

4/5/2012

**24-R-12**

**A RESOLUTION**

**Approving a Plan of Operation and Governance for the  
Electricity Aggregation Program**

**WHEREAS**, pursuant Section 1-92 of the Illinois Power Agency Act, 20 ILCS 3855/1-92 (“Act”), to facilitate competitive retail electric service to promote electric savings, lower cost of electric supplies, and other benefits, certain governmental entities may aggregate certain electric consumers within the jurisdiction; and

**WHEREAS**, on March 20, 2012, the electors of the City of Evanston approved the City’s plan to create a program for the municipal aggregation of electricity (“Electricity Aggregation Program”); and

**WHEREAS**, the Act requires a governmental entity interested in the registration of customers under governmental aggregation, subject to customer rights to “opt-out” of such aggregation, to adopt a plan of operation and governance for the Electricity Aggregation Program (the “Plan”); and

**WHEREAS**, the City previously conducted three duly-noticed public hearings pursuant to the Act, for the purpose of considering the Plan with members of the public; and

**WHEREAS**, the City Council has determined that the adoption of the Plan as provided in this Resolution would be in the best interests of the City and its residents.

**NOW BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF  
EVANSTON, COOK COUNTY, ILLINOIS, THAT:**

**SECTION 1:** The foregoing recitals are found as fact and made a part hereof.

**SECTION 2:** The City Council hereby adopts the City of Evanston's Plan, attached hereto and incorporated herein by reference as Exhibit "A", for the implementation and administration of the City's Electricity Aggregation Program in accordance with the Act.

**SECTION 3:** This Resolution 24-R-12 shall be in full force and effect from and after its passage and approval in the manner provided by law.

  
Elizabeth B. Tisdahl, Mayor

Attest:

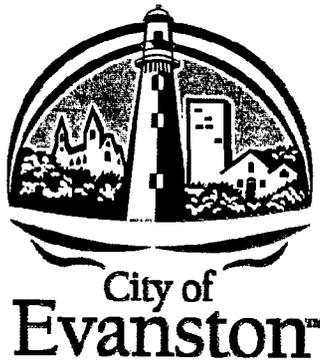
  
Rodney Greene, City Clerk

Adopted: April 10, 2012

**EXHIBIT A**

**Plan of Operation and Governance**

City of Evanston  
Electricity Aggregation Program



**Plan of Operation and Governance**

April 5, 2012

## **1. Purpose of Electricity Aggregation Program & Services**

This Plan of Operation and Governance (the "Plan") has been developed in compliance with the Illinois Power Agency Act, 20 ILCS 3855/1-92 regarding aggregation of electrical load by municipalities. The statute defines two types of aggregation programs that may be enacted by a governmental entity; opt-in aggregation and opt-out aggregation. The City of Evanston ("City") will administer an opt-out aggregation program (the "Program"). Under this Program, the City will aggregate the electric loads of residential and small commercial retail customers located within the City and then solicit proposals, select an Alternative Retail Electric Supplier ("Supplier") and enter into a service agreement to facilitate the purchase of electricity and related service on behalf of its residents and small businesses. Customers will be given prior written notice entitling them to affirmatively elect not to be part of the Program (the "Opt out Notice").

On November 29, 2011, the City adopted Ordinance 103-O-11, to place the issue of Opt-Out Governmental Aggregation of Electricity on the March 20, 2012 election ballot. The registered voters of the City subsequently passed the ballot measure on March 20, 2012. The City will follow the Plan of Operation and Governance ("Plan") outlined below. This Plan will be presented to the Evanston City Council for introduction and action on April 10, 2012 after two public hearings are held in accordance with 20 ILCS 3855/1-92.

The City's Program seeks to aggregate the retail electric loads of eligible residential and small commercial retail accounts located within the City to negotiate the most favorable rates for the generation of supply of electric power. The City's program will solicit proposals for both a lowest rate alternative as well as an alternative for a cleaner, greener supply of electric power that would at a minimum meet the city's goal of reducing greenhouse gas emissions as set forth in the Evanston Climate Action Plan. With a City population of approximately 74,000, the Program has the potential to combine residential accounts and small commercial accounts into a buying group that will be attractive to a Supplier. Participation in the Program is voluntary. Any individual customer ("Member") has the opportunity to decline to be a Member of the Program and remain with the local utility ("ComEd") standard offer of service or to enter into a power supply contract with any other Alternative Retail Electric Supplier.

Residential and small commercial retail electric customers often lack the ability to effectively negotiate electric supply services. The City's Program provides them an opportunity to benefit from professional representation and bargaining power achieved through an aggregation program.

The Program is designed to reduce the amount Members pay for electric energy supply and to gain other favorable terms of service. The City will not buy and resell the power to the Program Members. Instead, the City will competitively seek proposals and negotiate a contract with a Supplier to provide firm, full-requirements generation service to the Members of the Program. Individual members of the program will enter into an

electric purchase and sale contract with the selected Supplier. The City is not a party to the contract and is not responsible for performance of the contract beyond negotiating the safeguards in the contract.

As required by the Act, this Plan of Operation and Governance describes:

1. How the Aggregation Program will provide for universal access to all applicable residential customers and equitable treatment of applicable residential customers;
2. How demand management and energy efficiency services will be provided to each class of customers; and
3. How the Aggregation will meet any other legal requirements concerning aggregated electric service.

The City and the selected Supplier will follow the Plan set forth in this document.

## **2. Proposal / Contract Procedures**

Following the adoption of this Plan, the City will conduct a proposal process in compliance with the City Code. The City will retain the full and absolute right to accept, accept with conditions, or reject any proposals. If this process does not result in the identification of an acceptable supplier, the City will conclude the proposal process and not proceed with the Program at that time. The proposal process will include a qualifications phase and a firm pricing phase. Suppliers which are found to be responsive and qualified will be invited to submit actionable pricing proposal following completion and adoption of this Plan. Requirements for company qualifications are outlined in Section 15.

By majority vote of the Corporate Authorities of the City, the City may select an Alternative Retail Electric Supplier to provide electric power through the Program according to the terms of a written Master Agreement to Provide Services to an Aggregated Group ("Agreement") entered into by and between the Supplier and the City. By majority vote of the Corporate Authorities, the City may determine not to enter into an Agreement with any Supplier and in such event eligible customers shall continue to purchase electric power through ComEd. If the Corporate Authorities enter into an Agreement with a Supplier, ComEd will continue to provide and service delivery of the electricity purchased from the Supplier, and metering, repairs and emergency service will continue to be provided by ComEd.

The Program may be terminated upon the termination or expiration of the Agreement without any extension, renewal, or subsequent Agreement being negotiated. Each individual Member receiving electric supply service under the Program will receive notification 45-90 days prior to termination of the Program. At the end of the agreement term, the City will consult the Supplier regarding the next course of action, which will be

one of the following: 1) switch the Members back to ComEd, 2) switch the Members to a different Supplier or 3) enter into a new Agreement with the City to continue the Program.

### **3. Determination of Rates and Other Charges**

#### **3.1 Rates**

The City will solicit proposals from Alternative Retail Electric Suppliers (“ARES”) certified by the Illinois Commerce Commission to provide electricity to aggregation programs. The proposal documents shall require the suppliers to offer a generation charge for firm, full-requirements supply. The Members will be charged the price determined to be the most favorable based on term and energy mix selected. Members will be notified of the rates and terms of the Program through a direct mailing sent to each eligible resident and business within the City limits.

#### **3.2 Charges**

Neither the City nor the selected Supplier will impose any terms, conditions, fees, or charges on any Member served by the Program unless the particular term, condition, fee, or charge is clearly disclosed to the Member at the time the Members chose stay in the Program and did not elect to opt out.

ComEd will continue to bill for Late Payments, Delivery Charges and Monthly Service Fees, and any other typical fees. These charges apply whether or not a Member switches to the Program’s Supplier. Switching generation suppliers will not result in any new charges billed to the Member.

#### **3.3 Switching Fees**

Should ComEd assess a switching fee for Members voluntarily remaining in the aggregation program; the terms and conditions will be written to require the selected Supplier shall pay the switching fee without assessing the fee to the Members.

#### **3.4 Early Termination Fee**

Members may terminate their agreement without penalty if they relocate outside of the City or if they decide to go back to ComEd for their energy supply. Members that leave the Program for other reasons, such as switching to another Supplier may be assessed an early termination fee by the Supplier. The City will negotiate with the Supplier to ensure that any early termination fee assessed against the Members is reasonable and clearly stated in the electric purchase and sale terms and conditions sent to the Members with the Opt-out Notice.

### **4. Contents of the Proposal**

Suppliers which are found to be responsive and qualified will be formally invited to submit actionable pricing and will be sent a formal request for proposals. Key items to be included in the proposal include the following:

4.1 Term of Agreement:

Proposals by prospective suppliers shall provide pricing for a 12-month and 24-month term. The City will select the duration which offers the City the most protection against future increases in energy prices.

