

# EXHIBIT A

## AGREEMENT

This Agreement ("Agreement") is made and entered into as of the date of attestation thereto by the City Clerk by and between the City of Duluth, (the "City") and St. Mary's Duluth Clinic Health System, dba Essentia Health East, a Minnesota nonprofit corporation, ("Essentia"). The City and Essentia are referred to in this Agreement individually as a "Party" and collectively as the "Parties." It is understood by the Parties that the City may fulfill certain of its responsibilities set forth below through its current manager of the District Energy System ("Manager"), which is Ever-Green Energy, Inc. at the time of this Agreement.

## RECITALS

A. Essentia has put forward a proposal, ("Project") to redevelop Essentia's Duluth based health care system facilities in the area of the Central Hillside Neighborhood and the East Hillside Neighborhood of Duluth commonly referred to as the medical district (the "Medical District");

B. The term, "Project" as used in the Agreement is generally described as the following activities of Essentia and its affiliates: (i) acquiring land and constructing and equipping a new inpatient hospital tower, clinic and outpatient surgery facilities; (ii) remodeling existing facilities of Essentia and its affiliates; and (iii) demolishing obsolete facilities of Essentia and its affiliates, all to be located within Essentia's Medical Campus;

C. Essentia's "Medical Campus" as used in this Agreement is described as follows in the city of Duluth, Minnesota: the area bounded by Third Avenue East on the west and Fifth Street on the north and Sixth Avenue East on the east and Superior Street on the south;

D. The City is committed to the proposed Project and working cooperatively with Essentia to advance the proposed Project and address any issues relating thereto, including written support of mutually agreed zoning initiatives related to the zoning district plan for the project;

E. The City and Essentia are currently working collaboratively on legislation that will assist in the development of the Project and would be proposed during the 2019 Minnesota Legislative Session;

F. Certain portions of the Medical District are currently served by the City's District Energy System, a division of the City's Public Works and Utilities Department ("DES") for the provision of thermal energy. Essentia is a customer of DES for certain of its facilities and provides its own thermal energy for certain of its facilities located on Essentia's Medical Campus;

G. The City has established certain Environmental Goals it is committed to

achieving by 2050;

H. The City and Essentia desire that Essentia's facilities located within the Medical Campus utilize steam and hot water supplied by DES for their thermal energy requirements, provided that such energy is provided on a cost-effective basis to its facilities as established by the Life Cycle Cost Analysis document attached as Exhibit C to the Agreement ("LCCA");

I. This Agreement formalizes the commitments of the City and Essentia to ensure that thermal energy is provided to Essentia by way of the DES as provided for below.

## **AGREEMENT**

**NOW, THEREFORE**, the Parties agree as follows:

- A. As of the date of this Agreement, the LCCA demonstrates connecting to the DES to be cost-effective for Essentia. Essentia will therefore utilize DES as the exclusive primary source for all thermal energy for space heating, domestic water heating, and other proposed purposes to all of Essentia's current buildings and, if shown to be cost-effective under the current LCCA, those buildings proposed to be constructed or acquired pursuant to Section H below as part of the Project on its Medical Campus except for those times when the backup capacity is operated as mutually agreed or when DES is unable to provide the necessary services. The current Essentia buildings and anticipated services as of the date of this Agreement are set forth in Exhibit A; and
- B. City shall connect Essentia's facilities to the DES hot water and steam systems in substantially the manner set forth in Exhibit B "DES System Diagram" at no cost to Essentia. It is understood by the parties that Essentia is not responsible for costs to run infrastructure to connect to present and/or future Essentia facilities, including, but not limited to, any necessary modifications to streets, roadways, or similar thoroughfares; and
- C. Essentia shall install such backup and supplemental thermal energy production capacity as shown on Exhibit B as Essentia Equipment (the "Equipment") on the Medical Campus at their cost, subject to provisions hereinafter set forth; and
- D. Essentia shall provide for all maintenance necessary to maintain readiness of the Equipment and will pay all costs of operation and maintenance of the Equipment. In any event, any operation and maintenance activities on the Equipment shall be performed by Essentia-employed or contracted personnel with any payment responsibilities for such operations and maintenance activities being determined by ownership of the Equipment and as shown in the LCCA; and

