

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
EASTERN DIVISION**

THE UNIVERSITY OF IOWA ENERGY
COLLABORATIVE, LLC,

Plaintiff,

v.

THE UNIVERSITY OF IOWA,

Defendant.

CASE NO. 3:23-CV-0006

MOTION TO DISMISS

Defendant, the University of Iowa, pursuant to Fed. R. Civ. P. 12(b)(1) and (b)(7), moves the Court for an order dismissing the Complaint without prejudice for lack of subject-matter jurisdiction under 28 U.S.C. 1332(a) and failure to join the Board of Regents of the State of Iowa as a required party under Fed. R. Civ. P. 19.

Dated this 31st day of March, 2023.

THE UNIVERSITY OF IOWA, Defendant,

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INTRODUCTION

This action concerns the parties' rights and obligations under a Long-Term Lease and Concession Agreement for the University of Iowa's Utility System, executed in December of 2019 between the Plaintiff, University of Iowa Energy Collaborative, LLC ("UIEC"), the Defendant, University of Iowa, and the Board of Regents for the State of Iowa.¹ UIEC premised federal jurisdiction on diversity of citizenship, 28 U.S.C. § 1332(a)(1).

The case cannot proceed in federal court. The University is not a citizen of the State of Iowa for purposes of diversity jurisdiction, but an arm of the State itself. As a result, the Court lacks subject-matter jurisdiction and the action is barred by the Eleventh Amendment. Those defects are compounded by UIEC's omission of the Board of Regents as a defendant, joinder of which is required as a result of the broad-ranging declaratory relief requested in the Complaint. The Board of Regents is likewise an arm of the State of Iowa, lacks the citizenship required for diversity jurisdiction, and is entitled to Eleventh Amendment immunity. The Motion to Dismiss should be granted, and this litigation should instead proceed in Iowa state court.²

¹ Capitalized terms not otherwise defined have the meaning assigned to them in the Concession Agreement, which is attached to the Affidavit of Benjamin Fish as Exhibit A. The Agreement, though not attached to the Complaint, may be considered by the Court in support of this Motion. *Zean v. Fairview Health Servs.*, 858 F.3d 520, 526 (8th Cir. 2017) (quoting *Energations, Inc. v. Minn. Min. & Mfg. Co.*, 380 F.3d 1066, 1069 (8th Cir. 2004)) ("Though 'matters outside the pleadings' may not [ordinarily] be considered in deciding a Rule 12 motion to dismiss, documents necessarily embraced by the complaint are not matters outside the pleading."); *Osborn v. United States*, 918 F.2d 724, 729 (8th Cir. 1990) (District Court has authority to consider matters outside pleadings when motion is brought challenging subject-matter jurisdiction. Fed. R. Civ. P 12(b)(1)).

² The Concession Agreement, § 20.7, contains a permissive forum selection clause designating the District Court of Johnson County, Iowa, as a proper venue for the above-captioned dispute.

FACTUAL BACKGROUND

A. The Parties

Three parties executed the Concession Agreement: the University, the Board of Regents, and UIEC. (Declaration of Benjamin Fish (hereafter, “Fish Dec.”), ¶ 3, Ex. A). Each signatory is discussed in turn.

First, as the original public university of the State of Iowa, the University is the subject of both constitutional and legislative directives. The Iowa State Constitution, promulgated in 1857, provides that “[t]he State University shall be established at one place without branches at any other place, and the University fund shall be applied to that Institution and no other.” Iowa Const. Art. IX, § 11. A separate constitutional section “established, as now fixed by law . . . the state university at Iowa City, in the county of Johnson.” *Id.*, Art. XI, § 8.

Particular statutory requirements applicable to the University are set forth in the Iowa Code, I.C.A. § 263 et seq. Among them are that the University, which is not separately incorporated apart from the State of Iowa, “may never be under the control of any religious denomination,” and must “provide the best and most efficient means of imparting to men and women, upon equal terms, a liberal education and thorough knowledge of the different branches of literature and the arts and sciences.” I.C.A. § 263.1. The University “shall include colleges of liberal arts, law, [and] medicine.” *Id.* In addition, the University may establish “such other colleges and departments, with such courses of instruction and elective studies as the state of board regents may determine from time to time.” *Id.* Reflective of the University’s instrumental function as an institution of continued public learning, the Code requires that “[i]nstruction in the liberal arts college

shall begin, so far as practicable, at the points where the same is completed in high schools.” *Id.*

Second, as indicated in I.C.A. § 263.1, the Board of Regents serves as the University’s governing body. I.C.A. § 262.7. Originally, the University was governed by a Board of Education, which was subsequently abolished and replaced by a Board of Trustees. 1864 Acts, Ch. 52, § 1; Ch. 59. The Board of Regents followed. 1870 Acts, Ch. 87. The Board of Regents also governs the State’s land grant university, Iowa State University, and the University of Northern Iowa, among others. I.C.A. § 262.7.

The Board of Regents is comprised of nine members, appointed by the Governor, subject to confirmation by the Senate. I.C.A. § 262.2. Eight members are “selected from the state at large solely with regard to their qualifications and fitness to discharge the duties of the office.” I.C.A. § 262.1. “The ninth member shall be a student enrolled on a full-time basis in good standing at either the graduate or undergraduate level at one of the institutions [governed by the Board of Regents].” *Id.* Only five of the nine members may belong to “the same political party.” *Id.* Members duly appointed may be removed by the Governor, with approval of the Senate, for malfeasance in office. I.C.A. § 262.4.

The Board of Regents exercises significant operational control over the University. Its responsibilities include hiring the University’s president and other executive officers; directing the expenditure of state appropriations made to the University; and, importantly for purposes of this case, purchasing, selling, and leasing real estate belonging to the University. I.C.A. § 262.9(2), (4), (8), (10), (15). The University’s real estate is held in the

name of the State of Iowa, and exempt from state taxation. I.C.A. §§ 262A.4, 262.37, 262.46, 427.1.

The Board of Regents similarly supervises University finances. The University is required to comply with the “uniform budgeting and accounting system” promulgated by the Board of Regents in collaboration with the Director of the Iowa Department of Management. I.C.A. § 8.29. The University must further report the receipt of all federal funds and other non-appropriated funds that supplement or replace state appropriations. I.C.A. § 8.44. And the Board of Regents, in turn, is audited annually by the State Auditor of the State of Iowa. I.C.A. § 11.2(1). As part of the audit, the Board of Regents must make available for inspection “the most recent annual report of any investment entity or investment professional by a regents institution.” I.C.A. § 11.2(3)(a). Overall, the Board of Regents is broadly tasked with “[p]erform[ing] all other acts necessary and proper for the execution of the powers and duties conferred by law upon it.” I.C.A. § 262.9(13).

UIEC is the third party to the Concession Agreement, and the current Concessionaire. According to the allegations of the Complaint, UIEC is a Delaware limited liability company with its principal place of business in Iowa City, Iowa. (Doc. 1, ¶ 7). Its members are (1) Meridiam Infrastructure North America Corporation, a Delaware corporation with its principal place of business in New York, (2) Engie North America, Inc., a Delaware corporation with its principal place of business in Texas, (3) Hannon Armstrong Sustainable Infrastructure Capital, Inc., a Maryland corporation with its principal place of business in Maryland, and (4) numerous individuals who do not reside in the State of Iowa. (*Id.*).

B. The Concession Agreement

In 2019, the University engaged in an extensive and competitive proposal process for a public-private partnership in connection with the operation of its Utility System. (Doc. 1, ¶ 13). Public-private partnerships, also referred to as a “P3,” involve collaboration between a government agency and a private-sector company to finance and operate public facilities. (*Id.*, ¶ 14). In this instance, the University desired a new funding source to invest in strategic initiatives centered on research, student success and University engagement, through the grant of a concession of its on-campus Utility System to a private utility operator. (*Id.*, ¶ 15). Utility System goals included long-term sustainability of system assets and an emphasis on renewable fuel options, including operating the power plant coal-free no later than January 1, 2025. (Fish Dec., ¶ 3, Ex. A, § 3.29, p. 77).

The University ultimately selected UIEC as the Concessionaire, which offered \$1.165 billion in closing consideration. (*Id.*, Ex. A, § 2.1, p. 34). In return for UIEC’s services and the upfront payment, the University agreed to compensate UIEC over the 50-year lease term through the payment of an annual “Utility Fee,” a defined term under Schedule 5 of the Concession Agreement. (*Id.*, Ex. A, Schedule 5, pp. 1-5).

The Utility Fee consists of three general components: (1) a \$35 million annual “Fixed Fee,” which was made subject to an inflation escalator starting in 2025; (2) pass-through to the University of particularly identified operation and maintenance costs incurred by UIEC in the course of managing the system, and (3) a deemed return on approved capital expenditures made to sustain and improve the Utility System. (*Id.*).

C. The Complaint

The Complaint alleges breach of contract and seeks related declaratory relief on topics concerning the second and third components of the Utility Fee, along with two UIEC performance breach events occurring in the first year of its operation of the Utility System. (Doc. 1, ¶¶ 74-98). Despite the Board of Regents' presence as a signatory to the Concession Agreement, and the concession being made both by the University and the Board of Regents, UIEC filed suit against the University alone. (*Id.*).

ARGUMENT

I. THE UNIVERSITY LACKS THE CITIZENSHIP REQUIRED FOR DIVERSITY JURISDICTION AND IS FURTHER ENTITLED TO ELEVENTH AMENDMENT IMMUNITY FROM SUIT IN FEDERAL COURT.

UIEC ignored a cardinal rule of diversity jurisdiction, namely that “a State is not a ‘citizen’ for purposes of [§ 1332(a)(1)].” *Moor v. Cnty. of Alameda*, 411 U.S. 693, 717, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973). “Nor is an entity that is merely an ‘alter ego’ or ‘arm’ of a State a citizen for purposes of § 1332(a)(1).” *Id.* The University is an arm of the State of Iowa for diversity purposes, and is therefore not subject to suit in federal court when subject-matter jurisdiction is premised on diversity of citizenship. Decisions involving the University itself, other Iowa public universities governed by the Board of Regents, and public universities in general, as well as the recognized factors those courts examined, all compel a conclusion that the University both lacks a separate citizenship apart from its status as an arm of the State of Iowa and is entitled to Eleventh Amendment immunity.

The Eleventh Amendment provides: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any

Foreign State.” U.S. Con., Amd. XI. “[A]s the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today ... except as altered by the plan of the Convention or certain constitutional Amendments.” *Alden v. Maine*, 527 U.S. 706, 710, 119 S. Ct. 2240, 2245, 144 L. Ed. 2d 636 (1999).

“[W]hether an entity is a citizen of the State for diversity purposes, or a State for Eleventh Amendment ... purposes ... present[s] the same ultimate question for decision: whether the State ... remains the real party in interest .” *Pub. Sch. Ret. Sys. of Missouri*, 640 F.3d at 826 (quoting *Univ. of R.I. v. A.W. Chesterton Co.*, 2 F.3d 1200, 1203 (1st Cir.1993)). If the State is the real party in interest, the suit cannot proceed in federal court under 28 U.S.C. § 1332(a), and the public entity is entitled to Eleventh Amendment immunity.

The Eighth Circuit has endorsed the application of a factor-specific test, broadly applied in other federal courts, for determining when an entity is an arm of a State for purposes of Eleventh Amendment immunity. *Sherman v. Curators of Univ. of Missouri*, 16 F.3d 860, 865, n. 6 (8th Cir. 1994) (citing *Kovats v. Rutgers, The State Univ.*, 822 F.2d 1303, 1309 (3d Cir.1987)). The factors are:

(1) local law and decisions defining the status and nature of the agency involved in its relation to the sovereign; (2) most importantly, whether the payment of the judgment will have to be made out of the state treasury; (3) whether the agency has the funds or the power to satisfy the judgment; (4) whether the agency is performing a governmental or proprietary function; (5) whether it has been separately incorporated; (6) the degree of autonomy over its operations; (7) whether it has the power to sue and be sued and to enter into contracts; (8) whether its property is immune from state taxation; and (9) whether the sovereign has immunized itself from responsibility for the agency's operations.

Id. “The court must examine the particular circumstances of each entity, however, to determine whether the suit is in reality against an ‘arm or alter ego of the state.’” *Van Pilsum v. Iowa State Univ. of Sci. & Tech.*, 863 F. Supp. 935, 936 (S.D. Iowa 1994) (quoting *Greenwood v. Ross*, 778 F.2d 448, 453 (8th Cir.1985)).

The majority of courts applying those factors have concluded that state universities are arms of the state and share in the state’s Eleventh Amendment immunity. See e.g. *Walstad v. University of Minnesota Hosps.*, 442 F.2d 634 (8th Cir.1971); *Becker v. Univ. of Nebraska at Omaha*, 191 F.3d 904, 908 (8th Cir. 1999); *Kaimowitz v. Board of Trustees of Univ. of Illinois*, 951 F.2d 765 (7th Cir.1991); *Estate of Ritter by Ritter v. University of Michigan*, 851 F.2d 846 (6th Cir.1988); *Kashani v. Purdue Univ.*, 813 F.2d 843 (7th Cir. 1987); *Rutledge v. Arizona Bd. of Regents*, 660 F.2d 1345 (9th Cir.1981) (abrogated on other grounds) (Arizona State University); *Prebble v. Brodrick*, 535 F.2d 605 (10th Cir.1976) (University of Wyoming); *Hutsell v. Sayre*, 5 F.3d 996 (6th Cir.1993) (University of Kentucky); *BV Eng’g v. University of California, Los Angeles*, 858 F.2d 1394 (9th Cir.1988). Those same institutions cannot be sued in federal court under diversity jurisdiction. *Fifty Associates v. Prudential Insurance Company of America*, 446 F.2d 1187, 1192 (9th Cir.1970) (emphasizing that while Eleventh Amendment immunity can be waived, a state entity cannot thereby create diversity jurisdiction).

In keeping with the majority rule, the Eighth Circuit has held that the University is the alter ego and an arm of the State of Iowa. *Brine v. Univ. of Iowa* 90 F.3d 271, 275 (8th Cir. 1996). In *Brine*, three tenured associate professors in the dental hygiene program at the University filed suit against the University and the Board of Regents alleging various federal and state law violations concerning the University’s decision to

phase-out the dental hygiene program. *Id.* at 272-73. Among other causes of action, Plaintiffs asserted a 42 U.S.C. § 1983 claim for alleged violations of due process and the First Amendment. *Id.* at 275. The Eighth Circuit held the District Court properly dismissed those claims as barred by the State of Iowa's Eleventh Amendment immunity, which encompassed the University and the Board of Regents. *Id.*

In so holding, the Eighth Circuit cited with approval Judge Vietor's decision in *Van Pilsum v. Iowa State University*, 863 F.Supp. 935, 936–40 (S.D. Iowa 1994). Van Pilsum brought state and federal age discrimination claims against Iowa State University, the Board of Regents, and various Iowa State officials. *Id.* at 936. Acknowledging the determinative premise that “[t]he overwhelming majority of courts that have considered the question of whether state universities share in their respective state's Eleventh Amendment immunity have found that they do,” the court then applied the *Kovats* factors cited in *Sherman*, finding that Iowa State shared in the State's Eleventh Amendment immunity. *Id.* at 936-37. As noted, Iowa State and the University are two of several public universities governed by the Board of Regents. I.C.A. § 262.7. Judge Vietor's holding is thus equally applicable and dispositive as to the University.

Application of the various *Kovats* factors confirms that conclusion. First, providing public education is “clearly a governmental function.” *Van Pilsum*, 863 F. Supp. at 939; *see also State v. Trucke*, 410 N.W.2d 242, 244–45 (Iowa 1987) (“[E]ducation is ‘perhaps the most important function of state and local government.’”) (quoting *Brown v. Board of Educ. of Topeka, Kan.*, 347 U.S. 483, 493, 74 S. Ct. 686, 691, 98 L.Ed. 873 (1954)). Further proof of that premise comes from the fact that the Iowa State Constitution itself called for the establishment of the University. Iowa Const. Art., IX, § 11; Art., XI, § 8

(1857). To implement the constitutional command, the University's purpose and functions were later defined by statute without separately incorporating the institution as a separate entity distinct from the State. I.C.A. § 263.

Second, the State's legislative and executive branches exercise significant control over the University. The control is both direct, through statutory provisions applicable to the University, and indirect, through the Board of Regents. I.C.A. §§ 262 et seq.; 263 et seq. The members of the Board of Regents are appointed by the State's highest ranking executive branch officer, the Governor, and then confirmed by the legislature through Senate approval. I.C.A. § 262.2. Members must be chosen according to enumerated statutory requirements. I.C.A. §§ 262.1.

Third, the Iowa Code likewise dictates the Board of Regents' rights, duties, and obligations with respect to the University. Those duties include operational functions such as hiring the University President and other executive officials, directing state expenditures made to the University, supervising the University's finances, and purchasing, selling, and leasing real estate belonging to the University, which is held in the name of the State. I.C.A. §§ 8.29; 8.44; 262.9(2), (4), (8), (10), (15); 262A.4, 262.37; 262.46. In addition to specifically enumerated obligations, the Board of Regents is broadly tasked with "[p]erform[ing] all other acts necessary and proper for the execution of the powers and duties conferred by law upon it." I.C.A. § 262.9(13).

The State of Iowa monitors the Board of Regents' compliance with its statutory obligations through control of Board membership and other oversight mechanisms, such as financial audits by the Iowa State Auditor. I.C.A. §§ 11.2(1), 11.2(3)(a). The State, of

course, retains the ability to further adjust the functions of both the University and the Board of Regents through legislative enactments.

Fourth, the University is subject to traditional protections afforded to the state sovereign on account of its immunity. The University's property is exempt from state taxation. I.C.A. § 427.1. The University's actions are considered "agency actions" under the Iowa Administrative Procedure Act, I.C.A. Ch. 17. *Press-Citizen, Co. v. Univ. of Iowa*, 817 N.W.2d 480, 489 n. 8 (Iowa 2012) (noting the University of Iowa is an agency within the meaning of section 17A.2); *Sood v. Univ. of Iowa*, 847 N.W.2d 237 (Iowa Ct. App. 2014) (same). And, the Iowa Supreme Court has held the University is entitled to sovereign immunity. *Jones v. Univ. of Iowa*, 836 N.W.2d 127, 142 (Iowa 2013) (affirming dismissal of claims against the University outside of actions permitted under Iowa Tort Claims Act). The University therefore lacks the operational, financial, and political independence necessary to be considered a distinct entity, separate and apart from the State of Iowa. See *Pub. Sch. Ret. Sys. of Missouri*, 640 F.3d at 828 (emphasizing that the less institutionally independent, the more likely a state entity is an arm of the state).

Because the University is the alter ego and arm of the State of Iowa, it lacks the citizenship required for diversity jurisdiction under 28 U.S.C. § 1332(a) and is entitled to Eleventh Amendment immunity from suit by UIEC in federal court. The Eleventh Amendment encapsulates two fundamental concepts: "first, that each State is a sovereign entity in our federal system; and second, that '[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.'" *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 54, 116 S. Ct. 1114, 1122, 134 L. Ed. 2d 252 (1996) (quoting *Hans v. Louisiana*, 134 U.S. 1, 13, 10 S. Ct. 504, 506, 33 L. Ed. 842 (1890)). A

state sovereign is thus immune from suit in federal court, absent three exceptions—(1) prospective injunctive relief under the line of authority commenced with *Ex parte Young*, 209 U.S. 123, 159-160, 28 S. Ct. 441, 454, 52 L. Ed. 714 (1908); (2) abrogation by Congress, under exceedingly narrow circumstances, as exemplified in *Tennessee v. Lane*, 541 U.S. 509, 517-534, 124 S. Ct. 1978, 1985-1994, 158 L. Ed. 2d 820 (2004); and (3) waiver by the state, as found in *Lapides v. Bd. of Regents of Univ. Sys. of Georgia*, 535 U.S. 613, 624, 122 S. Ct. 1640, 1646, 152 L. Ed. 2d 806 (2002). None of those exceptions are implicated here, and, in any event, the defect remains jurisdictional, given the absence of any federal question at issue. That jurisdictional defect cannot be waived or otherwise cured. See *State Highway Comm'n of Wyoming v. Utah Const. Co.*, 278 U.S. 194, 49 S. Ct. 104, 73 L. Ed. 262 (1929) (“State’s consent to be sued does not affect question of diverse citizenship.”).

