

## FOR BOARD ACTION

Agenda Item # 6.b.

Meeting Date:

5/27/08

**SUBJECT:**

SLP Plant Software Service Agreement (Emerson Novaspect)

**PREPARED BY:**

Rob Dunnette  
Mgr of Power Resources


ITEM DESCRIPTION:

This item will provide for a renewal of the existing DeltaV distributed control system software service agreement provided by Emerson/Novaspect. The scope, and associated cost, of this agreement has been significantly reduced consistent with SLP staff reorganization plans. Service no longer being purchased will be provided by the Measures & Controls Supervisor, Jay Button, and his staff.

Funding for this agreement is included in the approved 2008 Power Resources budget.

UTILITY BOARD ACTION REQUESTED:

Staff recommends that the Utility Board approve an agreement with Emerson Novaspect for control system software support services in the amount of \$77,779.

  
General Manager

5/27/08  
Date

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**Novaspect Inc.**  
**System Support Plan**  
**Prepared For:**

**Rochester Public Utilities**  
**Silver Lake Plant**  
**Rochester Minnesota**  
**Novaspect Contract #: 5269**  
**February 14, 2008**



Date	Rev. No.	Description	Issued By	Checked By
2-14-08	0a	Renewal Proposal	JCT	
4-11-08	0b	Added Service Bank Options 300 & 400, Novaspect Technical Access	JCT	
04-17-08	1	Revised for 300 service Units and deleted 24/7 access options	LAL	JCT



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**Novaspect, Inc.**  
**7565 Corporate Way**  
**Eden Prairie, MN 55344**

**APPENDIX I – SCHEDULE OF SERVICES AND CHARGES**

The following Services are to be provided by Novaspect in accordance with this Agreement and are subject to the charges as set out below:

**DeltaV System ID: 0001-0001-6369, 2500 DST**  
**AMS System ID: 0002-0003-1478, 400 Tag**

Schedule of Services and Pricing Summary: Delta V Systems – Boiler Controls System

**2008 Renewal**

Service Description	Fixed Annual	Service Period	
DeltaV Guardian Support (Normal Hours Response)	25,671.00	05/01/08	04/30/09
DeltaV Express Module Replacement	7,813.00	05/01/08	04/30/09
AMS Foundation Support	795.00	05/01/08	04/30/09
Novaspect Technical Support Access <del>24 X 365 Emergency Access</del> <del>Next Business Day On-Site Response – Note 2</del> <del>Novaspect Help Desk</del>	NA	NA	NA
Service Bank – 300 Units (1 Service Bank Unit = 1 Hour, see Appendix II for details)	43,500.00	05/01/08	04/30/09
<b>Total (Annual Charge)</b>	<b>\$77,779.00</b>		
Available on a Monthly Payment	\$ 6,482.00		

- 1 Invoice to occur on or around May 1, 2008 Payment Terms: Net 30 Days
- 2 Business Day is defined as Monday through Friday excluding Novaspect holidays.
- 3 Service Bank of 300 hours annually These hours can be use for Onsite Service (including travel time), Phone Support or Office Engineering The Service Bank will be decremented 2 hours for each site visit from the Novaspect-Red Wing, MN office to cover travel time and expenses Travel to site from other Novaspect offices will require additional hours decremented for each site visit
4. Primary Contacts for each party are as follows:

<p><b>Novaspect, Inc.</b> 7565 Corporate Way Eden Prairie, MN 55344 Attn: Jeff Olson Phone: (952) 934-5100 FAX: (952) 934-1279</p>	<p><b>Rochester Public Utilities</b> 4000 East River Road, NE Rochester, MN 55906 Attn: Jay Button Phone: (507) 280-1654 FAX: (507) 280-1651</p>
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## **APPENDIX II – DESCRIPTION OF SERVICES**

### **Foundation/Guardian Support**

Foundation Support provides DeltaV or AMS users with the essential support needed to achieve peak system utilization and reduce the risk of lost production with around the clock access to crucial information, timely advice and problem diagnosis by product experts plus the latest software releases and access to on-line information services