4.2 Power Mix:

Proposers will quote rates for the following energy mixes:

- a. Lowest Price Mix – The lowest priced electricity supply available from an ARES using, at a minimum, renewable energy consistent with the Illinois Renewable Portfolio Standard (IRPS) required by law (7% for the period 7/12 thru 7/13 and 8% for the period 7/13 – 7/14).
- b. 75% Renewable - REC Supported Mix. Electricity where 75% of the energy used by the aggregated accounts will be offset by Renewable Energy Credits. Renewable Energy Credits shall be Green-e certified.
- c. 100% Renewable - REC Supported Mix. Electricity where 100% of the energy used by the aggregated accounts will be offset by Renewable Energy Credits. Renewable Energy Credits shall be Green-e certified.

4.3 Rates:

The documents shall require the ARES to provide the rate information in the following format:

	<b>Energy Mix Options</b>		
<b>Rate Period</b>	<b>Best Rate – IRPS</b>	<b>75% REC Supported</b>	<b>100% REC Supported</b>
12 month fixed term July '12 - July '13			
24 month fixed term July '12 – July '14			

The City's intent in soliciting the proposals is to provide residents with delivered electricity prices that are always less than ComEd's applicable rates. The City is also interested in selecting a renewable energy option in a cost effective way.

## **5. Determination of Eligible Customer Pool**

Under the opt-out aggregation provisions, all eligible electric consumers within the City will be automatically included in the Program. However, such customers will be given prior notice entitling them to affirmatively elect not to be part of the Program.

Prior to mailing opt-out notices, a thorough review will be performed to see that all ineligible customers are excluded. The review process will include the efforts of numerous parties and utilize a number of resources:

- ComEd will query their customer database using best efforts to capture all accounts within the City limits.
- The Supplier, with assistance from the City, using available City resources and publicly available material shall screen out customers who are not located within the City limits. Those resources may include any or all of the following: property records, water and/or sewer records, fire and/or police department address records, 911 address records, street listings, City maps, internet maps, county parcel mapping databases, and geographical information systems (GIS).
- Ineligible accounts will be screened out based on codes provided in the ComEd data.
- The data shall be reviewed to see that all zip codes have been included, all streets included, all customer classes, all customer rate schedules, and finally that an expected total for a community of this population was turned over.
- Any suspected omissions will be reported to ComEd along with a request to furnish that data.

## **6. Opt-Out Process**

The City is using an Opt-Out form of Governmental Aggregation under the Act. Any such person that opts-out of the aggregation program pursuant to stated procedure will default to the standard service offer provided by ComEd until the person chooses an alternative supplier.

When a successful supply offer is found, the City shall order the eligible customer list from ComEd. ComEd shall turn over the list to the City upon request within a reasonable time period. Once the City obtains the list, it will be shared with the selected Supplier and they will have thirty (30) days from the City's receipt of the data to mail the Opt-out Notices to all eligible Members receiving an offer.

The selected Supplier will be required to pay for printing and mailing of Opt-out Notices. The notices will be mailed to the owner or occupant residing at the electric account mailing address shown on ComEd's customer list. The selected Supplier and the City will agree upon the format and content of the Opt-out Notice prior to mailing the notice to eligible Members. A City official will sign the notice and it will contain the City's name

and logo on the outside of the envelope to clearly indicate to the recipient that it is a notice from the City. The City will review and approve any additional attachments to be included in the opt-out notices.

Prior to mailing the Opt-out Notices, a thorough review will be performed of the customer list to ensure that all eligible Members receive the Opt-out notice. The review process will include the efforts of numerous parties and utilize a number of resources as specified in Section 5 of this Plan.

Following acceptance of an offer by the City, the Supplier will mail the Opt-out Notices to eligible Members receiving an offer. Members will have at least twenty-one (21) days from the postmark date on the notice to postmark the return opt-out card if they do not wish to participate in the City's program. The Supplier shall offer at least 2 additional means of opting out, such as, a toll-free phone number, website, or email address. The selected Supplier will not enroll the accounts which affirmatively opted out of the Program.

In the event that an eligible Member is inadvertently omitted from the Program, the Supplier shall, upon request, enroll the eligible Member at the group rate for the remaining term.

All members of the Program will also be given an opportunity to opt-out without penalty at least once every three (3) years.

**Procedure Steps:**

- a. The selected Supplier and the City will agree upon the format of the Opt-out Notice and other documents to be included in the mailing prior to mailing it to eligible Members.
- b. The selected Supplier will distribute an Opt-Out Form to all eligible Members via first-class U.S. Mail.
- c. Recipients will have at least twenty-one (21) days from the postmark on the Opt-out Notice to notify the selected Supplier if they do not want to be part of the Program.
- d. Members will be able to opt-out by returning an opt-out card via U.S. Mail to the selected Supplier. The Supplier shall offer at least two additional means of opting out, such as a toll-free phone number, website, email address, or fax number.
- e. The opt-out notice will clearly notify the Program Members of the rates to be charged for electricity and other terms of the contract with the selected supplier.
- f. The selected Supplier will not enroll those accounts opting out from the Program.
- g. Additionally, Members who do not opt-out under step d above will receive written notification from ComEd stating that they are about to be switched to the new Supplier. The ComEd notice will inform the Member that they have seven (7) days to rescind the contract by contacting ComEd.

**7. Customer Classes Included**

The Program provides for universal access and equitable treatment of all eligible customers. Utility rules approved by the Illinois Commerce Commission (“ICC”) or other regulatory agencies may limit eligibility to enroll in the aggregation program.

The following eligibility requirements apply:

- Customers must not have opted-out of the Program
- Customers must not be supplied generation service from another supplier
- Commercial customers must have a Peak Demand of  $\leq 100\text{kW}$
- Residential customers must live within the City limits
- Customers must not be an “hourly rate” ComEd customer
- Customers must not be on ComEd’s residential electric heat rate
- Customers must not be on ComEd’s “bundled hold”

Customers receiving power from ComEd under particular tariffs as they may be approved and/or amended by the Illinois Commerce Commission from time to time may not be eligible to enroll in the aggregation program.

While providing for universal access to all eligible customers, specific savings for each such customer may depend upon the load usage patterns of that customer. Thus, a Supplier’s offer may not provide to all Members equal economic savings opportunity as compared to ComEd’s prevailing rate

## **8. Billing Procedures**

The Program will utilize the coordinated billing services of ComEd and the selected Supplier. Customers will receive a single bill from ComEd that itemizes among other things, the cost of generation provided by the Supplier.

Members are required to remit and comply with the payment terms of ComEd. The City will not be responsible for late or no payment on the part of any of the Members. Furthermore, slow or no payment on the part of some Members will not adversely impact the rates charged to other Members.

## **9. Credit / Deposit Requirements**

Collection and credit procedures remain the responsibility of ComEd, the selected Supplier, and the individual Member. Members are required to remit and comply with the payment terms of ComEd and/or the Supplier. This Program will not be responsible for late or no payment on the part of any of its Members. The City will have no separate credit or deposit policy.

## **10. Procedures for Handling Customer Complaints and Dispute Resolution**

Members have multiple means of addressing complaints. As a general rule, concerns regarding service reliability should be directed to ComEd, billing questions should be directed to ComEd or the selected Supplier, and any unresolved disputes should be directed to the ICC.

### **11. Moving Into the City**

Residents and businesses that move into the City will NOT be automatically included in the City's Program. However, customers wishing to opt-in to the Program may contact the Supplier to obtain enrollment information. There is no guarantee that customers opting-in at a later date will receive the same price as did the initial participants.

### **12. Moving Within the City and Maintaining the Same Account Number**

The selected Supplier shall continue service at the same rate and under the same terms and conditions for any Member who relocates within the City prior to the expiration of the contract term, providing that the Member notifies the Supplier of their desire to do so with thirty (30) days notice. Moving within the City may cause the Member to be served for a brief period of time by ComEd. The Supplier shall have the right to bill the participant for any associated switching fee imposed by ComEd. Members may also opt-out without penalty under these circumstances.

### **13. Joining the Aggregation Group after Opting-Out**

Members who have left the aggregation group and wish to rejoin at a later date are treated in the same manner as new residents moving into the City. These customers may contact the Supplier at any time to obtain enrollment information. There is, however, no guarantee that customers opting-in at a later date will receive the same price as did the initial participants.

### **14. Joining the Aggregation Group after ending an agreement with another Supplier**

Residents and businesses that were under contract with a Supplier at the start of the Program were not initially eligible for the program. However, they can join the program at a later date once their contract with their current Supplier has ended. These customers may contact the Supplier at any time during the Term of the program to obtain enrollment information. There is, however, no guarantee that customers opting-in at a later date will receive the same price as did the initial participants.

### **15. Reliability of Power Supply**

The Program will only affect the generation source of power. ComEd will continue to deliver power through their transmission and distribution systems. Responsibility for maintaining system reliability continues to rest with ComEd. If members have service

reliability problems, they should contact ComEd for repairs. The ICC has established "Minimum Reliability Standards" for all utilities operating distribution systems in Illinois. Customer outages, duration of outages, interruptions, etc., are monitored to ensure reliability remains at satisfactory levels.

In addition to maintaining the "wires" system, ComEd is required to be the "Provider of Last Resort." This means, should the selected Supplier fail for any reason to deliver any or all of the electricity needed to serve the Members needs, ComEd will immediately provide for the shortfall. ComEd would then bill the Supplier for the power provided on their behalf. The Supplier cannot pass on the additional costs incurred to the Members from charges by ComEd from performing services and supply as a last resort.