The impact of this issue extends beyond the boundaries of this case. As recognized by the U.S. Supreme Court, while the Eleventh Amendment explicitly only addresses suits against states in federal court, a State’s immunity against suit in other state courts is implicated as well. “[T]he ‘natural inference’ from [the Amendment’s] speedy adoption is that ‘the Constitution was understood, in light of its history and structure, to preserve the States’ traditional immunity from private suits.” *Franchise Tax Bd. of California v. Hyatt*, 203 L. Ed. 2d 768, 139 S. Ct. 1485, 1496 (2019) (quoting *Alden v. Maine*, 527 U.S. 706, 722, 119 S. Ct. 2240, 2251, 144 L. Ed. 2d 636 (1999)). That traditional immunity extends to immunity from state court litigation in other states. *Id.* An adverse ruling here could thus subject the University to diversity actions in Iowa federal

court and state court filings in forty-nine other states, depending on the facts at issue, effectively relegating the University to the status of an ordinary private litigant.

In sum, this action is effectively brought against the State of Iowa as the real party in interest and cannot proceed in federal court for two independent reasons. First, the University is not a citizen of the State of Iowa but the State itself, resulting in the absence of diversity of citizenship between the parties. Second, the University is entitled to Eleventh Amendment immunity from suit in federal court. On either basis, the University's Motion to Dismiss should be granted.

II. IRRESPECTIVE OF THE COURT'S RULING ON THE UNIVERSITY'S CITIZENSHIP AND ELEVENTH AMENDMENT IMMUNITY, THE CASE CANNOT PROCEED IN FEDERAL COURT BECAUSE THE BOARD OF REGENTS IS A REQUIRED PARTY.

The Board of Regents' absence as a party provides a second and equally definitive barrier to this case proceeding in federal court. Though the concession to UIEC was made jointly by the University and the Board of Regents, UIEC sued the University alone, seeking both money damages and wide-ranging declaratory relief that will impact the parties' rights and obligations under the Concession Agreement for the remainder of its fifty-year term. (Doc. 1, pp. 22-23). As such, the outcome will affect the terms on which both the University and the Board of Regents made their concession of the Utility System, and the case cannot be fully or fairly resolved without the presence of the Board of Regents as a party. Since the Board of Regents is likewise an alter ego and arm of the State of Iowa, making joinder not feasible and resolution impossible without material prejudice, dismissal is the proper outcome.

The joinder of required parties absent from the litigation is governed by Fed. R. Civ. P. 19. Under Rule 19, the Court applies a three-part test to determine whether joinder

of a party is required. First, the Court must determine whether the absent party is a required party. *Gwartz v. Jefferson Mem'l Hosp. Ass'n*, 23 F.3d 1426, 1428 (8th Cir. 1994) (citing FRCP 19(a)). Second, if an absent party's presence is required, the Court must determine whether the absent party may be joined. *Id.* Lastly, if the absent party cannot be joined, the Court must decide whether the action can proceed as postured without the required party. *Id.* (citing FRCP 19(b)).

The Board of Regents is a required party and dismissal is the appropriate remedy. Although the relief UIEC currently requests concerns the University, the Board of Regents' interests cannot be separated from those of the other two signatories to the Concession Agreement. The concession to UIEC is made both by the University and the Board of Regents. (Fish Dec. ¶ 3, Ex. A, §§ 2.1, 3.1, pp. 34, 52). The joint concession is consistent with the University's real estate being held in the name of the State, and the Board of Regent's authority to purchase, sell, and lease the same. I.C.A. §§ 262.9(4), (8), (15); 262A.4; 262.37; 262.46. The contract's structure further acknowledges the control exercised by the Board of Regents and, derivatively, by the State of Iowa, as detailed previously. Any judgment rendered in this litigation against the University would necessarily impact the University's budget and financial obligations, which too are under the purview of the Board of Regents and ultimately the obligation of Iowa taxpayers. I.C.A. § 262.9(10). Especially in light of the declaratory relief requested by UIEC, which will bind both the University and the Board of Regents for the remaining term of the Concession Agreement, joinder of the Board is required.

However, joinder of the Board of Regents is not feasible in light of the same jurisdictional barriers applicable to the University. The Board of Regents, like the

University, is an alter ego and arm of the State of Iowa, lacks the citizenship necessary for diversity jurisdiction, and is entitled to Eleventh Amendment immunity. See *Brine v. Univ. of Iowa*, 90 F.3d 271, 275 (8th Cir. 1996); *Van Pilsum v. Iowa State Univ. of Sci. & Tech.*, 863 F. Supp. 935, 940 (S.D. Iowa 1994); *Clark v. Iowa State Univ.*, No. 4:09-CV-370 RP-CFB, 2009 WL 10677892, at *5 (S.D. Iowa Dec. 17, 2009).

The Eighth Circuit has confirmed the appropriate outcome under Rule 19 “[i]n the specific context of an immune sovereign entity that is a required party not amenable to suit.” *Two Shields v. Wilkinson*, 790 F.3d 791, 798 (8th Cir. 2015). In that instance, dismissal is appropriate “if the claims of sovereign immunity are not frivolous and ‘there is a potential for injury to the interests of the absent sovereign.’” *Id.* (quoting *Republic of the Philippines v. Pimentel*, 553 U.S. 851, 867, 128 S. Ct. 2180, 171 L.Ed.2d 131 (2008)). The Board of Regents’ entitlement to Eleventh Amendment immunity is well established, and potential injury to the interests of the absent sovereign is inherent in UIEC’s request for declaratory relief. Dismissal is therefore appropriate.

The particular factors set forth in Rule 19(b) confirm that outcome. The prejudice to the Board of Regents, should UIEC prevail on the merits, cannot be limited or avoided as such relief would effectively alter the terms under which the concession was granted. Any judgment so rendered would thus be inadequate as to the Board of Regents. In contrast, no prejudice ensues to UIEC from having to prosecute its action in the Iowa state courts. Procedurally, the parties each consented in the Concession Agreement to venue in the District Court of Johnson County, Iowa. (Fish Dec., ¶ 3, Ex. A, § 20.7, p. 164). Substantively, UIEC can obtain complete and adequate relief in Iowa state court, as the Iowa Supreme Court has abrogated sovereign immunity in its state courts for

claims on State contracts. *Lee v. State, Polk Cnty. Clerk of Ct.*, 815 N.W.2d 731, 741 (Iowa 2012) (citing *Kersten Co. v. Dep't of Soc. Servs.*, 207 N.W.2d 117, 122 (Iowa 1973)).

Thus, the required presence of the Board of Regents to the adjudication of the claims raised in this action provides a second basis for dismissal.

CONCLUSION

The University of Iowa respectfully requests that its Motion to Dismiss be granted, and this action dismissed without prejudice to a future action between the parties to the Concession Agreement in the District Court of Johnson County.

Dated this 31st day of March, 2023.

THE UNIVERSITY OF IOWA, Defendant,

By: /s/Steven D. Davidson

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of March 2023, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will provide notice to the following:

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/s/Steven D. Davidson

DOCS/2946883.4

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
EASTERN DIVISION

THE UNIVERSITY OF IOWA ENERGY
COLLABORATIVE, LLC,

CASE NO. 3:23-CV-0006

Plaintiff,

**DECLARATION OF BENJAMIN P. FISH
IN SUPPORT OF MOTION TO DISMISS**

v.

THE UNIVERSITY OF IOWA,

Defendant.

I, Benjamin P. Fish, declare and state as follows:

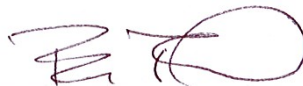
1. I am a resident of Johnson County, Iowa, am over the age of 19 years, and make this declaration with personal knowledge of the matters set forth.

2. I serve as the Director of Utility Operations at the University of Iowa.

3. I am familiar with the Long-Term Lease and Concession Agreement between the University, the Board of Regents, and the University of Iowa Energy Collaborative, LLC. A true and correct copy of the Concession Agreement, and Schedule 5 to the Concession Agreement, are attached to this declaration as Exhibit "A."

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing statements are true and correct.

Executed this 30 day of MARCH, 2023, in Iowa City, Iowa.



Benjamin P. Fish

EXHIBIT A

**LONG-TERM LEASE AND CONCESSION AGREEMENT FOR
THE UNIVERSITY OF IOWA UTILITY SYSTEM**

dated as of

December 10, 2019

by and among

BOARD OF REGENTS, STATE OF IOWA,

UNIVERSITY OF IOWA

and

UNIVERSITY OF IOWA ENERGY COLLABORATIVE LLC

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**LONG-TERM LEASE AND CONCESSION AGREEMENT FOR
THE UNIVERSITY OF IOWA UTILITY SYSTEM**

THIS LONG-TERM LEASE AND CONCESSION AGREEMENT FOR THE UNIVERSITY OF IOWA UTILITY SYSTEM (this “Agreement”) is made and entered into as of this 10th day of December, 2019 by and among the Board of Regents, State of Iowa (the “BOR”), the University of Iowa (the “University”) and University of Iowa Energy Collaborative LLC, a Delaware limited liability company (the “Concessionaire”).

RECITALS

WHEREAS, the University has an ongoing commitment to sustainable operations and pursuing creative solutions to reduce its impact on the environment, and has articulated this commitment in its 2020 Vision, and the University views the Transaction (as defined herein) as an opportunity to further this commitment; and

WHEREAS, the University and the BOR, as applicable, have established a Utility System (as defined herein) and owns or leases (as applicable) the Utility Facilities and the Utility System Assets (both, as defined herein); and

WHEREAS, the University, as part of the procurement process described in the University of Iowa P3 Utility System Transaction – Second Amended and Restated Request for Proposal Submission Process Letter dated October 4, 2019 (as amended or modified, the “Request for Proposals”) has selected the Concessionaire as the winning bidder for the long-term lease and concession of the Utility System as described herein in part because of the Concessionaire’s commitments with respect to the existing University Utility System Employees (as defined herein) and to being capable of operating the Utility System without coal after January 1, 2025, as described in more detail herein and in the Concessionaire’s response to the Request for Proposals;

WHEREAS, the Concessionaire desires to lease (or sublease, as applicable) the Utility Facilities from the University and the BOR, as applicable, and receive an exclusive grant from the University to operate, maintain, possess, control and improve the Utility System for the Term (as defined herein) of this Agreement, all as hereinafter provided; and

WHEREAS, the University has determined that the engagement of the Concessionaire under this Agreement will, among other things, further its sustainability goals, and permit for the more efficient operation of the Utility System, and therefore, along with the BOR, as applicable, desires to lease (or sublease, as applicable) the Utility Facilities to the Concessionaire and provide the Concessionaire the exclusive right to operate, maintain, possess, control and improve the Utility System for the Term of this Agreement, all as hereinafter provided; and

WHEREAS, the Concessionaire agrees to lease (or sublease, as applicable) the Utility Facilities and to operate, maintain, possess, control 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 and to engage in the Utility System Operations 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:

“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).

“AAA” means the American Arbitration Association.

“Actual Knowledge of the University” means the actual, current knowledge of the University’s Senior Vice President for Finance and Operations, the University’s Chief Financial Officer, the University’s Assistant Vice President of Facilities Management or the University’s Director of Utilities 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(m).

“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 adjustment period 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 7.2.

“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 SOFR (or any successor rate thereto) as reported in the *Wall Street Journal* (or any successor thereof).

“Benchmark Amount” has the meaning ascribed thereto in Schedule 5.

“Bid Date” means November 5, 2019.

“Boiler MACT Authorizations” has the meaning ascribed thereto in Section 11.13.

“BOR” has the meaning ascribed thereto in the preamble 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.

“Campus-Wide Permits” has the meaning ascribed thereto in Section 11.13.

“Capital Improvement” means any improvement to or replacement or expansion of the components of the Utility Facilities or Tunnels that is capital in nature, as determined in accordance with GAAP.

“Capital Recovery Amount” has the meaning ascribed thereto in Schedule 5.

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

“Capped O&M Costs” means 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, without duplication: (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, including the cost to dispose of ash and other waste products generated by the Utility System Operations and the cost to operate and maintain the Utility System Light Fixtures; (viii) legal fees directly related to the operation of the Utility System and specifically excluding legal fees associated with the negotiation of this Agreement, the Main Campus Water Treatment Plant Sublease or the Trademark License Agreement, any amendment or modification thereto or any dispute with the University in connection with this Agreement, the Main Campus Water Treatment Plant Sublease, the Trademark License 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, but Capped O&M Costs may include the rental charges, including additional rental charges for common area maintenance expenses, real estate taxes and other items, for which the Concessionaire is obligated under Section 3.30(c); (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 Campus-Wide Permits to the extent applicable to the Utility System; (xviii) 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; (xix) payments to the Operator pursuant to the agreement between the Concessionaire and the Operator to operate the Utility System pursuant to this Agreement; (xx) the costs for the Operator to be a member of any regulatory program, to the extent required by Law or this Agreement; (xxi) the costs for any Authorizations for the Concessionaire or Operator to perform the Utility System Operations, to the extent required by Law including those costs paid to the University for an Authorization that the University uses to pay the applicable Governmental Authority; (xxii) the professional fees and expenses relating to the preparation of audited financial statements of the Concessionaire for purposes of Section 8.1(c) (provided that, for the first 3 Fiscal Years after Closing, this cost shall not be included in the calculation of the Capped O&M Index but will instead be added to the Capped O&M Index in accordance with Section 3.6); and (xxiii) the cost and expense of maintaining the credit rating required by Section 3.6 (provided that, for the first 3 Fiscal Years after Closing, this cost shall not be included in the calculation of the Capped O&M Index but will instead be added to the Capped O&M Index in accordance with Section 3.6); 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, violation of Law 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 the 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.

“Chilled Water Plant 1” means the building identified on Part 1 of Schedule 3 and associated improvements installed therein.

“Chilled Water Plant 2” means the building identified on Part 2 of Schedule 3 and associated improvements installed therein.

“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.

“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, 2023, (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 University 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 Iowa Utilities Board or the Federal Energy Regulatory Commission or their 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 Iowa Utilities Board or the Federal Energy Regulatory Commission (or their successors) 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 elects 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 (other than any KPI Compensation due and payable with respect to the Safety KPI), 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 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.

“Control Room” means that certain space located in the University Services Building identified and depicted on Schedule 23.

“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., Moody’s Investor Services and Kroll Bond Rating Agency, Inc., or their successors or Affiliates, 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 central 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; (xi) the failure of the University to enforce an obligation under an Unassigned Contract; or (xii) a written notice or direction from a Governmental Authority specifically requiring the Concessionaire 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 or Material Change that, if Approved, would have caused Utility System Operations to comply with the relevant Law to which such notice 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 Remedy” has the meaning ascribed thereto in Section 15.1(d).

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

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

“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 at least one of the City of Iowa City, Iowa; the City of Des Moines, Iowa; the City of Chicago, Illinois; the City of Minneapolis, Minnesota; or the City of St. Paul, Minnesota; 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 Iowa City, Iowa.

“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 University’s Senior Vice President for Finance and Operations, and the Designated Senior Person for the Concessionaire will be André Canguçu.

“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, Schedule 18 and Schedule 19.

“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 discretion, provided that at least one member shall be a Representative of the Concessionaire.

“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.

“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).

“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 7.2 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 a Party 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, vandalism, epidemic, quarantine restriction, strike, labor dispute or other labor protest, stop-work order or injunction issued by a Governmental Authority, a governmental embargo or general unavailability or interruption 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.

“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 that 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).

“Hospital Plant” means the building identified on Part 3 of Schedule 3 and associated improvements installed therein.

“Hospital Water Tower” means the building identified on Part 4 of Schedule 3 and associated improvements installed therein.

“IFRS” means the International Financial Reporting Standards, consistently applied.

“Independence Road Annex Lease” means the Amended and Restated Lease Agreement dated December 9, 2015, by and between KGRD Green Bay, LLC, as landlord, and the Board of Regents, State of Iowa, for the Use and Benefit of the University of Iowa, as tenant, as amended by that certain Amendment to Amended and Restated Lease Agreement dated September 24, 2016 and that certain Second Amendment to Amended and Restated Lease Agreement dated March 1, 2016, which is attached hereto as Schedule 24, and as may be further amended, modified or restated, with respect to the building of which the Independence Road Annex Space is a part.

“Independence Road Annex Space” means the portion of the building leased pursuant to the Independence Road Annex Lease identified on Part 5 of Schedule 3 and associated improvements installed therein.

“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”.

“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.

“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 3.6 and 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 Mortgagee 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 A-2 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 at least one of the City of Iowa City, Iowa; the City of Des Moines, Iowa; the City of Chicago, Illinois; the City of Minneapolis, Minnesota; or the City of St. Paul, Minnesota 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.

“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 (provided that, for the avoidance of doubt, an actual loss, claim, liability, damage of any Contractor or Representative of the Concessionaire and for which the Concessionaire is liable subject only to receiving payment in respect thereof from the University, shall not be treated as a contingent liability for this purpose).

“Madison Street Replacement Building” has the meaning ascribed thereto in Section 3.30(d).

“Madison Street Replacement Notice” has the meaning ascribed thereto in Section 3.30(d).

“Madison Street Services Space” means the portion of the building identified on Part 6 of Schedule 3 and associated improvements installed therein.

“Madison Street Water Storage Tank” means the building identified on Part 7 of Schedule 3 and associated improvements installed therein.

“Main Campus” means the real property and improvements located thereon that are owned and/or leased by the University or the BOR, as applicable, which real property is shown on Appendices 1 through 7 of Schedule 16, which shall depict the real property that comprise the “Main Campus” for the applicable Utility, which the Parties acknowledge and agree may differ among Utilities, such that when reference is made herein to the “Main Campus”, it shall be the Main Campus for the relevant Utility.

“Main Campus Power Plant” means the building identified on Part 8 of Schedule 3 and associated improvements installed therein.

“Main Campus Water Treatment Plant” means the building identified on Part 9 of Schedule 3 and associated improvements installed therein.

“Main Campus Water Treatment Plant Sublease” means the sublease of certain space within the Main Campus Water Treatment Plant for research and certain ancillary uses related and unrelated to the Utility System or Utility System Operations by the University in substantially the form attached hereto as Schedule 22.

“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.

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

“MS4 Permit” has the meaning ascribed thereto in Section 11.13.

“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.

“Newton Road Chilled Water Plant” means the building identified on Part 10 of Schedule 3 and associated improvements installed therein.

“North Campus Chilled Water Plant” means the building identified on Part 11 of Schedule 3 and associated improvements installed therein.

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

“Oakdale 69kV Substation” means the building identified on Part 12 of Schedule 3 and associated improvements installed therein.

