaire.
- C. Section 12.9: Limitation on Certain Claims. The maximum liability of the University, without limiting any other remedy under the Agreement, shall not exceed 50% of the Closing Consideration, but such limits shall not apply to Claims for (i) breaches of certain fundamental representations and warranties, (ii) fraud, intentional misrepresentation or intentional breach of representations and warranties, (iii) certain Excluded Liabilities related to environmental matters, (iv) payment of the Utility System Concession Value, and (v) payment of the Utility Fee. The maximum liability of the Concessionaire, without limiting any other remedy under the Agreement, shall not exceed 50% of the Closing Consideration, but such limits shall not apply to the Claims described in clauses (i) and (ii) above.
- D. Section 12.11: Offset Rights; Limitations on Certain Damages. Each Party's payment obligations shall be subject to its defense and offset rights. No Party is liable for indirect or consequential damages.
- E. Section 12.12: Governmental Immunity. The University shall not waive its rights and privileges pursuant to its governmental immunity.

- F. Section 12.13: Survival. The indemnity provisions survive the termination of the Agreement.

**Article 13. Insurance.**

- A. Section 13.1: Insurance Coverage Required – Concessionaire. The Concessionaire is required to provide and maintain insurance coverages typical for this nature of transaction, including (i) workers' compensation and employer's liability; (ii) commercial general liability (primary and umbrella); (iii) automobile liability (primary and umbrella); (iv) professional liability; (v) network security and privacy insurance; (vi) railroad protective liability; (vii) pollution legal liability; (viii) property; and (ix) builder's risk.
- B. Section 13.2: Insurance Coverage Required – University. The University is required to provide and maintain insurance coverages typical for this nature of transaction, including (i) workers' compensation and employer's liability; (ii) commercial general liability (primary and umbrella); and (iii) property.
- C. Section 13.3: Additional Requirements. Each Party must provide original Certificates of Insurance evidencing the Concessionaire Required Coverages or University Required Coverage, as applicable, within 14 Business Days following renewal and must provide 30 Days' prior notice in the event coverage is canceled (or 10 Days' prior notice in the case of cancellation for non-payment). Certain other additional insurance requirements are set forth that are typical for this nature of transaction, including the provision that if any of the Concessionaire Required Coverages are not available on a commercially reasonable basis, the Concessionaire may obtain insurance that best approximates the Concessionaire Required Coverages, subject to the University's Approval. If it is in the best interests of, and agreed by, both Parties, the University shall purchase and hold any of the required Concessionaire insurance coverages.
- D. Section 13.4: Damage and Destruction. If part of any of the Utility System is destroyed or damaged by fire or other casualty of any kind, the Concessionaire shall (i) give the University notice; (ii) proceed diligently to repair the same; and (iii) deposit all insurance proceeds received plus any additional Restoration Funds necessary for such Restoration with a Depositary for approved distributions to the Concessionaire (only if the Restoration costs exceed \$5 million). Prior to any Restoration work, the Concessionaire must submit such plans to the University for Approval.

**Article 14. Adverse Actions.**

- A. Section 14.1: Adverse Action. An Adverse Action shall occur if the City of Columbus, Ohio, the County of Franklin, Ohio, the State of Ohio, or any agency, political division or unit or commission thereof, or the University, takes any action that is (i) principally borne by the Concessionaire (or by the Concessionaire and the concessionaire under the Parking Agreement) and (ii) has a material

adverse effect on the fair market value of the Concessionaire Interest, but the following are NOT Adverse Actions: (A) the development, redevelopment, construction, modification or change in the operation of any existing or new utility facility or utility (other than any Utility Facility or the Utilities), (B) the imposition or increase of a state or local Tax of general application or federal Tax and (C) any action of the Public Utilities Commission of Ohio or the Federal Energy Regulatory Commission that subjects the Concessionaire to such agency's regulatory jurisdiction due solely to the Utility System Operations performed in accordance with the Agreement, which could be a Compensation Event. If an Adverse Action occurs, the Concessionaire may, at its election, either (i) receive the Concession Compensation with respect thereto ("AA-Compensation"); or (ii) terminate the Agreement and receive the Termination Damages, which is defined as the fair market value of the Concessionaire Interest as of the date of such termination provided it is not less than amount of the Leasehold Mortgage Debt plus the reasonable out-of-pocket expenses incurred by the Concessionaire or the Operator as a direct result of such termination plus any accrued Concession Compensation less any insurance proceeds.