#### **This Service provides:**

- Consultation for DeltaV or AMS system software and hardware topics, i.e. technical product support. Consultation requests are directed to the Emerson Process Management Response Center. Emerson Process Management will work closely with the Customer's system manager to provide an effective problem-resolution process, including remote system diagnosis where authorized by the Customer and an automatic escalation process for inquiries or problems requiring advanced expertise.
- CD media and documentation for software releases to Programs as and when issued by Emerson Process Management. Software releases may include new and improved features
- Access to system technical articles via fax information service and Internet WEB site, <http://www.emersonprocess.com/systems/support>). This site provides technical articles with downloadable files and an E-Mail facility for requesting technical assistance or specific software updates
- Guardian Website – A user-configurable content that is specific to the enrolled system to use in place of the standard product Foundation Support website
- Guardian Email – Automated email messages configured from the Guardian Website to communicate alerts that are specifically applicable to the enrolled system.
- Differentiated Treatment of Support Calls – The GSC will apply system content awareness to the situation to simplify and speed system maintenance and troubleshooting
- System Analysis Reports – Two system analysis reports per year will be prepared by Emerson specialists, with recommendations on system maintenance based on system content, trends, events and call history

### **Customer Responsibilities**

To request service the Customer should contact the Emerson Process Management **Response Center at (800) 833-8314**. Upon contacting Emerson Process Management, you must provide the DeltaV or AMS System Identification Number **0001-0001-6369 or 0002-0003-1478** and the fullest possible explanation of the problem for which assistance is required

When Remote Diagnosis is necessary, the Customer will make available and switch-on a Emerson Process Management supplied modem, run the *pcANYWHERE* software and provide a suitable telephone connection

The Customer shall have a trained engineer available to provide the fullest details available on the problem(s) to be investigated and shall provide any local technical assistance required during the remote log-on and diagnosis session

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#### **DeltaV Express Module Replacement**

Under this Service, the Customer has access to Emerson Process Management's stock of spares held at Emerson Process Management's premises. Should an assembly require replacement, Express Module Replacement provides replacement assemblies shipped within one business day.

#### **Customer Responsibilities**

Each Exchange Replacement provided under this Service is supplied on the understanding that the faulty unit is returned to Emerson Process Management within 7 days of dispatch of the Exchange Replacement and that the faulty item is, in Emerson Process Management's opinion, acceptable for repair. Units which have been mechanically damaged, immersed in liquid, corroded or damaged by fire or lightning will be automatically deemed unacceptable and rejected from the Plan. If on receipt by Emerson Process Management the item is found to be unacceptable, it will be returned at the Customer's expense and an invoice for the Exchange Replacement will be issued at 100% of the prevailing list price. Each item returned must be accompanied by sufficient documentation to identify the item as the property of the Customer (including return address for redelivery of the item in case found to be unrepairable). Documentation should include the following: System ID Number, DeltaV Part Number, Serial Number, item description, symptom of problem, Service Agreement PO number (supplied by Novaspect), Customer contact name, phone and FAX number. Emerson Process Management cannot be held responsible for the loss of any item that is insufficiently identified. Novaspect will supply preprinted shipping labels and provide you with a Returned Goods Authorization number for returned shipments. Items not returned to Emerson Process Management within the allotted 7-day period will be subject to invoicing at 100% of the prevailing list price.

#### **Service Details**

Next business day replacement for DeltaV failed modules. Faulty items shall be returned freight prepaid, using the packing list and address information supplied by Novaspect.

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## **Novaspect Technical Response Access**

### **Service Description**

In the event that the DeltaV System ceases to function satisfactorily, the Customer may call upon Company's experienced and fully qualified Specialists for emergency service to investigate, identify and repair the fault and restore the System as quickly as possible to its normal operating condition

### **Level of Service**

time to travel to the Customer's site following receipt of a call for assistance. Normally the Specialist will acknowledge receipt of the Customer's call immediately by telephone. If the fault cannot be resolved over the phone, he will travel to the Customer's site. The response time is the time in which the Specialist will normally be expected to leave for site following receipt of the call for assistance

### **Customer Responsibilities**

In an emergency, the Customer should contact Company at **847-709-8966** during normal business hours, and **847-709-8976** after hours. Upon contacting Company, the Customer must give the fullest possible explanation of the System failure. To be eligible for this Service, the Customer must have either purchased the recommended spares for the System or agreed in to a Company Spares Support Plan. This will ensure that spares are available to enable the Equipment to be returned to its normal operational condition