“Oakdale Campus” means the real property and improvements located thereon that are owned and/or leased by the University or the BOR, as applicable, which real property is shown on Appendices 1 through 7 of Schedule 17, which shall depict the real property that comprise the “Oakdale Campus” for the applicable Utility, which the Parties acknowledge and agree may differ among Utilities, such that when reference is made herein to the “Oakdale Campus”, it shall be the Oakdale Campus for the relevant Utility.

“Oakdale Chilled Water Plant” means the building identified on Part 13 of Schedule 3 and associated improvements installed therein.

“Oakdale Hygienic Lab Chiller Space” means that certain space on the Oakdale Campus, in which certain Utility System Assets and Utility Facility Assets are located, as identified on Part 14 of Schedule 3.

“Oakdale Power Plant Substation” means the building identified on Part 15 of Schedule 3 and associated improvements installed therein.

“Oakdale Utility Power Plant” means the building identified on Part 16 of Schedule 3 and associated improvements installed therein.

“Oakdale Water Tower” means the building identified on Part 17 of Schedule 3 and associated improvements installed therein.

“Oakdale Well House” means the building identified on Part 18 of Schedule 3 and associated improvements installed therein.

“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.

“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.

“Operating Agreements and Plans” has the meaning ascribed thereto in Section 3.11(a).

“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.

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

“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’ or warehousemen’s liens 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' or warehousemen's liens 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 Iowa, City of Iowa City, Iowa and Johnson County, Iowa 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, including the University.

"Post-Closing Transition Period" means the period from the Closing Date to the date that is 9 months after the Closing Date, provided that the Concessionaire may terminate the Post-Closing Transition Period earlier on written notice to the University.

“Project Intellectual Property” has the meaning ascribed thereto in Section 3.11(b).

“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.

“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; provided, however, when taking into account Prudent Industry Practices, the Concessionaire shall also take into account commercially reasonable sustainability practices, as determined in accordance with Section 3.29, then being utilized by providers of similar services.

“Public Way” means the streets, alleys, driveways and sidewalks owned by (or for the benefit of) the University.

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

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

“Record Retention Policy” has the meaning ascribed thereto in Section 3.12(a).

“Recovery Period” means a period for each New Approved Capital Improvement, commencing at the beginning the Fiscal Year following the Fiscal Year in which the applicable New Approved Capital Improvement Costs are incurred and expiring on the earlier to occur of (i) the expiration of the 20th Fiscal Year following the commencement of such period and (ii) the expiration of the Term, over which the Concessionaire shall recover the cost of that 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, the failure to comply with or to 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.

“Request for Proposals” has the meaning ascribed thereto in the recitals to this Agreement.

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

“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).

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

“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).

“Safety KPI” has the meaning set forth in Schedule 15.

“Sand Road Space” means the portion of the building identified on Part 19 of Schedule 3 and associated improvements installed therein.

“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 5 Business Days prior to the Bid Date.

“SOFR” means, with respect to any day, the secured overnight financing rate published for such day by the Federal Reserve Bank of New York, as the administrator of the benchmark, (or a successor administrator) on the Federal Reserve Bank of New York’s Website.

“Substation L” means the building identified on Part 20 of Schedule 3 and associated improvements installed therein.

“Substation U” means the building identified on Part 21 of Schedule 3 and associated improvements installed therein.

“Substations” means, collectively, Substation L, Substation U, Oakdale Power Plant Substation and the Oakdale 69kV Substation.

“Supplies” has the meaning ascribed thereto in Section 7.3(a).

“Supply Contract” has the meaning ascribed thereto in Section 7.3(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.

“Third Party Customer Contracts” has the meaning given thereto in Section 2.5(e).

“Third Party Customers” means each of the following parties for the following Utilities: (i) City of Iowa City for water at the Hawkeye Lift Station; (ii) Rainbow Child Care for water and sewer; (iii) Brookland Woods for water and sewer; (iv) Hope Lodge for water and sewer; (v) Sprout House for water and sewer; (vi) Ronald McDonald for water and sewer; (vii) 401 Melrose

Ave for water and sewer; (viii) 321 Melrose Ave for water and sewer; (ix) State Historical Building for steam, water and sewer and (x) Levitt Center for University Advancement for water and sewer.

“Time of Closing” means 10:00 a.m. Central 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 Chicago 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 18, which Tunnels, for the avoidance of doubt, are part of the Utility System but are not Utility System Land. 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.

“Unassigned Contracts” has the meaning ascribed thereto in Section 2.5(e).

“Uncapped O&M Costs” means the sum of the following: (1) 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 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 7.4, 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 to make time-sensitive repairs or improvements to (A) the Utility System or (B) University-owned property related to, but not a part of, the Utility System, in each case to the extent such repairs or improvements (1) are not Capital Improvements, (2) were not contemplated in the most recently approved Five-Year Plan, (3) were either (x) made in the Concessionaire's good-faith belief that they were being made to the Utility System or (y) made in the Concessionaire's good-faith belief that the repair was the best first response to an Emergency, and (4) have been Approved by the University in its discretion, (i) stormwater charges assessed by the City of Iowa City, Iowa, except to the extent that such stormwater charges increase as a result of an action or inaction of the Concessionaire (other than the 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), (j) an Approved Capital Improvement or Material Change that is classified as Uncapped O&M Costs pursuant to Section 4.3(h), (k) costs incurred in connection with Supply procurement assistance under Section 7.3(a) or Section 7.3(b), but only to the extent such costs were Approved by the University prior to being incurred, (l) costs (including KPI Compensation) incurred as a direct result of the Concessionaire's failure to comply with Law or this Agreement if the sole reason for such failure is that the University failed to be reasonable in its Approval of all possible Capital Improvements or Material Changes that would cure or prevent such failure to comply with such Law or this Agreement, (m) costs associated with a University Directive that is not the construction of a Capital Improvement in accordance with Section 5.1, (n) legal fees arising out of any Excluded Liabilities, (o) the costs of any premium or deductible for professional liability insurance coverage procured by the Concessionaire in accordance with Section 13.1(e) for a particular Approved Capital Improvement or Material Change provided that such coverage and the cost thereof is expressly included in the request for Approval of such Capital Improvement or Material Change and the University Approves such cost, (p) the cost of the deductible for the University's All Risk Property Insurance described in Section 13.2(c) for any claim made on such insurance with respect to the Utility System in excess of \$250,000 (Adjusted for Inflation) per claim, (q) those costs identified as "Uncapped O&M Costs" in Section 3.30, (r) all costs identified in the definition of "Capped O&M Costs" related to any Ongoing Utility System Project or New Approved Capital Improvement incurred during the first 3 Years after such Ongoing Utility System Project or New Approved Capital Improvement becomes part of the Utility System or is brought into service, as applicable (s) the operations and maintenance costs that are reasonably necessary to cause the Utility System or Utility System Operations to comply with 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 for the first 3 Years after the occurrence of such enactment, modification, amendment or change (but not, for the avoidance of doubt, those costs that are included in any other clause of this definition), and (t) the reasonable costs of any other adjustments to the Capped O&M Index made pursuant to this Agreement for the first 3 Years after such adjustment is first made, provided that, for the avoidance of doubt, in no event, shall Uncapped O&M Costs include any costs or expenses incurred by the Concessionaire that result from the negligence, violation of Law or willful misconduct of the Concessionaire or the Operator; and (2) amount equal to the sum of (a) the federal income Taxes that the Concessionaire would pay on the income generated

solely by the equity portion of the Variable Fee Component (which for the avoidance of doubt is the amount equal to sub-part (ii) only in the calculation of the Utility Fee as set forth on Schedule 5 of the Concession Agreement) assuming the highest corporate income tax rate and (b) the Taxes that the Concessionaire would pay on the income solely generated by the equity portion of the Variable Fee Component (which for the avoidance of doubt is the amount equal to sub-part (ii) only in the calculation of the Utility Fee as set forth on Schedule 5 of the Concession Agreement) to the State of Iowa for the highest corporate income tax imposed by the State of Iowa, in each case regardless of the amount of such Taxes actually paid by the Concessionaire, provided, that the sum of subparts (2)(a) and (2)(b) shall be calculated according to the following formula: $((\text{Benchmark Amount} \times 0.5 \times \text{Variable Fee Component}) * [X]) / (1 - [X])$, where “[X]” is defined as the then-current blended tax rate using the then-highest federal corporate income tax rate expressed as a decimal (e.g., currently 0.21) (the “Federal Tax Rate”) and the then-highest Iowa corporate income tax rate expressed as a decimal (e.g., currently 0.12) (the “State Tax Rate”). For the avoidance of doubt, such blended tax rate will be calculated such that $[X] = \text{State Tax Rate} + (1 - \text{State Tax Rate}) * \text{Federal Tax Rate}$.

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

“University Campus” means, collectively, the Main Campus and the Oakdale Campus.

“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 University Campus on utility facilities or energy equipment that are not and will not be considered part of the Utility System in accordance with the definition thereof; (b) taking control of the internal University billing system for Utilities; and (c) causing the Concessionaire to engage in sustainability practices in excess of those reasonably required by Prudent Industry Practices) 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 that, notwithstanding the foregoing, (1) as part of any such order or directive or as a separate order or directive, the University may cause certain personal property to be deemed Utility System Assets and part of the Utility System even if such personal property is beyond the line of demarcation for the applicable Utility as set forth in the Performance Standards and may cause the Concessionaire to purchase and/or install such personal property, provided that if any such personal property would be beyond the line of demarcation for the applicable Utility as set forth in the Performance Standards, such order or directive may only be issued with the approval of the Concessionaire, acting reasonably, (2) any such order or directive can include the design, demolition, project management, construction, repair, replacement, remodeling, renovation, reconstruction, enlargement, addition, alteration, painting, or structural or other improvements not included in the Utility Facilities but related thereto, provided that such work must be part of a larger project (as determined by the University in its reasonable discretion) for which the Utility System is the primary driver of such project (as determined by the University in its reasonable discretion), (3) the University may, in any such order or directive, direct the manner and means by which the Concessionaire performs a

University Directive, and (4) no such order or directive may in any event order or direct the Concessionaire to do any act that (x) 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 or (y) result in additional expenditure by the Concessionaire of an amount in excess of \$100,000,000 in any given Fiscal Year or in excess of \$200,000,000 over any given period of five Fiscal Years (in each case Adjusted for Inflation).

“University Liaison” means Associate Director, Utility Operations, 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 Responsible Parties” has the meaning ascribed thereto in Section 12.2.

“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) domestic water, (iv) chilled water, (v) sanitary sewage, (vi) storm water and (vii) compressed air, and “Utilities” means each of them.

“Utility Facilities” means the improvements and equipment (a) constituting part of or located on the University 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 (1) the distribution pipes carrying the Utilities (including pipes conveying sanitary sewage and storm water), (2) the trench-boxes and vaults exclusively used in connection with the Utilities, (3) the Main Campus Power Plant, (4) Substation L, (5) Substation U, (6) the Oakdale Utility Power Plant, (7) the Oakdale 69kV Substation, (8) the Oakdale Power Plant Substation (9) the Main Campus Water Treatment Plant, (10) the Oakdale Water Tower, (11) the Oakdale Well House, (12) the North Campus Chilled Water Plant, (13) the Newton Road Chilled Water Plant, (14) Chilled Water Plant 1, (15) Chilled Water Plant 2, (16) the Oakdale Chilled Water Plant, (17) the Oakdale Hygienic Lab Chiller Space, (18) the Hospital Plant, (19) the Hospital Water Tower, (20) West Campus Steam Plant, (21) the Independence Road Annex Space (until such time as such the Independence Road Annex Lease is terminated or expires), (22) the Sand Road Space, (23) the Madison Street Services Space, (24) the Madison Street Water Storage Tank and (25) 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 (I) expressly set forth in the Performance Standards as being within said line of demarcation or (II) which the University directs to be part of the Utility System as part of a University Directive in accordance with the definition thereof or (ii) any cameras or other public safety equipment installed, maintained or used by the University's Department of Public Safety or any successor department.

"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, real property, improvements, fixtures and equipment owned and operated by the University prior to the Time of Closing to provide the Utilities on the University Campus, specifically limited to (i) the Utility System Assets, (ii) the computer systems and software set forth on Schedule 12, (iii) the Utility Facilities, (iv) the Utility System Land, (v) the Tunnels and (vi) Utility System Light Fixtures; 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, except to the extent incorporated into the Utility System by a University Directive, (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 line of demarcation for such building, as described in the Performance Standards, except to the extent incorporated into the Utility System by a University Directive; 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 23 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 or thereafter.

“Utility System Electrical Lighting Map” means the map set forth on Schedule 26.

“Utility System Land” means those parcels of real property described in Schedule 3 for the Main Campus Power Plant, Substation L, Substation U, the Oakdale Utility Power Plant, the Oakdale 69kV Substation, the Oakdale Power Plant Substation, the Main Campus Water Treatment Plant, the Oakdale Water Tower, the Oakdale Well House, the Chilled Water Plant 2, the Oakdale Chilled Water Plant, the Hospital Water Tower, the Madison Street Water Storage Tank and the West Campus Steam Plant, and certain other land as identified on Schedule 3 and further described in the Memorandum of Lease.

“Utility System Light Fixtures” means those stand-alone exterior light poles located within the boundaries of the Utility System Electrical Lighting Map that are owned by the University but not (i) located on property that is part of the University of Iowa Hospital Center, (ii) located in parking lots or parking facilities, (iii) located along roads maintained by the University’s parking and transportation department, (iv) attached to or affixed to any building (other than a Utility Facility) or (v) attached to bollards or hand rails.

“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 University Campus, including to students, faculty, administrators, employees and invitees of the University thereon and others providing services to the University.

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

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

“West Campus Steam Plant” means the building identified on Part 22 of Schedule 3 and associated improvements installed therein.

“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 Iowa City, Iowa 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 Iowa City, Iowa 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, within 10 Business Days after receipt of the Concessionaire's request, (1) provide the responding notice mentioned in clause (iii) of this Section 1.15(a) or (2) if the University determines in its discretion that additional time to consider such request would be appropriate due to the request's complexity or interrelationship with larger University issues, advise the Concessionaire by written notice of a reasonable timeframe (not to exceed 91 Days) in which the University will provide the responding notice mentioned in clause (iii) of this Section 1.15(a), which written notice shall extend the timeframe for Approval of the request to the timeframe set forth in such notice; (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 \$1,165,000,000 in cash (the “Closing Consideration”) in accordance with Section 2.2(a), (b) the University and the BOR shall demise and lease the Utility System Land and the Utility Facilities (other than the Independence Road Annex Space) and sublease the Independence Road Annex Space 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, lease and sublease (as applicable) 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, (c) the University shall (i) grant the Concessionaire a non-exclusive license during the Term, appurtenant to the leasehold interest described in clause (i) above, to access the Public Way, 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, (ii) 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 University 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 and (d) the University and the Concessionaire shall execute the Main Campus Water Treatment Plant Sublease (collectively, the “Transaction”).

Section 2.2. Closing.

- (a) The closing of the Transaction (the “Closing”) shall take place on the date that is 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”). The Closing shall be held at 2390 University Capitol Centre, 200 South Capitol Street, Iowa City, IA 52240 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 (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, 2019, 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 will 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.

Section 2.3. Deposit.

- (a) The University acknowledges receipt from the Concessionaire of cash (the "Cash Deposit") and/or one or more Letters of Credit with a term of at least 210 Days

from the date hereof (the “Closing Deposit”), in an aggregate amount equal to \$100,000,000, 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, (1) a full return of the Cash Deposit, if any, and all investment earnings accrued thereupon or (2) apply the Cash Deposit (including any accrued interest) as a credit against the Closing Consideration and (ii) with respect to the Closing Deposit, (1) a return of the Closing Deposit, (2) its cancellation or (3) 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) 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 from the Office of the General Counsel of 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, or condemnation of, the Utility System; provided, however, that as used in this Section 2.4(a)(vi), a material casualty loss, destruction or damage to, or condemnation of, the Utility System means the casualty, loss, damage, destruction or condemnation of the Utility System such that its annualized aggregated delivery capacity (calculated in British Thermal Units) for the electricity, steam, domestic water and chilled water 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 Authorizations set forth on Schedule 19 are in full force and effect and shall be transferred to the Concessionaire as of the Time of Closing;
 - (ix) the landlord under the Independence Road Annex Lease has consented to the sublease of the Independence Road Annex Lease to the Concessionaire; and
 - (x) there are no outstanding Tax-Advantaged Bonds of the University which are encumbered by, or are otherwise secured by, the revenues or other assets of any portion of the Utility System; and
 - (xi) 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)(x) 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, except that some (but not all) of such Leasehold Mortgage Debt issued on or before Closing need not have a credit rating of at least investment grade as determined by at least one of the Credit Rating Agencies if such Leasehold Mortgage Debt is, within 6 months after Closing, either (i) completely repaid and retired or (ii) given a credit rating of at least investment grade as determined by at least one of the Credit Rating Agencies and, in either case, the Concessionaire has provided the University with Notice and reasonable proof thereof; 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 20 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 \$2,000,000 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, including the reasonable and documented out-of-pocket costs incurred by the Concessionaire to hedge interest rate costs between execution of this Agreement and Closing. 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 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 transfer to the University any such receivables, existing up to and including the Time of Closing, received after the Closing Date within 30 Days after the Concessionaire's receipt of such receivables. Without limiting the foregoing, the University shall not, without the Concessionaire's approval, which shall not be unreasonably withheld, conditioned or delayed, (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 or (iii) commence any Material Changes or Capital Improvements to the Utility System that are not (1) Ongoing Utility System Projects or (2) reasonably necessary to address an Emergency; provided, the Capped O&M Index for the Fiscal Year in which such Capital Improvements are made shall be increased by any amounts the Concessionaire can reasonably prove caused an increase in the Capped O&M Costs as a direct result of such Capital Improvement or Material Change made to address an Emergency without the Concessionaire's approval. Notwithstanding anything to the contrary in this Agreement, the University shall, on behalf of the Concessionaire, operate and maintain the Utility System through 11:59 p.m. on the Closing Date, so as to facilitate the transition of the operation of the Utility System in a timely and orderly manner. The Concessionaire shall be fully liable under this Agreement to perform the Utility Services after the Time of Closing.
- (e) *Utility System Contracts.* Except as set forth herein, the Utility System Contracts shall be assigned by the University to, and assumed by, the Concessionaire at the Time of Closing. All other contracts 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. The Parties hereby acknowledge and agree that consents to the assignment of certain Utility System Contracts may not be received on or before the Time of Closing (the “Unassigned Contracts”). The Parties agree that each Unassigned Contract shall not be deemed assigned to the Concessionaire (and the Concessionaire shall not be liable under such Unassigned Contracts) until such time as the consent to the assignment has been obtained from the counterparty to such Unassigned Contract, at which time the Unassigned Contract will be automatically assigned by the University to the Concessionaire pursuant to the Assignment and Assumption Agreement, provided that the University shall remain liable for any obligations with respect to such Unassigned Contracts incurred prior to such assignment. The University shall use diligent efforts to cause the consents to the Unassigned Contracts to be obtained promptly following Closing through the end of the Post-Closing Transition Period. If any consent has not been obtained by the end of the Post-Closing Transition Period, despite the University’s diligent efforts, the University shall not be obligated to continue to seek such consent. For so long as such Unassigned Contracts are not assigned to the Concessionaire (including, to the extent that the University is permitted to no longer seek such consent in accordance with the preceding sentence, for a period up to the full term of such Unassigned Contracts), the University and the Concessionaire shall reasonably cooperate (i) to provide the Concessionaire the benefit of such Unassigned Contracts, including by delivering an amount equal to all revenue generated therefrom to the Concessionaire, and (ii) to exercise any rights relating to the counterparty’s failure to comply with the terms of its obligations to which the University may be entitled pursuant to the terms of such Unassigned Contracts. The University shall use reasonable efforts to document utility supply arrangements between the University and Third Party Customers for the utilities identified in the definition therefor (the “Third Party Customer Contracts”), in form and substance reasonably satisfactory to the Concessionaire and the University, with each Third Party Customer on or before the Time of Closing (to the extent that, as at the date of this Agreement, such Third Party Customer Contracts are not already documented in a form that is capable of being assigned to the Concessionaire). The Third Party Customer Contracts, if documented by the Time of Closing, shall be assigned by the University to, and assumed by, the Concessionaire at the Time of Closing. If, as part of the documentation of the Third Party Customer Contracts, the Third Party Customers are obligated to pay for services that the Concessionaire is already being compensated for pursuant to this Agreement, including by means of payment of the Utility Fee, then the University and the Concessionaire shall, in good faith, use commercially

reasonable efforts to modify the Utility Fee to account for such compensation so that the Concessionaire is not compensated twice for the same services. The Concessionaire acknowledges and agrees that it shall (I) perform all of its obligations under each Third Party Customer Contract, and (II) not make any material amendments to any third Party Customer Contract without the University's prior written consent, which shall not be unreasonably withheld, conditioned or delayed.