## **16. Supplier Qualification Process**

The City will conduct a qualifications process to identify Suppliers which are qualified to provide electric power to the Program. Only Suppliers meeting strict criteria and providing complete responses to the request for qualifications will be considered for the firm pricing process. A summary of key qualifications criteria is provided below:

- Certified by the Illinois Commerce Commission.
- Registered with ComEd to do business in their service territory. Both the certification and registration ensure that Suppliers possess the managerial, technical, and financial competence to perform the services they offer.
- Agree to sign the Master Service Agreement with the City as provided in the request for qualifications documentation.
- Demonstrate creditworthiness by possessing an investment grade long-term bond rating from a major rating agency.
- Submit a complete response to the request for qualifications including the submission of references, completed certification forms litigation history, detailed scope of work, and company history and experience.

Pursuant to 20 ILCS 3855/1-92, Supplier shall:

- Provide for universal access to all applicable residential customers and equitable treatment of applicable residential customers.
- Describe demand management and energy efficiency services to be provided to each class of customers.
- Meet any requirements established by law concerning aggregated service offered pursuant to the 20 ILCS 3855/1-92.

The following factors will be evaluated for each Supplier that submits a proposal:

- The qualifications of the Supplier to conduct a municipal aggregation based on references, past experience, financial information and litigation information.
- Rate and power mix.

- Willingness of Supplier to execute the proposed Master Agreement to Provide Services to an Aggregated Group
- Completeness of Proposal.
- Proposed aggregation implementation plan.
- Quality of customer service procedures and resources.

Suppliers which are found to be responsive and qualified will be notified as such and will be formally invited to submit firm pricing following the adoption of this Plan.

## **17. Miscellaneous**

The operation of the City's Program may be impacted by any of the following:

- Amendments to the Act
- Federal Energy Regulatory Commission (FERC) tariffs that may be enacted or amended from time to time.
- Illinois Commerce Commission (ICC) rules and regulation as may be enacted or amended from time to time.
- ComEd tariffs as approved or amended from time to time by the ICC.
- Federal, state, and local laws.
- Rules, regulations, and orders approved or enacted by federal, state, or local regulatory agencies.

The City will maintain a copy of this Plan of Operation and Governance on file at its administrative office. This Plan will be kept available for public inspection. It will, upon request, be copied for any existing or potential Member of the aggregation in accordance with the City rules for copying public documents.

**MASTER AGREEMENT TO PROVIDE SERVICES TO AN AGGREGATED GROUP**

**BETWEEN**

**THE CITY OF EVANSTON, ILLINOIS**

**AND**

**CONSTELLATION NEWENERGY, INC.**

APPROVED BY CITY COUNCIL ON APRIL 30, 2012  
BASED ON ACTIONABLE PRICING RFP 12-105

This Master Agreement ("Agreement"), is entered into as of this 1st day of May, 2012 ("Effective Date") by and between Constellation NewEnergy, Inc. ("Constellation NewEnergy"), an Illinois Corporation with its principal place of business at 550 W. Washington Blvd, Suite 300, Chicago, Illinois and The City of Evanston, an Illinois municipality, with its principal place of business at 2100 Ridge Avenue, Evanston, Cook County, County, Illinois ("The City of Evanston", "Evanston" or "Governmental Aggregator"). Collectively Constellation NewEnergy and Evanston shall be referred to collectively as the "Parties".

## RECITALS

A. Constellation NewEnergy is certified by the Illinois Commerce Commission ("ICC") as an Alternate Retail Electric Supplier ("ARES") to sell competitive retail electric service to customers in the State of Illinois utilizing the existing transmission and distribution systems. Constellation NewEnergy is certified by the ICC to operate as an ARES in the service areas of Ameren Illinois Company and Commonwealth Edison Company.

B. Constellation NewEnergy (directly or through its affiliates) is an energy services provider with extensive experience in the provision of a broad range of energy related services.

C. Constellation NewEnergy sells electricity and related services and equipment ("Retail Electric Supply") to corporate authorities of municipalities or boards of county supervisors acting as governmental aggregators of residential and small commercial retail electrical loads located within the municipality or the unincorporated areas of the county, as authorized by 20 ILCS 3855/1-92 *et seq.* ("Act").

D. Both Parties have the corporate, governmental and/or other legal capacity(s), authority(s) and power(s) to execute and deliver this Agreement and related agreements and to perform its obligations hereunder.

E. The City of Evanston has adopted an ordinance (the "Aggregation Ordinance") under which it may aggregate, in accordance with the Act, residential and small commercial retail electrical loads located within the corporate limits of the City of Evanston for the purpose of soliciting and entering into service agreements to facilitate for those loads the sale and purchase of Retail Electric Supply (the "Aggregation Program").

F. Evanston duly adopted Ordinance 37-O-12, which enables the Electrical Aggregation Program as an opt-out program under the Act and has complied with all the requirements of the Act to operate an opt-out program.

G. By this Agreement, the City of Evanston and Constellation NewEnergy desire to enter into a mutually beneficial energy and services provisions relationship whereby Constellation NewEnergy shall provide Retail Electric Supply and related administrative services ("Administrative Services") necessary to fulfill the obligations of this Agreement.

H. The City of Evanston desires to enter into this Agreement with Constellation NewEnergy to provide Retail Electric Supply to applicable residential and small commercial retail customers through the Aggregation Program.

NOW, THEREFORE, in consideration of the mutual covenants and agreements set forth herein, and for other good and valuable considerations, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

**ARTICLE 1**  
**GENERAL REQUIREMENTS**

1.1 Governmental Aggregator Obligations and Authority.

1.1.1 The Governmental Aggregator: (1) shall take all necessary action as required by the Act to develop, adopt and maintain an Aggregation Program for all applicable residential and small commercial retail customers, within its boundaries (the "Aggregation Area") that the Governmental Aggregator has determined are eligible to participate in the Aggregation Program ("Eligible Customers"); (2) shall request the names and addresses of Eligible Customers from the electric utility that provides residential and small commercial retail electric service in the Aggregation Area (the "Electric Utility"); (3) shall hold and publish notice of any required public meetings regarding the Aggregation Program; and (4) hereby authorizes Constellation NewEnergy to contract for Retail Electric Supply with those Eligible Customers that do not opt-out of the Aggregation Program, rescind their switch to Constellation NewEnergy as part of their enrollment in the Aggregation Program, otherwise terminate their participation in the Aggregation Program, or have their participation terminated by the Governmental Aggregator, or their Retail Electric Supply terminated by Constellation NewEnergy or the Electric Utility ("Aggregation Program Customer" or "Participating Customer").

1.1.2 The Governmental Aggregator shall, on a best efforts basis and in a timely manner, forward to Constellation NewEnergy all notices from the Electric Utility concerning Participating Customers' accounts served pursuant to this Agreement, including but not limited to verbal or written notices regarding transition costs, changes in the terms and conditions of tariffs, rates or riders, and notices concerning the operation and reliability of the Electric Utility's system.

1.1.3 Governmental Aggregator has the authority to designate, and has designated Constellation NewEnergy as its ARES for the Eligible Customers for the Term of this Agreement.

1.1.4 During the Term of this Agreement, the Governmental Aggregator hereby grants Constellation NewEnergy the exclusive rights to provide Retail Electric Supply to the Eligible Customers.

1.1.5 Customer Data and Load Forecast Information. Submit to Commonwealth Edison a request for the identification of the Eligible Customers located within the boundaries of the City of Evanston that are in the delivery class(es) that will be included

in the Aggregation and transfer such data to Constellation NewEnergy with the customer address information only. (Note this data is obtained by the City of Evanston pursuant to Commonwealth Edison's tariff, Rate GAP (hereinafter "Rate GAP") and will be used by Constellation NewEnergy for mailing Informational Materials).

1.1.6 Service Inquiries and Service Notices to Customer. Participating Customers may direct inquiries regarding this Agreement, and Retail Electric Supply provided hereunder, and any electric generation supply or billing questions, to Constellation NewEnergy at the address and phone number provided in Section 11.1, which address and phone number shall be provided in communications with Participating Customers regarding the Aggregation Program. Participating Customers should direct inquiries concerning Electric Utility related emergency, power outage, wire or service maintenance, metering, Electric Utility service billing or other similar Electric Utility related concerns to the Electric Utility.

1.1.7 Point of Sale. Governmental Aggregator and Participating Customers acknowledge and agree that Constellation NewEnergy shall have no responsibility for damage to any property, or to any equipment or devices connected to the Participating Customers' electrical system.

## **ARTICLE 2** **CONSTELLATION NEWENERGY OBLIGATIONS**

### **2.1 Constellation NewEnergy Obligations.**

2.1.1 Commencing on the Effective Date and during the Term, subject to the terms of this Agreement, Constellation NewEnergy shall provide Retail Electric Supply (subject to the terms of the appropriate transmission and/or distribution tariffs) sufficient to serve the total electric generation needs of the small commercial retail and residential Aggregation Program Customers. Constellation NewEnergy shall arrange for the delivery of Retail Electric Supply in accordance with the requirements of the Participating Customers' respective Electric Utility and Independent System Operator ("ISO") or Regional Transmission Organization ("RTO") according to the rules, regulations, and tariffs governing Retail Electric Supply from an alternative supplier to the Point of Delivery, recognizing that the Electric Utility provides utility distribution service from the Point of Delivery to the Point of Sale. To the extent that any services or requirements are provided by the Electric Utility, Constellation NewEnergy shall not be responsible for the provision of such services. Notwithstanding the foregoing, Constellation NewEnergy is not responsible for the performance or failure to perform of the provider of such transmission, distribution, or ancillary services, or the consequences of such performance or failure to perform.