### **Service Details**

- **Availability:** 24 hours per day, 365 days per year
- **Response Time:** Next Business Day

### **Charges**

A fixed annual charge for the Service shall be set out in Appendix I

In addition, a charge will be made for each visit to site by a Specialist in response to a call for assistance. The charge will be based on the Specialist's time (including time traveling to and from site) plus all expenses incurred during travel and subsistence. The Specialist's rates and car mileage rates will be specified in Appendix IV of the Agreement. All other expenses will be charged at cost as incurred

***It is expected that a valid Purchase Order is available at time of service or that the service bank be utilized as defined in Appendix I***

### **Novaspect Help Desk**

This Service provides the Customer with prompt, reliable technical consultation and service coordination for the System. Expert answers and advice are provided by telephone and, in some situations, this can eliminate the need for an on-site service call

This Service provides consultation for DeltaV system configuration, software and hardware topics. Consultation requests are directed to the local Novaspect 'Help Desk' where Specialists (already familiar with the Customer's System and its service history) provide a first-line support. The Help Desk Specialists will work closely with the Customer's system manager to provide an effective problem-resolution process combining the local customer and Novaspect resources with that of the whole Emerson Process Management Systems Product Technical Support Group. An automatic escalation process will apply to all inquiries or problems requiring advanced expertise. This service will be provided during Normal Working Hours, Mondays to Fridays, excluding Novaspect holidays by calling our offices at **(847) 956-8020**.

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### **Service Bank**

#### **Service Description**

This Service provides the Customer with specialized assistance from a certified Emerson Process Management support or engineering Specialist, to execute tasks which are unforeseen or not covered by any other service of the Support Contract. The Customer can reserve the use of the Specialist for future needs through purchase of a block of service time that can be stored or banked away in an account and drawn upon when required

#### **Level of Service**

This Service provides the Customer with easy access, often without the need to issue a separate purchase order, to assistance for the execution of tasks such as:

- Demand on-site service to determine system problems, replace failed modules, or arrange for other corrective action
- Installation of software upgrades
- Installation of hardware expansions
- Spares Management
- Configuration modifications
- Host computer program modifications
- Control system modifications
- System integration
- Disaster planning and recovery plans, or
- Other custom services

#### **Customer Responsibilities**

If assistance is required within the framework of this service, the Customer should contact Novaspect service department to arrange the required assistance, mentioning that the costs need to be charged to the Service Bank account.

#### **Not Included**

- Parts Repair Service
  - Spares Support or hardware replacement.
- These and other services are available as separate service modules.

#### **Service Details**

- These hours may be used for Onsite Service (including travel time), Phone Support or Office Engineering
- Availability: Normal Working Hours, Monday to Friday excluding public holidays. If service is required outside these time periods overtime multipliers will apply
- After each visit, an account balance sheet detailing services performed and remaining available Service Bank hours will be provided. All Service Bank hours should be used before the end of the contract period.

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**Appendix III – Schedule of Equipment and Software**

**DeltaV Equipment**

ITEM #	DESCRIPTION	QTY
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**DeltaV Consoles**

	Professional Plus Engineering Workstations	1
	Professional Workstation	1
	Operator Workstations	6
	Application Workstations	1

**DeltaV Controllers**

VE3004	MD Simplex Controllers	
VE3004	MD Redundant Controller Pairs	14

**DeltaV System Software**

	DeltaV System Software – Revision v8.4.1 – 2000 DST System Database	1
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**APPENDIX IV – SERVICES RATE SCHEDULE**

<u>SERVICE DESCRIPTION</u>	<u>Scheduled Hourly Rate</u>	<u>Demand Hourly Rate</u>
Drawing Services / Project Support Services	\$85 00	
Control System Designer	\$113 00	\$130 00
Instrumentation Engineering	\$139 00	\$160 00
Valve Asset Manager / Valve Diagnostic Engineer	\$139 00	\$160 00
Control System Engineering (See * Note 4)	\$165 00	\$220 00
Control System Field Service Engineer (See * Note 4)	\$180 00	\$235 00
Project Manager / Lead Project Engineer	\$180 00	
Custom Training Courses	\$190 00	
Network Design Consulting	\$190 00	
Control Loop Performance Consulting	\$205 00	
Process Consulting (Steam Generation, Refining, Batch)	\$230 00	

