

PUBLIC WORKS & UTILITIES COMMITTEE

12-0291R

RESOLUTION AUTHORIZING AGREEMENT WITH EVER-GREEN ENERGY
DULUTH LLC TO OPERATE AND MANAGE DULUTH STEAM DISTRICT
NO. 1.

CITY PROPOSAL:

RESOLVED, that the proper city officials are authorized to enter into an agreement substantially in the form of that on file in the office of the city clerk as Public Document No. _____ with Ever-Green Energy Duluth, LLC for the operation of Duluth Steam District No. 1 through December 31, 2017 for a management fee of \$20,000 per month through December 31, 2013, \$20,600 per month between January 1, 2014 and December 31, 2016, and \$21,218 thereafter plus a one-time fee for development of a five-year strategic plan for the long-term development and operation of Duluth Steam District No. 1 for a cost not to exceed \$130,000, all payable from Fund No. 540-920-1495-5307 (Steam, Steam Department, Steam General and Administrative).

Approved:


Department Director

Approved for presentation to council:


Chief Administrative Officer

Approved as to form:


Attorney

Approved:


Auditor

PW&U/ATTY REA:dma 06/05/2012

STATEMENT OF PURPOSE: The purpose of this resolution is to authorize an agreement with Ever-Green Energy Duluth LLC to manage and operate the downtown steam plant and facilities, legally identified as Duluth Steam District No. 1, on behalf of the City through 2017.

The City initially acquired the steam plant and equipment from a private owner/operator who had determined to abandon the operation due to difficulties in meeting then-existing environmental regulations. Since that time the operation has been managed by a user cooperative which has used the facilities of the City for such work as purchasing, payroll, and capital improvements. The coop has acted as the managing agent and has employed all of the employees providing services to the operation.

Due to pending retirements of the two senior managers of the Duluth steam system, the Coop is facing transition to new managers over the next 24 months. The pending transitions provide an opportunity to look at the steam system with a long-term strategic focus, addressing its operations, customer base and system development potential as well as assessing environmental regulatory concerns and sustainability issues. Ever-Green Energy, a nationally known and experienced operator of district heating and cooling facilities was located and agreed to take on operation of the Duluth facilities through a wholly-owned subsidiary, Ever-Green Energy LLC ("EGE Duluth").

It is anticipated that operations will continue in substantially the same format as that presently existing. EGE Duluth will provide all management and operating services required by the district. The existing employees will become employees of Ever-Green Energy LLC, the parent company of EGE Duluth. EGE Duluth will honor the collective bargaining agreement of plant employees currently under renewal negotiations. The City will continue to pay all operating costs of the district and to control all capital improvements. The City Council will continue to approve the budget, approve rates for product and the City will receive all revenues generated by the district.

Ever-Green Energy is a recognized leader in the district energy field, in large part due to its work at District Energy St. Paul. District Energy St. Paul is recognized as the premier district energy system in North America due to its reputation for operating an efficient, reliable, and cost effective district system while integrating biomass, combined heat and power, solar thermal, chilled water storage, and efficient distribution systems. Ever-Green Energy has a reputation for being customer focused and providing outstanding customer service, particularly when it comes to helping customers increase their buildings' energy efficiency. Ever-Green Energy also has expertise in responsibly migrating district energy systems forward toward becoming more efficient and using sustainable energy sources. District Energy St. Paul has largely transitioned from being a coal based district energy system to a majority of the energy being supplied from renewable energy sources today. While upgrading, transforming and expanding District Energy St. Paul systems, Ever-Green Energy has been able to keep rates below inflation over the entire 30 year history.

The City will pay a management fee to EGE Duluth of \$20,000 per month which will increase to \$20,600 per month in 2014 and to \$21,218 per month in 2017. In addition the City will pay a one-time fee of \$130,000 for the development of the five-year plan; there will be no additional cost for annual updating.

**ENERGY SYSTEM MANAGEMENT
SERVICES AGREEMENT**

DULUTH STEAM DISTRICT NO. 1

EVER-GREEN ENERGY DULUTH, LLC

THIS AGREEMENT, effective as to the date of attestation thereto by the City Clerk as hereinafter set forth (the "Effective Date"), is entered into between the CITY OF DULUTH, a municipal corporation under the laws of the State of Minnesota, hereinafter referred to as "City", and EVER-GREEN ENERGY DULUTH, LLC, a limited liability company under the laws of the State of Minnesota and wholly owned affiliate of Ever-Green Energy, LLC, hereinafter referred to as "EGE-Duluth".

WHEREAS, City is the owner of the hereinafter-defined System which provides energy in the form of steam, hot water and cooled water to various Customers in Duluth's Downtown, Canal Park and East Hillside neighborhoods through a district energy system; and

WHEREAS, the City understands the importance of having robust energy infrastructure to provide reliable and affordable energy services to serve the needs of its businesses and residents in the 21st century; and

WHEREAS, district energy systems are proven to be flexible, efficient and reliable infrastructure, capable of integrating in a variety of energy sources, including renewables and low carbon energy sources to affordably meet the energy needs of its customers while reducing carbon emissions; and

WHEREAS, the System in Duluth has been managed and operated on behalf of City by the hereinafter-defined Coop consisting of Customers and the City for the benefit of the Customers; and

WHEREAS, City wishes to contract with a professional management company which will be able to manage the System on behalf of the City for the benefit of the Customers and also the City and the System itself, while working to advance the System and improve its efficiency; and

WHEREAS, City wishes to retain the knowledge of and experience with the operation and maintenance of the System that the Coop Employees have by transitioning their employment from the Coop to the professional management company; and

WHEREAS, EGE-Duluth is a professional management company that has proven experience managing, operating, advancing and modernizing district energy systems, and is capable and willing to provide such management and operating services to City and to the System, and is willing to employ the Coop Employees at its affiliate Ever-Green Energy, LLC

for the purpose of managing and maintaining the System under the terms and conditions hereinafter set forth.