2.1.2 Constellation NewEnergy shall be responsible for all acts necessary for Constellation NewEnergy to perform its obligations hereunder, including but not limited to the scheduling of delivery of Retail Electric Supply hereunder.

2.1.3 Constellation NewEnergy shall make available the fixed price, terms and conditions of the Master Agreement to all Evanston residential and small commercial retail customers that may become eligible to participate in the Aggregation Program and desire to join the Aggregation Program at any time during the term of the Master Agreement.

2.1.4 Provide the City of Evanston with reports and information reasonably required by the City of Evanston, including reports to provide competent and reliable evidence to support its purchase and retirement of Renewable Energy Credits ("RECS") in a sufficient quantity to offset the non-renewable energy provided in the Mix specified in the Price Quote. Constellation NewEnergy will provide quarterly reports showing the number of Aggregation participants, total quantity of energy, and the Price for energy provided to the Program as compared to the Utility default tariff services rates.

2.2 Subcontracting. Constellation NewEnergy may not subcontract the performance of its obligations under this Agreement.

2.3 Comply with Governance Plan. Constellation NewEnergy shall comply with all the terms and conditions of the Act and shall comply with the Plan of Operation and Governance (the "Plan") adopted by The City of Evanston, a copy of said Plan is marked as Attachment "B" and made a part hereof as if fully set forth by this reference. Constellation NewEnergy, at its own expense, shall be fully responsible to mail out all required enrollment and opt-out notices to Eligible Customers according to the requirements of the Act and any other applicable law and the form of the letter shall be approved in advance by The City of Evanston, which approval shall not be unreasonably withheld or delayed by The City of Evanston.

2.4 Eligible Customers that have Opted Out: After an Eligible Customer has indicated its desire to opt-out of the Aggregation Program; the Constellation NewEnergy acknowledges and agrees not to solicit any future business from the Eligible Customer regarding Aggregation Program participation.

2.5 Comply with the Illinois Freedom of Information Act. Pursuant to the Illinois Freedom of Information Act, 5 ILCS 140/7(2) ("FOIA"), records in the possession of others whom the City has contracted with to perform a governmental function are covered by the Act and subject to disclosure within limited statutory timeframes (five (5) working days with a possible five (5) working day extension). Upon notification from the City that it has received a Freedom of Information Act request that calls for records within Constellation NewEnergy control, Constellation NewEnergy shall promptly provide all requested records to the City so that the City may comply with the request within the required timeframe. The City and Constellation NewEnergy shall cooperate to determine what records are subject to such a request and whether or not any exemptions to the disclosure of such records, or part thereof, is applicable. Constellation NewEnergy shall indemnify and defend the City from and against all claims arising from the City's exceptions to disclosing certain records which Constellation NewEnergy may designate as proprietary or confidential. Compliance by the City with an opinion or a directive from the Illinois Public Access Counselor or the

Attorney General under FOIA, or with a decision or order of Court with jurisdiction over the City, shall not be a violation of this Section.

### **ARTICLE 3** **TERM AND TERMINATION**

#### **3.1 Term of Agreement and Termination.**

3.1.1 This Agreement may be terminated prior to the expiration of the Term, in compliance with this Agreement's provisions, if: (1) a Party exercises its right under Article 6 to terminate this Agreement; (2) Constellation NewEnergy fails to maintain its ICC Certification; or (3) any of the situations described in Section 3.3 occur and Parties are unable to mutually negotiate modification(s) to the Agreement so that the adversely-affected Party may be restored to a reasonably similar economic position that the adversely-affected Party would have been in but for the occurrence of the events set forth in Section 3.3. Otherwise, the Agreement shall terminate upon the expiration of this Agreement's Term.

3.1.2 Term of Enrollment. Participating Customers shall remain enrolled in the Aggregation Program until the Participating Customer exercises the right to opt-out, or they otherwise terminate their participation in the Aggregation Program, their participation in the Aggregation Program is terminated by the Governmental Aggregator, their Retail Electric Supply is terminated by Constellation NewEnergy or the Electric Utility, or their electric service is terminated by the Electric Utility or until this Aggregation Program is terminated, whichever occurs first.

3.2 Interaction Between Termination Dates of this Agreement and Contracts with the Participating Customer. Participating Customers initially enrolled in the Aggregation Program shall receive Retail Electric Supply at the rate(s) set forth in this Agreement. If this Agreement is terminated prior to the end of the Term due to a Regulatory Event, then Retail Electric Supply will terminate early and the Participating Customers will be switched to the applicable tariff services provided by the Electric Utility as required by 220 ILCS 5/16-103 and defined by its rates on file with the ICC pursuant to 220 ILCS 5/6 *et seq.* ("Tariff Service") in accord with the standard switching rules and applicable notices. If this Agreement is terminated pursuant to the terms of Article 6, the Retail Electric Supply will terminate early and the Participating Customers may choose another ARES Provider or will be switched to the Tariff Service in accord with the standard switching rules and applicable notices. The Participating Customers agreements with the Supplier cannot be automatically renewed after the expiration of the Term. In the event that the Term expires and a new Agreement with an ARES is not in place, the Participating Customers will revert to ComEd as the supplier of the service.

#### **3.3 Regulatory Contingencies.**

3.3.1 Regulatory Events. The following, as well as the events described in Section 3.3.3 herein, will constitute a "Regulatory Event" governing the rights and obligations of the Parties under this Agreement:

(i) **Illegality.** If, due to the issuance of an order, or adoption of, or change in, any applicable law, rule, or regulation, or in the interpretation of any applicable law, rule, or regulation, by any judicial, regulatory, administrative or government authority with competent jurisdiction, it becomes unlawful for a Party to perform any obligation under this Agreement.

(ii) **Material Adverse Government Action.** If (A) any regulatory agency or court having competent jurisdiction over this Agreement requires a change to the terms of the Agreement that materially adversely affects a Party(s), or (B) any regulatory or court action which adversely and materially impacts a Party's ability to perform or otherwise provide services pursuant to this Agreement.

(iii) **New Taxes.** If any tax or increases in such tax, or an application of such tax to a new or different class of parties, is levied or enacted on Constellation NewEnergy and effective after the Execution Date, except federal and state income taxes, employee taxes or other taxes assessed against the business of Constellation NewEnergy as opposed to the delivery of services under this Agreement.

**3.3.2 Notice, Negotiation, and Early Termination.** Upon the occurrence of a Regulatory Event, the adversely affected Party shall give notice to the other Party that such event has occurred. The Parties will mutually attempt to negotiate modification(s) to the Agreement so that the adversely-affected Party may be restored to a reasonably similar economic position that the adversely-affected Party would have been in but for the occurrence of the Regulatory Event. If the Parties are unable, within thirty (30) days of entering into negotiations, to agree upon modification(s) to this Agreement, the adversely affected Party shall have the right, upon thirty (30) days notice, to terminate this Agreement without liability and close out its obligations hereunder.

**3.3.3 Regulatory Events Defined.** Regulatory changes or rulings, legislative and agency acts, and judicial rulings covered by preceding Section 3.3.1, include but are not limited to: (i) material changes affecting Constellation NewEnergy's ICC Certification applicable to this Agreement/franchise status, fees, costs, or requirements; (ii) other material changes or clarifications of federal, state or local government certification, licensing or franchise requirements for electric power suppliers; (iii) material changes to existing or material new charges, fees, costs, and/or obligations, including without limitation transmission or capacity requirements or charges, that may be imposed upon Constellation NewEnergy by an ISO or a RTO, independent transmission provider, federal law or government agency; (iv) material changes to existing or material new charges, fees, costs, credits, emission allowance requirements, permitting requirements and/or obligations associated with environmental or energy law and regulations (including, without limitation, alternative energy requirements, carbon and greenhouse gas, or other similar controls); and (v) other material changes to, or requirements of, retail electric customer access or aggregation programs in a manner which will not reasonably allow a Party or the Parties to perform economically hereunder.

3.4 Termination Obligations. Termination of this Agreement shall not relieve either Party of the obligation(s) to pay amounts owed for actual performance of obligations rendered prior to the termination of this Agreement.

3.5 Termination Notices. In the event of termination hereunder, the terminating Party shall exercise its best efforts to communicate to the non-terminating Party the upcoming possibility of termination. In the event that this Agreement is terminated prior to the end of the Term, each individual Participating Customer of the Aggregation Program will be provided written notification from the terminating Party of the termination of the Agreement at least thirty (30) days prior to termination, and in compliance with other regulatory or legal requirements and Participating Customers will also be notified of their right to return to the Electric Utility or to select an alternate retail electric supplier. All other notification(s) shall be in accordance with ICC requirements.