**Primetime** – Hourly Rate times 1 (Straight time)  
Monday - Friday, 7:00 AM to 6:00 PM (8 hour maximum)

**Overtime** - Hourly Rate times 1.5 (Time and one-half)  
Monday - Friday hours exceeding 8 hours but less than 12 hours  
Saturday, 7:00 AM to 6:00 PM (8 hour maximum)

**Premium Time** - Hourly Rate times 2 (Double time)  
Monday - Friday hours exceeding 12 hours  
Service engagements or shifts that begin outside of Primetime or Overtime  
Saturday hours exceeding 8 hours  
Sundays and Novaspect scheduled holidays

- \* Note 1 - A four (4) hour minimum charge (including travel time) applies to demand services
- \* Note 2 - A four (4) hour minimum charge will be applied for calls canceled or re-scheduled with less than 24 hours prior notification.
- \* Note 3 – The appropriate multiplier applies to all minimum charges.
- \* Note 4 – Rates are subject to discount for large projects and Service Agreements based upon project size or services committed under a Service Agreement.
- \* Note 5 – For time and material engagements, Novaspect will invoice one hour for project management time for every 20 hours of engineering services provided

Technical support is available at the defined rate for the service type required. An access fee of \$500.00 will be charged for technical support during Primetime hours and an access fee of \$1000.00 will be charged for technical support during non-Primetime hours. Hourly charges in addition to the access fee will begin after 1 hour.

**TRAVEL AND EXPENSE CHARGES**

- Travel time is calculated portal to portal at prevailing rates
- All travel and living expenses will be invoiced at cost plus 10% as incurred by Novaspect.
- Auto mileage will be invoiced at the IRS rates per mile (currently \$0.505/mile).

**EQUIPMENT RENTAL CHARGES**

- Control system equipment is available for rental. Pricing upon request
- Control system test equipment is available for rental (i.e. Combustion Gas Analyzer)

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## APPENDIX V – STANDARD TERMS & CONDITIONS OF SALE

The proposal to which these Terms and Conditions are attached (the "Proposal"), these Terms and Conditions and any Change Orders (as defined herein) shall constitute the entire agreement between the parties and shall collectively be referred to herein as the "Agreement."

1. **ACCEPTANCE** ACCEPTANCE OF THIS AGREEMENT BY BUYER WITHIN 30 DAYS OF THE DATE HEREOF (OR SUCH LONGER PERIOD AS NOVASPECT, INC. ("NOVASPECT") SHALL, IN ITS SOLE DISCRETION, AGREE TO IN WRITING) CREATE A CONTRACT BETWEEN NOVASPECT AND BUYER FOR THE PERFORMANCE OF SERVICES ("SERVICES") AND THE SALE OF HARDWARE, SOFTWARE, FIRMWARE AND/OR OTHER PRODUCTS ("GOODS"), EACH AS PARTICULARLY DESCRIBED IN THE PROPOSAL. BY ACCEPTING THIS AGREEMENT WITHIN THE REQUISITE TIME PERIOD, BUYER AGREES TO ACCEPT ALL OF THE TERMS AND CONDITIONS OF THIS AGREEMENT. TO THE EXTENT BUYER'S PURCHASE ORDER OR ANY OTHER STATEMENT OF BUYER CONTAINS ANY TERMS OR CONDITIONS IN ADDITION TO OR DIFFERENT FROM THE TERMS OF THIS AGREEMENT SUCH TERMS AND CONDITIONS ARE HEREBY REJECTED BY NOVASPECT AND HEREBY WAIVED BY BUYER AND SUCH TERMS AND CONDITIONS SHALL NOT AFFECT THIS AGREEMENT NOR BE BINDING UPON NOVASPECT ABSENT AN EXPRESS WRITTEN STATEMENT BY NOVASPECT TO THE CONTRARY. THIS AGREEMENT CONSTITUTES THE ENTIRE AGREEMENT AND UNDERSTANDING BETWEEN THE PARTIES WITH RESPECT TO THE SERVICES AND THE DELIVERY OF THE GOODS AND SUPERSEDES ANY OTHER NEGOTIATIONS, AGREEMENTS AND REPRESENTATIONS BETWEEN THE PARTIES, WRITTEN OR ORAL. NO MODIFICATION OF THIS AGREEMENT SHALL BE OF ANY FORCE OR EFFECT UNLESS IN WRITING AND SIGNED BY NOVASPECT. IN THE EVENT OF ANY CONFLICT BETWEEN THESE TERMS AND CONDITIONS AND THE PROPOSAL, THE TERMS OF THE PROPOSAL SHALL GOVERN. IN THE EVENT OF ANY CONFLICT BETWEEN ANY CHANGE ORDER AND THESE TERMS AND CONDITIONS OR THE PROPOSAL, THE TERMS OF THE CHANGE ORDER SHALL GOVERN.