NOW THEREFORE in consideration of the mutual covenants and conditions hereinafter set forth, the Parties hereto hereby agree as follow:

1. DEFINITIONS

The following terms and phrases shall have the meanings defined below:

- 1.1. CAO: shall mean the Chief Administrative Officer of the City or such other person or office in the City which he or she shall designate in writing to EGE-Duluth.
- 1.2. Capital Maintenance: shall mean maintenance projects shown in the approved budgets as provided for in Paragraph 2.3.2 below as Capital Maintenance Projects and such other maintenance projects or work determined by the CAO to be of such a size, scope or expense as to make it unreasonable to classify them as Routine Maintenance.
- 1.3. City Costs: shall mean all costs incurred by the City in support of the System and its operation and maintenance including but not limited to the cost of goods or services incurred for the benefit of the System, the cost of insurance purchased for the benefit of the System and the costs associated with any self-insurance program established by City for the benefit of the System, the value of City services provided to EGE-Duluth or to the System for the benefit of the System and the amount of the PILOT.
- 1.4. Coop: shall mean the Duluth Steam Cooperative Association, a cooperative association under the laws of the State of Minnesota which has been the operating entity of the System up to the effective date of this Agreement.
- 1.5. Coop Employees: shall mean the persons employed in the management and operation of the System by Coop on the effective date of this Agreement, which persons and positions are identified by name on Exhibit A attached hereto and made a part hereof.
- 1.6. Council: shall mean the City Council of the City of Duluth.
- 1.7. Customer: shall mean any person or entity owning, controlling, using or occupying any building or property in the areas served by the System who applies for, agrees to pay for or agrees to be responsible for product or services of any kind from the System provided to said building or property.
- 1.8. Energy: shall mean steam, hot water, cooled water or any other energy source used to provide heating or cooling to buildings or property in the areas served by the System.
- 1.9. Finance: shall mean the City of Duluth Department of Finance to the attention of the City Auditor.
- 1.10. GAAP: shall mean Generally Accepted Accounting Principles.
- 1.11. Management Services: shall mean the maintenance, operation, and oversight of the business operations of the System on behalf of the City as described in Paragraph 2 below. Business operations include such activities as marketing and sales, customer service and representing the System in the community.

Management Services shall be provided in accordance with System's existing guidelines, policies, procedures, agreements, and contracts with its Customers as modified or amended from time to time.

- 1.12. PILOT: shall mean the amount of the Payment In Lieu of Taxes authorized by the State of Minnesota to be collected by City from Customers and paid to the City's funds in lieu of taxes on the property of the System.
- 1.13. Reimbursable Expenses: shall mean all costs and expenses incurred directly by EGE-Duluth in the course of providing Management Services, a listing of the generally anticipated expenses is included in Exhibit B and will be listed as such in the budgets approved pursuant to Paragraph 3.3 below; provided that the CAO may approve reimbursement of other expenses not anticipated in said budgets in writing in the exercise of his or her reasonable discretion. Reimbursable Expenses include the expenses for the on-going operation and maintenance and business operations of the System not paid directly by the City, and all labor related costs including costs for Duluth staff positions that exist as of the effective date of this Agreement listed in Exhibit A, and other staff positions and costs that are approved by the City during the budgeting process or by the CAO. Labor related costs include but are not limited to compensation, health benefits, retirement plan benefits, paid-time-off, sick leave, vacation pay, Workers' Compensation, Unemployment Insurance, long and short term disability pay and severance pay, and any and all other reasonable employment-related expenses. The Parties will review and jointly determine which expenses shall be paid directly by the City. With the exception of labor costs, it is anticipated that most expenses for the on-going operation and maintenance of the system will be paid directly by the City. All business and liability insurance purchased by EGE-Duluth for the purpose of this Agreement shall be considered a reimbursable expense.
- 1.14. Routine Maintenance: shall mean any and all maintenance, repair or replacement of any portion of the System, the maintenance, repair or replacement of which is usual and customary in the ordinary or day-to-day operation of the System.
- 1.15. Management Fee: shall mean the monthly fee paid by the City to EGE-Duluth under the terms pursuant to Paragraph 5.1. below.
- 1.16. Start Date: shall mean the date established by the CAO in writing to EGE-Duluth which shall be a date after the date upon which Coop management contract with the City is terminated, Coop Employees together with the newly ratified collective bargaining agreement with International Union of Operating Engineers, Local No. 70 are transitioned from the Coop to Ever-Green Energy, LLC, and responsibility for the Management Services described herein are fully and completely transitioned from the Coop to EGE-Duluth.
- 1.17. System: shall mean Duluth Steam District No. 1 located in Downtown Duluth, Canal Park and in the East Hillside neighborhood as it exists as of the effective date of this Agreement and as it may, from time to time, be expanded, added to or supplemented, including all steam, hot water, cooled water, and electrical

power generating facilities and equipment together with all buildings, structures, hot or chilled water storage facilities, piping, valves, meters and equipment, inventory and other City-owned property of any kind whatsoever, whether located on City-owned property or easements or on private property, used in the generation of steam, hot water, or cooled water and electrical power and its distribution as part of the business of the System.

- 1.18. System Advisory Board (the "SAB"): shall mean the board described in Paragraph 2.5.1. below.

