

COMMITTEE OF THE WHOLE

11-0151R

RESOLUTION APPROVING THE SETTLEMENT AGREEMENT BETWEEN JOHNSON CONTROLS, INC., THE CITY OF DULUTH AND DULUTH STEAM COOPERATIVE ASSOCIATION IN THE AMOUNT OF \$2.3 MILLION.

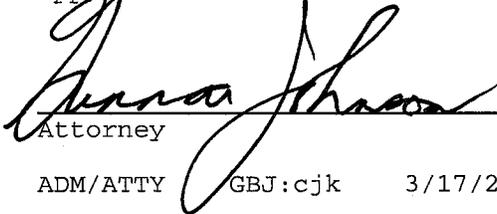
CITY PROPOSAL:

RESOLVED, that the city council hereby approves the settlement agreement between Johnson Controls, Inc., the city of Duluth and Duluth steam cooperative association, substantially in the form of that agreement on file with the city clerk as Public Document No. \_\_\_\_\_; funds to be deposited in Fund No. 540 (Steam District #1).

Approved for presentation to council:

  
Chief Administrative Officer

Approved as to form:

  
Attorney

Approved:

  
Auditor

ADM/ATTY GBJ:cjk 3/17/2011

STATEMENT OF PURPOSE: This resolution requests that the city council approve the settlement agreement between Johnson Controls, Inc., the City of Duluth and the Duluth Steam Cooperative Association

AMERICAN ARBITRATION ASSOCIATION

JOHNSON CONTROLS, INC.

Claimant,

v.

CITY OF DULUTH and  
DULUTH STEAM COOPERATIVE  
ASSOCIATION

Respondents and  
Counter-Claimants.

AAA File No.: 65 198 00147 09

## SETTLEMENT AGREEMENT AND MUTUAL RELEASE

This Settlement Agreement and Mutual Release ("Agreement") is entered by and between:

1. Johnson Controls, Inc., a Wisconsin corporation ("JCI") on the one hand;
2. The City of Duluth, a Minnesota municipality (the "City"); and the Duluth Steam Cooperative Association, a Minnesota cooperative under and pursuant to the provisions of Minnesota Statutes, Chapter 308A, (the "Co-op"), on the other;

and their officials, officers, directors, agents, and councils.

### RECITALS

**WHEREAS**, on September 22, 2006 the parties entered into two agreements: 1) an ENERGY CONSERVATION AGREEMENT – ASSIGNMENT OF CARBON OFFSET CREDITS (hereinafter, referred to as "Carbon Agreement") and 2) a PERFORMANCE CONTRACT which was attached to the Carbon Agreement as Exhibit A. Under the PERFORMANCE CONTRACT JCI was to perform work on a Project at the Steam Plant ("Plant") and on its steam distribution system. The Carbon Agreement also contained as Exhibit B an EMISSION REDUCTION PURCHASE AGREEMENT (ERPA) between JCI and the Climate Trust. Schedule 5 of the PERFORMANCE CONTRACT contained a SALE AND TRANSFER OF EMISSIONS REDUCTIONS from the City to JCI for purchase of the future emission reductions that were anticipated to be produced under the PERFORMANCE CONTRACT and the resale of such anticipated emissions reductions from JCI to the Climate Trust. ); and

**WHEREAS**, the parties subsequently had disagreements regarding the Performance Contract; and

**WHEREAS**, on or about July 22, 2009, JCI filed a demand for arbitration in the above captioned matter against the City and Co-op regarding the methodology for the calculation of shortfalls due under the Performance Contract; and

**WHEREAS**, thereafter, the parties made claims and counterclaims against each other, including, but not limited to, contract claims, tort claims, and claims in equity regarding the Performance Contract.

## **AGREEMENT**

**NOW THEREFORE**, in consideration of the foregoing facts and mutual covenants and agreements herein contained and for other valuable consideration, the parties agree as follows:

1. The definition of terms used herein shall be the same as contained in the Carbon Agreement and PERFORMANCE CONTRACT.

2. JCI shall pay to the City the sum of \$2.3 Million Dollars (\$2,300,000). Such payment shall be made by check on the account of JCI payable to the "City of Duluth" and delivered to the City on or before the 5th day following the execution and delivery of this Agreement by each of the signatories set forth on the signature page hereto.

3. JCI shall install, at its own expense, the additional modifications to the steam plant set out in the list attached hereto as **Exhibit A**.