- B. Section 14.2: Termination. If the Concessionaire exercises its right to terminate the Agreement in connection with an Adverse Action, then the Agreement, subject to the University's right to remedy such Adverse Action, shall terminate 60 Days following the date of the University's receipt of the notice setting forth the details of the Adverse Action.
- C. Section 14.3: Right of the University to Remedy. If the University wishes to remedy the Adverse Action, it shall provide notice within 30 Days and remedy the Adverse Action within 120 Days, which remedy may consist of a written commitment to the Concessionaire to pay funds from time to time to compensate the Concessionaire.
- D. Section 14.4: Other Actions by Governmental Authorities. If any Governmental Authority proposes to take any action that will be principally borne by the Concessionaire and have a Material Adverse Effect, then at the request of the Concessionaire, the University shall use reasonable efforts to oppose such action at the Concessionaire's cost.
- E. Section 14.5: Regulatory Filings. To the extent that either Party is required to make any regulatory filing or submission with respect to a tariff or rate for the Utility System or the Utility Fee, the Parties shall reasonably cooperate in connection therewith and shall, collectively, only make one filing or submission. The Parties shall also reasonably cooperate with respect to any required regulatory filings or submissions not involving a tariff or rate for the Utility System or the Utility Fee, to the extent practicable.



**Article 15. Delay Events; Concession Compensation and KPI Compensation.**

- A. Section 15.1: Delay Events. A Delay Event is an event such as Force Majeure and other limited events beyond the Concessionaire's reasonable control that cause a delay to the Concessionaire in performing its obligations. In the event that the Concessionaire is affected by a Delay Event and provides written notice to the University, the Concessionaire will receive an extension of time to perform the obligations for which it was delayed. While a Delay Event is occurring, the Utility Fee shall be reduced by an amount equal to the Utility Fee multiplied by the percentage of the Utility System that is inoperable as a result of the Delay Event, as determined by the University in its reasonable discretion, provided that such Delay Event shall be deemed a Compensation Event. If a Delay Event exceeds 120 continuous Days (or 120 non-continuous Days during a 360-Day period) and it results in a Material Adverse Effect, then the Concessionaire shall have the right to extend the Term for a period of time sufficient to compensate the Concessionaire and to restore it to the same economic position as it would have been in had such Delay Event not occurred, provided that the Term shall not be extended to the extent it would subject either Party to a leasehold tax or conveyance fee.
- B. Section 15.2: Notice of Compensation Events and KPI Events. If a Compensation Event occurs, the Concessionaire shall give the University written notice within 30 Days. If a KPI Event occurs, the University shall give the Concessionaire written notice within 30 Days.
- C. Section 15.3: Payments of Concession Compensation and KPI Compensation. This section sets forth the procedure for determination and payment of Concession Compensation and KPI Compensation. KPI Compensation is the amount due from the Concessionaire to the University if a KPI Event occurs for each violation and depends on the severity of the event and whether such violation has occurred in prior years. The amount of KPI Compensation for each KPI Event can be as high as the greater of (i) \$10 million and (ii) 10% of the Utility Fee paid in the applicable year. KPI Events relate to unplanned outage events and hours, emergency response times, Energy Use Intensity reductions on an annual and 10-year basis, and smart meter deployment,
- D. Section 15.4: KPI Compensation. Other than the University's right to cause the Concessionaire to remove the Operator, the payment of KPI Compensation by the Concessionaire is the University's sole and exclusive remedy for any KPI Event.

**Article 16. Defaults.**

- A. Section 16.1: Default by the Concessionaire. This section sets forth (i) the events that constitute a "Concessionaire Default" under the Agreement. Such events are typical for this nature of transaction and include, among other things, (A) failing to comply with covenants (other than those relating to a breach of the Performance Standards, smart meters and Energy Use Intensity reduction), (B)

transferring its interest in contravention of the Agreement, (C) failing to comply with requirements of a final award resulting from dispute resolution, and (D) admitting that it is unable to pay its debts or otherwise files bankruptcy; and (ii) the remedies of the University upon a Concessionaire Default, including termination of the Agreement with no compensation paid to the Concessionaire.