- (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 solely as a result thereof but shall not serve as a waiver of any of the Concessionaire's rights hereunder. The Concessionaire shall hold and shall 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 the Concessionaire's operations.

(h) *Transition.*

- (i) 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 or as provided in Section 2.5(h)(ii).
- (ii) At the request of the Concessionaire, the University will use commercially reasonable efforts to provide to the Concessionaire, for up to 12 months after the Closing Date, the services of any University Utility System Employees and other employees of the University (who for the avoidance of doubt remain employees of the University at the time of such request).

The Concessionaire and the University agree that during the period of time that any services are performed by any University Utility System Employee or other employee of the University pursuant to this Section 2.5(h)(ii), the University Utility System Employees or such other employees shall continue to be employees of the University and not be employees of the Concessionaire. All such services shall be provided for an amount equal to the actual cost to the University (including employment costs and related overhead expenses allocable to such employees, as reasonably determined by the University), which amount shall be billed to the Concessionaire as soon as reasonably practicable following the end of each month and shall be payable by the Concessionaire within 30 Days of receipt of any such statement, and upon such other reasonable terms and conditions as the University and the Concessionaire may agree; provided, however, that such statement shall show in reasonable detail the hours worked and hourly rate of each such University Utility System Employee or other employee by the University and the amount of overhead expenses allocated to each such University Utility System Employee or other employee by the University.

- (i) *Casualty Loss Prior to Closing.* If between the Setting Date and the Time of Closing, a casualty loss, destruction or damage to, or a condemnation of, the Utility System or a portion thereof 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, damage or condemnation to the extent reasonably practicable, 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, damage or condemnation, 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 remaining repairs or restoration following the Time of Closing at the University's expense and shall then complete such repairs or restoration (to the extent reasonably practicable) in accordance with such plan, or (ii) authorize the Concessionaire to repair the Utility System and assign to the Concessionaire all insurance, condemnation and other proceeds (if any) payable by third-party insurers or other third parties in respect of such casualty loss, destruction, damage or condemnation 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 or condemnation 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 or condemnation 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, damage or condemnation 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 and any work performed by the University or by the Concessionaire after the Closing Date in order to repair or rebuild the Utility System to at least the same condition in which they were before the occurrence of such casualty loss, destruction, damage or condemnation shall constitute a Delay Event, provided if the Concessionaire is undertaking such work, it shall do so diligently to be completed as soon as reasonably practicable.

- (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, in the aggregate, to the wages, benefits and other terms and conditions of employment such University Utility System Employee received as an employee of the University immediately prior to the Closing, it being acknowledged that there are certain benefits that the University currently provides that the Concessionaire cannot provide. 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. The Concessionaire shall be obligated to permit each University Utility System Employee who accepts any offer of employment from the Concessionaire or the Operator to transfer to his or her employment with the Concessionaire or the Operator up to 320 hours of accrued vacation or personal time off that such University Utility System Employee accrued and had not used while employed by the University. Any such accrued vacation or personal time off beyond 320 hours for a University Utility System Employee will be paid out to the University Utility System Employee by the Concessionaire or the Operator at the commencement of their employment with the Concessionaire or the Operator. All accrued and unused sick time for any University Utility System Employee (who is hired by the Concessionaire or the Operator) that accrued during his or her employment with

the University will be transferred to such University Utility System Employee's employment with the Concessionaire or the Operator. Further, the Concessionaire and the Operator will honor seniority amongst the University Utility System Employees as it relates to accrual rates for vacation and personal time off, providing at least 3 weeks per annum to employees with 0-4 years of service, at least 4 weeks per annum for employees with 5-19 years of service and 5 weeks to employees with 20 or more years of service, in each case taking into account any service time with the University. 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 University Campus at the then applicable University rental rates as established by the University from time to time, subject to availability of such space as determined by the University in its 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 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 and shall reasonably cooperate with the University with respect to the completion of the Ongoing Utility System Projects, which cooperation shall include (i) providing the University with notice if the Concessionaire becomes aware of any deviation from the University's approved plans and specifications for the applicable Ongoing Utility System Project and (ii) directing the University's Contractors to stop any work on the Ongoing Utility System Project if the Concessionaire reasonably believes that continuing such work would constitute an Emergency. 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. For the avoidance of doubt, Ongoing Utility System Projects shall not be considered New Approved Capital Improvements. If the University elects to abandon an Ongoing Utility System Project, the Capped O&M Index shall be increased for the Fiscal Year in which such Capital Improvement is abandoned 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. If the University does not complete the construction and installation of the boiler described as Project #0647205 in Schedule 11 by the Closing Date, then the University shall continue to rent the existing temporary boiler that is being used in lieu of the boiler described as Project #0647205 in Schedule 11, at the University's sole cost and expense, and shall license to the Concessionaire the right to use, access and maintain such temporary boiler as part of the Utility System until such time as Project #0647205 in Schedule 11 is completed, at which time the University may disconnect and remove such temporary boiler at its cost and expense.

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 University 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 Iowa Code governing legal title to real property or the common law of Iowa 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 providing the services hereunder to the University 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 Schedule 20.
 - (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.
 - (viii) Notwithstanding the foregoing, if a Governmental Authority treats the Transaction, or any portion thereof, differently for state or federal Tax purposes, that shall not impact, affect, modify or alter either Party's obligations hereunder.
- (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, (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, except as set forth above, all such rental payments shall 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, in such return, 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 the University and the Concessionaire have agreed on such schedule, which is attached hereto as Schedule 20, 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 on Schedule 20. 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 Johnson 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, including the removal of property from service by the Utility System in accordance with Section 5.3, the Parties shall timely (and in no event longer than 10 Days after a request therefor) execute, deliver and record an amendment to the recorded Memorandum of Lease reflecting such changes. The Parties acknowledge that for purposes of recordation, a description of certain portions of the Utility System constituting Utility Facilities that are a real property interest, are depicted specifically but are recorded generally against the plat in which such Utility Facility is located. Each party shall

have the right, from time to time, at its cost and expense to further refine by a metes and bounds legal description the specific location of the applicable Utility Facility, and subject to the other Parties' reasonable approval, may modify the Memorandum of Lease by recording an amendment thereto that shows the refined location description. In such instance, the modification to the Memorandum of Lease, is subject to the other Party's reasonable approval, and both Parties shall sign consent to the recording of the Memorandum of Lease upon its approval. 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.* Each of the University and the BOR (as applicable) agrees that, subject to the University's or the BOR's remedies (as applicable) 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, the BOR 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, the BOR or their 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 and the BOR shall, at all times during the Term, defend its respective 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, the BOR 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 the State of Iowa, owned for the benefit of 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) *University 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 University Campus or any other real property owned by or for the benefit of the University, including any special events conducted on the University 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 University Campus or any other real property owned by or for the benefit of the University, 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 University Campus or any other real property owned by or for the benefit of the University to specific hours. In accessing any portion of the University Campus or any other real property owned by or for the benefit of the University 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 University Campus or any other real property owned by or for the benefit of the University, 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, solely at the Concessionaire's election, 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 provided, however, that the Concessionaire shall be entitled to make a claim on any applicable Concessionaire Required Coverage.
- (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 or the BOR (as applicable) 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 or the BOR’s respective obligations under this Agreement, (ii) arising out of the Utility System or any Utility System Operations (including with respect to any Utility System Contracts or University Utility System Employee) prior to the Time of Closing (or with regards to Unassigned Contracts, prior to the time of assignment), (iii) 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 or the BOR (as applicable) 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, (iv) 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 (v) with respect to the Ongoing Utility System Projects that have not yet become a part of the Utility System in accordance herewith (collectively, the “Excluded Liabilities”).

- (e) *Right of Entry and Access to the Public Way.* Subject to Section 3.19, the University and the BOR (where applicable) hereby grants to the Concessionaire and its Representatives a non-exclusive 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) *Deemed Planned Outage.* The Concessionaire shall have the right to propose to shut down a portion of the Utility System such that such portion shall not transmit Utilities provided by that portion of the Utility System if the Concessionaire reasonably believes that such a shutdown will avoid additional costs in excess of the costs of such shutdown or lengthier shutdowns of the Utility System or a portion thereof later. If the University Liaison agrees to such shut down (which agreement must be in writing or by e-mail from the University Liaison), then it shall be treated as a Planned Outage. The University Liaison may make this determination in its sole discretion. If the University Liaison does not Approve such shutdown, then it will be considered an Unplanned Outage if the Concessionaire elects to proceed with such shutdown.
- (h) *Emergency Shutdown.* If there is a circumstance where the continued operation of a portion of the Utility System creates an Emergency (other than an Unplanned Outage), then the Concessionaire shall have the right, directly or through its automatic protection system or the Operator, to shut down the applicable portion of the Utility System to address such circumstance, provided that the Concessionaire shall comply with the provisions of Section 8.1 and the relevant portion of the Performance Standards, as if such shutdown were an Unplanned Outage. The Concessionaire shall perform the corrective action to address such circumstance as soon as reasonably practicable. Within 10 Business Days after the shutdown and repair of the applicable portion of the Utility System, the Concessionaire shall provide the University with pertinent information on such circumstance and such other relevant information within the Concessionaire's possession or control that is requested by the University, and the University shall determine, in its reasonable judgment, whether such shutdown shall constitute an Unplanned Outage for purposes of determining the applicable Key Performance Indicator. For the avoidance of doubt, such determination shall not affect the Concessionaire's obligation to treat such shutdown as an Unplanned Outage for purposes of compliance with the Performance Standards.

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 180 consecutive Days or appoint a successor interim Operator after such 180-Day 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 Board of Regents of the University 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, then 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.
- (iv) For the avoidance of doubt, if there is a dispute as to whether there has been a failure to meet the Performance Standards or the Target for any Key Performance Indicator, such dispute shall be subject to resolution in accordance with Article 18.
- (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 or a KPI Event.

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 and any fees from third parties to which it provides services to the extent permitted by Section 3.15(c), (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. The annual reasonable, actual-out-pocket cost of maintaining the credit rating of the Leasehold Mortgage Debt with a Credit Rating Agency shall, for the first three Fiscal Years after the Closing be added to the Capped O&M Index, and shall not be included in the calculation of the Capped O&M Index.

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, including performance of an assessment of the condition of the Utility System or any component thereof, 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 University 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), provided that, notwithstanding Section 3.7(a)(z), no notice shall be required for the utility companies providing electricity to the Substations to access the property on which the Substations are located in order to operate, maintain, repair and replace their property and equipment thereon; 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. Any entry to or action on the Utility System pursuant to clauses (iv), (v) and (vi) of this Section 3.7(a) shall be a Compensation Event.

- (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. The University shall have the right to install or replace such energy apparatus, equipment, or improvement. Prior to any such installation, the University shall provide the Concessionaire written notice that includes the plans and schedule for completing such installation or replacement or, alternatively, the University may provide the Concessionaire a written notice requiring it to complete such installation or replacement as part of a University Directive, which notice shall include the plans, specifications, schedule (including the liquidated damages for failure to meet such schedule) and cost therefor. If the Concessionaire is directed 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 and (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. 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. For the avoidance of doubt and notwithstanding any other provision of this Agreement, access to the Utility System by the University and its staff, students and Representatives shall be subject to and in accordance with the Concessionaire's reasonable access and safety protocols to the extent provided in writing in advance to the University and consistent with those protocols set forth in Schedule 28.

- (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, unless disclosure is required by applicable Law, 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. The Concessionaire agrees that any intellectual property, including copyrights, patents, trade secrets and trademarks, created or generated by or related to any of the University's actions under this Section 3.7(e) shall not be considered owned or created by the Concessionaire, notwithstanding that the University or its energy industry research partners may access or use the Utility System with respect thereto, and the Concessionaire shall have no rights with respect thereto unless the University enters into a separate agreement with the Concessionaire granting such rights. 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 7.3(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. 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 7.3, 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) *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. Assignment of Operating Agreements and Plans; Project Intellectual Property.

- (a) *Operating Agreements and Plans.* At the request of the University, the Concessionaire shall collaterally assign, to the extent reasonably practicable and subject to the terms and conditions herein, to the University, in form and substance satisfactory to the University, all of the right, title and interest of the Concessionaire in, to and under all or any of the Operating Agreements and all present and future specifications, plans, drawings, information and any other documentation (except Project Intellectual Property) in relation to the Utility System Operations regardless as to whether any of the foregoing involve proprietary information (collectively, the “Operating Agreements and Plans”) as collateral security to the University for the observance and performance by the Concessionaire of its covenants and obligations under this Agreement. The Concessionaire covenants that it shall cause all of the right, title and interest of the Concessionaire in, to and under all Operating Agreements and Plans entered into or created after the Time of Closing to be collaterally assignable and transferable to the University as provided in this Section 3.11(a). The University acknowledges and agrees that the Operating Agreements and Plans 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 Operating Agreements and Plans in enforcing their respective security interests as hereinafter provided. Without limiting the generality of the foregoing, the University shall be entitled to use the Operating Agreements and Plans in the event of, and as necessary to, remedy a Concessionaire Default under this Agreement for so long as such Concessionaire Default is continuing and has not been cured. Notwithstanding the foregoing, in the event that any such Leasehold Mortgagee has entered into possession or is diligently enforcing and continues to diligently enforce its security, whether by way of appointment of a receiver or manager, foreclosure or power of sale in accordance with Article 19 or otherwise, or has entered (or is in

process to enter) into a New Agreement under Section 19.5 and is using the Operating Agreements and Plans in respect of the Utility System Operations, the University shall not be entitled to use the Operating Agreements and Plans in enforcing its security, it being acknowledged that any assignment of the Operating Agreements and Plans to a Leasehold Mortgagee shall have priority at all times (other than if the University is enforcing its rights to cure under Section 3.3(c)(i)(B) or, if the Leasehold Mortgagee's extended cure period under Section 19.3, if any, has expired and the Leasehold Mortgagee has not commenced any action to effect a cure in accordance therewith, Section 16.1(b)(iii)) over any assignment of the Operating Agreements and Plans to the University. The Concessionaire shall promptly deliver to the University, at the sole cost and expense of the Concessionaire, forthwith after completion or execution and delivery, a copy of each item of the Operating Agreements and Plans. The University agrees that (i) it shall bear all risks associated with the use of the Operating Agreements and Plans, (ii) it may not rely on the Operating Agreements and Plans, 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 Operating Agreements and Plans.

- (b) *Project Intellectual Property.* The University shall have and is hereby granted a nonexclusive, transferable, irrevocable, perpetual, fully paid up right and license to use, exploit, reproduce, modify, adapt, and disclose, and sublicense others to use, reproduce, modify, adapt, and disclose, the intellectual property (including business systems and patents) of the Concessionaire or the Operator solely used in connection with the Utility System (the "Project Intellectual Property"), subject to the following:
- (i) the University shall have the right to exercise such license only in connection with the Utility System and Utility System Operations;
 - (ii) the University shall have the right to exercise such license only at the following times: (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 pursuant to Section 3.7(a)(ii) or Section 3.7(a)(iii); and (C) during any time that a receiver is appointed for the Concessionaire, or during any time that there is pending a voluntary or involuntary proceeding in bankruptcy in which the Concessionaire is the debtor;
 - (i) the University shall not at any time use, reproduce, modify, adapt and disclose, or allow any party to use, reproduce, modify, adapt and disclose, any such Project Intellectual Property for any other purpose;
 - (ii) the right to transfer the license is limited to any Person that succeeds to the power and authority of the University generally or with respect to the

Utility System, and all such transfers shall be subject to Section 3.11(b)(v);

- (iii) the right to sublicense is limited to concessionaires, contractors, subcontractors, employees, attorneys, consultants, and agents that are retained by or on behalf of the University in connection with the Utility System, and all such sublicenses shall be subject to Section 3.11(b)(v); and
- (iv) except to the extent required by Law, the University (A) shall not disclose any Project Intellectual Property to any Person other than authorized transferees and sublicensees who agree to be bound by any confidentiality obligations of the University relating thereto; (B) shall enter into a commercially reasonable confidentiality agreement if requested by the Concessionaire with respect to the licensed Project Intellectual Property; and (C) include, or where applicable require the contract with the transferee or sublicensee to include, a 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 Project Intellectual Property of the Concessionaire and other materials provided under the license or sublicense, as the case may be, against disclosure to third parties not in receipt of a license or sublicense, as applicable, and to use the license or sublicense only for the permitted purposes.

provided that: (A) for the avoidance of doubt, the Concessionaire shall continue to have a full and complete right to use any and all duplicates or other originals of its Project Intellectual Property in any manner it chooses, and (B) the University agrees that if it uses any Project Intellectual Property: (x) it shall bear all risks associated with the use of the Project Intellectual Property, (y) it may not rely on the Project Intellectual Property, and (z) 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 Project 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. At least 30 Days prior to the Closing Date, the Concessionaire shall deliver to the University for its Approval a proposed policy for the maintenance and retention of all records related to the operation and maintenance of the Utility System (once Approved, the “Record Retention Policy”). If the University does not Approve the Record Retention Policy, it shall provide the Concessionaire a reasonably detailed explanation for its disapproval, and the Concessionaire shall, promptly thereafter, submit a revised Record Retention Policy intended to address the University’s comments, and this process shall continue until the University Approves a Record Retention Policy. Following the Approval of the Record Retention Policy, the Concessionaire shall maintain all records related to the operation and maintenance of the Utility System in accordance with such Record Retention Policy. 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, including any information obtained through its performance of the Utility System Operations. 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. If any information obtained from the University or its Representatives is provided by the Concessionaire, or the University on behalf of the Concessionaire, to any third party, including any equity member of the Concessionaire, the Operator or any Contractor, then (i) the Concessionaire shall cause such third party to comply with the provisions of this Section 3.12(b) and (ii) the Concessionaire shall be liable for the disclosure or use of such information by such third party as if the Concessionaire had disclosed or used it.

Section 3.13. Standard of Operation and Maintenance of the Utility System. At all times during the Term, 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 University 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 discretion.
- (b) The University shall have the right, in its discretion, to install, replace, display and maintain signage (i) that relates to identification or naming of the Utility System, the Utility Facilities, portions thereof, or surrounding areas or (ii) for informational or educational purposes; provided that (A) the Concessionaire shall have no obligation under the Performance Standards to replace or maintain any signage installed by the University for advertising purposes, and (B) 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 and 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 the Agreement; (ii) the University is granted the right to receive a mutually agreed portion of the gross revenue from 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 University 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 execute on Closing a trademark license agreement in the form attached hereto as Schedule 21.