- E. Essentia shall respond to dispatch directives from DES for operation of the Equipment within reasonable limits established by the Parties. City shall provide a credit to Essentia for labor costs at a starting rate of \$784.71 per operating day (December 2017 dollars) and said labor credit shall escalate at the index Consumer Price Index for All Urban Customers (CPI-U) in the Midwest; and
- F. Essentia will pay City for thermal energy services in conformance with the methodology contained in the “LCCA” found in Exhibit C. When the Equipment is operated by Essentia as provided in Section A, City shall reimburse Essentia for the natural gas utilized for said operation at Essentia’s actual current natural gas rates. During such operation, Essentia will pay to DES, at DES’s current consumption rate, for any production of the Equipment consumed by the Essentia facilities. Essentia will operate the Equipment a minimum of one hundred ten (110) days per year as reflected in the LCCA document and will operate as necessary to help and aid the DES in backing up its system and/or providing backup for connected Essentia buildings. The Parties agree that the definitive agreement will contain mutual indemnification language similar to what is customarily contained in thermal energy supply agreements.
- G. The Parties acknowledge financial numbers contained in Exhibit C as attached to this Agreement are based on present estimates and that the Parties anticipate that the actual financial amounts resulting from the application of actual costs and other numbers may vary from those set forth in Exhibit C. The financial amounts in years subsequent to Year 1 will vary as appropriate to reflect the following:
  - a. The Capacity Charge shall escalate at a rate no higher than the index Consumer Price Index for All Urban Customers (CPI-U) in the Midwest starting with a base rate of \$6.75 per MMBtu (December 2017 dollars) in accordance with Group 9 Capacity Charge Rate in Exhibit D;
  - b. All Essentia buildings on the Medical Campus will receive the largest prescribed capacity charge discount established by City and applicable to all DES customers through aggregation of all Essentia buildings using either steam or hot water into consumption category 9 as shown in Exhibit D. Additionally, in the event City would offer better rates or more favorable capacity charge terms to any other customer, excluding the Canal Park and the DECC service territory and any existing or future industrial process load customers, Essentia will receive the same capacity charge discount afforded to that other customer effective as of the date first offered to that customer. The definition of what shall constitute an “industrial process load customer” shall be more fully set forth in the definitive agreement between the parties.

- c. City will pay a production capacity standby charge to Essentia of \$0.27706 per capacity charge dollar as shown in the LCCA (\$236,000 in 2021 and capacity charge of \$851,805) to compensate Essentia for all plant capacity and operations and maintenance except operations labor.
  - d. The hot water energy rate (Hot Water Consumption Charge) and the steam energy rate (Steam Consumption Charge) will be established per the rates established by DES annually and approved by Duluth City Council for all customers of DES according to set formulas in substantially the form contained in Exhibit E;
  - e. City has communicated that Essentia will not be responsible for an initial infrastructure charge for converting the DES system to hot water.
- H. Essentia agrees that any buildings in the Medical Campus later acquired or constructed by Essentia shall be connected to DES provided it can be shown to be cost effective on the same basis as provided for in Section A above at then-prevailing rates.
- I. The term of the initial energy services agreement between the Parties will be for a period of 20 years from the start of service which is anticipated to begin June 1, 2022.
- J. The Parties agree that the following assignment provision will be included in the definitive agreement and that DES will be synonymous with City as defined herein:

“Customer shall not assign, transfer, delegate, or subcontract any of its rights or obligations under this Agreement without the prior written consent of DES, with the exception of any internal reorganization. Any purported assignment or delegation in violation of this Article shall be null and void. DES may at any time assign or transfer any or all of its rights or obligations under this Agreement without Customer’s prior written consent if such assignment is made to a tax-exempt entity and the assignee fully assumes in writing all DES’s obligations under this Agreement and any related agreements, including, but not limited to, the methods for rate calculation. Upon any other assignment by DES, Customer may terminate the Agreement upon 180 days written notice.