#### **ARTICLE 4** **ENERGY SCHEDULING, TRANSMISSION, PRICING AND DELIVERY**

4.1 Scheduling, Transmission and Delivery of Power. During the Delivery Term, Constellation NewEnergy shall schedule Energy as required by the RTO or other transmission provider and the Electric Utility, and shall arrange for transmission and distribution service to the Participating Customers. Constellation NewEnergy will arrange for necessary electric distribution and transmission rights for delivery of such Energy to provide the Retail Electric Supply hereunder and subject to the understanding that Constellation NewEnergy has an obligation to make deliveries to Participating Customer as set forth in Section 2.1 except pursuant to Sections 3.3 or Article 7 of this Agreement. Constellation NewEnergy does not take responsibility for any delivery of services supplied by the Electric Utility or RTO, or for the consequences of the failure to provide such services. Constellation NewEnergy shall not be responsible to Participating Customer in the event the Electric Utility or RTO disconnects, suspends, curtails or reduces service to Participating Customer (notwithstanding whether such disconnection is directed by the ISO) in order to facilitate construction, installation, maintenance, repair, replacement or inspection of any of the Electric Utility's facilities, or to maintain the safety and reliability of the Electric Utility's electrical system, or due to emergencies, forced outages, potential overloading of the Electric Utility's transmission and/or distribution circuits, or Force Majeure or for any other reason permitted by the Electric Utility's tariff or any other acts or omissions of the Electric Utility.

4.2 Pricing. During the Delivery Period, Constellation NewEnergy shall provide Retail Electric Supply to all Participating Customers at the price set forth on the Pricing Attachment. There will be no discount given on such charges as transmission and ancillary services if they are identified in a separate tariff or rider approved by the ICC.

4.3 Failure of Delivery. In the event that Constellation NewEnergy fails to schedule all or part of the Retail Electric Supply as set forth herein and Constellation NewEnergy's failure is not due to a Force Majeure Event, and a Participating Customer is required to obtain and pays for Tariff Service or other Energy supply arrangement necessary to cure such Energy deficiency, Constellation NewEnergy shall reimburse

Participating Customer, on the later of ten (10) days after receipt of invoice or the date payment would otherwise be due to Constellation NewEnergy, an amount determined by multiplying (a) the aggregate deficiency in the Retail Electric Supply by (b) the Replacement Price. IN THE EVENT OF CONSTELLATION NEWENERGY'S FAILURE TO PERFORM DUE TO A NON-FORCE MAJEURE EVENT, CONSTELLATION NEWENERGY'S OBLIGATION TO PAY SUCH AMOUNT DURING THE PERIODS OF NON-DELIVERY SHALL BE THE GOVERNMENT AGGREGATOR'S AND THE PARTICIPATING CUSTOMERS' SOLE REMEDY FOR CONSTELLATION NEWENERGY'S FAILURE TO DELIVER ENERGY PURSUANT TO THE TERMS OF THIS AGREEMENT.

## **ARTICLE 5** **BILLING AND PAYMENTS**

5.1 Additional Costs. In addition to the pricing described in Section 4.2 and the Pricing Attachment, Constellation NewEnergy will charge Participating Customers for any and all fees, costs, and obligations imposed by an ISO or a RTO on Constellation NewEnergy that are not otherwise reimbursed by the Electric Utility to Constellation NewEnergy, regardless of whether such charges are greater than, less than, or equal to the charges a Participating Customer currently pays for these services to the Electric Utility ("Transmission and Ancillary Charges"). Constellation NewEnergy will pass these Transmission and Ancillary Charges, which may be variable, through to the Participating Customers, and Participating Customers will receive no discount or percent-off of these Transmission and Ancillary Charges. Such pass through includes, without limitation, the cost of Network Integration Transmission Services, Transmission Losses and Ancillaries (as such terms are used by the ISO), distribution line losses and distribution service charges assessed by the Electric Utility on Constellation NewEnergy and/or its customers, and any capacity requirement imposed on Constellation NewEnergy by an ISO or a RTO.

5.2 Billing. Billing shall be provided by the Electric Utility under a consolidated billing format pursuant to the Electric Utility's tariff provisions and ICC rules applicable to Participating Customer(s). If a Participating Customer fails to pay amounts due within the specified time period for said payments in accord with the Electric Utility's tariff and ICC regulations, Constellation NewEnergy retains the right to assess late payment fees on, or deem such non-payment a default of Participating Customer for purposes of Section 6.1.1 of this Agreement. Constellation NewEnergy may not convert Participating Customer from consolidated billing to dual billing, or from dual billing to consolidated billing if such a conversion will facilitate more timely billing, collections, and/or payment, without the prior written consent of the City of Evanston and such consent shall not be unreasonably withheld or delayed.

## **ARTICLE 6** **DEFAULT AND REMEDIES**

6.1 Event of Default.

6.1.1 A "City of Evanston Event of Default" shall mean the occurrence of any of the following and the passage of any cure period set forth therein:

(i) Any representation or warranty made by the City of Evanston in Article 9 hereunder is false or misleading in any material respect when made;

(ii) The non-excused failure to perform any material covenant or obligation set forth in this Agreement (other than that set forth in (i) above) and such failure is not remedied within thirty (30) days after written notice thereof unless the cure requires longer than the thirty (30) days to effect and the City of Evanston is diligently working towards such cure; and

6.1.2 A "Constellation NewEnergy Event of Default" shall mean the occurrence of any of the following and the passage of any cure period set forth therein:

(i) the failure to make, when due, any undisputed payment required pursuant to this Agreement if such failure is not remedied within ten (10) Business Days after written notice;

(ii) any representation or warranty made by Constellation NewEnergy in Article 9 hereunder is false or misleading in any material respect when made or when deemed made;

(iii) the non-excused failure to perform any material covenant or obligation set forth in this Agreement (other than that set forth in (i) above and as set forth in Section 4.3) if such failure is not remedied within thirty (30) days after written notice thereof, unless the cure period reasonably requires more than thirty (30) days to effect and Constellation NewEnergy is diligently working towards such cure; and

## 6.2 Rights and Remedies.

6.2.1 Rights and Remedies for a City of Evanston Event of Default. Subject to other provisions of this Agreement, if the City of Evanston is the defaulting Party hereunder, so long as such the City of Evanston Event of Default shall have occurred and be continuing, Constellation NewEnergy shall have the right to (i) designate a date ("Early Termination Date"), no earlier than the day such notice is effective and no later than twenty (20) days after such notice is effective, on which this Agreement shall terminate and to terminate this Agreement on the Early Termination Date, (ii) suspend performance under this Agreement, and/or (iii) have all rights and remedies available in law and equity. In addition to the foregoing remedies, Constellation NewEnergy shall have the right to seek the remedies of specific performance of The City of Evanston's and Participating Customers' obligations hereunder and/or injunctive relief to continue to provide Retail Electric Supply hereunder.

6.2.2 Rights and Remedies for a Constellation NewEnergy Event of Default. Subject to other provisions of this Agreement, if Constellation NewEnergy is the defaulting Party hereunder, so long as such Constellation NewEnergy Event of Default shall have occurred and be continuing, the City of Evanston shall have the right to (i) designate an

Early Termination Date, no earlier than the day such notice is effective and no later than 20 days after such notice is effective, and to terminate this Agreement on the Early Termination Date, (ii) suspend performance under this Agreement, and/or (iii) have all rights and remedies available in law and equity. In addition to the foregoing remedies, the City of Evanston shall have the right to seek the remedies of specific performance and/or injunctive relief.

6.2.3 Duty to Mitigate. Each Party agrees that it has a duty to mitigate damages and covenants that it will use commercially reasonable efforts to minimize damages it may incur as a result of the other Party's failure to perform pursuant to this Agreement.

## **ARTICLE 7 FORCE MAJEURE**

7.1 Excused Failure to Comply. Neither Party shall be considered to be in default in the performance of its obligations under this Agreement, if its failure to perform results directly or indirectly from a Force Majeure Event. If despite its commercially reasonable efforts, either Party is unable, wholly or in part, to meet its obligations under this Agreement due to a Force Majeure Event, the obligations of each Party, other than the obligation to make payments due for performance rendered hereunder, so far as they are affected by such Force Majeure Event, shall be suspended during such period of the Force Majeure Event. The Party claiming excuse due to a Force Majeure Event shall exercise commercially reasonable efforts and due diligence to remove the inability to perform as soon as reasonably possible so that the affected period shall be no longer than that necessarily affected by the Force Majeure Event and shall exercise commercially reasonable efforts and due diligence to mitigate the effects of the Force Majeure Event. Nothing contained in this Section 7.1 shall be construed as requiring a Party to settle any strike or labor dispute in which it may be involved.