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.

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 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 University Campus, the University shall have the right to construct any building, structure or other improvement on that part of the University 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 University 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 the University 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 University Campus or (ii) as of the Bid Date, (1) any district utility systems within the University Campus which are generating or distributing Utilities beyond the lines of demarcation identified in the Performance Standards or (2) with respect to chilled water only, are not served by the Utility System for chilled water, which list is set forth in Schedule 27 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 University 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 be responsible for maintaining, repairing and replacing the Tunnels, which, for the avoidance of doubt, are part of the Utility System, including the right to include New Approved Capital Improvement Costs for Capital Improvements with respect to the Tunnels (if Approved in accordance with Article 4) in the calculation of the Variable Fee Component and the Capital Recovery Amount. The Concessionaire or the Operator shall contract with a Contractor to perform such restoration, repair or maintenance, which Contractor must either be on a list of pre-approved contractors provided by the University or otherwise Approved by the University in its discretion. If the Concessionaire fails to repair and maintain the Tunnels in accordance with Prudent Industry Practices and such failure creates an Emergency, the University shall have the right to take such action as is necessary to remedy such Emergency, and the Concessionaire shall, within 30 Days after receipt of an invoice therefor, reimburse the University for the out-of-pocket cost thereof, provided that the University shall, where practical, provide the Concessionaire advance written notice of such action. Notwithstanding the foregoing, the Concessionaire shall not interfere with, modify or alter any of the personal property, fixtures or improvements within the Tunnels that are not used in Utility System Operations, and the University shall have the right to access the Tunnels, not subject to Section 3.7, to maintain, alter, improve, repair or remove any such personal property, fixtures or improvements, provided, the University shall use commercially reasonable efforts to minimize interference with Utility System Operations.

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 University Campus, including in connection with the reconstruction of a Utility Facility following a fire or other casualty. Except as provided in Section 13.4 with respect to any modifications in connection with a casualty, 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 University Campus. The Concessionaire shall not be permitted to sell any fuels or Supplies to individual customers on the University Campus. To the extent that the Concessionaire supplies fuels or Supplies to the University for distribution to individual customers, the University shall control the distribution of such fuels or Supplies. 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 fuels or Supplies.

Section 3.25. 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 3.26. 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 3.27. Uniforms. To aid the University's provision of security and safety measures to the University Campus, Concessionaire and Operator personnel working on the University Campus shall wear a uniform that is standard across the Utility System and clearly identifies such personnel as Concessionaire and Operator personnel.

Section 3.28. EAC. 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, Key Performance Indicators or the components of the Utility Fee or should consider providing incentives to the Concessionaire to meet certain operational targets. 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. The EAC shall meet, which meetings may be held telephonically, as reasonably necessary to address issues that arise during the Term, as determined by the University.

Section 3.29. Sustainability. The Concessionaire acknowledges that the University has a long-term commitment to operating the University Campus in a sustainable manner and that the Utility System Operations are an integral part of that commitment. As such, in addition to the Concessionaire’s covenants with respect to the coal-free operation of the Utility System under Section 7.3(e), the Concessionaire covenants that it will use commercially reasonable efforts to perform the Utility System Operations in a manner that is intended to make the Utility System Operations as sustainable as reasonably possible under the circumstances (to the extent consistent with Prudent Industry Practices and subject to obtaining any required University Approvals for Capital Improvements and Material Changes), and it will use commercially reasonable efforts to implement any changes to the Utility System Operations requested by the University in the form of a University Directive to increase the sustainability of the Utility System Operations that do not materially and adversely affect the Concessionaire’s ability to meet its obligations hereunder, including the obligation to meet the Performance Standards. In addition, the Concessionaire will use commercially reasonable efforts throughout the Term to propose Capital Improvements and Material Changes pursuant to Article 4 that are reasonably intended to increase the sustainability of the Utility System Operations and the University Campus, including reduction of emissions, Utility use and other impacts on the environment. Further, the Concessionaire shall attend any University meetings regarding sustainability planning on the University Campus if requested by the University. The Parties acknowledge that what constitutes “sustainability” may evolve over the Term and that the Parties intend that, for purposes of this Section 3.29, “sustainable” and “sustainability” shall have the then-current generally accepted utility industry meaning of the term, which, as of the Effective Date, includes undertaking measures to (i) reduce energy and water consumption, (ii) become a net-negative energy use, (iii) reduce the impact of operations on the environment, (iv) recycle and reuse resources, (v) purchase goods and services from sources that provide such goods and services in a sustainable manner and (vi) reduce the use of goods and services that damage the environment. For the avoidance of doubt, the Concessionaire shall not be required to incur costs that would otherwise be Capped O&M Costs or Uncapped O&M Costs to comply with this Section 3.29 unless such costs are included in an Approved Five-Year Plan.

Section 3.30. Shared Space and Temporary Space.

- (a) *Control Room and USB Space.* The University shall grant the Concessionaire and the Operator access to the Control Room upon at least 24 hours’ advance written notice for purposes of carrying out the obligations set forth in this Agreement; provided, the Concessionaire shall not be obligated to provide advance notice in the event of an Emergency but shall provide notice promptly after access in such event. The University shall be entitled to have a Representative present at all times while the Concessionaire has access to the Control Room, and the Concessionaire shall be obligated to observe all reasonable University safety and security protocols in effect with respect to the Control Room and provided to the Concessionaire in advance. In addition, if requested by the Concessionaire, the University shall use reasonable efforts, at no out-of-pocket cost to the University, to provide a temporary license to the Concessionaire and its Representatives to use space within the University Services Building, or any replacement building where the University’s Facilities Management group is located, which is expected to be no more than 5 offices

and/or cubicles, to facilitate cooperation in the Utility System Operations and the larger operation of the University Campus. The University shall not be required to provide such space if it determines, in its sole discretion, that it does not wish to provide such space based on its current use, and it may terminate such license at any time upon Notice to the Concessionaire and may require the Concessionaire to abide by reasonable rules and regulations, including limiting the hours of access thereto.

- (b) *Oakdale Power Plant Gasifier.* The Concessionaire shall grant the University access to that certain gasifier equipment in the Oakdale Power Plant upon at least 24 hours' advance written notice for purposes of carrying out research, operations, maintenance and other ancillary tasks; provided, the University shall not be obligated to provide advance notice in the event of an Emergency but shall provide notice promptly after access in such event. The Concessionaire shall be entitled to have a Representative present at all times while the University has access to the Oakdale Power Plant, and the University shall be obligated to observe all reasonable safety and security protocols promulgated by the Concessionaire with respect to the Oakdale Power Plant and provided to the University in advance.
- (c) *Utility System Space in Larger Buildings.* The Concessionaire acknowledges that each of the Oakdale Hygienic Lab Chiller Space, Madison Street Space, the Sand Road Space, the Hospital Plant and the Independence Road Annex Space are not separate buildings but are spaces within larger buildings that the University or the BOR (for the benefit of the University) owns or leases, as applicable. As such, the University shall retain the responsibility, either by University employees or Contractors, or at the University's direction, to maintain, repair, replace and keep in good order and condition the structural and building-system components of the Madison Street Space, the Sand Road Space, the Hospital Plant and the Independence Road Annex Space, including the roof, load-bearing walls and foundation of each of the foregoing, except to the extent any maintenance, repair or replacement is caused by the negligence or willful misconduct of the Concessionaire or its Representatives, in which case the Concessionaire shall be responsible therefor and shall perform such maintenance, repair or replacement as promptly as reasonably practicable. The Concessionaire shall abide by any reasonable rules and regulations promulgated by the University and provided to the Concessionaire in writing, and the Concessionaire shall have non-exclusive access to any common areas of the larger buildings (as identified by the University) in which those spaces are a part, provided that, in no event, shall the Concessionaire and its Representatives be entitled to use more than 16 parking spaces serving the Madison Street Space. The Concessionaire shall, in addition, have non-exclusive access to the loading dock serving the Independence Road Annex Space, provided that such access shall be subject to the University's right to schedule use and access thereof. The Concessionaire shall not be obligated to pay any rental with respect to such shared spaces, except that the Concessionaire shall pay to the University its pro rata share (based on square footage) of the rental charges, including additional rental charges for

common area maintenance expenses, real estate taxes and other items, incurred by the University with respect to the building in which the Independence Road Annex Space is located within 30 Days after receipt of notice of such rental amounts, the cost of which shall be considered a Capped O&M Cost.

- (d) *Madison Street Replacement Building.* The Parties acknowledge and agree that it is the intent of the University, at the University's sole cost and expense, to construct a building located within the area identified on Schedule 25 that will contain at least 30,000 gross square feet and that will be constructed to serve as office and storage space for the Utility System and replace the Madison Street Space (the "Madison Street Replacement Building"). The Concessionaire shall reasonably cooperate with the University, at no out-of-pocket cost to the Concessionaire, in the design and construction of the Madison Street Replacement Building, and the University shall provide design and working drawings to the Concessionaire for the Concessionaire's comment. Upon completion of the Madison Street Replacement Building and Notice from the University to the Concessionaire of such completion (the "Madison Street Replacement Notice"), at no additional cost to the Concessionaire, the Madison Street Replacement Building shall automatically become a Utility Facility (and thus part of the Utility System) and the land underneath it shall become Utility System Land. The University shall include in the Madison Street Replacement Notice a depiction of the Madison Street Replacement Building and the Utility System Land on which it is located, which shall be deemed appended to this Agreement as an additional part of Schedule 3; provided, the Parties acknowledge that the University may adjust the site for the construction of the Madison Street Replacement Building in its discretion and as necessary in accordance with its plans for the ongoing development and improvement of the University Campus and, in the event of any such relocation, shall include an updated depiction of the Madison Street Replacement Building in the Madison Street Replacement Notice. Within 60 Days after the Madison Street Replacement Notice, the Concessionaire shall surrender the Madison Street Space to the University in the condition in which it is required to surrender the Utility System in accordance with Section 16.3, and it shall automatically, without any further action, be removed as a Utility Facility and shall no longer be leased by the Concessionaire or be part of the Utility System. The cost of operation and maintenance of the Madison Street Replacement Building, to the extent materially higher than the cost to operate and maintain the Madison Street Space, shall be included in the Capped O&M Index for the Fiscal Year in which the Madison Street Replacement Notice is delivered to the Concessionaire. If the Concessionaire fails to surrender the Madison Street Space in the condition in which it is required to surrender it hereunder, the University shall have the right to restore the Madison Street Space to such condition, and the Concessionaire shall pay the University's cost with respect thereto promptly upon receipt of written Notice.
- (e) *Surrender of Sand Road Space.* On the second-year anniversary of the Closing Date, the Concessionaire shall surrender the Sand Road Space to the University

in the condition in which it is required to surrender the Utility System in accordance with Section 16.3, and it shall automatically, without any further action, be removed as a Utility Facility and shall no longer be leased by the Concessionaire or be part of the Utility System. If the Concessionaire fails to surrender the Sand Road Space in the condition in which it is required to surrender it hereunder, the University shall have the right to restore the Sand Road Space to such condition, and the Concessionaire shall pay the University's cost with respect thereto promptly upon receipt of written Notice. The Parties intend that the Concessionaire shall use the Independence Road Annex Space for the purposes currently served by the Sand Road Space, but the failure of the Concessionaire to do so shall not modify or alter its obligation to surrender the Sand Road Space in accordance herewith.

- (f) *Independence Road Annex Space Lease.* The Concessionaire agrees that its use and occupancy of the Independence Road Annex Space is subject and subordinate to the terms and conditions of the Independence Road Annex Lease and that it shall not cause the University or the BOR to be in default thereof. The Concessionaire shall have no right to deal directly with the landlord under the Independence Road Annex Space Lease and does, to the extent permitted by Law, and except for the breach of the University's or the BOR's obligations hereunder, hereby waive any cause of action and any right to bring an action against the University or the BOR by reason of any act or omission of the landlord under the Independence Road Annex Lease. Notwithstanding anything contained in this Agreement to the contrary, the Concessionaire acknowledges and agrees that: (x) neither the University nor the BOR shall be responsible for or deemed a guarantor with respect to any representations, warranties, covenants or other obligations or liabilities of the landlord under the Independence Road Annex Lease, and the Concessionaire agrees to look solely to the landlord under the Independence Road Annex Lease for performance of its obligations, (y) the University's and the BOR's sole obligation to the Concessionaire under the Independence Road Annex Lease shall be, at the Concessionaire's request and on the Concessionaire's behalf, to use commercially reasonable efforts to require the landlord under the Independence Road Annex Lease to perform its specific obligations under the Independence Road Annex Lease if necessary, and (z) neither the University nor the BOR shall have liability to the Concessionaire for any misrepresentation, warranty, default or other act or omission of the landlord under the Independence Road Annex Lease and neither the University nor the BOR shall be obligated to provide any services to the Concessionaire or otherwise to perform any obligations that the landlord under the Independence Road Annex Lease is required to perform. Whenever the approval or consent of the landlord is required under the Independence Road Annex Lease for any action that the Concessionaire proposes to undertake, the Concessionaire shall not undertake such action unless and until the landlord has approved such action, in addition to any University Approval required hereunder. The University shall use commercially reasonable efforts to request and shall diligently pursue the Independence Road Annex Lease landlord's approval if the University has Approved such action. The Concessionaire shall not be entitled to exercise any

of the University's or the BOR's rights or remedies under the Independence Road Annex Lease. If the Independence Road Annex Lease terminates or expires, the sublease of the Independence Road Annex Space shall terminate at that time and the Parties hereto shall be relieved of any further liability or obligation under this Agreement with respect to the Independence Road Annex Space only and the Independence Road Annex Space shall no longer be a Utility Facility or otherwise subject to this Agreement, except that, unless the termination of the Independence Road Annex was caused by a Concessionaire Default, the University shall reasonably cooperate, at no out-of-pocket cost to the University, to assist the Concessionaire in locating replacement space, which space shall be rented by the Concessionaire at its cost, which may be a Capped O&M Cost.

- (g) *North Campus Chilled Water Plant Walls and Roof.* The Parties acknowledge and agree that the North Campus Chilled Water Plant shares certain structural, load-bearing walls with a parking facility owned and operated by the University. In recognition of such shared walls, the Parties agree that the University shall be responsible for all structural repairs and replacements of such walls and any other capital repairs associated therewith. In exchange therefor, the Concessionaire shall pay, within 30 Days after demand, 50% of such costs, which shall be considered Capped O&M Costs except for those repairs or replacements that would be considered a capital improvement under GAAP, in which case they shall be considered Uncapped O&M Costs. In addition, the Concessionaire hereby grants the University an exclusive license to use the entirety of the roof of the North Campus Chilled Water Plant for basketball courts and other athletic uses, and the University and its students, faculty and staff shall have the right to use such basketball courts at all times during the Term, except for such times as the Concessionaire limits access thereto in order to perform Utility System Operations, including repairs and replacements of the roof, which the Concessionaire shall use reasonable efforts to minimize. The Concessionaire shall be responsible for the maintenance of the structural components of the roof and shall be responsible for repairing any leaks associated therewith, and the University shall be responsible for non-structural maintenance of the portion of the roof for which it has a license hereunder. Notwithstanding the foregoing, if any damage to the roof or the walls is caused by the negligence or willful misconduct of (i) the University or its students, faculty or staff, the cost to repair such damage shall be considered Uncapped O&M Costs or (ii) the Concessionaire or its Representatives, including the Operator, then the cost to repair such damage shall not be recovered through the Utility Fee.
- (h) *Newton Road Chilled Water Plant Walls and Roof.* The Parties acknowledge and agree that the Newton Road Chilled Water Plant shares certain structural, load-bearing walls with a parking facility owned and operated by the University and that the ceiling of the Newton Road Chilled Water Plant is also the floor of a portion of the parking facility. In recognition of such shared walls and floor, the Parties agree that the University shall be responsible for all structural repairs and

replacements of such walls and such floor and ceiling and any other capital repairs associated therewith. In exchange therefor, the Concessionaire shall pay, within 30 Days after demand, 50% of such costs, which shall be considered Capped O&M Costs except for those repairs or replacements that would be considered a capital improvement under GAAP, in which case they shall be considered Uncapped O&M Costs. Notwithstanding the foregoing, if any damage to the roof is caused by the negligence or willful misconduct of (i) the University or its students, faculty or staff, the cost to repair such damage shall be considered Uncapped O&M Costs or (ii) the Concessionaire or its Representatives, including the Operator, then the cost to repair such damage shall not be recovered through the Utility Fee.

- (i) *Chilled Water Plant 1 Walls and Roof.* The Parties acknowledge and agree that the Chilled Water Plant 1 shares certain structural, load-bearing walls, building systems and a roof with a parking facility and office owned and operated by the University. In recognition of such shared walls, building systems and roof, the Parties agree that the University shall be responsible for all structural repairs and replacements of such walls, building systems and roof and any other capital repairs associated therewith. In exchange therefor, the Concessionaire shall pay, within 30 Days after demand, 50% of such costs, which shall be considered Capped O&M Costs except for those repairs or replacements that would be considered a capital improvement under GAAP, in which case they shall be considered Uncapped O&M Costs. Notwithstanding the foregoing, if any damage to the roof is caused by the negligence or willful misconduct of (i) the University or its students, faculty or staff, the cost to repair such damage shall be considered Uncapped O&M Costs or (ii) the Concessionaire or its Representatives, including the Operator, then the cost to repair such damage shall not be recovered through the Utility Fee.

Section 3.31. University Utility System Employees.

- (a) The Concessionaire covenants that prior to the termination of employment (other than for cause and subject to any limitation, qualification or restrictions arising out of applicable Law) of any University Utility System Employee that agrees to be transferred to, and employed by, the Concessionaire or the Operator as of the Closing Date prior to the fifth anniversary of the Closing Date, the Concessionaire shall provide the University with at least 60 Days' written notice to the University prior to a decision to so terminate the employment of such individual, which decision shall be in the sole discretion of the Concessionaire or the Operator, as applicable.
- (b) During the Term, the Concessionaire shall, or shall cause the Operator to, maintain a program for the employment of students of the University in connection with the Utility System Operations, which shall be on terms and conditions determined by the Concessionaire or Operator, as applicable. Further, the Concessionaire shall, or shall cause the Operator or their Affiliates, to develop and maintain an internship program for University students to gain

hands-on, practical experience with structured educational and mentorship opportunities either with respect to the Utility System or other utility systems owned, leased, operated or maintained by the Concessionaire, the Operator or any of their Affiliates.

Section 3.32. Utility System Light Fixtures. In connection with its obligation to operate and maintain the Utility System Light Fixtures as part of the Utility System, the Concessionaire shall be responsible for ensuring that such Utility System Light Fixtures remain in compliance with the Design Standards (as defined in the Performance Standards) and otherwise shall be maintained in accordance with Prudent Industry Practices. At the University's request, the Concessionaire shall design, construct and install additional Utility System Light Fixtures, the cost of which shall be subject to the prior Approval of the University prior to installation and shall be considered a Capital Improvement, subject to being reclassified as an Uncapped O&M Cost in accordance with Section 4.3(h). If there is a dispute as to whether a light fixture is a Utility System Light Fixture, the reasonable determination of the University shall be binding on the Parties. In addition, if there are exterior light fixtures that are not Utility System Light Fixtures, at the University's request, the Concessionaire shall provide operations, maintenance, repair and replacement services with respect thereto and shall charge the University the rate for such services as set forth in the Operations Plan. For the avoidance of doubt, if a Utility System Light Fixture is not located on the University Campus for the distribution of electricity, the Concessionaire shall have no right or obligation to distribute electricity to such Utility System Light Fixture but shall be obligated to operate and maintain such Utility System Light Fixture in accordance with this Section 3.32.