To the extent Customer's obligations under this Agreement are transferred and assumed in accordance with this Article,

and to that extent only, Customer shall be released from such obligations.

Except by the written consent of City or instances of internal reorganization by Customer, Customer (if a corporation or business entity) shall not consolidate with or merge into any other person or convey or transfer all or substantially all of its properties and assets to any person unless such person shall fully assume in writing all Customer's obligations under this Agreement.”

- K. The Parties acknowledge that, because of the size and complexity of the Project and the extent to which the plans therefore are subject to change, the Parties will need to enter into a more extensive and definitive agreement consistent with the methodology contained in the LCCA. The Parties hereby agree that the Excel spreadsheet file utilized in the LCCA and included in Exhibit C has been provided to Essentia for review and comment. The Parties further agree to correct any clerical formula errors found during the negotiation of the definitive agreement that changes the overall cost calculations by +/- 10%. The Parties hereby agree to negotiate the terms thereof in good faith and to enter into such agreement prior to the commencement of DES service to the Project using the terms of the Hot Water Delivery Agreement found in Exhibit F as a general guide to the extent such terms are relevant.

## **OTHER PROVISIONS**

- a. Relationship between the Parties. The Parties expressly acknowledge that nothing in this Agreement is intended nor may be construed to create an employer/employee or joint venture relationship between the Parties.
- b. Confidentiality. This Agreement and all data related thereto is subject to the provisions of Minnesota Statutes Chapter 13, “The Minnesota Government Data Practices Act. Subject to the provisions thereof, all non-public, confidential, or proprietary information of either Party (“Confidential Information”), including, but not limited to, specifications, samples, patterns, designs, plans, drawings, documents, data, business operations, lists, pricing, discounts, or rebates disclosed by either Party, whether disclosed orally or disclosed or accessed in written, electronic, or other form or media, and whether or not marked, designated, or otherwise identified as “confidential,” in connection with this Agreement is confidential, solely for the other Party’s use in performing this Agreement and may not be disclosed or copied unless authorized by the disclosing Party in writing.

Confidential Information does not include any information that: (a) is or becomes generally available to the public other than as a result of either Party's breach of this Agreement; (b) is obtained by either Party on a non-confidential basis from a third-party that was not legally or contractually restricted from disclosing such information; (c) either Party establishes by documentary evidence, was in its possession prior to the disclosing Party's disclosure hereunder ; or (d) was or is independently developed by the receiving Party without using any Confidential Information. Upon the disclosing Party's request, receiving Party shall promptly return all documents and other materials received from the disclosing Party. Either Party shall be entitled to injunctive relief for any violation of this Section.

- c. Termination. This Agreement shall continue in full force and effect until such time that the definitive agreement described in Section J is in place or until it is otherwise agreed to in writing by the Parties.
- d. Arbitration. Any controversy or claim arising out of or relating to this agreement, or breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgement on the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. The arbitration shall be before a panel of three arbitrators in Duluth, Minnesota.
- e. Recitals. The recitals are incorporated into and made a part of this Agreement.
- f. Entire Agreement. This Agreement, sets forth and constitutes the entire agreement between the Parties with respect to the subject matter as of the date hereof, and supersedes any and all prior agreements or understandings concerning the subject matter.
- g. Amendments. No amendments to this Agreement will be binding unless in writing and signed by the Parties.
- h. Agreement. The Parties intend that this Agreement be binding upon each of them upon signing.
- i. Counterparts. This Agreement may be executed simultaneously in any number of counterparts, all of which shall constitute one and the same instrument.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement on the dates indicated below.

**CITY OF DULUTH**

\_\_\_\_\_  
Mayor

By: *David W. McIntyre*  
Chief Administrative Officer  
9.26.18

Attest:

\_\_\_\_\_  
City Clerk

Approved:

\_\_\_\_\_  
Assistant City Attorney

Countersigned:

\_\_\_\_\_  
City Auditor

**ST. MARY'S DULUTH CLINIC HEALTH SYSTEM,  
DBA ESSENTIA HEALTH EAST**

Countersigned:

By: *Bradley Beard*  
Its: *Chief Operating Officer, East Market*  
Date: *September 26, 2018*