7.2 Force Majeure Event. For purposes of this Agreement, a "Force Majeure Event" shall mean any non-economic cause beyond the reasonable control of the Party affected and shall include, but not be limited to, Acts of God, winds, floods, earthquakes, storms, droughts, fires, pestilence, destructive lightning, hurricanes, washouts, landslides, tornadoes and other natural catastrophes; strikes, lockouts, labor or material shortage, or other industrial disturbances; acts of the public enemies, epidemics, riots, civil disturbances or disobedience, sabotage, wars or blockades; the failure of facilities, governmental actions such as necessity to comply with any court order, law, statute, ordinance or regulation promulgated by a governmental authority, a change in law or court order; provided, however, that any such discretionary acts, failure to act or orders of any kind by Government Aggregator may not be asserted as a Force Majeure Event by Government Aggregator; or any other reasonably unplanned or non-scheduled occurrence, condition, situation or threat not covered above and not caused by a Party's action or inaction, which renders either Party unable to perform its obligations hereunder, provided such event is beyond the reasonable control of the Party claiming such inability. A change in economic electric power market conditions shall not constitute a Force Majeure Event. Failure or interruptions, including without limitation, government ordered interruptions, on the systems of generation, transmission

or distribution relied upon for supplying Energy under this Agreement shall constitute a Force Majeure Event provided that Constellation NewEnergy has arranged for service on these systems at a level of firmness as required to provide the Retail Electric Supply agreed upon herein.

7.3 Notification. If either Party is unable to perform any of its obligations under this Agreement due to a Force Majeure Event, then said Party shall notify the other Party in writing as soon as possible, but no later than seventy-two (72) hours after the start of the Force Majeure Event. The written notice shall include a specific description of the cause and expected duration of the Force Majeure Event.

## **ARTICLE 8 INDEMNIFICATION AND LIMITATION OF LIABILITY**

8.1 The Constellation NewEnergy shall defend, indemnify and hold harmless Evanston and its officers, elected and appointed officials, agents, and employees from any and all liability, losses, or damages as a result of claims, demands, suits, actions, or proceedings of any kind or nature, including but not limited to costs, and fees, including attorney's fees, judgments or settlements, resulting from or arising out of any negligent or willful act or omission on the part of the Constellation NewEnergy employees, or agents during the performance of this Agreement. Such indemnification shall not be limited by reason of the enumeration of any insurance coverage herein provided. This provision shall survive completion, expiration, or termination of this Agreement.

8.2 Nothing contained herein shall be construed as prohibiting the City, or its officers, agents, or employees, from defending through the selection and use of their own agents, attorneys, and experts, any claims, actions or suits brought against them. The Constellation NewEnergy shall be liable for the costs, fees, and expenses incurred in the defense of any such claims, actions, or suits. Nothing herein shall be construed as a limitation or waiver of defenses available to the City and employees and agents, including but not limited to the Illinois Local Governmental and Governmental Employees Tort Immunity Act, 745 ILCS 10/1-101 *et seq.*

8.3 At Evanston's option, Constellation NewEnergy must defend all suits brought upon all such losses and must pay all costs and expenses incidental to them, but the City has the right, at its option, to participate, at its own cost, in the defense of any suit, without relieving Constellation NewEnergy of any of its obligations under this Agreement. Any settlement of any claim or suit related to this Project by Constellation NewEnergy must be made only with the prior written consent of the City of Evanston's Corporation Counsel, if the settlement requires any action on the part of the Evanston.

8.4 To the extent permissible by law, Constellation NewEnergy waives any limits to the amount of its obligations to indemnify, defend, or contribute to any sums due under any Losses, including any claim by any employee of Constellation NewEnergy that may be subject to the Illinois Workers Compensation Act, 820 ILCS 305/1 *et seq.* or any other related law or judicial decision, including but not limited to, *Kotecki v. Cyclops Welding Corporation*, 146 Ill. 2d 155 (1991). The City, however, does not waive any

limitations it may have on its liability under the Illinois Workers Compensation Act, the Illinois Pension Code or any other statute.

8.5 The Constellation NewEnergy shall be responsible for any losses and costs to repair or remedy work performed under this Agreement resulting from or arising out of any act or omission, neglect, or misconduct in the performance of its Work. Acceptance of the work by the City will not relieve the Constellation NewEnergy of the responsibility for subsequent correction of any such error, omissions and/or negligent acts or of its liability for loss or damage resulting there from.

8.6 INDEMNIFICATION BY EVANSTON. Evanston agree to defend, indemnify and hold harmless Constellation NewEnergy and its affiliates and their respective employees, directors, managers, officers, owners, attorneys and representatives and each of their respective successors and assigns (each, a "Constellation NewEnergy Indemnified Person") fro and against any and all losses, damages, claims, deficiencies, judgments, liabilities, costs and expenses, and any and all claims, proceedings, suits, settlements or other proceedings of every nature, kind and descriptions whatsoever, including without limitation, reasonable attorneys' fees, disbursements and court costs (collectively, "Losses") incurred or suffered by an Constellation NewEnergy indemnified person arising out of or relating to (A) a breach by Evanston of any of its representations, warranties or covenants contained herein, (B) the negligence or willful misconduct of Evanston, or (C) any improper or illegal actions or omissions of Evanston; in each case, except to the extent such losses are determined by a court of competent jurisdiction by final and non-appealable judgment to have resulted from the breach of this agreement, gross negligence or willful misconduct of Constellation NewEnergy.

8.7 LIMITATION OF LIABILITY. Except as otherwise specifically provided herein, in no event will either party be liable under this agreement o the other party, to a customer or third party for any incidental, indirect, special, consequential or punitive damages in connection with or arising out of any performance or non-performance of this agreement or any event of default, regardless of whether such claims are based upon breach of warranty, tort (including but not limited to negligence of any degree), strict liability, contract, operation of law, equity or otherwise.

8.8 All provisions of this Section shall survive completion, expiration, or termination of this Agreement.

## **ARTICLE 9** **REPRESENTATIONS AND WARRANTIES**

9.1 Representations and Warranties by Constellation NewEnergy.

9.1.1 Constellation NewEnergy hereby represents and warrants to the City of Evanston as of the Effective Date as follows:

(i) Constellation NewEnergy is a corporation, duly formed, validly existing and in good standing under the laws of the State of Delaware and certified as an Alternative Retail Electric Supply in the State of Illinois.

(ii) Constellation NewEnergy has all authorizations from any governmental authority necessary for it to legally perform its obligations under this Agreement or will obtain such authorizations in a timely manner prior to when any performance by it requiring such authorization becomes due;

(iii) The execution and delivery of, and performance under, this Agreement are within Constellation NewEnergy's powers, have been duly authorized by all necessary action and do not violate, conflict with or breach any of the terms or conditions in its governing documents or any contract to which it is a party or any governmental rule applicable to it;

(iv) This Agreement has been duly executed and delivered by Constellation NewEnergy, and this Agreement (assuming due authorization, execution and delivery of all Parties) constitutes legal, valid and binding obligations of Constellation NewEnergy enforceable against it in accordance with its terms, subject to bankruptcy, insolvency, reorganization and other laws affecting creditor's rights generally and general principles of equity, regardless of whether such enforceability is considered in a proceeding in equity or at law; and

(v) No Bankruptcy is pending against it or to its knowledge threatened against it.

(vi) None of the documents or other written information furnished by or on behalf of Constellation NewEnergy to the City of Evanston and the Request for Proposal contains any untrue statement of a material fact or omits to state any material fact or is misleading. Constellation NewEnergy is not in default with any order, writ, injunction or decree of any court or federal, state, municipal or other governmental department, commission, board, bureau, agency or instrumentality, domestic or foreign, which would prevent Constellation NewEnergy from complying with the terms and conditions of this Agreement.

(vii) That there are no actions, proceedings or investigations pending or threatening Constellation NewEnergy before any court or before any governmental department, commission, board, agency or instrumentality, nor does Constellation NewEnergy know or have reasonable ground to know of any basis for any such action, proceeding or investigation against Constellation NewEnergy which would prevent Constellation NewEnergy from complying with the terms and conditions of this Agreement.

(viii) That Constellation NewEnergy will carry, at its own expense, secure and maintain in effect throughout the duration of this agreement, insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the Work hereunder by the Constellation NewEnergy, its agents, representatives, employees.

(ix) The Constellation NewEnergy shall comply with all federal, state, and local statutes, regulations, rules, ordinances, judicial decisions, and administrative rulings applicable to its performance under this Agreement.

## 9.2 Representations and Warranties by the City of Evanston.

9.2.1 Government Aggregator hereby represents and warrants to Constellation NewEnergy as of the Effective Date as follows:

(i) The City of Evanston has complied with requirements under the Act for the City of Evanston to provide for the aggregation of electrical loads for residential and small commercial retail customers within the corporate limits of the City of Evanston as an opt-out program;

(ii) The City of Evanston has all authorizations from any governmental authority necessary for it to legally perform its obligations under this Agreement;

(iii) The execution and delivery of, and performance under, this Agreement are within The City of Evanston's powers, have been duly authorized by all necessary action and do not violate, conflict with or breach any of the terms or conditions in its governing documents or any contract to which it is a party or any governmental rule applicable to it. Neither the execution nor delivery by the City of Evanston of this Agreement nor the consummation by the City of Evanston of the transactions contemplated hereby or thereby does or will result a breach or violation of the Agreement establishing The City of Evanston's Aggregation Group, or its bylaws, or any material provision of the governance document related thereto;

(iv) This Agreement has been duly executed and delivered by the City of Evanston, and this Agreement (assuming due authorization, execution and delivery of all Parties) constitutes legal, valid and binding obligations of the City of Evanston, enforceable against it in accordance with its terms, subject to applicable bankruptcy, insolvency, fraudulent conveyance, reorganization and similar laws affecting creditors' rights and remedies generally, to general principles of equity, regardless of whether such enforceability is considered in a proceeding in equity or at law;

(v) The City of Evanston is entering into this Agreement with a full understanding of all of the risks hereof (economic and otherwise), and it is capable of assuming and willing to assume those risks;

(vi) None of the documents or other written information furnished by or on behalf of the City of Evanston or Eligible Customers to Constellation NewEnergy pursuant to this Agreement contains any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements contained herein or therein, in the light of the circumstances in which they were made, not misleading;

(vii) The City of Evanston has the contractual right to enter into this Agreement, to contract with Constellation NewEnergy to supply Retail Electric Supply and

Administrative Services to meet the obligations of its Aggregation Program Customers, and shall enforce its contractual agreements and rights.