2. EGE-DULUTH OBLIGATIONS

Subject to the direction of the CAO and to the terms and conditions of this Agreement EGE-Duluth shall provide Management Services necessary and convenient for the complete administration, operation and maintenance of the System, including but not limited to the following:

2.1. Employment-Related

- 2.1.1. Employ, provide and pay for all administrative, professional, including managerial and legal, skilled and unskilled labor and any other personnel necessary for the performance of EGE-Duluth's responsibilities under this Agreement. All such persons shall be qualified to perform the services they are hired to perform and, where applicable, properly licensed by appropriate licensing authorities to perform said work. All such persons shall be employees or agents of EGE-Duluth and not of City.
- 2.1.2. Hire, train, supervise, control, discipline and terminate any employees, agents or subcontractors as is appropriate and necessary to the efficient performance of EGE-Duluth's responsibilities under this Agreement.
- 2.1.3. Offer employment to all Coop Employees through its affiliate Ever-Green Energy, LLC. The new, ratified, three year collective bargaining agreement for the Coop Employees represented by the International Union of Operating Engineers, Local No. 70 shall be assumed by EGE-Duluth's affiliate Ever-Green Energy, LLC on the Start Date. All Coop Employees not represented by a collective bargaining agreement shall be offered an employment contract, including benefits with Ever-Green Energy. Available benefits shall be on a level roughly equivalent to those Coop benefits in place immediately prior to the Start Date and shall remain so up to December 31, 2013. Notwithstanding, Ever-Green Energy and EGE-Duluth each shall retain its rights to supervise, control, discipline and terminate any and all employees pursuant to Paragraph 2.1.2 above and with the alternative to enter into an employment agreement of a set duration with any employee not otherwise represented under a collective bargaining agreement.
- 2.1.4. Pay all employees and agents of EGE-Duluth providing service to the System in accordance with applicable contracts and provide applicable payroll services, withholdings and reporting necessary thereto.

2.2. System Maintenance and Operation

- 2.2.1. Safely operate and control the System so as to provide Energy to all System Customers in quantities and within time frames as needed by such Customers and in a manner which will deliver said Energy to said Customers in the most efficient and cost-effective manner possible in accordance with normal business practices, Customer contracts, and to the extent practical within the capabilities of the System at a given time and in accordance with laws, rules and regulations related to System operations described in 2.2.10.
- 2.2.2. Perform all required Routine Maintenance of the System and all component parts thereof to keep the System operational and to fulfill the requirements of Paragraph 2.2.1. above to the extent practical.
- 2.2.3. Both Parties understand the critical nature of the services provided by the System, and that from time to time the System will need to undergo repairs, replacements, improvements or extensions. As the manager of the System EGE-Duluth shall, when necessary to make repairs or extensions to mains, pipes, conduits, service connections, or generating plants, have the right to temporarily shut off the supply of steam, hot water or chilled water to the premises of any Customer in accordance with the System's Customer contracts, provided a reasonable notice of such intention is given to the Customer and the repairs or such extensions are made with due diligence, and priority is given to restoring services to facilities necessary for the protection of human life, health, and safety. EGE-Duluth shall regularly review the System's policies and procedures regarding service interruptions. Recommended changes shall be reviewed by the SAB and approved by the CAO.
- 2.2.4. Maintain copies of all plans, specifications, technical and operating manuals, maintenance records, operating history and other documents pertaining to the construction, reconstruction, repair, maintenance and operations of the System provided to EGE-Duluth by the City at the commencement of this Agreement and created during EGE-Duluth's management of the system. All such information and documents shall be the property of the City and, upon termination of this Agreement, shall be turned over to City.
- 2.2.5. Maintain adequate supplies of fuel and spare parts necessary for the maintenance and operation of the System as set forth in Paragraphs 2.2.1 and 2.2.2 above, to the extent provided in the budget approved by the City.
- 2.2.6. Work with City Purchasing to purchase all fuel, parts and equipment and the services of contractors to perform construction, reconstruction and non-Routine Maintenance of the System in accordance with State purchasing law and with the City Charter except as set forth in Exhibit B.

- 2.2.7. Prepare and file all reports and information required by all federal or state regulatory agencies or authorities having authority over any aspect of the facilities or operations of the System.
- 2.2.8. Make no structural change in or addition to the System, except the hooking up of new steam, hot water, or cooling service Customers into existing lines, without prior budget approval or written approval of the CAO.
- 2.2.9. Keep the System operational and maintain the system in the same general condition or better than it was in at the commencement of this Agreement, reasonable wear and tear excepted.
- 2.2.10. Operate and maintain the System in conformance with all applicable Federal, State and local laws, ordinance, rules, agreements, regulations and codes, including but not limited to those pertaining to employment, safety, industrial and environmental issues, applicable to the maintenance and operation of the System and to promptly provide copies of all reports received by EGE-Duluth regarding compliance therewith or relating to the condition of the System or any portion or component part thereof.
- 2.2.11. The City shall give EGE-Duluth the right to remotely monitor alarms and the performance of the System during the term of this Agreement.

2.3. Financial Matters

- 2.3.1. No later than September 1st of each year, develop and transmit to the Council annual capital improvement, capital maintenance and operating budgets for the following budget year. Submitted budgets shall include sufficient capital, maintenance and operating costs to meet the System's regulatory obligations described in Paragraph 2.2.10.
- 2.3.2. Working together with the CAO, secure approval of said budget from Council.
- 2.3.3. Maintain complete books and records in accordance with GAAP of all income, expenses, liability and assets pertaining to the System and to its operation and maintenance.
- 2.3.4. No later than the Fifteenth (15th) day of each month, provide to Finance an invoice that includes a statement of all EGE-Duluth income and expenses, including Reimbursable Expenses, resulting from the management of the System for the prior month, including copies of all bills, receipts, checks and payment authorizations of any kind pertaining thereto. Such statement shall include a comparison of such budgeted income and expenses to the budgeted income and expenses for said month and on a year-to-date basis. Such statements and the supporting documentation shall be subject to the approval of Finance. Notwithstanding the above, EGE-Duluth shall submit to Finance biweekly invoices for its labor expenses resulting from the management of the System.