ARTICLE 4 CAPITAL IMPROVEMENTS 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, provided that the Concessionaire shall reimburse the University in a timely manner for any reasonable out-of-pocket costs incurred by the University in providing such assistance. 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 University Campus where the

Approved Capital Improvement will be located, subject to the reasonable conditions and restrictions of the University, provided that the Concessionaire shall reimburse the University in a timely manner for any reasonable out-of-pocket costs incurred by the University in providing such assistance.

Section 4.3. Approval of Capital Improvements and Material Changes.

- (a) The Concessionaire shall not have the right to make any (i) Capital Improvements or (ii) Material Changes, except those Capital Improvements 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 or Material Change or (II) a change in the scope or cost of a previously Approved Capital Improvement or Material Change at any time (and shall identify whether an item requested for Approval or any portion thereof is a Capital Improvement or Material Change or a combination thereof), 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 7.2 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; (iv) required due to Force Majeure, all of which the University shall consider in good faith; or (v) submitted in connection with Capital Improvements or Material Changes directed primarily at discharging the Concessionaire's obligation pursuant to Section 7.3(e).
- (c) The Concessionaire shall request Approval of one or more proposed Capital Improvements or Material Changes or Approval of a proposed change in the scope or cost of a previously Approved Capital Improvement 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 or Material Change or proposed change in the scope or cost of a previously Approved Capital Improvement or Material Change or (2) submitting a proposed Five-Year Plan in accordance with Section 7.2 containing a detailed description of each proposed Capital Improvement 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 or Material Change, provided that, in each case, such detailed description shall include: (A) total costs for construction and installation thereof, including any applicable sales or use tax; (B) forecasted annual operations and maintenance costs therefor; (C) any proposed modification to the Recovery Period (if applicable) for such Capital Improvement; (D) an explanation of all relevant assumptions, variables, and data sources, used to develop the proposal; (E) the proposed schedules, process, and other technical and logistics details associated with the proposed Capital Improvement and/or Material Change proposal, including any liquidated

damages if the Concessionaire fails to meet the proposed schedule; (F) how such proposed Capital Improvement and/or Material Change will improve the sustainability of the Utility System Operations or the University Campus; (G) any actual or anticipated tax credits or other benefits that will accrue to the Concessionaire as a result thereof of which the Concessionaire has knowledge, and a description thereof as well as a description as to how such credits or benefits will be incorporated into the Capital Improvement Cost (if Approved); (H) any fee or charge payable to the Operator in connection with such Capital Improvement or Material Change; and (I) any proposed change to the limits on the professional liability insurance coverage for the professionals providing services with respect to such Capital Improvement or Material Change and the associated change in the premium associated therewith; provided that, (x) to the extent any of the details set out in clauses (A) through (I) above are unavailable or inapplicable, the Concessionaire shall describe the reason for such unavailability or inapplicability and (y) to the extent that the Concessionaire has explicitly requested that the University respond only pursuant to Sections 4.3(c)(ii), (iii) or (iv), the Concessionaire may include an indicative estimate or estimate range with respect to Sections 4.3(c)(A) or (B). To the extent the University elects to, or is required to, consider a request for Approval of a proposed Capital Improvement or Material Change or a change in the scope or cost of a previously Approved Capital Improvement or Material Change, the University shall review such request and, in its 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 by the University 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 or Material Change or proposed change in the scope or cost of a previously Approved Capital Improvement 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 or Material Change or proposed change in the scope or cost of a previously Approved Capital Improvement or Material Change or procuring any details set out in clauses (A) through (I) of Section 4.3(c)(2) 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 or Material Change or proposed change in the scope or cost of a previously Approved Capital Improvement 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 University Campus capital improvement plans existing at such time or disagreeing with its characterization as a Capital Improvement or Material Change, 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 or Material Change or proposed change in the scope or cost of a previously Approved Capital Improvement or Material Change and (2) if such proposed Capital Improvement or Material Change or change to the scope of a previously Approved Capital Improvement 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 or such proposal is required to cause the Concessionaire to comply with Section 7.3(e), (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 or the requirement to comply with Section 7.3(e), as applicable, 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 or Material Changes or changes in the scope or cost of a previously Approved Capital Improvement 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 that the Concessionaire elects to abandon a proposed Capital Improvement or Material Change after it has been Approved by the University, which the Concessionaire may do so upon Notice to the University, unless such Capital Improvement or Material Change is the subject of a University Directive, the Concessionaire shall be obligated to promptly restore the Utility System and any other affected area of the University Campus to the condition that existed prior to the commencement of such Capital Improvement or Material Change. As a condition of its Approval of any proposed Capital Improvement or Material Change or proposed change in the scope or cost of a previously Approved Capital Improvement or Material Change, the University may require certain payments of liquidated damages by the Concessionaire to the University if the Concessionaire does not meet the timeframe set forth in the applicable Approval regardless of the abandonment of such Capital Improvement or Material Change, 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 that is not a Capital Improvement or any proposed change in the scope or cost of a previously Approved Material Change, the out-of-pocket costs incurred by the Concessionaire pursuant to Section 4.3(c)(ii) shall be included in Uncapped O&M Costs.
- (f) After Approval of a proposed Capital Improvement or Material Change or a proposed change in the scope or cost of a previously Approved Capital Improvement or Material Change, the Concessionaire shall make such Capital Improvement or Material Change in accordance with this Agreement, but subject to Section 4.3(d).
- (g) 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.

- (h) In the event that the cost of any Approved Capital Improvement or Material Change is less than \$100,000 (Adjusted for Inflation), such costs will be classified as Uncapped O&M Costs for purposes of calculating the Utility Fee, unless otherwise indicated by the University, in its discretion, in its Approval thereof.

Section 4.4. University's Capital Plan. The Concessionaire shall reasonably cooperate with the University in the development, modification, and discussion 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 may include (i) 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 or (ii) the design, demolition, project management, construction, repair, replacement, remodeling, renovation, reconstruction, enlargement, addition, alteration, painting, or structural or other improvements not included in the Utility Facilities but related thereto. 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 requires the construction of anything other than 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. To the extent that that an order or directive would be a University Directive but for the operation of sub-paragraph (4)(y) of the definition of "University Directive", and in the event that the Concessionaire notifies the University in writing that it is not willing to carry out such order or directive for such reason: (A) the University may elect to engage a third party to perform the relevant order or directive, and (B) if the University so elects, the University and the Concessionaire shall determine in good faith any corresponding

adjustments to the Utility Fee and other provisions of the Concession Agreement that may be required to put the Parties in substantially the same economic position as they were prior to such actions being taken, provided the University shall not be required to compensate the Concessionaire for any benefit that the Concessionaire would have received if it undertook the University Directive.

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 University 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 remove or abandon in place all Utility Facilities and Utility System Assets thereon and shall not be permitted to serve such real property, except if Approved in accordance with Section 3.15(c). However, if the University elects to enter into a concession agreement with a third party to operate and maintain any real property that had been part of the University Campus, the Concessionaire shall not be required to disconnect such real property from the Utility System. 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 University 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 discretion, may, pursuant to a University Directive, cause the Concessionaire to provide Utility Services to any portion of the University Campus not served by the Utility System at that time and may expand the definition of the Main Campus and/or the Oakdale Campus.

Section 5.4. Domestic Water Meters. Following the Closing Date, the Concessionaire shall complete the metering of the Domestic Water System (as defined in the Performance Standards) consistent with the University's commencement of such metering project, subject to the Approval by the University of any Capital Improvements required therefor in accordance with Section 4.3.

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 at all times 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 University 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.

Section 6.4. Post-Closing Transition Period Assessment. During the Post-Closing Transition Period, the Concessionaire shall have the right to propose to the University modifications to the Performance Standards and Key Performance Indicators based on the Concessionaire's assessment of historic Utility System Operations, including reasonable evidence to support such modification. The University shall consider any such proposals in good faith but shall not be obligated to agree to any such modifications. If the Concessionaire and the University, each acting reasonably, agree to such modifications, they shall enter into an amendment to memorialize such changes.

ARTICLE 7 UTILITY FEE, FIVE-YEAR PLAN, AND ENERGY SUPPLY

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 (as determined in accordance with Schedule 5, and subject to the limitations therein) to the University for the upcoming Fiscal Year (the “Forecast Utility Fee”), provided that the Concessionaire shall, by notice to the University (i) on or before 90 Days prior to the commencement of any Fiscal Year and (ii) again at least 10 Days and no more than 30 Days prior to the commencement of such Fiscal Year, adjust such Forecast Utility Fee as necessary, as determined by the Concessionaire in its good faith and reasonable discretion. 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, provided that if the Term expires on a date that is not the last day of a Fiscal Year, the Forecast Utility Fee for that last partial Fiscal Year shall be prorated based on the number of Days in that last Fiscal Year. The Forecast Utility Fee for the first Fiscal Year of the Term shall be \$55,386,489 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. For purposes of providing the Forecast Utility Fee for any Fiscal Year after the first Fiscal Year, the Parties shall meet in advance and, acting in good faith, shall agree on the methodology for determining the Forecast Utility Fee, including, but not limited to, estimations of the CPI Index and the Capped O&M Costs for the current 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 (as determined in accordance with Schedule 5, and subject to the limitations therein) for such Fiscal Year and provides a detailed accounting of each component of the Utility Fee and of the Capped O&M Costs incurred in such Fiscal Year, in each case 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 (as determined in accordance with Schedule 5, and subject to the limitations therein) 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 Iowa City, Iowa 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 any (i) undisputed amounts within 30 Days after such determination and (ii) amounts which have been determined to be due pursuant to Article 18 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 3.0%, 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 3.0%. 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. Five-Year Plan.

- (a) The Concessionaire shall submit to the University a proposed Initial Five-Year Plan on or before 90 Days 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 and Material Changes (and shall identify whether an item requested for Approval is a Capital Improvement 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 the anticipated types of Supplies that will be used for each such Fiscal Year, including the estimated usage pattern over the course of the first 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 review and provide comments to the Concessionaire on the proposed Five-Year Plan, provided that to the extent pertaining to proposed Capital Improvements 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 7.2(c), if the University shall have previously Approved any such Capital Improvement 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 all components of the proposed Five-Year Plan, including the estimated usage of Supplies over the first Fiscal Year in such Five-Year Plan.
- (c) 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 second through fifth full Fiscal Years therein shall be deemed Approved by the University, except to the extent that a Capital Improvement 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 second through fifth full Fiscal Years therein. For the avoidance of doubt, the Approval of a Five-Year Plan that includes a Capital Improvement or Material Change that is not scheduled to be commenced until the second Fiscal Year therein at the earliest shall not be deemed an Approval of such Capital Improvement or Material for purposes of Article 4 or this Article 7.
- (d) If the Concessionaire does not accommodate or otherwise resolve any comment provided by the University pursuant to Section 7.2(b), 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.
- (e) 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 7.2 shall permit the Concessionaire to make a Capital Improvement 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 7.2 shall permit the Concessionaire to make a Capital Improvement or Material Change except if it is Approved in accordance with Section 4.3(c).

- (f) 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.
- (g) Except as otherwise provided in Section 7.2(b), the contents of any Approved Five-Year Plan shall not be binding on any future Five-Year Plan.
- (h) 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.
- (i) In acknowledgement of the importance of the Utility System to the operation of the University Campus and the integrated delivery of services to students, employees, staff, faculty and visitors of the University Campus, the University Liaison and other University Representatives selected by the University will meet with a representative of the Concessionaire and the Operator on a quarterly basis in order to discuss and assess the implementation of the then-current Five-Year Plan, including any delays or failures to meet the then-current Five-Year Plan and discuss the development of the immediately subsequent Five-Year Plan.

Section 7.3. Energy and Water Supply; Coal-Free Requirement.

- (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”); provided that the University shall have made a reasonable determination that each such Supply Contract is consistent with the then-current Approved Five-Year Plan or has issued a University Directive with respect to such 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, and the Concessionaire shall operate the Utility System consistent with the types and sources of Supplies determined by the University. 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 7.3(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 7.3(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 University 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 University 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 University 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 7.3(a).

- (c) The Concessionaire shall ensure that any Supply Contracts negotiated by the Concessionaire 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 Concessionaire shall be responsible for procuring the water used for the Utility System from the Iowa River in accordance with the applicable Authorizations therefor or such other source as Approved by the University.
- (e) The Parties further acknowledge and agree that from and after January 1, 2025, the Utility System shall be capable without additional work or improvement to perform in a manner that satisfies all the requirements hereunder without the use of any coal in the Utility System Operations. In the event that the Concessionaire fails to comply with the restrictions on coal use set forth in this Section 7.3, unless otherwise waived by the University in writing or expressly provided in the Approved Five-Year Plan for that month, the Concessionaire shall pay to the University \$1,000,000 per month on a monthly basis for each month in which the Concessionaire fails to comply, which shall be payable within 5 Days after the end of the applicable month in which the Concessionaire fails to comply, and such failure shall be considered a Major KPI Event. The Parties agree that damages to the University as a result of the ongoing use of coal will be difficult and impracticable to ascertain and the monthly payment by the Concessionaire to the University described herein is a reasonable estimate of such damages and shall not be considered a penalty. Notwithstanding the foregoing, the Concessionaire shall not be required to make any payment to the University pursuant to this Section 7.3(e) for any periods during which the Concessionaire's failure to comply with this Section 7.3(e) is as a direct and primary result of a (i) Delay Event, (ii) University Directive or (iii) University Default.
- (f) The Concessionaire shall cause the Utility System to be operated using a mix of Supplies supported by the then-current Supply Contracts and the Approved Five-Year Plan. The Concessionaire shall consult the University with respect to any adjustments to the mix of Supplies required to operate the Utility System in accordance with this Agreement and any such adjustments shall only be made upon Approval from the University, which may be withheld in its sole discretion.

Section 7.4. Energy Use Intensity Reduction and Energy Conservation Measures.

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 on the University Campus, and the Concessionaire shall in good faith discuss with the University the Concessionaire implementing such recommendations and proposals. In addition, in connection with each Five-Year Plan, the Concessionaire may propose certain measures or improvements on

the University Campus, including energy conservation measures, buying strategies in connection with Supplies, or such other improvements anticipated to achieve an energy use intensity reduction. The University may consider such proposals in its sole discretion in connection with reviewing such Five-Year Plan and any Approval of the same may include a shared savings of costs with respect thereto.

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 University Campus or any part thereof, 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, and the Concessionaire shall not be financially responsible for other Releases of Hazardous Substances from the Utility System, but shall be responsible for the remediation thereof, except to the extent such Release is an Excluded Liability. The Parties acknowledge and agree that if Hazardous Substances are Released from the Utility System but the Concessionaire was operating the applicable portion of the Utility System at the time of such Release in accordance with Prudent Industry Practices and the Performance Standards, then the Concessionaire will be conclusively deemed to have not caused such Release by its negligence or willful misconduct. 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 in writing to or directed in writing 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 of the respective dates of and for the periods referred to in such financial statements, all in accordance with GAAP or IFRS, provided that if such financial statements are prepared in accordance with IFRS, such financial statements shall include a reconciliation statement setting forth any material discrepancies between IFRS and GAAP reporting with respect to the subject matter thereof. The Concessionaire's independent certified public accountants shall be subject to the University's Approval, provided the University's Approval shall not be required if the independent certified public accountants are KPMG, PriceWaterhouseCoopers, Ernst & Young, or Deloitte Touche Tohmatsu (or their respective successors-in-interest). The annual reasonable, actual-out-pocket cost of preparing these audited financial statements shall, for the first three Fiscal Years after the Closing be added to the Capped O&M Index, and shall not be included in the calculation of the Capped O&M Index.
- (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. In addition, within 30 days after the end of each quarter of each Fiscal Year, the Concessionaire shall provide the University with an allocation of the Utility Fee for such quarter by each Utility, and such other information reasonably requested by the University, so that the University can allocate costs across Utilities for internal billing purposes with respect to its buildings or departments.

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: (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 University 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 by applicable Iowa Law, including Iowa Code Ann. § 550.2, as determined by the University in its reasonable discretion. 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 and Reviewing 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 and Review 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 and Review 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 and Reviews 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 and Reviews 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 and Review 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 Iowa duly organized and existing under the laws of the State of Iowa.
- (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 by the BOR) 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.* Other than the consent of the landlord under the Independence Road Annex Lease, no Consent that has not already been obtained is required to be obtained by the University from, and no notice or filing that has not already been given 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, in either case, 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 identifies operational costs for the periods that ended June 30, 2017 through June 30, 2019, and, fairly presents the financial information disclosed thereon in accordance with standard accounting procedures of the University with respect to the Utility System, and is adjusted for anticipated expenditures the Concessionaire will incur to operate the Utility System as it is currently operated.
- (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, 2019, 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, 2019 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 Wells Fargo Securities, LLC ("Wells Fargo"), 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 Hercules" 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) *Independence Road Annex Lease.* The Independence Road Annex Lease is in full force and effect and has been made available for review by the Concessionaire.

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 that has not already been obtained is required to be obtained by the Concessionaire from, and no notice or filing that has not already been given 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 Iowa.
- (i) *Brokers.* Except for Barclays Capital Inc., 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 18 months following the Closing Date unless a bona fide notice of a Claim shall

have been given, in writing, in accordance with Section 20.1, 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 12 months following the Closing Date unless a bona fide notice of a Claim shall have been given, in writing, in accordance with Section 20.1, 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. 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, provided that such lenders and potential lenders shall hold such information in confidence (provided that such lenders and potential lenders may disclose such

information to Affiliates and their respective officers, employees, agents, advisors, stockholders, partners, members, accountants and attorneys to the extent the foregoing agree to maintain such information as confidential in accordance with this Section 10.2 or as may be compelled in a judicial, regulatory (including any self-regulatory organization) or administrative proceeding or as otherwise required by applicable Law or required by any Governmental Authority having jurisdiction over the lender) and the Concessionaire shall be liable for any disclosure by such lenders or potential lenders in breach thereof. 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), to take any action or 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 notify the University within 7 Days after receiving written notice from a Governmental Authority that the Concessionaire or the Operator 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.*; and (ix) the Iowa Civil Rights Act of 1965, Iowa Code Chapter 216.
- (b) *Contract Provisions.* The Concessionaire shall cause all Contractors to comply with each of the federal Laws and Iowa 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 Iowa Minimum Wage Law, Iowa Code Ann. § 91D; and (iii) the Iowa Wage Payment Collection Law, Iowa Code Ann. § 91A.

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 the 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. 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.

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 such documentation and information as the University may reasonably request.

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 and Other Campus-Wide Authorizations. The Concessionaire acknowledges and agrees that, in connection with (I) the Title V permit for Utility System sources issued by the Iowa Department of Natural Resources (as may be extended, renewed, modified or replaced, the "Title V Permit"), (II) Plantwide Applicability Limit Permit issued by the Iowa Department of Natural Resources (as may be extended, renewed, modified or replaced, the "PAL Permit"); (III) the storm water permit for the municipal separate storm sewer system issued by the Iowa Department of Natural Resources (as may be extended, renewed, modified or replaced, the "MS4 Permit"); and (IV) the permit issued by the U.S. Environmental Protection Agency to the University regarding its boilers' maximum achievable control technology (as may be extended, renewed, modified or replaced, the "Boiler MACT Authorization"), together with the Title V Permit, the PAL Permit and the MS4 Permit, the "Campus-Wide Permits"): (i) the University will continue to be the "owner" identified in the Campus-Wide Permits during the Term; (ii) the Concessionaire will become the "operator" of permitted emission sources from the Utility System identified in the Campus-Wide Permits 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; (iv) the Concessionaire shall provide to the University (a) complete drafts of all required reports with respect to the Utility System portion of the Campus-Wide Permits 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 modifications to any Campus-Wide Permit for review and Approval at least 30 Days prior to submission to a regulatory agency; and (v) the Parties shall reasonably cooperate with each other in connection with any matters relating to the Campus-Wide Permits. The Concessionaire shall comply with all Campus-Wide Permits to the extent applicable to the Utility System or Utility System Operations, provided that the Concessionaire shall not be responsible for ensuring compliance with the MS4 Permit to the extent related to Utility System Operations performed outside of Utility Facilities or Utility System Land.