4. All rights and obligations between JCI, and the City and the Co-op under the Performance Contract and the Carbon Agreement will terminate upon the execution of this Agreement. Notwithstanding the foregoing, nothing herein shall be construed to terminate the Sale and Transfer of Emissions Reductions from the City or the Co-op to JCI, of the Carbon Dioxide Offsets generated by or as a result of the Project as contained in paragraph 2(a) of Schedule 5 to the Performance Contract. Paragraphs 2(b), 2(d), and 2(e) of Schedule 5 shall no longer have any effect between the parties. The parties expressly understand and agree that the prohibition included in paragraph 2(a) of Schedule 5 to the Customer's ability to sell or otherwise transfer Carbon Dioxide Offsets to any party other than JCI applies only to those Carbon Dioxide Offsets resulting from actions implemented by JCI prior to the date of this Agreement as part of the Project but including those additional modifications made pursuant to paragraph 3 above.

5. The City/Co-op will provide JCI such periodic plant operating data as indicated in Exhibit B.

6. Annual offsets for work performed by JCI under the Performance Agreement and to be performed by JCI under this Agreement will be determined in accordance with the formula exclusively developed by JCI, attached hereto as **Exhibit B**.

a. Under such formula, JCI will be entitled to carbon dioxide offsets created as a result of project work which it did pursuant to the Performance Contract and the modifications to be done pursuant to this Agreement listed in **Exhibit A**.

b. If the City and/or the Co-op make capital or other significant improvements or modifications to the plant and/or the distribution system that create offsets incremental to those that are described in paragraph 6.a, the City and Co-op shall be entitled to such incremental offsets.

c. All incremental offsets created by the City and/or Co-op will be calculated annually and be deducted from the total offsets determined under **Exhibit B**. Such incremental offsets will be owned by the Co-op and the City.

d. If the position of the third-party auditor/engineering firm is that there is no clear way to segment the incremental offsets, then the annual certification process will not recognize the retention of such offsets by City/Coop.

e. JCI shall be solely responsible to the Climate Trust for any shortfalls in carbon offsets between the original operating baseline under the Performance Contract and Carbon Agreement resulting from terms as conveyed in the Performance Contract and Carbon Agreement. Similarly, JCI shall protect, indemnify and make City and Co-op whole for any loss, penalty or claim (including attorney's fees) for payment or for action of the Climate Trust resulting from any such deficiency or shortfall of production of carbon offset credits whether arising under the Performance Contract, the Carbon Agreement, or otherwise.

## **MUTUAL RELEASES and COVENANTS**

### **7. RELEASE OF CITY AND CO-OP**

In consideration of the Agreements referred to herein, JCI, on behalf of itself, and its affiliates, shareholders, officers, directors, employees, agents, predecessors, successors, and assigns hereby releases and forever discharges the City and Co-op, their predecessors, successors, parents, subsidiaries, and related companies, including, but not limited to any official, council, officer, director, employee, owner, principal, agent, shareholder, attorney, heir, executor, administrator, representative, insurer or assign thereof, from all claims, demands, costs, expenses, fees, and causes of action, of whatever character, nature or kind, known or unknown, which they may now have or may have had, which arise out of or relate in any way to the subject matter of the above captioned arbitration, except as specifically reserved within this Agreement. Nothing in this Release shall be construed to waive or release any rights or obligations created by this Agreement, and the Parties expressly reserve the right to enforce the terms and conditions of this Agreement.

### **8. RELEASE OF JCI**

In consideration of the Agreements referred to herein, the City and the Co-op, on behalf of themselves, and their affiliates, stockholders, officials, councils, officers, directors, employees, agents, predecessors, successors, and assigns hereby release and forever discharge JCI, its predecessors, successors, parents, subsidiaries, and related companies, including, but not limited to any officer, director, employee, owner, principal, agent, shareholder, attorney, heir, executor, administrator, representative, insurer or assign thereof, from all claims, counterclaims, demands, costs, expenses, fees, and causes of action, of whatever character, nature or kind, known or unknown, which they may now have or may have ever had, which arise out of or relate in any way to the subject matter of the above captioned arbitration, however characterized, except as specifically reserved within this Agreement. Nothing in this Release shall be construed to waive or release any rights or obligations created by this Agreement, and the Parties expressly reserve the right to enforce the terms and conditions of this Agreement.