- B. Section 16.2: Default by the University. This section sets forth the events that constitute a “University Default” under the Agreement. Such events are typical for this nature of transaction and include, among other things, (A) failing to pay the Utility Fee, the Forecast Utility Fee, or the Concession and KPI Compensation Balance, (B) failing to comply with covenants, (C) failing to comply with requirements of a final award resulting from dispute resolution, and (D) admitting that it is unable to pay its debts or otherwise files bankruptcy. This section also sets forth the remedies of the Concessionaire upon a University Default, including termination which obligates the University to pay to the Concessionaire the fair market value of the Concessionaire Interest as of the date of such termination, which may not be less than amount of the Leasehold Mortgage Debt, plus the reasonable out-of-pocket expenses incurred by the Concessionaire or the Operator as a direct result of such termination plus unpaid Concession and KPI Compensation. A University Default shall not include any failure to perform obligations as a result of Force Majeure.
- C. Section 16.3: Consequences of Termination or Reversion. This section sets forth the procedure to be followed upon the termination or expiration of the Agreement, including Concessionaire’s surrendering of the Utility System.
- D. Section 16.4: Termination Other than Pursuant to Agreement. If the Agreement is terminated by the University other than because of a Concessionaire Default, the University shall pay to the Concessionaire the fair market value of the Concessionaire Interest as of the date of such termination plus the reasonable out-of-pocket expenses incurred by the Concessionaire or the Operator as a direct result of such termination.
- E. Section 16.5: Option to Extend the Term. The University shall have the right, upon written notice delivered to the Concessionaire between 3 and 5 Years before the anticipated expiration date of the Agreement on the date that is 50 years after the Closing Date to terminate the Concessionaire’s Extension Option by purchasing the Concessionaire Interest for \$1 (representing, for purposes of this section, the residual value of the Utility System and the Utility Facilities existing as of the Closing Date without regard to any Capital Improvements undertaken after the Closing Date). If the University does not exercise such right, the Concessionaire shall have the right to extend the Term by 10 Years by providing written notice to the University within 6 months after the date on which the University declines to exercise its termination right or allows such right to expire, as applicable. If the Concessionaire exercises its right to extend the Term, the calculation of the Utility Fee shall be modified for such extended term as set forth

in this section. If the Concessionaire does not exercise such right, then the Agreement shall expire in accordance with its terms.

**Article 17. Restrictions on Transfers.**

- A. Section 17.1: Transfers by the Concessionaire. Subject to the rights of the Leasehold Mortgagee, the Concessionaire may not Transfer any portion of its interest that would result in the Concessionaire directly owning 50% or less of the Concessionaire Interest as of the date of entering into the Agreement unless (i) the University has Approved, and (ii) the proposed Transferee assumes the obligations of the Concessionaire. The University may withhold its consent in various instances, and the University can take into account financial strength and integrity, experience with utility facilities, reputation and the proposed operator. A change in control of the Concessionaire shall be deemed a Transfer requiring the University's consent. If the Concessionaire is not permitted by Law to disclose a change in control prior to its effectiveness, the Concessionaire shall not be in breach of this section if the new Persons holding interests in the Concessionaire meet certain requirements including a minimum net worth, credit rating, and experience in operating a Comparable Utility System; provided that within 2 Business Days after the Concessionaire is permitted to disclose such change in control, it shall provide the University with written notice thereof and the University shall have the right to Approve such change in control. If the University does not Approve such change in control, it shall be deemed a Concessionaire Default if the Concessionaire does not cause a Transfer or change in control that is Approved by the University to be effectuated within 120 Days after the University's disapproval.
- B. Section 17.2: Assignment by the University. The University may Transfer any or all of its interest but must remain jointly and severally liable.

**Article 18. Dispute Resolution.**

- A. Section 18.1: Scope. Any dispute arising out of the Agreement is to be resolved in accordance with this Article 18.
- B. Section 18.2: Informal Dispute Resolution Procedures. If the Parties are unable to resolve any dispute within 15 Business Days, the dispute shall be referred to the Designated Senior Person of each Party. The Designated Senior Persons shall negotiate in good faith to resolve the dispute.
- C. Section 18.3: Mediation. If the Designated Senior Persons do not resolve the dispute in 15 Business Days, the Parties shall attempt to resolve the dispute through mediation administered by the AAA.
- D. Section 18.4: Litigation. If mediation does not resolve the dispute within 30 Business Days, then the Parties shall present the dispute to a court of competent jurisdiction.