Section 11.14. Financial and Audit Standards. The Concessionaire shall comply, and its financial statements shall be prepared in accordance, with GAAP or IFRS, provided that if such financial statements are prepared in accordance with IFRS, such financial statements shall include a reconciliation statement setting forth any material discrepancies between IFRS and GAAP reporting with respect to the subject matter thereof.

Section 11.15. 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.

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, subject to Section 12.5 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 the 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 any of its employees, officers or agents (collectively, the “University Responsible Parties”) 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 any University Responsible Party 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 and therefore not paid to the Concessionaire as Uncapped O&M Costs; provided, however, that, except with respect to Claims resulting from Third Party Claims, subject to Section 12.5 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 Iowa 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 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 Iowa'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 Obligees 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 Obligees 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 whatsoever 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 Obligees 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 Obligees 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 Obligees against any third party in respect of the Loss to which the Obligation Payment relates. Until the Obligees 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 Obligees's rights against such third party.

Section 12.8. Payment and Interest. All amounts to be paid by an Obligor hereunder, not including deductibles or self-insured retentions or insurance proceeds, 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 Obligees 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 Obligees.

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, AA-Compensation or KPI 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), (g), and (k); (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)(iii)(2); (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 (i) 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 or gross negligence of the other Party or its Representatives (or University Responsible Parties in the case of the University).

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.
- (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, employees, and agents 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 Iowa Code Ann. § 669.1 *et seq.*, or otherwise available to the University and its officers, employees, and agents.

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 and all Utility System Operations (the “Concessionaire Required Coverages”).

- (a) *Workers’ Compensation and Employer’s Liability.* The Concessionaire shall provide or cause to be provided Workers’ Compensation Insurance, to cover liability imposed by Federal and State statutes having jurisdiction over the Concessionaire’s employees engaged in the performance of this Agreement and Employer’s Liability Insurance coverage with limits of not less than \$1,000,000 each employee and \$1,000,000 for each accident. The policy shall be endorsed with the Voluntary Compensation and the Alternate Employer endorsements. The policy shall also include Federal Employers Liability Act (FELA), Longshore and Harbor Worker’s Compensation Act (USL&H) and Jones Act coverage, in each case to the extent applicable to the Utility System, the Concessionaire or the transactions contemplated under this Agreement.
- (b) *Commercial General Liability.* The Concessionaire shall provide or cause to be provided Commercial General Liability Insurance or equivalent with limits of not less than \$1,000,000 per occurrence and \$2,000,000 in the annual aggregate. Coverage shall include the following: bodily injury and property damage including personal injury, coverage for contractual employees (excluding any employees of the University), all premises and operations, including blanket contractual and products/completed operations, explosion, collapse, mobile equipment not suitable for roadways, underground, separation of insureds, defense of terrorism (to the extent commercially available) and liability assumed under an insured contract and shall be written on ISO form CG 00 01 04 13 or its equivalent. Terrorism may be insured through a standalone, terrorism specific policy.

- (c) *Commercial Automobile Liability.* 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 Commercial Automobile Liability Insurance with limits of not less than \$10,000,000 combined single limit each accident for bodily injury and property damage. The policy shall be endorsed with CA 99 48 and MCS 90, where required by applicable Law.
- (d) *Umbrella Liability.* The Concessionaire shall provide or cause to be provided follow form Umbrella Liability Insurance with a minimum limit of \$50,000,000 (\$25,000,000 for terrorism) per occurrence and shall apply to all underlying and primary liability coverages required above.
- (e) *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, with limits not less than \$15,000,000 per claim and in the aggregate or such other limit (whether lower or higher) as the University and the Concessionaire may agree (each, acting reasonably) with respect to such policy for a particular Capital Improvement or Material Change, which other limit shall be included as part of the Approval of such Capital Improvement or Material Change in accordance with Section 4.3. The policy shall include: contingent bodily injury liability, rectification and punitive damages. The faulty workmanship exclusion should be modified to cover losses arising out of professional services. Should the Concessionaire self-perform any work of the nature noted in this Section 13.1(e), evidence of Professional Liability Insurance meeting the standards for such work set forth above shall be required.
- (f) *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.
- (g) *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.

- (h) *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 \$10,000,000 per claim and \$15,000,000 in the aggregate over 3 years for environmental and pollution damage liability arising out of pollution events occurring after the Closing Date.
- (i) *Builder's Risk.* When the Concessionaire undertakes, pursuant to this Agreement, any construction, maintenance or repairs to the Utility System (including Capital Improvements, Material Changes and betterments), 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. 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 may be named as additional insured 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.* As a Board of Regents institution, the University is a unit of the State of Iowa (State), and as such employees of the University are considered State employees and are covered for workers compensation pursuant to the Iowa Code, Chapters 85 and 19A.32.
- (b) *Commercial General Liability (Primary and Umbrella).* As a Board of Regents institution, the University is an agency of the State of Iowa (State), and as such is covered by the State's self-insurance for tort liability, which includes motor vehicle liability. Tort claims against the State are handled as provided in the Iowa Tort Claims Act (Iowa Code, Chapter 669) which also sets forth the procedures by which tort claims may be brought.
- (c) *Property.* The University shall obtain All Risk Property Insurance, covering loss, damage or destruction to the University's owned property (including the Utility System and all other property leased by the University 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 the valuation clause in the University's insurance policy(ies). Coverage shall include flood insurance. The Concessionaire shall be responsible for property deductible for any loss or damage to University property that is part of the Utility System, and the Concessionaire may not include the cost therefor in any component of the Utility Fee except as expressly set forth in sub-section (p) of the definition of "Uncapped O&M Costs". The University shall name the Concessionaire, the Operator and the Leasehold Mortgagee as additional insureds under such All Risk Property Insurance with respect to the Utility System. 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 negligence of 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.
- (b) *Notice of Cancellation or Violation.* The University shall notify the Concessionaire in writing 30 Days (or in the case of cancellation for non-payment of premiums, 10 Days) prior to cancellation of the University's All Risk Property Insurance described in Section 13.2(c). The Concessionaire shall notify the University in writing 30 Days (or in the case of cancellation for non-payment of premiums, 10 Days) prior to cancellation of any Concessionaire Required Coverages. The University 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 the Concessionaire shall reimburse the University for any delinquent premiums paid by the University on demand without any Days of grace and without prejudice to any other rights and remedies of the Parties hereunder.

- (c) *Deductibles.* All deductibles or self-insured retentions for Concessionaire Required Coverages or Concessionaire Contractors shall not exceed amounts approved by the University in writing. Any and all deductibles or self-insured retentions on Required Coverages, except for the University's property and flood insurance deductibles, 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.* The products/completed operations portion of the Concessionaire's 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 University 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.* 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 (and, in the case of the Concessionaire Required Coverages, against the State of Iowa; University of Iowa; Board of Regents, State of Iowa, their agents, officials, and employees). Concessionaire shall cause each of its Contractors to waive all their rights of subrogation against the State of Iowa; University of Iowa; Board of Regents, State of Iowa, their agents, officials, and employees.
- (g) *University's Right to Insure.* If the Concessionaire fails to obtain and maintain or cause to be obtained and maintained the Concessionaire Required Coverage in accordance with this Article 13, the University shall have the right (without any obligation to do so), upon 2 Business Days' notice to the Concessionaire 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 in connection therewith shall be payable by the Concessionaire on demand without any Days of grace and without prejudice to any other rights and remedies of the University hereunder. Such insurance taken out by the University shall not relieve the Concessionaire of its obligations to insure hereunder and the University shall not be liable for any loss or damage suffered by the Concessionaire 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 State of Iowa; the University; or the Board of Regents, State of Iowa shall not contribute with insurance provided by the Concessionaire under this Agreement.
- (j) *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 State of Iowa; the University; Board of Regents, State of Iowa, their agents, officials, and employees (provided that such agents, officials or employees shall not be included if not permitted by applicable Law or commercially available), 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 State of Iowa; the University; Board of Regents, State of Iowa, their agents, officials and employees as 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.
- (k) *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.
- (l) *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.
- (m) *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 State of Iowa; the University; Board of Regents, State of Iowa, their agents, officials and employees, to be named as additional insureds under such Additional Coverages, if that is normally allowed in accordance with good industry practice.

- (n) *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, each acting reasonably, 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.
- (o) *Commercial Availability.* To the extent any of the Required Coverages are not available on a commercially reasonable basis or on commercially reasonable terms, the Party responsible for obtaining such Required Coverage shall obtain insurance that is available on a commercially reasonable basis or on commercially reasonable terms that best approximates the applicable Required Coverages, but said substitute coverage shall, at the other Party’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.
- (p) *Endorsements.* All Concessionaire Required Coverages shall be endorsed to include the State of Iowa; the University; Board of Regents, State of Iowa, their agents, officials, and employees as additional insureds except the Professional Liability Insurance policies shall include the State of Iowa; the University; Board of Regents, State of Iowa, their agents, officials, and employees as indemnified parties, in each case to the extent permitted by Law and commercially available.

- (q) *Concessionaire Required Coverage Requirements.* All Concessionaire Required Coverages and the University's All Risk Property Insurance described in Section 13.2(c) shall be issued by reputable insurance companies duly authorized to engage in the insurance business in the State of Iowa, with an A.M. Best's rating of A-, VII or better; be primary noncontributory coverage, contain severability of interests provisions, and be governed by Iowa law.
- (r) *Defense of Coverage Outside Limits of Liability.* All Concessionaire Required Coverages shall include defense coverage outside the limits of liability, except for the Professional Liability Insurance required to be carried by the Concessionaire.
- (s) *Requirements for Concessionaire Required Coverages for Liability Policies.* All Concessionaire Required Coverages that are liability policies shall be occurrence-based, except where not commercially available, in which case they shall be on a claims-made basis, provided that such policies shall extend for a period of 10 years after the expiration or earlier termination of this Agreement, which obligation shall survive the expiration or earlier termination of this Agreement.

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, which for the avoidance of doubt, may not be included in the Utility Fee or any component thereof, subject to the University's obligations under Section 13.4(b), 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 or with such modifications, including as to location or configuration, as directed by the University provided such modifications shall not materially and adversely affect the Concessionaire's ability to perform the Utility System Operations once completed and such cost shall be included in the Casualty Costs (any such activity being a "Restoration"); and
 - (iii) deposit all insurance proceeds received by the Concessionaire in connection with any Restoration with the Depositary selected by the

University pursuant to Section 13.4(b); 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 deposited pursuant to this Section 13.4(a)(iii) and Section 13.4(b) (the “Restoration Shortfall Amount”), except to the extent such difference is caused by the negligence or willful misconduct of the University or is the result of any modifications made by the University pursuant to Section 13.4(a)(ii) in which case the University shall be responsible to make such deposit (collectively, with any interest earned thereon, the “Restoration Funds”).

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 in writing. For the avoidance of doubt, and notwithstanding any direction by the University to modify the location or configuration of the Utility System pursuant to Section 13.4(a)(ii), the Restoration Shortfall Amount shall not be considered a New Approved Capital Improvement Cost.

- (b) *Rights and Obligations of University.* Promptly following receipt of notice pursuant to Section 13.4(a)(i), the University shall make such claims under its University Required Coverages with respect to the Utility System that it reasonably believes are appropriate and shall deposit all insurance proceeds received by the University with respect thereto with a Depositary selected by the University in its reasonable discretion. 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 Depositary 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 Depositary to pay over to 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)(ii), 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, 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, provided the deficiency in funds necessary to complete the Restoration is provided in accordance with Section 13.4(a)(iii).

For the avoidance of doubt, the costs incurred for Capital Improvements made as part of the Restoration shall not be considered Capital Improvement Costs for purposes of Schedule 5 or otherwise included in the calculation of the Utility Fee.

- (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 liens or other Encumbrances 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 Depositary 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 State of Iowa; the University; Board of Regents, State of Iowa, their agents, officials, and employees, 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 of performance bonds shall rank *pari passu* in priority 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 Depositary 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) *Lien of Leasehold Mortgage.* Any Restoration Funds not used for the Restoration shall be subject to the lien of the applicable Leasehold Mortgage, but only after such Restoration is complete.

Section 13.5. Additional University Requirements.

- (a) The Concessionaire shall submit, at the Concessionaire's cost and expense, all design documents for proposed Capital Improvements to the Utility System to

the standard University design and construction review process, including, but not limited to submitting documents to the University of Iowa Facilities Management Department of Design and Construction and the University's property insurance carrier for a plan review.

- (b) The Concessionaire shall cooperate and participate, at the Concessionaire's cost and expense, in any and all Utility System Land visits or site inspections by or for any University insurance carrier.
- (c) The Concessionaire shall comply with and participate in, at the Concessionaire's cost and expense and as directed by the University, the University of Iowa Flood Emergency Response Plan as it relates to the Utility System while coordinating these Utility components with other actions as outlined in the plan. This shall include, but is not limited to, emergency repair or mitigation actions, coordination, preventative actions, semi-annual training and regular testing activities.

ARTICLE 14 ADVERSE ACTIONS

Section 14.1. Adverse Action.

- (a) An "Adverse Action" shall occur if the City of Iowa City, Iowa, the County of Johnson, Iowa, the State of Iowa, 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 by private sector utility concessionaires at universities and other public institutions in Iowa, including the Concessionaire, (and not by others) 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 Iowa Utilities Board 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.

- (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, but the Concessionaire may not change its election to receive AA-Compensation with respect to such Adverse Action.

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), 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 or by private sector utility concessionaires at universities and other public institutions in Iowa, including 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 Remedy 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 Remedy 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 Remedy Notice, the University shall give written notice to dispute (the “Delay Event Remedy Dispute Notice”) to the Concessionaire within 30 Days following the date of receipt of the Delay Event

Remedy Notice stating the grounds for such dispute, and if neither the Delay Event Remedy Notice nor the Delay Event Remedy Dispute Notice has been withdrawn within 30 Days following the date of receipt of the Delay Event Remedy 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 Remedy 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, as applicable, is claimed therein, including an explanation of the reasons that such event(s) constitute Compensation Event(s), Adverse Action(s) and KPI Event(s), as applicable, under the terms of this Agreement; and (iii) the amount claimed as Concession Compensation and KPI Compensation, as applicable, with respect to each such Compensation Event, Adverse Action and KPI Event, as applicable, 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, subject to Section 3.12.

- (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 in equal monthly installments.
- (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 (whether owed to the University or the Concessionaire), 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 in accordance with Section 15.3(d), 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, with the University's consent, 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.

- (h) Notwithstanding anything to the contrary contained in this Section 15.3, if there is KPI Compensation that is determined to be due and payable with respect to the Safety KPI at the end of any Compensation Calculation Measuring Period, such KPI Compensation shall not be included in the Concession and KPI Compensation Balance but will instead be paid into a separate account held by the University at the same time as the payment of any Concession and KPI Compensation Balance. Within 30 Days after such payment, the Concessionaire shall propose a Capital Improvement, Material Change or other initiative designed to increase the safety of Utility System Operations that is reasonably expected to cost the amount of such KPI Compensation that had been paid for the University's Approval in the same manner as a Capital Improvement or Material Change in accordance with Section 4.3. If the University does not Approve such proposal, then the Concessionaire shall, promptly thereafter, submit another proposal that meets the criteria hereunder for the University's Approval, and this process shall continue until the University Approves a proposal. Promptly after University Approval of such proposal, the Concessionaire shall construct, perform or otherwise implement such proposal using the funds paid as KPI Compensation for a Safety KPI, which payment shall be subject to receipt of evidence, reasonably acceptable, that such funds had been spent and that the Concessionaire has completed such proposal. For the avoidance of doubt, such amounts shall not be included in the Utility Fee, and the Concessionaire shall earn no return thereon.

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.

Section 15.5. Maximum Annual Amount of KPI Compensation. Notwithstanding anything to the contrary contained herein, the maximum amount of KPI Compensation for which the Concessionaire may be liable in any given Fiscal Year shall be the greater of (i) \$20,000,000 and (ii) 30% of the Utility Fee for that Fiscal Year. For the avoidance of doubt, the limitation on the maximum amount of KPI Compensation shall not limit the number of KPI Events that have occurred, including the determination of the number of KPI Events in a Fiscal Year for purposes of Section 3.3 or the determination of future KPI Compensation.

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 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) subject to the cure rights of the Leasehold Mortgagee set forth in Section 19.3, 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, (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 (other than any payment obligations of the University with respect to such termination, if any, and the payment obligation set forth in this Section 16.3(a)), 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 or 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, all in exchange for \$1 paid by the University on the Reversion Date;

- (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 with a third party, by providing notice to the Concessionaire 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.

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 or nominee/designee of 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 (unless disclosure is required by applicable Law) 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 (thus requiring the University's Approval) 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).

Section 17.2. Assignment by the University or the BOR. The University and the BOR shall each have the right to Transfer any or all of its respective 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 or the BOR, as applicable, under this Agreement, and any agreement entered into by the University or the BOR, as applicable, 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 or the BOR 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 20.7.

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 termination of this Agreement, following the expiration of the Leasehold Mortgagee's cure period in Section 19.3, if any, without a cure, 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;
- (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;
- (j) a Leasehold Mortgagee shall, within ten (10) days after receipt of written request from the University or the BOR, execute an amendment to its recorded Leasehold Mortgage to conform the legal description of the real property encumbered by such Leasehold Mortgage to conform to the legal description in the Memorandum of Lease to the extent properly modified pursuant to Section 2.8; and
- (k) a Leasehold Mortgagee shall, within ten (10) days after receipt of written request from the University or the BOR, execute documentation reasonably acceptable to the University and the BOR releasing any land or other real property owned by the University or the BOR from the lien of any Leasehold Mortgage such that such land or real property may be conveyed to a third party without being subject to this Agreement or the Leasehold Mortgage, provided such request is accompanied by an affidavit from the University that such land or other real property does not contain any Utility Facilities or Utility System Assets.