- 2.3.5. No later than the last day of each month, provide to Finance a statement of all income and expenses for the System for the prior month. Such statement shall incorporate the financial information provided by Finance pursuant to Paragraph 3.7. below in the appropriate accounts of EGE-Duluth for the System and shall include a comparison of such budgeted expenses to the budgeted expenses for said month and on a year-to-date basis.
- 2.3.6. No later than March 15th of each year, provide to Finance a full financial audit of financial records of EGE-Duluth for the operation of the System for the prior financial year complying with the requirements of GAAP. Said audit shall incorporate the financial information provided by Finance pursuant to Paragraphs 3.9. and 3.10. below in the appropriate accounts of EGE-Duluth for the System.
- 2.3.7. Develop and present to Council a Five (5) year plan for the long-term development and operation of the System. The initial plan shall be presented to the Council within 15 months of the Effective Date of this Agreement. The scope of the Five year plan shall be as described on Exhibit C. The plan shall be reviewed annually, and the appropriate updates made and submitted to the Council.
- 2.3.8. Develop and recommend for approval by Council appropriate rates for the sale and provision of services to Customers, which rates shall be sufficient to fund the approved budget for the System including the cost of capital improvements to the system approved by Council, debt service, Capital Maintenance approved by Council, operating expenses, Reimbursable Expenses, Routine Maintenance costs, the City Expenses, the PILOT, operating and capital reserves in accordance with GAAP and any other costs of the System approved by Council. Rate structure shall be consistent with the rate structure in effect the Effective date of this Agreement unless and until a modification is approved by Council.
- 2.3.9. Invoice to and collect from Customers monthly all payments due for product and services provided to such Customers at the rates approved by Council including the collection of all delinquent accounts. In the event that a Customer fails to enter into or extend an existing agreement for services, or defaults in its payments for steam, hot water or chilled water service EGE-Duluth shall follow the System's written guidelines, policies and procedures concerning notice and hearing, and discontinuing or refusing service to a Customer. EGE-Duluth shall regularly review the System's guidelines, policies and procedures regarding interruption or discontinuing service. Recommended changes shall be reviewed by the SAB and approved by the CAO.
- 2.3.10. No later than Thursday of each week, remit to Finance all payments received from Customers and any other party received by EGE-Duluth during the prior seven (7) calendar days.

2.4. Purchasing

- 2.4.1. Within the approved budget, purchase directly as manager of System all supplies, goods and services included as Reimbursable Expenses on Exhibit B.
- 2.4.2. Request that City Purchasing purchase all goods, equipment, supplies, fuel and contract services necessary to the operation, maintenance and improvement of the System, subject to the approved budget, supply all information necessary to the City Purchasing Agent to purchase the same and use the services of the City Purchasing Agent to make such purchases subject to approval thereof by the Council except as set forth in Paragraph 2.4.3. below. All such purchases and purchasing procedures shall be subject to and conform to the requirements of State statute, the City's City Charter and the City's City Code.
- 2.4.3. In the event of an emergency beyond the control of EGE-Duluth which requires that goods or services be purchased outside of the scope of the procedure set forth in Paragraph 2.4.2. above, EGE-Duluth may make such purchases provided that notification to the CAO or the City Purchasing Agent be made within a reasonable time after said purchase, but no later than two business days. Upon approval from the CAO or the City Purchasing Agent for any such emergency purchase, EGE-Duluth may purchase such goods or services in conformance with said procedure.

2.5. System Advisory Board

- 2.5.1. Create, maintain and staff a System Advisory Board, hereinafter referred to as "SAB", consisting of a representative membership of System's Customers and community to meet no less than quarterly for the purpose of receiving reports on from EGE-Duluth on the operation of the system and advising EGE-Duluth on matters pertaining to the operation and maintenance of the System including services provided and rates charged. The SAB shall have a minimum of five members. Membership and the operation of the SAB shall be subject to the approval of the CAO.

2.6. Annual Customer Survey

- 2.6.1. Annually survey Customers to measure the experience of the System's Customers. Results shall be summarized and shared with the City and SAB.

3. CITY OBLIGATIONS

City shall be responsible to perform the following tasks and provide the following services in the time frames hereinafter set forth.

- 3.1 Provide and pay for all administrative services, professional services, including legal services, and labor services sufficient and necessary to the performance of City's responsibilities as set forth in this Agreement.
- 3.2. Provide copies of all plans, specifications, manuals and other documents in City's possession pertaining to the system to EGE-Duluth for their use in operating and maintaining the System, provided that all such documents shall remain the

property of City and shall be returned to City in good condition upon any termination of this Agreement.

- 3.3 Review and approve the annual budgets for the System, referenced in Paragraph 2.3.1. above, in time frames allowing their implementation for the next budget year, subject to receipt thereof from EGE-Duluth in time frames permitting considered review and approval thereof. The approved budgets shall include sufficient funding to allow EGE-Duluth to meet the obligations contained in Paragraph 2.2.10.
- 3.4 Maintain a budgeting and procurement approval process that enables EGE-Duluth to reasonably obtain approvals for authorized expenditures.
- 3.5 Review and approve the Five (5) year Plan for the System referred to in Paragraph 2.3.7. above.
- 3.6. Process payment to EGE-Duluth for labor expenses resulting from the management of the System within three (3) business days of receipt of invoice from EGE-Duluth.
- 3.7. No later than the first Monday of the month following the month to which they are attributable, pay to EGE-Duluth the Management Fee attributable to said month as set forth in Paragraph 5.1. below.
- 3.8. No later than the Twentieth (20th) day of the month following the month in which the Reimbursable Expenses were incurred by EGE-Duluth, reimburse EGE-Duluth for said Reimbursable Expenses in amounts approved pursuant to Paragraph 2.3.4. above.
- 3.9. No later than the Tenth (10th) day of the month following the month in which they paid by City, transmit to EGE-Duluth a full accounting of all expenses paid by City during the preceding month which are chargeable to the budgets for the System.
- 3.10. In conformance with the requirements of State statute and the City's City Charter and its City Code, purchase and contract for all goods, equipment, supplies, fuel and services required for the operation, maintenance and betterment of the System as are provided for in the approved budgets, except purchases of those goods and services provided for Exhibit B.
- 3.11. Fund all accrued liabilities that are transitioned to EGE-Duluth as a result of Paragraph 2.1.3.