**ARTICLE 10**  
**CONFIDENTIAL INFORMATION**

10.1 Confidential Information. Constellation NewEnergy shall preserve the confidentiality of the account information it receives as a result of the performance of its obligations set forth herein. Constellation NewEnergy shall not disclose, use, sell or provide customer account information to any person, firm or entity for a purpose outside of the operation of the Program. This provision will survive the termination of the Agreement. Notwithstanding the foregoing, Constellation NewEnergy may disclose confidential account information as required by law, and any such disclosure shall not be a violation of this Agreement. However, such disclosure shall not terminate the obligations of confidentiality. Constellation NewEnergy agrees to give the City of Evanston prompt notice of any discovery request or order, subpoena, or other legal process requiring disclosure of any confidential account information. Constellation NewEnergy shall provide the City of Evanston with sufficient advance notice as to give the City of Evanston opportunity, at the Village's discretion and sole cost, to seek to quash the subpoena, obtain a protective order or similar relief. Constellation NewEnergy shall furnish only that portion of the confidential account information that is required or necessary in the opinion of Constellation NewEnergy's legal counsel. In addition,

10.2 Treatment of Information. Constellation NewEnergy shall use reasonable efforts to obtain reasonable assurances that confidential treatment will be accorded any account information so disclosed. All account information, shall be returned to the City of Evanston at the conclusion of the services provided to the Aggregation as set forth in Section 4.6. . Notwithstanding the foregoing, nothing herein shall prevent the use by Constellation NewEnergy of such customer account information for the purpose of communicating with its customers except for customers which have opted out of the Aggregation Program.. In addition, nothing herein shall prevent Constellation NewEnergy from using information in the public domain prior to its disclosure under this Agreement.

**ARTICLE 11**  
**MISCELLANEOUS**

11.1 Notices. Any notices, requests or demands regarding the services provided under this Agreement and the Attachments shall be deemed to be properly given or made (i) if by hand delivery, on the day and at the time on which delivered to the intended recipient at its address set forth in this Agreement; (ii) if sent by U.S. Postal Service mail certified or registered mail, postage prepaid, return receipt requested, addressed to the intended recipient at its address shown below; or (iii) if by Federal Express or other reputable express mail service, on the next Business Day after delivery to such express service, addressed to the intended recipient at its address set forth in this Agreement. The address of a Party to which notices or other

communications shall be mailed may be changed from time to time by giving written notice to the other Party.

Constellation NewEnergy Inc.,

Frank Orcel

550 West Washington Blvd. Suite 300

Chicago, IL 60661

Phone: 410-470-5828 (office)

631-926-8374 (cell)

City of Evanston:

City Manager, Wally Bobkiewicz

2100 Ridge Avenue, Room 4500

Evanston, IL 60201

Phone: 847-866-2936

Fax: 847-448-8083

With a copy to:

Corporation Counsel, W. Grant Farrar

2100 Ridge Avenue, Room 4400

Evanston, IL 60201

With a copy to:

Director of Utilities, David Stoneback

555 Lincoln Street

Evanston, IL 60201

11.2 Entire Agreement. This Agreement, including all Attachments hereto, contains all of the terms and conditions of this Agreement reached by the Parties, and supersedes all prior oral or written agreements with respect to this Agreement. This Agreement may not be modified, amended, altered or supplemented, except by written agreement signed by all Parties hereto. No waiver of any term, provision, or conditions of this Agreement, whether by conduct or otherwise, in any one or more instances, shall be deemed to be, or shall constitute a waiver of any other provision hereof, whether or not similar, nor shall such waiver constitute a continuing waiver, and no waiver shall be binding unless executed in writing by the Party making the waiver.

11.3 Waivers. Any request for a waiver of the requirements and provisions of this Agreement shall be in writing and must be approved in writing by the non-waiving Party. The failure of either Party to insist upon strict performance of such requirements or

provisions or to exercise any right under this Agreement shall not be construed as a waiver or relinquishment of such requirements, provisions or rights.

11.4 Applicable Law. This Agreement shall be governed by and interpreted in accordance with the laws of the State of Illinois. Jurisdiction and the venue for any cause of action between the Parties relating to the terms of this Agreement shall be filed in either the circuit court of Cook County, Illinois or the Northern District Court of Illinois.

11.5 Controlling Provisions. In the event of any inconsistency between the terms herein and the terms of the Attachments hereto, the provisions of the Agreement shall control.

11.6 Severability. Any provision in this Agreement that is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions or affecting the validity or enforceability of such provision in any other jurisdiction. The non-enforcement of any provision by either Party shall not constitute a waiver of that provision nor shall it affect the enforceability of that provision or the remainder of this Agreement.

11.7 Savings Clause. If any provision of this Agreement, or the application of such provision, shall be rendered or declared invalid by a court of competent jurisdiction, or by reason of its requiring any steps, actions, or results, the remaining parts or portions of this Agreement shall remain in full force and effect.

11.8. Non-Assignability. This Agreement shall not be transferred or assigned by either Party without the express written authorization of the non-assigning Party, which authorization shall not be unreasonably withheld; provided, however, that such authorization may be withheld upon a reasonable determination that the proposed assignee does not have at least the same financial and technical abilities. Notwithstanding the foregoing, Constellation NewEnergy may, without the consent of the City of Evanston or the Participating Customers, (a) transfer, sell, pledge, encumber or assign this Agreement or the accounts, revenues or proceeds hereof in connection with any financing or other financial arrangement; (b) transfer or assign this Agreement to an affiliate of Constellation NewEnergy; or (c) transfer or assign this Agreement to any person or entity succeeding to all or a substantial portion of the assets of Constellation NewEnergy. Upon an assignment pursuant to (b) or (c), the City of Evanston and the Participating Customers agree that Constellation NewEnergy shall have no further obligations regarding future performance hereunder. Either Party's assignee shall agree in writing to be bound by the terms and conditions of this Agreement, including the Attachments. Subject to the foregoing, this Agreement and its Attachments shall be binding upon and inure to the benefit of any permitted successors and assigns, to the extent permitted by law.

11.9 Forward Contract. The Parties acknowledge and agree that (a) this Agreement constitutes a forward contract within the meaning of the United States Bankruptcy Code, and (b) Constellation NewEnergy is a forward contract merchant.

11.10 Recitals. The Parties agree and acknowledge that the prefatory statements and recitals in this Agreement are intended to be and shall be a part of the provisions of this Agreement.

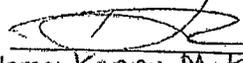
11.11 Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which shall together constitute one instrument.

IN WITNESS WHEREOF, the Parties have duly executed this Agreement to be effective on the date first written above.

CONSTELLATION NEWENERGY, INC.

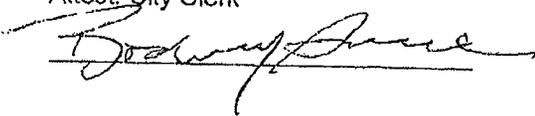
CITY OF EVANSTON, ILLINOIS

MAY 2 2012

Signed:   
Typed Name: Kenny Matvia  
Title: Senior Vice President  
Date: May 1, 2012

Signed:   
Typed Name: Wally Bobkiewicz  
Title: City Manager  
Date: 5-1-12

Attest: City Clerk

  
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**ATTACHMENT A  
PROGRAM TERMS**

Retail Electricity Supply Terms and Conditions of Service  
For the Aggregated Group between  
The City of Evanston and Constellation NewEnergy, Inc.

**AGREEMENT**

These Terms and Conditions together with the City of Evanston's enrollment information / opt-out notification will apply to the generation component of your electric bill if you do not opt-out of the aggregation program adopted by the City of Evanston. Please keep a copy of these Terms and Conditions for your records.

Constellation NewEnergy, Inc. (CNE) is certified by the Illinois Commerce Commission ("ICC") as an Alternate Retail Electric Supplier ("ARES") to sell competitive retail electric service to customers in the State of Illinois utilizing existing transmission and distribution systems. CNE is certified by the ICC to operate as an ARES in the service area of Commonwealth Edison Company. As an ARES, CNE will supply the electric generation to your Electric Utility ("EU") based on your usage. Your EU then distributes or delivers the electricity to you. The generation prices and charges that customers in the aggregation group pay is based on an Agreement between the City of Evanston and CNE. The ICC regulates distribution prices and services. As authorized by 20 ILCS 3855/1-92, CNE sells electricity and related services and equipment ("Retail Electric Supply") to corporate authorities of municipalities or boards of county supervisors acting as governmental aggregators of residential and small commercial retail electrical loads located within the municipality or the unincorporated areas of the county.