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 20.1). 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, without any charge, penalty, assessment or consideration not specifically

provided for in this Section 19.5 (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 Iowa 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 (who, for the avoidance of doubt, may act on behalf of one or more lender groups as contemplated by Section 19.1), 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 right to exercise the rights as a Leasehold Mortgagee under this Article 19 vis-à-vis the University, unless such Leasehold Mortgagee has designated in writing another Leasehold Mortgagee to exercise such rights in which case the other Leasehold Mortgagee may exercise such rights, provided that such requirement shall not limit such additional Leasehold Mortgagees' rights hereunder. 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 Mortgage 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 without any charge, penalty, assessment or consideration not specifically provided for in 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 Mortgagee 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 Mortgagee 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 MISCELLANEOUS

Section 20.1. Notice. All notices by the Concessionaire or the University, approvals or consents by the Concessionaire, and Approvals by the University (each, a "Notice") 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 by facsimile (with hard copy sent via mail), email, nationally recognized overnight courier service, or certified or registered mail (return receipt requested and postage prepaid) for the attention of the persons and to the addresses, fax numbers or email addresses shown below (or such other persons, address, fax numbers or email addresses as either Party may from time to time designate by a Notice to the other):

(a) in the case of the University:

(i) for delivery by mail or fax:

University of Iowa
Office of the Senior Vice President for Finance and Operations
105 Jessup Hall
Iowa City, Iowa 52242-1316
Attention: Rod Lehnertz
Fax: (319) 353-2069

With a copy to:

University of Iowa
Office of the General Counsel
120 Jessup Hall
Iowa City, Iowa 52242-1316
Fax: (319) 335-2830

(ii) for delivery by email:

Rod Lehnertz
Email: rodney-lehnertz@uiowa.edu

With a copy to:

Office of the General Counsel
Email: general-counsel@uiowa.edu

(b) in the case of the Concessionaire:

(i) for delivery by mail or fax:

University of Iowa Energy Collaborative LLC
c/o ENGIE Hawkeye Holdings LLC
1990 Post Oak Blvd., Suite 1900
Houston, Texas 77056
Attention: André Canguçu
Fax: (713) 636-1364

With a copy to:

University of Iowa Collaborative LLC
c/o Meridiam Hawkeye, LLC
605 Third Avenue, 36th Floor, New York, NY, 10158
Attention: John Dionisio
Fax: (212) 798-8690

With a copy to:

Allen & Overy LLP
1221 Avenue of the Americas
New York, New York 10020
Attention: Kent Rowey
Fax: (212) 610-6399

(ii) for delivery by email:

André Canguçu
Email: andre.cangucu@engie.com

With a copy to:

John Dionisio
Email: hawkeye@meridiam.com

A Notice 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 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 provided by mail or fax in accordance with the foregoing via email to the persons and email addresses designated pursuant to the foregoing to receive Notices provided by email.

All communications other than Notices that are 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 by email to the persons and email addresses shown below (or such other persons or email addresses as either Party may from time to time designate by a Notice to the other):

(x) in the case of the University:

Rod Lehnertz
Email: rodney-lehnertz@uiowa.edu

(y) in the case of the Concessionaire:

André Canguçu
Email: andre.cangucu@engie.com

With a copy to:

John Dionisio

Email: hawkeye@meridiam.com

Section 20.2. 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 20.3. Amendment. This Agreement may be amended, changed or supplemented only by a written agreement signed by the Parties.

Section 20.4. 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 20.5. 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 20.6. 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 Iowa (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 20.7. 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 Iowa in Johnson 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 20.1. Service of process on the Concessionaire may be made either by registered or certified mail addressed as provided for in Section 20.1 or by delivery to the Concessionaire's registered agent for service of process in the State of Iowa. 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 20.8. 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 20.9. 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 20.10. 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 20.11. 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 20.12. 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 20.13. 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 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 20.14. 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 20.15. Time of the Essence. Time is of the essence for this Agreement.

(Intentionally Left Blank)

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

UNIVERSITY OF IOWA

BY: 

PRINTED: J. Bruce Harreld

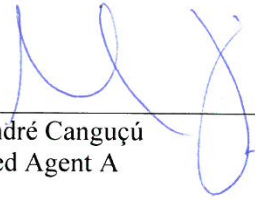
ITS: President

BOARD OF REGENTS, STATE OF IOWA

BY: 
PRINTED: Dr. Michael Richards
ITS: President, Board of Regents, State of Iowa

UNIVERSITY OF IOWA ENERGY
COLLABORATIVE LLC, a Delaware limited
liability company

af

BY: 
PRINTED: André Canguçu
ITS: Authorized Agent A

BY: _____
PRINTED: Romain Limouzin
ITS: Authorized Agent B

UNIVERSITY OF IOWA ENERGY
COLLABORATIVE LLC, a Delaware limited
liability company

BY: _____
PRINTED: André Canguçu
ITS: Authorized Agent A

A handwritten signature in blue ink, consisting of a large, stylized 'R' followed by a horizontal line and a small vertical tick mark.

BY: _____
PRINTED: Romain Limouzin
ITS: Authorized Agent B

SCHEDULE 5

UTILITY FEE

Calculation of Utility Fee

The Utility Fee for any given Fiscal Year shall be calculated as follows: (i) the Fixed Fee, *plus* (ii) the Benchmark Amount multiplied by 0.5 multiplied by the Variable Fee Component *plus* (iii) Cost of Debt Factor multiplied by 0.5 multiplied by the Variable Fee Component *plus* (iv) the Capital Recovery Amount *plus* (v) the Capped O&M Index, as may be adjusted in accordance with the definition thereof *plus* (vi) the Uncapped O&M Costs.

The Parties acknowledge that the purpose of the calculation of the Utility Fee is to approximate a reasonable and market rate to be paid by the University for the Utility Services commensurate of what would be paid for such services in the applicable market and is not intended to reflect Concessionaire's actual cost of debt, return on equity, return of capital, tax liability or similar items. The parties intend that no component of the Utility Fee be considered as a separate fee for any standalone element of the overall service arrangement.

Abandoned Capital Improvements

If any New Approved Capital Improvement Costs were included in the calculation of the Utility Fee in any Fiscal Year for a Capital Improvement that the University subsequently determines, in its reasonable discretion, that the Concessionaire has abandoned and does not ever intend to complete and bring into service for reasons other than a University Directive, a Delay Event, an Adverse Action or any other change in requirements by the University, those New Approved Capital Improvement Costs shall be removed from the Variable Fee Component and the Unrecovered Balance for each such Fiscal Year, and the Concessionaire shall promptly after receipt of notice of such determination recalculate the Utility Fee for such Fiscal Years resulting from the removal of such New Approved Capital Improvement Costs and pay to the University, within 30 Days of the determination by the Concessionaire, the difference between the Utility Fee actually paid by the University and the Utility Fee that the University would have paid if those New Approved Capital Improvement Costs had not been included.

Exhibit A

Attached hereto as Exhibit A is an illustrative mathematical explanation and example of the Utility Fee formula, which, in the event of a conflict between Exhibit A and such formula, the formula set forth above shall control.

Exhibit B

Attached hereto as Exhibit B is an illustrative mathematical explanation and example of the Capped O&M Index formula, which, in the event of a conflict between Exhibit B and such formula, the formula set forth in the definition of "Capped O&M Index" shall control.

Definitions

"Capital Improvement Cost" shall mean the lesser of (i) the actual, out-of-pocket costs incurred by the Concessionaire in bringing a Capital Improvement into service, which may include insurance, any applicable sales or use tax, incremental financing costs and bonding costs and (ii) the amount budgeted for such Capital Improvement in the University's Approval therefor (which

may include amounts payable to the Operator that are included in such Approval) which shall be increased by any reasonable, actual out-of-pocket costs incurred by the Concessionaire due to a Delay Event that were unavoidable for reasons outside the Concessionaire's control, but excluding any amount budgeted for non-capital expenses with respect to such Capital Improvement, in each case taking into account any actual or anticipated tax credits or other benefits that will accrue to the Concessionaire (but only as and when such tax credit inures to the benefit of the Concessionaire and in the manner contemplated by the Approval of such Capital Improvement, if contemplated thereby), provided that, upon written request of the Concessionaire, the University shall have the right, in its sole discretion, to increase the Capital Improvement Cost by some or all of the amount that the actual out-of-pocket costs incurred for such Capital Improvement exceeds the amount Approved therefor.

"Capital Recovery Amount" shall mean the sum of the results of the following calculation, calculated separately for each New Approved Capital Improvement: (i) the New Approved Capital Improvement Costs incurred in the immediately prior Fiscal Year, *divided by* (ii) the Recovery Period for such New Approved Capital Improvement; which Capital Recovery Amount shall be included in each Fiscal Year's Utility Fee thereafter until such time as the Unrecovered Balance for such New Approved Capital Improvement Costs equals \$0.

"Capped O&M Ceiling" shall mean 102.0% of the Capped O&M Index for an applicable Fiscal Year.

"Capped O&M Index" shall mean for the applicable Fiscal Year (the "Subject Fiscal Year") (i) the three-year arithmetic average of Capped O&M Costs for the 3 previous Fiscal Years, regardless of whether the University or the Concessionaire was operating the Utility System (provided that for the Fiscal Years in which the University operated the Utility System, the Capped O&M Costs shall be the costs incurred or accrued by the University that are analogous to the categories of the Capped O&M Costs), provided that (A) when calculating such arithmetic average, the 3 previous Fiscal Years' of Capped O&M Costs shall each be Adjusted for Inflation as follows: each of the previous Fiscal Years' Capped O&M Costs shall be multiplied by (I) the CPI Index in the Subject Fiscal Year *divided by* (II) the CPI Index in such previous Fiscal Year, provided that, in no event, shall the Capped O&M Costs be reduced as a result of being Adjusted for Inflation and (B) for purposes of calculating the Capped O&M Costs to be part of the three-year arithmetic average of Capped O&M Costs for the Capped O&M Index in a Subject Fiscal Year, the Capped O&M Costs for any Fiscal Year used in such calculation shall not exceed the Capped O&M Ceiling for that Fiscal Year, except that the University may, in its sole discretion, approve the inclusion of any Capped O&M Costs above the Capped O&M Ceiling in such calculation, *plus* (ii) the three-year arithmetic average of the costs identified in the definition of "Capped O&M Costs" related to (1) a New Approved Capital Improvement after it has been brought into service or (2) an Ongoing Utility System Project after it has been transferred to the Concessionaire and becomes part of the Utility System for the first 3 Years after such New Approved Capital Improvement or Ongoing Utility System Project is brought into service or becomes part of the Utility System, as applicable, which costs, for the avoidance of doubt, will have been borne as "Uncapped O&M Costs" for such first 3 Years, *plus* (iii) the three-year arithmetic average of the operations and maintenance costs that are reasonably necessary to cause the Utility System or Utility System Operations to comply with 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 for the first 3 Years after the occurrence of such enactment, modification, amendment or change (but not, for the avoidance of doubt, those costs that are included in Uncapped O&M Costs with respect thereto other than in clause “(s)” of such definition) *plus* (iv) the three-year arithmetic average of the reasonable costs of any other adjustments to the Capped O&M Index made pursuant to the Agreement for the first 3 Years after such adjustment is first made. For the avoidance of doubt, any adjustments pursuant to (ii), (iii) and (iv) in the foregoing shall be applied to (a) increase the Capped O&M Index in the first Fiscal Year in which the adjustment is to be made and (b) to increase the Capped O&M Index for the two prior Fiscal Years solely for the purpose of calculating the Capped O&M Index for the subsequent two Fiscal Years. Notwithstanding the foregoing, the University and the Concessionaire hereby acknowledge and agree that, for purposes of calculating the Capped O&M Index, the Capped O&M Costs for the Fiscal Years ending June 30, 2017, June 30, 2018 and June 30, 2019 are deemed to be \$19,478,776, \$20,062,289 and \$19,487,502, respectively, which, for the avoidance of doubt, shall be Adjusted for Inflation in accordance with this definition of “Capped O&M Index”. For the further avoidance of doubt, to determine the CPI Index for a Fiscal Year hereunder, the Parties shall calculate the arithmetic average of the monthly CPI Index for each month during such Fiscal Year and such average shall be the CPI Index for that Fiscal Year.

“Cost of Debt Factor” shall be 0.0319, which shall be adjusted at the end of each fifth Fiscal Year (starting on June 30, 2025), to be the “yield-to-worst”, expressed as a decimal, as such term is defined in the Barclays Baa U.S. Corporate Investment Grade Index using the “LCBIYW” ticker as of the date hereof (or if such index is no longer published, such other index as reasonably agreed by the Concessionaire and the University), which adjustment shall not be considered an amendment or modification of this Schedule 5 or the method of calculation of the Utility Fee and shall not require the approval of either the Concessionaire or the University. The Concessionaire shall have the right, with the University’s Approval which may be withheld in its sole discretion, to set the Cost of Debt Factor for a portion of the Variable Fee Component attributable to the Unrecovered Balance of a New Approved Capital Improvement based on the actual cost of debt incurred by the Concessionaire with respect to such New Approved Capital Improvement.

“Fixed Fee” shall mean \$35,000,000, increased by 1.5% to \$35,525,000 on July 1, 2025 for the Fiscal Year ending on June 30, 2026 and by 1.5% at the start of each Fiscal Year thereafter. For the avoidance of doubt, the Fixed Fee is compensation for (i) the Concessionaire performing the Utility Services as set forth in the Agreement, (ii) the risks and liabilities undertaken by the Concessionaire in the Agreement for which the Concessionaire may not otherwise be compensated under the Agreement and (iii) the expertise and technical know-how that the Concessionaire is expected to bring to bear on the Utility System and the Utility System Operations.

“New Approved Capital Improvement” shall mean a Capital Improvement that was, or is being, constructed by the Concessionaire and is or will be brought into service as part of the Utility System.

“New Approved Capital Improvement Cost” shall mean the Capital Improvement Cost of a New Approved Capital Improvement.

“Relevant Region” shall mean Kansas, Illinois, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota and Wisconsin.

“Benchmark Amount” shall mean 0.098, which shall be adjusted at the end of each 5th Fiscal Year (starting on June 30, 2025) to be the mean average of all return on equity percentages (as expressed as a decimal) for the investor-owned electric or gas public utilities in the Relevant Region approved within the previous 10 Fiscal Years, to the extent approved by a publicly-available, final, non-appealable order (or its equivalent) issued by the relevant public utilities commission or court of competent jurisdiction, excluding the highest and the lowest equity percentages for the Relevant Region during that period, which adjustment shall not be considered an amendment or modification of this Schedule 5 or the method of calculation of the Utility Fee and shall not require the approval of either the Concessionaire or the University.

“Unrecovered Balance” shall mean for the New Approved Capital Improvement Costs incurred in any prior Fiscal Year, an amount equal to (i) those New Approved Capital Improvement Costs in such Fiscal Year less (ii) the aggregate Capital Recovery Amount that has been paid in the calculation of the Utility Fee in prior Fiscal Years that are attributable to such New Approved Capital Improvement Costs.

“Variable Fee Component” shall mean the sum of all Unrecovered Balances.

Exhibit A

CALCULATION OF UTILITY FEE

Formula

$$UF = FF + (BA \times 0.5 \times VFC) + (COD \times 0.5 \times VFC) + CRA + COMI + UOMC$$

COD = Cost of Debt Factor

CRA = Capital Recovery Amount

FF = Fixed Fee

COMI = Capped O&M Index

UOMC = Uncapped O&M Costs

BA = Benchmark Amount

UF = Utility Fee

VFC = Variable Fee Component

Exemplar

As an exemplar only to illustrate a portion of the calculation of the Utility Fee, below shows the calculation for clauses (ii) and (iii) of the Utility Fee calculation and the Capital Recovery Amount for Fiscal Years 2020, 2021 and 2022, assuming that (a) \$10,000,000 is incurred as a New Approved Capital Improvement Cost in Fiscal Year 2020 for a New Approved Capital Improvement with an Recovery Period of 20 years with no further New Approved Capital Improvement Costs in 2020, 2021 and 2022, (b) the Benchmark Amount is 0.10 and (c) the Cost of Debt Factor is 0.04. For the avoidance of doubt, none of these assumptions shall be binding on the University or the Concessionaire, and they are not intended to reflect any expectations of either Party or the actual calculation of the Utility Fee.

Fiscal Year 2020

Utility Fee clause (ii) = \$0, calculated as follows: $0.1 \times 0.5 \times \$0$

Utility Fee clause (iii) = \$0, calculated as follows: $0.04 \times 0.5 \times \$0$

Capital Recovery Amount = \$0

Fiscal Year 2021

Utility Fee clause (ii) = \$500,000, calculated as follows: $0.1 \times 0.5 \times (\$10,000,000 - \$0)$

Utility Fee clause (iii) = \$200,000, calculated as follows: $0.04 \times 0.5 \times (\$10,000,000 - \$0)$

Capital Recovery Amount = \$500,000, calculated as follows: $\$10,000,000 / 20$

Fiscal Year 2022

Utility Fee clause (ii) = \$475,000, calculated as follows: $0.1 \times 0.5 \times (\$10,000,000 - \$500,000)$

Utility Fee clause (iii) = \$190,000, calculated as follows: $0.04 \times 0.5 \times (\$10,000,000 - \$500,000)$

Capital Recovery Amount = \$500,000, calculated as follows: $\$10,000,000 / 20$

Exhibit B

CAPPED O&M INDEX CALCULATION

Formula

COMI = 3Y O&M Average + NACI O&M + OUSP O&M + NL O&M + OA O&M

COMI = Capped O&M Index

3Y O&M Average = three-year arithmetic average of Capped O&M Costs for last 3 previous Fiscal Years as adjusted by clauses A & B of the COMI definition.

NACI O&M = annual operations and maintenance costs for New Approved Capital Improvements based on the three-year arithmetic average of the O&M costs of such improvements.

OUSP O&M = annual operations and maintenance costs for Ongoing Utility System Projects based on the three-year arithmetic average of the O&M costs of such projects.

NL O&M = forecasted annual operations and maintenance costs for compliance with new Laws.

OA O&M = other adjustments to the COMI permitted by the Agreement.

Exemplar

As an exemplar only to illustrate the portion of the calculation of the Utility Fee related to the calculation of the Capped O&M Index for 2023, set forth below is the calculation using the hypothetical amounts set forth in the table below. For avoidance of doubt, none of these assumptions shall be binding on the University or the Concessionaire, and they are not intended to reflect any expectations of either Party as to the actual calculation of the Capped O&M Index.

Year	CPI	COMI	COM Costs	NACI O&M	OUSP O&M	NL O&M	OA O&M
2020	260	21 MM	21.1 MM				
2021	280	21.5 MM	23 MM				
2022	310	22.6 MM	21.2 MM				
2023	290			.2 MM ¹	.3 MM ¹	.25MM ¹	.1 MM ¹

For Example, the 3Y O&M Average For Subject Fiscal Year of 2023 would be calculated as follows:

$((2023 \text{ CPI} / 2020 \text{ CPI}, \text{ but no less than } 1) * 2020 \text{ Capped O\&M Costs}, \text{ but the } 2020 \text{ Capped O\&M Costs can be no more than } 102\% \text{ of } 2020 \text{ COMI}, \text{ plus } (2023 \text{ CPI} / 2021 \text{ CPI}, \text{ but no less than } 1) * 2021 \text{ Capped O\&M Costs}, \text{ but the } 2021 \text{ Capped O\&M Costs can be no more than } 102\% \text{ of } 2021 \text{ COMI}, \text{ plus } (2023 \text{ CPI} / 2022 \text{ CPI}, \text{ but no less than } 1) * 2022 \text{ Capped O\&M Costs}, \text{ but the } 2022 \text{ Capped O\&M Costs can be no more than } 102\% \text{ of } 2022 \text{ COMI}) / 3$

$((290 / 260 = 1.11 * 21.1 = \$23.421 \text{ MM}) + (290 / 280 = 1.036 * 21.93 \text{ (limited by } 1.02 \text{ of COMI)} = \$22.72) + (290 / 310 \text{ (can't be less than } 1) = 1 * 21.2 = \$21.2 \text{ MM})) / 3 = \22.45 MM

$\$22,450,000 \text{ COMI} + \$200,000 \text{ NACI O\&M} + \$300,000 \text{ OUSP O\&M} + \$250,000 \text{ NL O\&M} + 100,000 \text{ OA O\&M} = \$23,300,000$

¹ Such amounts would be included in the Capped O&M Index for Fiscal Years 2021 and 2022 (as adjusted by the CPI Index) solely for the purpose of calculating the Capped O&M Index for Fiscal Years 2024 and 2025, as applicable.