**9. MUTUAL COVENANTS NOT TO PURSUE FURTHER ACTION BY SUIT, ARBITRATION OR OTHERWISE:**

JCI, the City and Co-op, on behalf of themselves, their affiliates, shareholders, officials, councils, officers, directors, employees, agents, predecessors, successors, and assigns hereby agree and covenant not to assert any action, suit or a claim in arbitration or otherwise against any of the released parties with respect to any claim or counterclaim released hereby. The parties expressly agree that damages for a breach of this provision shall include all costs and reasonable attorneys' fees incurred by the non-breaching party or parties. However, the parties may enforce the terms and conditions of this Agreement either through arbitration or court action.

**GENERAL PROVISIONS**

10. Binding Effect. This Agreement shall be binding upon and for the benefit of the parties, and their respective affiliates, stockholders, officers, officials, councils, directors, employees, agents, predecessors, successors, and assigns.

11. No Admission of Liability/Wrongdoing. Nothing contained in or incorporated herein shall be deemed to be, nor shall the negotiation, execution and performance of this Agreement constitute any admission or concession of liability or wrongdoing on the part of any party, or any other form of admission with respect to any matter, thing or dispute whatsoever, any such liability or wrongdoing being expressly denied.

12. Representation by Counsel. Each party warrants that it is represented by independent counsel with respect to this Agreement and all matters covered by it; it has been fully advised by said counsel with respect to its rights and obligations and with respect to the execution of this Agreement, and it authorizes and directs its respective attorneys to execute such papers and to take such other action as is necessary and appropriate to effectuate the terms of this Agreement.

13. Complete Agreement. Each party warrants that no promise, inducement or agreement not expressed herein has been made in connection with this Agreement. This Agreement constitutes the entire agreement between the parties and supersedes and replaces all prior negotiations or proposed agreements, oral or written, including, without limitation, the November 15, 2010 letter agreement.

14. Written Modification. This Agreement may not be altered, amended, modified or otherwise changed in any respect whatsoever, except by a writing duly executed by an authorized representative of each of the parties.

15. Titles and Captions. Titles, captions, or headings in this Agreement are inserted as a matter of convenience and for reference, and in no way define, limit, extend, describe, alter, or affect the meaning of this Agreement.

16. Construction of Agreement. The language of this Agreement shall be construed as a whole, according to its fair meaning and intent, and not strictly for or against any party, regardless of who drafted or who was principally responsible for drafting the Agreement or any specific term or condition thereof. This Agreement shall be deemed to have been drafted by all parties and no party shall urge otherwise. This

Agreement shall be deemed to have been made in the State of Minnesota, shall be governed by, construed and interpreted in accordance with the laws of the State of Minnesota. Any conflict of laws, which it may have the affect of applying in other state or country's laws shall not apply. With respect to any dispute, controversy or claim arising out of or relating to this Agreement or the relationship between the parties, the parties agree and consent to personal jurisdiction in the State of Minnesota and that the federal court for the District of Minnesota venued in Duluth, Minnesota shall be the exclusive forum for resolution of the same.

17. Multiple Originals. This Agreement may be executed in multiple originals, each of which is equally admissible in evidence and shall be deemed to be one in the same instrument. The parties shall accept telefaxed or emailed signatures as binding and shall deliver the original counterpart executed to the other party.

18. Authority to Bind and Execute. Each party represents and warrants that it has the full power and authority to enter into this Agreement and to perform all transactions, duties and obligations herein set forth. Each signatory to this Agreement who signs on behalf of a party represents and warrants that he or she has the authority to sign on behalf of that party.

19. Independent Judgment. The parties hereto represent and declare that in executing this Agreement, they rely solely upon their own judgment and knowledge and the advice and recommendations of their counsel and have not been influenced to any extent whatsoever by the other in executing this Agreement.

[SIGNATURE PAGES TO FOLLOW]

IN WITNESS WHEREOF, the parties have executed this SETTLEMENT AGREEMENT AND MUTUAL RELEASE as of the date(s) set forth below.

<b>CITY OF DULUTH</b>  _____ Name: _____ Title: Mayor Date: _____  ATTEST:  _____ Name: _____ Title: City Clerk  COUNTERSIGNED:  _____ Name: _____ Title: City Auditor  APPROVED:  _____ Name: _____ Title: City Attorney	<b>JOHNSON CONTROLS, INC.</b>  _____ Name: _____ Title: Vice President, Legal -- Global Energy Solutions Date: _____  <b>DULUTH STEAM COOPERATIVE</b>  _____ Name: _____ Title: _____ Date: _____
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### Exhibit A – Modifications

In accordance with paragraph 3 of the Settlement Agreement and Mutual Release, JCI shall install, at its own expense, the modifications to the steam plant owned by the City and operated by the Co-op as follows:

Ref.	System	Scope
1.0	Combustion Air	Controls re-commissioning, includes: <ol style="list-style-type: none"> <li>1. Modification of auto/manual reset,</li> <li>2. Review of low load air control curve,</li> <li>3. Replacement of process sensors on Oxygen Analyzers.</li> </ol>
2.0	Field Device Wiring	<ol style="list-style-type: none"> <li>1. City water meter signal to display in control room</li> <li>2. Boiler combustion air and flue gas temperature sensors I/O integration to Intellution data historian.</li> </ol>
3.0	Coal Feeder Modification	<ol style="list-style-type: none"> <li>1. Engineering and general arrangement drawing for mechanical installation and power/controls interface.</li> <li>2. Installation and commissioning of (4) variable speed drives to replace current gear drive system.</li> </ol>
4.0	Performance Monitoring Package	Includes: <ol style="list-style-type: none"> <li>1. Screen displays of plant level performance (efficiency %) based on ASTM heat loss methodology</li> <li>2. Modification of the Intellution license to allow increased tags and functionality</li> <li>3. Reporting features to support:               <ul style="list-style-type: none"> <li>• carbon offset accounting</li> <li>• routine operational assessment of the plant.</li> </ul> </li> <li>4. Manual data input to support coal quality reporting</li> <li>5. Users' guide and on-site training. The training program will include up to 12 hours of remote support during the 90 days immediately following completion of the on-site training.</li> </ol>
5.0	Warranty	<ol style="list-style-type: none"> <li>1. Warranty coverage will be as provided by the OEM and/or Services Supplier associated with each of the systems. Each system will go through a joint check-out and acceptance process by representatives from JCI and the City and Co-op . Subsequent to such acceptance,</li> </ol>

		<p>warranty claims may be made directly by the City and Co-op to the respective OEM or Services supplier. A schedule of such OEMs and Services Suppliers will be made available to the City and Co-op as part of the final acceptance process.</p>
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## Exhibit B– Calculation of Offsets

In accordance with paragraph 6 of the Settlement Agreement and Mutual Release, the annual calculation of offsets will be determined under the following formula exclusively developed by JCI and will consist of a methodology for the annual calculation of offsets substantially in the form set forth in this Exhibit B, subject to the review and concurrence of the Oregon Climate Trust (the “Trust”). The Trust may request certain modifications to the formula as part of its review and concurrence.

Once the Trust has approved the final methodology, this final methodology formula shall be incorporated into this Agreement and shall be the sole methodology used by JCI for reporting purposes between it and the Trust. Any such revision to Exhibit B requested by the Trust shall be initialed by the Trust to indicate its agreement with the methodology as final.

For clarity, this final calculation methodology shall not apply to incremental offsets achieved by the City and Co-op as described in paragraphs 6(b) and (c) of the Agreement. Those increments are determined under paragraphs 6(b) and (c) of the Agreement and in the paragraphs below of this Exhibit B under the heading “Consideration of future plant capital improvements that may result in incremental offsets”.

Calculation of carbon offsets will be done on the basis of a full year of plant operation and account for all revenue generating loads served by the plant. The general premise of this approach involves determining plant efficiency factors which are generated from the output parameters for Hot Water and Steam loads and compared to the input Coal+Natural Gas Load parameter. Once all of the annual inputs and outputs have been processed, JCI will calculate the total number of offsets based on the following steps. JCI will document this value in an M&V Report and send to a third party auditor (“Auditor”) for certification to the Oregon Climate Trust. A copy of said report shall also be provided to the City/Co-op.

### Offsets from Distribution Steam System Avoided Losses – C1

This parameter addresses savings associated with the Steam Distribution FIM. Performance Year #2 will serve as the agreed to value for the avoided steam loss associated with FIM-1. The avoided steam loss is divided by the current annual plant efficiency (E1) based upon output parameter “Hot Water and Steam Distribution Loads” and Total Fuel input parameter “Coal+Natural Gas loads” to determine the resulting offsets.

$$C1 = \text{Distribution Savings} / E1_{\text{current year}}$$

$$E1 = (\text{Steam Sold} + \text{Unaccounted Steam} + \text{Hot Water Load})_{\text{current year}} / \text{FUEL}_{\text{current year}}$$

*Parameters measured:* Steam sold, fuel consumed (current year), hot water load (sold)

*Parameters stipulated:* Distribution savings (37,600)

*Parameters calculated:* Unaccounted steam, Plant load efficiency (E1), offsets from steam system avoided losses (C1)