2. **AGREEMENT TO MAKE PAYMENT** Buyer shall pay to Novaspect the fees and purchase prices set forth in the Proposal, as increased or decreased pursuant to any adjustments set forth in any Change Orders (the "Payments"). Any Goods ordered other than those specifically set forth in the Proposal, including additional copies of data/documentation or non-standard data/documentation, shall be priced at Novaspect's prices then in effect.

3. **INVOICES; METHOD OF PAYMENT** Novaspect shall issue an invoice to Buyer (an "Invoice") each month for the amount due Novaspect, as determined pursuant to the terms of the Proposal. Buyer shall pay to Novaspect the amount set forth in each Invoice within 30 days of receipt of such Invoice. Any amount which is not paid when due shall bear interest at the rate of 1.5% per month or portion thereof from the date such amount became due through the date on which payment is received by Novaspect. All payments shall be made without deduction or setoff to Novaspect at the address set forth in the Proposal.

4. **SECURITY** As security for the purchase price of the Goods, Buyer hereby grants and conveys to Novaspect a purchase money security interest in the Goods. Buyer shall, upon request of Novaspect, sign any financing statements and other instruments requested by Novaspect and shall otherwise cooperate with Novaspect in any manner deemed necessary to evidence, perfect or continue such security interest. The security interest granted to Novaspect shall be terminated only upon payment in full for the Goods.

5. **SCHEDULING** Buyer understands that any product design services to be performed by Novaspect are unique, extremely complex and involve a great degree of Buyer/Novaspect interaction. The schedule for completion of the Services and delivery of the Goods set forth in the Proposal is a good faith estimate of Novaspect. The time actually required to complete the Services and deliver the Goods will be subject to Buyer availability. Buyer's timely delivery of information described in the Proposal or otherwise requested by Novaspect, the accuracy of such information unforeseen design issues, design changes and modifications requested by Buyer pursuant to Change Orders, and other matters which generally effect product choice or product design services. Novaspect shall use all commercially reasonable efforts to meet all schedules set forth in the Proposal. Novaspect shall have no liability to Buyer or any other party for any loss or damage arising out of any Service or Good which is provided later than designated in the Proposal.

6. **DELIVERIES** Novaspect shall deliver to Buyer the Goods described in the Proposal. All deliveries from Novaspect to Buyer shall be F.O.B. shipping point and title and risk of loss with respect to such deliveries shall pass to Buyer upon delivery to Buyer or representatives of Buyer including, but not limited to any common or contract carrier, bailee, agent, or employee of Buyer. If Buyer does not accept such F.O.B. delivery, Buyer shall be responsible for all storage charges and other expenses incurred in handling and moving the Goods. Buyer shall pay transit insurance, packaging, handling, shipping and carrier costs associated with the Goods and all sales, use, excise and other taxes levied upon the Goods. Buyer's sole remedy for lost Goods, damage caused during shipment or any delay attributable to shipment shall be an action against the carrier. Buyer agrees to hold Novaspect harmless against any and all penalties, claims, demands, losses, causes of action, suits, judgements, costs and expenses, including reasonable attorneys' and paralegals' fees, of whatever nature arising out of or in connection with the shipment or storage of Goods. Novaspect reserves the right to withhold any and all deliveries in the event Buyer fails to pay any invoice in accordance with its terms or in the event Novaspect has reason to believe Buyer does not have the financial ability to pay any future invoice when due.

