

COMMITTEE OF THE WHOLE

12-0341R

RESOLUTION APPROVING TRANSITION AGREEMENT WITH DULUTH
STEAM COOPERATIVE ASSOCIATION.

CITY PROPOSAL:

RESOLVED, that the proper city officials are hereby authorized to execute an agreement, substantially the same as that on file in the office of the city clerk as Public Document No. _____, with the Duluth Steam Cooperative Association for the transition of operations of Duluth Steam District No. 1 from the Association to Ever-Green Energy Duluth, LLC.

Approved for presentation to council:



Chief Administrative Officer

Approved as to form:



Attorney

Approved:



Auditor

ADM/ATTY GBJ:cjk 6/28/2012

STATEMENT OF PURPOSE: The purpose of this resolution is to authorize an agreement with the Duluth Steam Cooperative Association to assist with the transfer of operations of the downtown steam plant and facilities to Ever-Green Energy Duluth LLC. This transition agreement is essentially an extension of the current management agreement between the City and the Association.

TRANSITION AGREEMENT

AGREEMENT made this _____ day of July, 2012 by and between the City of Duluth, Minnesota ("City") and the Duluth Steam Cooperative Association ("Association").

WHEREAS, the Association was created under the laws of the State of Minnesota as an Association whose primary purpose was to operate the City of Duluth Steam Plant and District ("Plant") when it was originally purchased by the City in 1978; and,

WHEREAS, the Association is managed by a volunteer Board of Directors; and,

WHEREAS, there currently exists a written Agreement for Management Services between the City and the Association dated January 15, 2008 ("Agreement") whereby the Association agreed to operate the Plant ; and,

WHEREAS, by its terms the Agreement expires between the parties on June 30, 2012; and,

WHEREAS, the City desires not to renew its agency relationship with the Association and instead hire an independent contractor ("Evergreen") to operate the Plant once certain condition precedents have taken place; and,

WHEREAS, until Evergreen actually takes over the operation of the steam plant, the City desires and the Association agrees that the Association will continue to operate the steam plan pursuant to the terms and conditions of the Agreement with the City dated January 15, 2008 (Attachment A), as modified herein; and,

WHEREAS, upon termination of this aforementioned transition relationship, the parties desire to reduce to writing the terms and conditions of the termination.

NOW, THEREFORE, the parties agree as follows:

1. The Association will continue to carry out the day-to-day management functions of the Plant as set forth in Item 2 of the Agreement except for Items 2(d) and (e) therein on and after June 30, 2012, until the latest of the following two events (condition precedents) have occurred ("Termination Date"):
 - a. Thirty days after the City has executed an independent contractor agreement with Evergreen to operate the Plant;
 - b. Thirty days after the Association has negotiated a new collective bargaining agreement with Local 70 representing the Association's union employees.
2. Upon termination of the Agreement and this Transition Agreement with the Association, the City agrees to:

- a. Continue a monthly management fee reasonably set by the Association for a period of three (3) months after the Termination Date. On or before December 31, 2012, any unspent management fee and remaining working capital funds will be returned to the City.

The management fee described herein shall be used to pay all accounts payable incurred by the Association related to the operation of the Plant and to pay those other items described in Item 2 of this Agreement, with the City responsible for any deficiency not covered by said management fee.

- b. Pay for a final audit and tax return of the Association's financial records in conjunction with the Association's operation of the Plant.
 - c. Pay for tail insurance in favor of the Association, its Board of Directors and employees to cover claims made under the Association's various insurance policies, including, but not limited to:
 - (i) Directors and Officers Liability;
 - (ii) Pollution;
 - (iii) Employment Practices Liability; and
 - (iv) General Liability.
 - d. Pay all invoices incurred by the Association within the scope of its Agreement with the City.
 - e. Pay for the Association's administrative and legal wrap-up costs to wind down and dissolve the Association and require Evergreen to cooperate as requested by the Association in the winding down process.
 - f. Pay the Association all payroll and payroll related costs incurred by the Association during the winding down process.
 - g. Affirm that all leases, easements, contracts, licenses, permits and other agreements executed and disclosed by the Association are and continue to be the sole responsibility of the City to administer.
 - h. Pay for refunding the Association's membership fees.
3. To the extent not covered by the tail insurance, the City shall indemnify and save and hold harmless Association from any and all claims of third parties against the Association, its Board of Directors individually and collectively, and its employees while acting within the scope of the Agreement and this Transition Agreement for:
 - a. All authorized payments made by the Association on behalf of the City;

- b. Payments upon contracts upon which the Association was authorized to make itself liable, and upon obligations arising from the possession or ownership of things which the Association was authorized to hold on account of the City;
- c. Payments of damages to third persons which the Association was required to make on account of the authorized performance of an act or omission to act which constitute a tort or breach of contract and have been disclosed to the City prior to the termination of this Transition Agreement;
- d. Expenses of defending actions by third persons, not covered by any insurance, brought because of any of the Association's authorized conduct, including any insurance deductibles incurred therewith;
- e. Payments resulting in benefit to the City, made by the Association under such circumstances that it would be inequitable for indemnity not to be made and that have been disclosed to the City prior to the termination of this Transition Agreement;
- f. All torts committed by the Association or its employees acting within the scope of its employment.

Further, the City shall indemnify the Association:

- g. In accordance with the terms of the Agreement between them;
- h. Unless otherwise agreed:
 - (i) When the Association made a payment or incurred an obligation;
 - (A) Within the scope of the Association's actual authority, or
 - (B) That is beneficial to the City, or
 - (ii) If the Association suffers a loss that fairly should be borne by the City in light of their relationship.

4. The Association agrees to use its best efforts to:

- a. Assist and cooperate with the City of the transition from the Association as operator of the Plant to Evergreen;
- b. Identify and assign and do whatever else is necessary to transfer all working permits, licenses and other legal documents either to the City or to Evergreen, as the case may be;
- c. Disclose to the City any information the Association has with respect to needed maintenance and repair items;

- d. Assist with all other matters as reasonably requested by the City, including assisting in any of the City's duties described in Section 2 above;
- e. Release the City and its officers, agents, servants and employees from and against any and all other claims by Association not addressed herein, including its agents or employees.

5. The City appoints the City Auditor as its contact person for the Association to communicate with during the wrap-up contemplated by this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first set forth above.

CITY OF DULUTH

DULUTH STEAM COOPERATIVE ASSOCIATION

By _____
Its Mayor

By _____
Its _____

ATTEST:

City Clerk

Countersigned:

City Auditor

Approved as to form:

City Attorney