## Offsets from Plant Operation – C2

This parameter addresses savings associated with the water softening system (FIM 2) and the modifications related to the boiler controls and pulverizer (FIM 3). Annual metered Hot Water Sold and Steam Sold load is compared to the base year “plant metered load” efficiency (E2) minus the current annual fuel input.

$$C2 = (\text{Hot Water Sold} + \text{Metered Steam Sold})_{\text{current year}} / E2_{\text{base year}} - \text{FUEL}_{\text{current year}}$$

$$E2_{\text{base year}} = (\text{Steam Sold} + \text{Hot Water Sold})_{\text{base year}} / \text{FUEL}_{\text{base year}}$$

*Parameters measured:* Hot water sold (current year), metered steam sold (current year), fuel consumed (current year), hot water sold (base year), metered steam sold (base year), fuel consumed (base year)

*Parameters stipulated:* None

*Parameters calculated:* Metered load efficiency (E2), offsets from plant operation (C2)

## Total Metric tons of CO<sub>2</sub> Savings

Values C1 and C2 are converted into the equivalent amount of metric tons. The calculator uses the following equation:

$$(C1 + C2) / 15.76 = \text{metric tons of CO}_2 \text{ savings.}$$

Where: 15.76 = conversion of savings in MMBtu to Metric tons of CO<sub>2</sub> and will be calculated each year to account for annual variations in coal quality. Such calculation has been reviewed by City/Coop personnel and is incorporated in the annual offset reporting methodology.

### Consideration of Future Plant capital improvements that may result in incremental offsets.

In accordance with Settlement Agreement and Mutual Release Paragraph 6(b), the City and Co-op will be entitled to retain incremental offsets that are associated with their capital and other significant improvements or modifications to the Plant, distribution system, or systems/components other than the work performed by JCI under the original Performance Contract or modifications to be performed by JCI under Exhibit A in the Settlement Agreement and Mutual Release.

When such improvements are contemplated, the City or Co-Op will notify JCI of the intention to undertake such improvements and a timeline within which such improvements are expected to be completed. The City or Co-Op will also provide to JCI a calculation methodology consistent with the American Society of Mechanical Engineer (“ASME”) as a basis for quantifying the incremental carbon offsets created by such improvements or modifications. If ASME does not apply to the improvement, then another generally accepted environmental

protocol may be proposed by the City/Co-op to quantify such incremental carbon offsets. The methodology for making the incremental offset calculations will include, at least twelve (12) full months of pre-retrofit data.

If JCI agrees with the calculations and methodology, then the offsets created by such improvements will be subtracted from the annual offset calculations generated in accordance with Settlement Agreement 6.a. If JCI does not agree with the submitted calculations and methodology, then the calculations and methodology will be submitted to a third-party auditor, jointly selected by the parties, for final determination. The third-party auditor may be the Auditor that is retained to perform the annual offset certification, or another auditor. The expenses of any such review and determination will be shared equally by the parties.

(In the event that the contemplated improvement or modification is completed and operational mid-period during an annual reporting cycle, the calculation of incremental benefit will be prorated for the part year in which the improvement or modification becomes effective.)

**Minimum Reporting Obligations:**

The following table outlines a list of annual reporting obligation of the City/Co-Op to JCI .

Item	Title	Description
1.	Monthly plant reports	XL spreadsheets that are maintained by plant management to record the key O&M attributes of the plant.
2.	Coal Testing Reports	Only as required in response to Auditor's request.
3.	Coal Delivery invoices	Only as required in response to Auditor's request.
4.	Natural Gas Invoices	Only as required in response to Auditor's request.
5.	Plant Electrical Bills	Only as required in response to Auditor's request.
6.	Metered Steam Sales	Only as required in response to Auditor's request.
7.	Hot Water Sales	Only as required in response to Auditor's request.
8.	Field Device Calibration	Submitted annually, includes certification of replacement of Oxygen Sensor. Replacement of oxygen sensor to be done per manufacturer's specifications, not annually.
9.	Steam Meter Calibration	Submitted bi-annually – calibration by manufacturer specification
10.	Hot Water Meter Calibration	Submitted annually calibration by manufacturer specification
11.	Major Maintenance Reports	Associated with the hot water and steam distribution system, whenever there is a major leak or significant loss due to equipment malfunction (steam trap, valve, theft, meter error )

12.	Significant changes from historical operating norms.	This would account for changes in boiler operating pressure, pipeline distribution pressures, loss of major loads or gain of new loads, especially on the Hot water loop.
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