7. **CHANGE ORDERS** In the event that Buyer requests any modifications to the Services or to the type or number of Goods, Novaspect shall, if commercially reasonable, prepare and deliver to Buyer a Change Order Proposal describing such modifications and the changes in the Services and/or Goods necessary to effect such modifications (a "Change Order"). The Change Order will also set forth the additional Payments if any and

the basis upon which additional Payments will be computed and an estimate of the revised schedule for completion of the Services and delivery of the Goods. After receipt of a Buyer request verbal or written, for modifications to the Services or to the type or number of Goods, Novaspect may elect not to continue or complete the Services or deliver Goods until Novaspect receives a written authorization to proceed with the additional scope of work. The execution of the written authorization required hereunder by Buyer shall constitute authorization from Buyer for Novaspect to proceed with the Services and delivery of the Goods as modified by the Change Order and Buyer's consent to the increase or decrease in the Payments and the revised schedule set forth in the Change Order.

8. **TERMINATION** Buyer may, by written notice to Novaspect (a "Termination Notice"), terminate its order for Goods and Services or any portion thereof at any time. Notwithstanding the "Notices" provision hereof, a Termination Notice shall not be effective until actually received by Novaspect (the "Termination Date"). Novaspect shall cease performance of the Services and delivery of the Goods as soon as is reasonably possible following receipt of a Termination Notice. Within 15 days after receipt of a final invoice, Buyer shall pay to Novaspect that portion of the Payments allocated to Services performed through the Termination Date as determined by Novaspect plus all expenses and non-cancelable commitments incurred by Novaspect prior to or in connection with such termination including without limitation, the cost of all Goods and all processing, handling and fabrication costs incurred in connection with the Goods (collectively, the "Termination Payment"). Novaspect shall prepare a final Invoice with respect to the Termination Payment as soon as is practicable following receipt of a Termination Notice.

### 9. INDEMNIFICATION

(a) Novaspect hereby agrees to indemnify and hold Buyer harmless from and against penalties, claims, demands, losses, causes of action, suits, judgements, costs and expenses, including reasonable attorneys' and paralegals' fees from (i) the injury or death of any employee, contractor, subcontractor, agent or of other person acting on behalf of or otherwise engaged by Novaspect (a "Novaspect Representative") caused by the negligent act or omission of a Novaspect Representative and (ii) the injury or death of any person other than a Novaspect Representative caused by the negligent act or omission of a Novaspect Representative; provided however, Novaspect's liability set forth in the preceding clause (ii) shall be limited to the proportionate share of liability caused by the Novaspect Representative vis-a-vis all other parties contributing to the cause of such injury, sickness or death. In no event shall Novaspect's liability under this paragraph exceed the amount of Payments actually received by Novaspect under this Agreement.

(b) Novaspect hereby agrees to indemnify and hold Buyer harmless from and against penalties, claims, demands, losses, causes of action, suits, judgements, costs and expenses, including reasonable attorneys' and paralegals' fees from the damage to or destruction of property caused by the negligent act or omission of a Novaspect Representative in providing the Services. In no event shall Novaspect's liability under this paragraph exceed the amount of Payments actually received by Novaspect under this Agreement.

(c) NOTWITHSTANDING ANYTHING CONTAINED HEREIN TO THE CONTRARY, BUYER AGREES THAT NOVASPECT SHALL NOT BE LIABLE TO BUYER FOR ANY DELAY IN PERFORMANCE NOR SHALL NOVASPECT'S LIABILITY IN ANY EVENT EXTEND TO INCLUDE INCIDENTAL, SPECIAL, EXEMPLARY, CONSEQUENTIAL OR PUNITIVE DAMAGES WHETHER OR NOT NOVASPECT HAS BEEN PREVIOUSLY ADVISED OF THE POSSIBILITY OF SUCH CLAIM INCLUDING, WITHOUT LIMITATION, LOSS OF TIME, LOSS OF USE OR LOSS OF ANTICIPATED PROFITS OR REVENUE.

(d) Buyer hereby agrees to indemnify and hold Novaspect harmless from and against penalties, claims, demands, losses, causes of action, suits, judgements, costs and expenses, including reasonable attorneys' and paralegals' fees from (i) the failure of Buyer to keep, perform and observe its obligations hereunder; (ii) any injury, sickness or death of a person other than a Novaspect Representative or damage to property to the extent not caused by the negligent act or omission of a Novaspect Representative; (iii) any injury, sickness or death of a Novaspect Representative not caused by the negligent act or omission of a Novaspect Representative; (iv) the failure of Buyer to comply with and observe all present and future laws, orders, codes, regulations, ordinances, rules and decrees of each governmental agency or instrumentality which may be applicable to the Goods or Buyer's business; (v) any actual or alleged infringement of any third party's intellectual property rights to the extent arising from designs, design information, specifications, processes or formulas supplied by Buyer; and (vi) specifications, design information, processes or other information or representation supplied or made by Buyer which proves to be inaccurate or which was not supplied by Buyer but should have been under the circumstances.