**DEFINITIONS:**

**Generation Service** – Charge for the production of electricity.

**Transmission Service** – Charge for moving high voltage electricity from a generation facility to the distribution lines of an electric utility.

**Distribution Service** – Charge for the physical delivery of electricity over a distribution system to customers from the transmission system.

**Right of Rescission** – If you do not opt-out of the aggregation group your EU will send you a confirmation letter. You will have the right to rescind your enrollment within three (3) calendar days following the postmark date of the confirmation letter by following the instructions contained in the letter. The Right of Rescission only applies when a customer switches to a generation supplier. Should you choose to opt-out of your governmental aggregator's program, you will continue to receive the applicable tariffed services provided by your EU as required by 220 ILCS 5/16-103 and defined by its rates on file with the ICC pursuant to 220 ILCS 5/Art. IX. ("Tariffed Service"), unless you choose an alternate supplier of electricity.

**Electric Utility ("EU")** means Commonwealth Edison Company, or any successor thereto, that owns and maintains the distribution system required for transmitting or distributing electric energy to retail customers.

**Governmental Aggregator** means the City of Evanston as authorized by the March 20, 2012 referendum on Electricity Aggregation.

## **TERMS AND CONDITIONS OF SERVICE**

1. **Eligibility.** Only residential customers and small commercial retail customers of an EU consuming 15,000 kilowatt-hours or less of electricity annually in the EU's service area are eligible customers to participate in the aggregation group. Applicable residential and small commercial retail customers in an aggregation program shall not include customers of an ARES that is not the chosen supplier of the aggregation program or customers participating in a residential real-time pricing program or Percentage of Income Payment Plan (PIPP) unless those customers affirmatively choose to join the aggregation program. CNE also reserves the right to refuse enrollment to any small commercial retail customer with an outstanding electric bill balance.

2. **Basic Service Prices.** Participants in the aggregation group will pay CNE a fixed price of \$0.04797 per kilowatt hour (\$ / kWh) for combined electric transmission, generation and generation related charges as specified in the enrollment notification. In addition you will be charged by your EU for distribution and various other charges. In addition to the charges described above, if any regional transmission organization or similar entity, EU, governmental entity or agency, NERC and other industry reliability organization, or court requires a change to the terms of the Agreement between the City of Evanston and CNE, or imposes upon the Supplier new or additional charges or requirements, or a change in the method or procedure for determining charges or requirements, relating to your Retail Electric Supply under this Agreement (any of the foregoing, a "Pass-Through Event"), which are not otherwise reimbursed to the Supplier, Customer agrees that Supplier may pass through the additional cost to Supplier of such Pass-Through Event, which may be variable, to participants in the aggregation group. Changes may include, without limitation, transmission or capacity requirements, new or modified charges or shopping credits, and other changes to retail electric customer access programs.

If the Tariffed Service rate ("ComEd rate") for the same service falls below the Agreement rate, the Supplier, at their option, will either match the Tariffed Service rate or return your account to the Tariffed Service. If the Supplier returns your service to the Tariffed Service for this reason, you will not be assessed a termination charge.

3. **Renewable Energy.** The fixed price includes the cost of renewable energy credits ("RECs") representing the environmental attributes from electricity in an amount equal to the RECs required by Illinois' renewable energy portfolio standard plus the voluntary RECs shall equal to 100% the Account(s) usage during the Term. The RECs equal to 100% of the Account(s) usage will be from an "Illinois or adjoining state wind" asset which meets all of the technology

criteria of Green-e. The renewable energy is "new", meaning it comes from wind farms built since 1997 and such facilities allow customers to make claims about being green and reducing carbon usage.

4. **Term.** As a part of your governmental aggregator's program, your generation supply from CNE will commence with the next available meter reading and after processing of the enrollment by your EU, and will continue for the term of 12 months, ending on the meter read for the last month of service. The program may be terminated prior to the term as specified in the opt-out notification pursuant to the terms of the Master Agreement to Provide Services to an Aggregated Group between the City of Evanston and CNE. Should the program be terminated, you will be returned to the applicable Tariffed Service.

5. **Billing.** You will receive a consolidated bill from your EU for both the Supplier and EU charges. If you do not pay your bill by the due date, the Supplier may cancel these terms and conditions after giving you a minimum of fourteen (14) days written notice. Upon cancellation you will be returned to your EU as a customer. You will remain responsible to pay the Supplier for any electricity used as well as any late payment charges. CNE reserves the right to convert you from consolidated billing to dual billing if such a conversion will facilitate more timely billing, collections, and/or payment pursuant to the terms of the Master Agreement to Provide Services to an Aggregated Group between CNE and the City of Evanston. Further, your failure to pay EU charges may result in your electric service being disconnected in accordance with your EU's tariffs.

6. **Penalties, Fees and Exceptions.** At present there is no switching fee to change from the Tariffed Service to the aggregation group. However, if a new regulation is passed legally requiring this fee, the EU may charge the switching fee to you. If you do not pay the full amount of your electric bill by the due date, CNE may charge a late payment fee no greater than 1.5% per month for the generation component of the bill.

7. **Cancellation/Termination Provisions.** Residential and small retail commercial customers may terminate their participation in the aggregation group without penalty, at any time to return to the Tariffed Service, or due to a move or cancellation of their account with the EU. If you terminate these terms and conditions for any other reason, except as expressly provided herein, you will be charged a termination fee of \$25 per account. Upon termination and return to Tariffed Service with your EU, the rates, terms, and conditions will be established by the EU.

8. **Customer Consent and Information Release Authorization.** By choosing not to opt-out of your community's aggregation program, these terms and conditions will result in change from your current generation service provider to CNE. CNE is authorized to obtain information from the EU that includes, but is not limited to: billing history, payment history, historical and future electricity

usage, meter readings, and characteristics of electricity service. The Supplier reserves the right to determine if your credit standing is satisfactory before accepting your enrollment request. These terms and conditions shall be considered executed by CNE following acceptance of your account enrollment request by CNE, the end of the 3 day rescission period and subsequent acceptance of the enrollment by your EU.

**9. Contract Expiration.** At the end of its term, these terms and conditions will expire. At least 30 days prior to the expiration of these terms and conditions, CNE will notify customers that the Agreement is ending and inform the customers whether they will be switched back to the Tariffed Service or if the Governmental Aggregator has contracted with a ARES for a new Aggregation Program.

**10. Dispute Procedures.** You may contact your EU or CNE with any questions concerning the terms of service by phone at 1-800-718-1493 (toll-free) M-F 8AM – 5PM CST or in writing at Constellation NewEnergy Inc., c/o Residential Care, 1221 Lamar Street, Suite 750, Houston, TX 77010. Our web address is [www.constellation.com](http://www.constellation.com). If your complaint is not resolved after you have called CNE and/or your EU, or for general utility information, you may contact the Consumer Services Division of the ICC for assistance at between 8:30 AM and 5:00 PM, Monday through Friday by calling 1-800-524-0795 or TTY at 1-800-858-9277 or visit [www.icc.illinois.gov](http://www.icc.illinois.gov) or [www.pluginillinois.org](http://www.pluginillinois.org).

**11. Miscellaneous.** You may request from the Supplier, twice within a 12 month period, up to 24 months of payment history, without charge. The Supplier is prohibited from disclosing a customer's social security number without the customer's affirmative written consent except as permitted or required by 220 ILCS 5/5-110, 815 ILCS 505/2RR or other applicable law. The Supplier is prohibited from disclosing a customer's billing, usage or load data except as permitted by 20 ILCS 3855/1-92, 220 ILCS 5/16-122 or other applicable law. The Supplier's environmental disclosure statement is available for viewing at [https://home.constellation.com/content/documents/IL\\_environmentaldisc.pdf](https://home.constellation.com/content/documents/IL_environmentaldisc.pdf). The Supplier will provide quarterly updates to the statement as a separate billing insert as required under Section 16-127 of the Electric Service Customer Choice and Rate Relief Law of 1997 and the rules of the Illinois Commerce Commission, 83 Ill. Adm. Code 421. The Supplier may assign its rights to another party, including any successor, in accordance with the rules and regulations of the ICC. The Supplier assumes no responsibility or liability for the following items that are the responsibility of the EU: operation and maintenance of the EU's electrical system, any interruption of service, termination of service, or deterioration of the EU's service. **In the event of a power outage, you should contact your local EU.** Customer is responsible for providing the Supplier with accurate account information. If said information is incorrect, the Supplier reserves the right to re-price the applicable

account(s) or terminate the Agreement. The Supplier reserves the right to return any customer to the EU if the customer's rate code or meter type is changed and the account is no longer eligible for this program.

12. **Warranty.** CNE warrants title and the right to all electricity sold hereunder. THE WARRANTIES SET FORTH IN THIS PARAGRAPH ARE EXCLUSIVE AND ARE IN LIEU OF ALL OTHER WARRANTIES, WHETHER STATUTORY, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR ARISING OUT OF ANY COURSE OF DEALING OR USAGE OF TRADE.

**ATTACHMENT B**  
**Plan of Operation and Governance**