4. TERM

4.1. Initial Term

The initial term of this Agreement shall commence as of the Start Date and shall terminate on December 31, 2017, unless extended or sooner terminated as hereinafter provided for. In the event that a Party to this Agreement determines it will not renew or extend this Agreement or enter into a new agreement beyond the initial term, that Party must give notice to the other Party no later than December 31, 2016, to allow sufficient time to transition management of the System beginning January 1, 2018.

4.2. Early Termination

After January 1, 2015, either Party may terminate this Agreement by giving to the other at least one year's advance written notice of such termination.

5. FEES

5.1. Management Fee: As compensation for the Management Services rendered to the City under this Agreement, the City agrees to pay to EGE-Duluth a Management Fee in the amount of \$20,000 per month, plus Reimbursable Expenses as defined in Paragraph 1.13., payable from Fund 540-920-1495-5307. The Management Fee shall commence on the Start Date of this Agreement. Beginning January 1, 2014, unless earlier terminated, the Management Fee shall increase by three percent (3%) to \$20,600 per month and shall increase by an additional three percent (3%) on January 1, 2017, to \$21,218 per month.

5.2. Transition Costs: Parties agree that after the Effective Date of this Agreement and prior to the Start Date, EGE-Duluth will be performing activities necessary to transition management of the system and the Coop Employees from the Coop to EGE-Duluth and will be experiencing costs during this transition period. Parties anticipate the transition will occur over a period of between one and three months. During this transition period, the City agrees to pay EGE-Duluth the Management Fee each month of the transition. In the event the transition from the Coop is delayed, the CAO will notify EGE-Duluth to suspend its transition activities until such time that the transition activities are able to resume.

5.3. System Planning Fee: For preparation of the Five Year Plan described in Paragraph 2.3.7, the City agrees to pay to EGE-Duluth a fee of \$130,000 payable from Fund 540-920-1495-5307. EGE-Duluth shall invoice the City monthly for progress payments.

5.4. Additional Services: The Parties agree that this Agreement does not include all of the professional services that EGE-Duluth is capable of providing or that may be requested of EGE-Duluth by the City. In the event the City determines that additional services are needed from EGE-Duluth, the Parties agree to meet and confer and exert their best efforts to reach a mutually acceptable agreement on the terms and conditions under which EGE-Duluth will perform said service or services. EGE-Duluth's standard rates shall apply for Additional Services.

6. STANDARD OF PERFORMANCE

6.1. EGE-Duluth agrees that all services to be provided to City pursuant to this Agreement shall be in accordance with the generally accepted practices of the profession for provision of services of this type.

7. RECORDS AND INSPECTIONS

7.1. Establishment and Maintenance of Records

Records shall be maintained by EGE-Duluth in accordance with requirements prescribed by City at the execution of this Agreement and such other prospective records required by the City, and with respect to all matters covered by this

Agreement. Such records shall be maintained for a period of six (6) years after receipt of final payment under this Agreement.

7.2. Documentation of Costs

EGE-Duluth will ensure that all costs shall be supported by properly executed payrolls, time records, invoices, contracts, vouchers or other official documentation evidencing in proper detail the nature and propriety of the charges. All checks, payrolls, invoices, contracts, vouchers, orders or other accounting documents pertaining in whole or in part to this Agreement shall be clearly identified and readily accessible.

7.3. Reports and Information

EGE-Duluth shall be responsible for furnishing to City records, data and information as City may reasonably require pertaining to matters covered by this Agreement.

7.4. Audits and Inspections

EGE-Duluth shall ensure that at any time during normal business hours and as often as City may deem necessary, there shall be made available to City for examination, all of its records with respect to all matters covered by this Agreement. EGE-Duluth will also permit City to audit, examine and make excerpts or transcripts from such records, and to make audits of all contracts, invoices, materials, payrolls, records of personnel, conditions of employment, and other data relating to all matters covered by this Agreement.

7.5. Confidentiality of Information

All reports, data, information, documentation and material given or prepared by the EGE-Duluth pursuant to this Agreement will be confidential and will not be released by EGE-Duluth without prior authorization in writing from CAO except as required for the performance of EGE-Duluth's services or as required by law.

7.6. Ownership of Data

All survey notes, reports, design plans, specifications, special studies, records and other data prepared under this Agreement shall become the property of City upon completion or termination of the services of EGE-Duluth.

8. INDEPENDENT CONTRACTOR

8.1. It is agreed that nothing herein contained is intended or shall be construed in any manner as creating or establishing a relationship of co-partners between the parties hereto or of constituting EGE-Duluth as an agent, representative or employee of City for any purpose or in any manner whatsoever. EGE-Duluth and any officers or employees thereof shall not be considered an employee of City, and any and all claims that may or might arise under the Workers' Compensation Act of the State of Minnesota on behalf of EGE-Duluth while so engaged and any and all claims whatsoever on behalf of EGE-Duluth arising out of employment or alleged employment, including without limitation, claims of discrimination against City, its officers, agents, contractors or employees shall in no way be the responsibility of City. EGE-Duluth and its officers, agents, contractors and employees shall not be entitled to any compensation or rights or benefits of any

hospital care, sick leave and vacation pay, Workers' Compensation, Unemployment Insurance, disability pay or severance pay from the City. Furthermore, City shall not, in any way, be responsible to defend, indemnify or save harmless EGE-Duluth from liability or judgments arising out of the intentional or negligent acts or omissions of EGE-Duluth or any Team member while performing the work specified by this Agreement.