- E. Section 18.5: Provisional Remedies. No Party shall be precluded from initiating a proceeding in a court of competent jurisdiction for the purpose of obtaining any emergency or provisional remedy.
- F. Section 18.6: Tolling. If a Party receiving a notice of default under the Agreement contests the propriety of such notice, any cure period that applies to such default shall be tolled for the time period between such application and the issuance of a final award or determination.

**Article 19. Lenders.**

- A. Section 19.1: Leasehold Mortgages. The Concessionaire may grant Leasehold Mortgages subject to various restrictions such as the Concessionaire not being in default, the mortgage may only be in favor of an Institutional Lender, the mortgage may not extend to the fee simple interest of the property, the University shall have no liability, etc. While any Leasehold Mortgage is outstanding, the University shall not amend the Agreement in a way that shall have a material adverse effect on the Leasehold Mortgagee without its consent.
- B. Section 19.2: Notices and Payments to Leasehold Mortgagees. All required notices to be made by the University to the Concessionaire must also be made to the Leasehold Mortgagee. All payments by the University to the Concessionaire shall be made to the Leasehold Mortgagee.
- C. Section 19.3: Leasehold Mortgagee's Right to Cure. The Leasehold Mortgagee shall have 90 Days after a Concessionaire Default to cure the default. If the Leasehold Mortgagee is working to cure the default, the University may not terminate the Concession Agreement.
- D. Section 19.4: Rights of the Leasehold Mortgagee. The Leasehold Mortgagee may enforce its rights in any lawful way, including taking possession of the Utility System. Upon taking possession, the Leasehold Mortgagee may transfer the Utility System subject to the rest of the Agreement, except it shall not be subject to the requirement that all Concessionaire Defaults must be cured upon a Transfer. Prior to taking possession of the Utility System, the Leasehold Mortgagee is not liable for any of the Concessionaire's obligations.
- E. Section 19.5: Termination of this Agreement; New Agreement. If the University terminates the Concession Agreement, the University agrees to enter into a New Agreement for the Utility System with the Leasehold Mortgagee, provided the Leasehold Mortgagee cures any Concessionaire Default.
- F. Section 19.6: Recognition of Leasehold Mortgagee. The Leasehold Mortgagee whose notice was earliest received by the University shall be the only one who shall have the rights as a Leasehold Mortgagee under the Concession Agreement.
- G. Section 19.7: University's Right to Purchase Leasehold Mortgages. In the event of a Concessionaire default and if the Leasehold Mortgagee wishes to foreclose

on the Leasehold Mortgage, the University may purchase the Leasehold Mortgage.

- H. Section 19.8: Assignment and Assumption Agreement. If (i) the University has determined that a New Agreement between the University and the Leasehold Mortgagee would violate law or (ii) the University and the Leasehold Mortgagee mutually agree, then the Leasehold Mortgagee and the University shall enter into an Assignment and Assumption Agreement whereby the Leasehold Mortgagee assumes the Concession Agreement in the event of a Concessionaire Default, provided the Leasehold Mortgagee cures such Concessionaire Default.
- I. Section 19.9: Right to Dispute Resolution. In the event of default, the Leasehold Mortgagee shall have the right to participate in the dispute resolution process set forth in Article 18.

**Article 20.** University Academic Collaboration Program. The Concessionaire agrees to provide the compensation and opportunities set forth on Schedule 22 (the Academic Collaboration Schedule) in accordance with the terms and conditions set forth therein.

**Article 21.** Interaction with Parking System Concessionaire.

- A. Section 21.1: Coordination. To the extent the Concessionaire reasonably determines that the Utility System Operations require the temporary closure of any parking spaces or access to any parking facility or parking space subject to the Parking Agreement, the Concessionaire shall provide the University written notice thereof at least 5 Business Days in advance, except in the case of an Emergency. The University shall then use commercially reasonable efforts to exercise its rights under the Parking Agreement to provide the Concessionaire such temporary closure and access as is reasonably necessary, provided the University may elect not to so if the cost associated therewith is unreasonably disproportionate to the benefit or there is a reasonable alternative.

**Article 22.** Miscellaneous. Article 22 contains the miscellaneous provisions standard for an agreement of this nature, including, among other items, (i) notice requirements, (ii) amendment procedure, (iii) governing law (Ohio), and (iv) waiver of jury trial.