9. INDEMNITY AND INSURANCE

9.1. Indemnity

EGE-Duluth agrees that it shall defend, indemnify and save harmless, City and its officers, agents, servants and employees from and against any and all claims, demands, suits, judgments, costs and expenses asserted by any person or persons, including agents or employees of City or of EGE-Duluth, by reason of the death of or injury to person or persons or the loss of or damage to property directly arising out of EGE-Duluth's performance of its obligations under this Agreement. On ten (10) days' written notice from any of City, EGE-Duluth will appear and defend all lawsuits against City directly arising out of such injuries or damages.

9.1.1. City shall indemnify EGE-Duluth for all known or unknown adverse environmental conditions which constitute a violation of any environmental law or laws or regulations with regard to pollutants or hazardous or dangerous substances which EGE-Duluth establish existed on the property occupied by the System prior to the Effective Date.

9.2. Insurance

9.2.1. Liability Insurance

EGE-Duluth shall procure and maintain continuously in force Public Liability Insurance written on an "occurrence" basis under a Comprehensive General Liability Form in limits of not less than One Million Five Hundred Thousand and No/100s (\$1,500,000.00) Dollars aggregate per occurrence for personal bodily injury and death, and limits of One Million Five Hundred Thousand and No/100s (\$1,500,000.00) Dollars for property damage liability and twice those amounts for environmental liability. If person limits are specified, they shall be for not less than One Million Five Hundred Thousand and No/100s (\$1,500,000.00) Dollars per person and be for the same coverages. The City shall be named as an additional insured therein. Insurance shall cover:

9.2.1.1. Public liability.

9.2.1.2. Independent contractors--protective contingent liability.

9.2.1.3. Personal injury.

9.2.1.4. Contractual liability covering the indemnity obligations set forth herein, coverage subject to approval of the City.

9.2.2. Workers' Compensation

EGE-Duluth shall procure and maintain continuously in force Workers' Compensation Coverage in statutory amounts with "all states" endorsement. Employer's liability insurance shall be carried in limits meeting or exceeding the requirements of the State of Minnesota for such insurance.

9.2.3. Crime Coverage

Standard Crime Coverage insurance in the amount of not less than \$300,000 per occurrence.

9.2.4. Professional Liability

Insurance covering design and engineering services provided by EGE-Duluth or provided by any contractor or subcontractor to EGE-Duluth with per claim and aggregate limits of not less than \$2,000,000.

9.3. Requirements for All Insurance

All insurance required in this Paragraph 9. shall be taken out and maintained in responsible insurance companies organized under the laws of the states of the United States and licensed to do business in the State of Minnesota. City shall be named as an "additional insured" on each liability policy other than the Workers' Compensation policies of EGE-Duluth.

9.4. Certifications

EGE-Duluth to provide proof of insurance by filing with the City certificates of insurance evidencing such coverage. EGE-Duluth to provide Certificate of Insurance evidencing such coverage with 30 days notice of cancellation, non-renewal or material change provisions included. City does not represent or guarantee that these types or limits of coverage are adequate to protect the EGE-Duluth's interests and liabilities. If a certificate of insurance is provided, the form of the certificate shall contain an unconditional requirement that the insurer notify the City without fail not less than 30 days prior to any cancellation, non-renewal or modification of the policy or coverages evidenced by said certificate and shall further provide that failure to give such notice to City will render any such change or changes in said policy or coverages ineffective as against the City. **The use of an "Accord" form as a certificate of insurance shall be accompanied by two forms – 1) ISO Additional Insured Endorsement (CG-2010 pre-2004) and 2) Notice of Cancellation Endorsement (IL 7002) – or equivalent, as approved by the Duluth City Attorney's Office.** EGE-Duluth shall be permitted to obtain the insurance required under this Agreement on a "blanket" basis, and shall be entitled to satisfy any insurance requirements with a combination of primary liability and umbrella coverage.

10. NON-ASSIGNMENT

10.1. The parties hereto acknowledge that City is relying upon the qualifications and identify of EGE-Duluth to operate the System and property related thereto. Therefore, except as otherwise approved by this Agreement, EGE-Duluth represents and agrees for itself, its successors and assigns that it has not made

or created, and will not make or create or suffer to be made or created, any total or partial sale, assignment, conveyance, lease, trust, lien or power of attorney, and has not or will not otherwise transfer in any other way all or any of its rights or obligations under this Agreement or any other contract or agreement entered into in connection with carrying out its obligations hereunder; and EGE-Duluth will not make or create or suffer to be made any such transfer of EGE-Duluth's rights hereunder without the prior approval of the CAO.

11. CIVIL RIGHTS ASSURANCES

11.1. EGE-Duluth, for itself and its officers, agents, servants and employees as part of the consideration under this Agreement, does hereby covenant and agree that:

11.1.1. No person on the grounds of race, color, creed, religion, national origin, ancestry, age, sex, marital status, status with respect to public assistance, sexual orientation and/or disability shall be excluded from any participation in, denied any benefits of or otherwise subjected to discrimination with regard to the work to be done pursuant to this Agreement.

11.1.2. That all activities to be conducted pursuant to this Agreement shall be conducted in accordance with the Minnesota Human Rights Act of 1974, as amended (Chapter 363), Title 7 of the U.S. Code and any regulations and executive orders which may be affected with regard thereto.

12. DEFAULTS AND REMEDIES THEREFORE

12.1. General Defaults and Remedies

12.1.1. General Events of Default by EGE-Duluth

The following shall be deemed to be general events of default by EGE-Duluth under the terms and conditions of this Agreement to which the remedies set forth in Subparagraph 2 below shall be applicable as otherwise set forth in this Agreement.

12.1.1.1. EGE-Duluth shall fail to pay any payment due to City under this Agreement within ten (10) days of the date said payment is due provided City provides written notice of intent to implement this provision at least five (5) business days in advance.

12.1.1.2. EGE-Duluth shall fail to observe or perform any of the other terms, conditions, covenants or agreements required to be observed or performed by it or any successors or assigns of EGE-Duluth pursuant to this Agreement and such failure shall continue for a period of thirty (30) calendar days after City has, pursuant to the provisions of this Agreement, given written notice to EGE-Duluth of such default or, in the event that such default shall be incapable of cure during said thirty (30) day period, shall have failed to commence to cure said default

within thirty (30) days of the date of said notice and to diligently pursue the same to completion.

- 12.1.1.3. EGE-Duluth makes an assignment for the benefit of its creditors or admits in writing its inability to pay its debts as they become due; or an adjudication of bankruptcy or insolvency as made as to EGE-Duluth or its business; or EGE-Duluth files a petition of bankruptcy or files a petition seeking any reorganization, dissolution, liquidation, or rearrangement, composition, readjustment or similarly under any present or future bankruptcy or insolvency statute, law or regulation; or EGE-Duluth files an answer admitting to or not contesting to the material allegations of a petition filed against in such proceeding or fails to have dismissed or vacated within thirty (30) days after its filing such a petition or seeks or consents or acquiesces in the appointment of any trustee, receiver or liquidator of a material part of EGE-Duluth's properties or fails to have dismissed or vacated within thirty (30) days after the appointment without the consent or acquiescence of EGE-Duluth of any trustee, receiver or liquidator of any material part of EGE-Duluth's properties.

12.1.2. City's Remedies

Except as otherwise set forth in this Agreement, City shall have the following remedies in the event of a default by EGE-Duluth:

- 12.1.2.1. Terminate this Agreement and, at its discretion, assume management and operating responsibility of the System from EGE-Duluth.
- 12.1.2.2. Seek and be entitled to monetary damages from EGE-Duluth for any damages incurred by City as a direct result of EGE-Duluth's default.
- 12.1.2.3. Seek and be entitled to injunctive or declaratory relief as is necessary to prevent EGE-Duluth's violation of the terms and conditions of this Agreement or to compel EGE-Duluth's performance of its obligations hereunder.
- 12.1.2.4. Seek such other legal or equitable relief as a court of competent jurisdiction may determine is available to City.

12.1.3. General Events of Default by City

The following shall be deemed to be general events of default by City under the terms and conditions of this Agreement to which the remedies set forth in Subparagraph 4 below shall be applicable as otherwise set forth in this Agreement.

- 12.1.3.1. City shall fail to pay any payment due to EGE-Duluth under this Agreement within ten (10) days of the date said payment is due provided EGE-Duluth provides written

notice of intent to implement this provision at least five (5) business days in advance.

12.1.3.2. City shall fail to observe or perform any of the other terms, conditions, covenants or agreements required to be observed or performed by it or any successors or assigns of City pursuant to this Agreement and such failure shall continue for a period of thirty (30) calendar days after EGE-Duluth has, pursuant to the provisions of this Agreement, given written notice to City of such default or, in the event that such default shall be incapable of cure during said thirty (30) day period, shall have failed to commence to cure said default within thirty (30) days of the date of said notice and to diligently pursue the same to completion.

12.1.4. EGE-Duluth's Remedies

Except as otherwise set forth in this Agreement, EGE-Duluth shall have the following remedies in the event of a default by City:

12.1.4.1. Terminate this Agreement.

12.1.4.2. Seek and be entitled to monetary damages from City for any damages incurred by EGE-Duluth as a result of City's default.

12.1.4.3. Seek and be entitled to injunctive or declaratory relief as is necessary to prevent City's violation of the terms and conditions of this Agreement or to compel City's performance of its obligations hereunder.

12.1.2.4. Seek such other legal or equitable relief as a court of competent jurisdiction may determine is available to EGE-Duluth.

12.2. Non-Waiver

12.2.1. The waiver by City of any default on the part of EGE-Duluth or the failure of City to declare default on the part of EGE-Duluth of any of its obligations pursuant to this Agreement shall not be deemed to be a waiver of any subsequent event of default on the part of EGE-Duluth of the same or of any other obligation of EGE-Duluth hereunder. And, to be effective, any waiver of any default by EGE-Duluth hereunder shall be in writing by City.

12.2.2. The waiver by EGE-Duluth of any default on the part of the City or the failure of EGE-Duluth to declare default on the part of the City of any of its obligations pursuant to this Agreement shall not be deemed to be a waiver of any subsequent event of default on the part of City of the same or of any other obligation of City hereunder. And, to be effective, any waiver of any default by City hereunder shall be in writing by EGE-Duluth.

12.3. Remedies Cumulative

Except as specifically set forth herein, the remedies provided under this Agreement shall be deemed to be cumulative and non-exclusive and the election of one remedy shall not be deemed to be the waiver of any other remedy with regard to any occasion of default hereunder.

12.4. Attorneys' Fees

Each party hereto shall be responsible for all of its costs for any litigation arising under or related to this Agreement including but not limited to attorney's fees and costs and other expenses related thereto.

13. RULES AND REGULATIONS

13.1. EGE-Duluth agrees to observe and comply with all laws, ordinances, rules and regulations of the United States of America, the State of Minnesota and City and their respective agencies which are applicable to its activities under this Agreement.

14. NOTICES

14.1. Notice to City or EGE-Duluth provided for herein shall be sufficient if sent by the regular United States mail, postage prepaid, addressed to the parties at the addresses hereinafter set forth or to such other respective persons or addresses as the parties may designate to each other in writing from time to time:

City: Chief Administrative Officer
City of Duluth
Room 402 City Hall
Duluth, MN 55802

EGE-Duluth: President/CEO
Ever-Green Energy Duluth, LLC
1350 Landmark Towers
345 St. Peter Street
St. Paul, MN 55102

15. APPLICABLE LAW

15.1. This Agreement, together with all of its paragraphs, terms and provisions is made in the State of Minnesota and shall be construed and interpreted in accordance with the laws of the State of Minnesota.

16. SEVERABILITY

16.1. In the event any provision herein shall be deemed invalid or unenforceable, the remaining provisions shall continue in full force and effect and shall be binding upon the parties to this Agreement.

17. FORCE MAJEURE

17.1. If, because of force majeure, either party shall be unable to carry out any of its obligations under this Agreement, then the obligations of that party shall be suspended to the extent made necessary by such force majeure. The party affected by force majeure shall give notice to the other party as promptly as practicable of the nature and probable duration of such force majeure. The term "force majeure" shall mean acts of God, legislation or lawful regulations of any governmental body; court orders; acts of public enemy; sabotage; riots; strikes; labor disputes; labor or material shortages; fires; explosions; floods; breakdowns or damage to plants; equipment, or facilities; interruptions in transportation or embargoes; inability to secure fuel or electric power or other causes of a similar nature which wholly or partially prevents the delivery of energy service from the system. City and EGE-Duluth shall use all reasonable means of avoiding the consequences of any of the foregoing. City shall pay such costs or expenses which EGE-Duluth incurs pursuant to this Agreement during force majeure that cannot be mitigated.

18. ENTIRE AGREEMENT

18.1. It is understood and agreed that the entire agreement of the parties is contained herein and that this Agreement supersedes all oral agreements and negotiations between the parties relating to the subject matter hereof. Any amendment to this Agreement shall be in writing and shall be executed by the same parties who executed the original agreement or their successors in office.

IN WITNESS WHEREOF, the parties have hereunto set their hands the day and date first above shown.

CITY OF DULUTH, a Minnesota

EVER-GREEN ENERGY DULUTH, LLC, a Minnesota
Limited Liability Company

municipal corporation
development authority

By: _____
Its Mayor

By: _____
Its

Attest:

City Clerk

Date _____

Approved:

Countersigned:

Assistant City Attorney

City Auditor

Exhibit A

Duluth Steam Cooperative Employees

Name	Position	Union	Non Union
Shelley Simpson	Administrative Assistant		Non Union
Gerald W. Pelofske	Manager		Non Union
Narcis (Bacon) Reuille	Assistant Manager		Non Union
Donald Larsien	Cleaner part time		Non Union
Michael J. Otto	Operating Watch Engineer	Union	
James A. Collette	Working Foreman	Union	
Timothy R. Kullhem	Maintainence Mechanic I	Union	
Galen R. Karlson	Distribution Worker	Union	
David R. Herald	Operating Watch Engineer	Union	
Cletus W. Kuznia	Operating Watch Engineer	Union	
Scott C. Ecklund	Working Foreman	Union	
Brian R. Erickson	Operating Watch Engineer	Union	
Harvey Bosiacki	Distribution Worker	Union	
Lance R. Drake	Assistant Watch Engineer	Union	
Dennis A. Wiita	Assistant Watch Engineer	Union	
Nathan J. Stevenson	Assistant Watch Engineer	Union	
Gregory A. Johnson	Assistant Watch Engineer	Union	
Mike J. Holmstrom	Assistant Watch Engineer	Union	
Joseph D. Rosberg	Laborer B	Union	
William J. Brown	Laborer A	Union	

Exhibit B

Reimbursable Expenses

- Salaries and Wages for employees directly engaged in providing Management Services, excluding company's senior management.
- Employer Payroll Taxes (FICA, Medicare, etc.)
- Payroll and Benefit Administrative Fees
- Unemployment Taxes
- Sales or other taxes associated with reimbursement amounts
- Workers Compensation Taxes
- Employee Fringe Benefits (Health, Dental, Life, Vacation, Sick, Disability, Retirement, Severance, Expense Allowances, etc.)
- Employee Uniforms
- Office Supplies
- Operating Supplies
- Audit Fees
- Employee Medical and Drug Testing Fees
- Professional Services and Consulting Fees
- Postage
- Travel – for operating staff and operating support excluding senior management
- Education
- Advertising
- Freight Charges
- Office Equipment Repair
- Dues & Subscriptions
- Permits and Licenses
- Property Insurance
- General Liability Insurance
- Environmental Liability Insurance
- Phone, Network and Internet
- Office computer and software
- Other Miscellaneous Expenses

Exhibit C

Scope of Five Year Plan

Develop and present to Council a Five (5) year plan ("Plan") that describes the planned and potential operation and development opportunities for the System. Plan will identify and assess opportunities to improve the efficiency of the System's existing heating and cooling plants, and the steam, hot water and chilled water distribution systems.

Analysis of the plants will include assessing opportunities to reduce primary energy usage, improve reliability, and diversify the energy and fuels sources used by the System thus increasing fuel flexibility and reducing carbon and other emissions. Analysis of the heating distribution system alternatives will include evaluating the feasibility and cost effectiveness of improving the existing steam system, expanding the use of hot water, or a combination thereof. The analysis will include assessing customer impact of transitioning from steam to hot water as well as from other proposed modifications and investments. Plan will also examine the potential to expand the heating and cooling distribution systems and the base of customers served by the System. Financial analysis of the Plan operations will be included.

Improvements and expansion to the System will consider opportunities to partner and collaborate with other building, infrastructure and street improvement projects being planned within or adjacent to the System's service territory. Plan should explore and identify opportunities to collaborate with other City of Duluth utilities, the University of Minnesota Duluth and St. Scholastica, other governmental entities and private businesses.

The Plan will consider the structures, processes and requirements necessary to move toward a long-term self-sustaining financing capability for the System.

During the preparation of the Plan, EGE Duluth will periodically update and seek input on the Plan from the System Advisory Panel and CAO.

Recommendations included in the Plan for the System should consider customer impacts and the impacts to System reliability, and the affordability and competitiveness of the services provided by the System.