### 10. LIMITED WARRANTY

(a) Novaspect warrants that the Goods shall be fit for the purpose intended provided such purpose has been communicated to Novaspect by Buyer and provided (i) Novaspect has not indicated in a writing delivered to Buyer that it disagrees with Buyer's selection of any such Goods or (ii) the purpose intended has not been affected by (A) improper handling, storage or installation by a person other than a Novaspect Representative, (B) deterioration, corrosion or other adverse affect to the Goods arising from exposure to chemicals, fumes or other environmental variants not known to Novaspect, (C) specifications, design information, under the circumstances, (D) any alterations or repairs not approved by Novaspect or any accident affecting the Goods not caused by a Novaspect Representative or (E) abuse or improper use or maintenance of the Goods. Novaspect's Representatives' oral statements do not constitute warranties and should not be relied upon by Buyer as such. All warranty claims for the particular purpose intended shall be deemed unconditionally waived by Buyer unless Buyer shall

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notify Novaspect in writing of such alleged breach within one year of delivery of the Goods. Buyer shall afford Novaspect prompt and reasonable opportunity to inspect all Goods as to which any breach of warranty claim is made hereunder. If the requisite notice is provided and the Goods are not fit for Buyer's intended purpose, Novaspect will either replace or repair the Goods or adjust the matter fairly and promptly, but under no circumstances shall Novaspect be liable for any delay in performance nor shall Novaspect's liability in any event extend to include incidental, special, exemplary, consequential or punitive damages whether or not Novaspect has been previously advised of the possibility of such claim including without limitation, loss of time, loss of use, or loss of anticipated profits or revenue. In no event shall Novaspect's liability under this paragraph exceed the amount of Payments actually received by Novaspect under this Agreement.

(b) EXCEPT AS EXPRESSLY SET FORTH IN PARAGRAPH (A) ABOVE (i)

NOVASPECT MAKES NO REPRESENTATIONS OR WARRANTIES EXPRESS OR IMPLIED INCLUDING ANY WARRANTY OF MERCHANTABILITY; AND (ii)

BUYER'S SOLE AND EXCLUSIVE REMEDY HEREUNDER SHALL BE LIMITED

TO THE WARRANTIES IF ANY OF THE ORIGINAL EQUIPMENT

MANUFACTURER(S) OF THE GOODS

11. **DEFAULTS.** In the event that Buyer fails to pay all or any portion of the Payments when the same is due and payable or is otherwise in default of any of its covenants hereunder or fails to comply with any of the terms or conditions hereof, or in Novaspect's reasonable opinion, Buyer's ability to make timely Payments hereunder is impaired, or Buyer becomes insolvent or bankrupt or admits in writing its inability to pay its debts as they mature, or makes an assignment for the benefit of creditors, or bankruptcy, reorganization, arrangement or insolvency proceeding or other proceedings for any relief under any bankruptcy or similar law for the relief of debtors are instituted by or against Buyer, then in any such event Novaspect may, (a) terminate and cancel this Agreement forthwith upon written notice to Buyer, (b) require cash payment, satisfactory security, and/or other assurances before providing further Services and Goods, (c) declare the Termination Payment and all other sums payable to Novaspect hereunder to be immediately due and payable whereupon such amount shall forthwith become immediately due and payable to Novaspect, (d) if full payment for the Goods has not been received, enter upon Buyer's premises or any other place where the Goods are located and repossess all of the Goods without notice, hearing, court order or further process of law and otherwise exercise any rights as a secured party under the Uniform Commercial Code and/or (e) pursue any other remedy available to Novaspect at law or in equity.

12. **RETURN.** Novaspect shall not accept return of the Goods unless it notifies Buyer in writing to the contrary. In the event Novaspect accepts return of the Goods, neither transportation charges for the return of Goods nor any other costs or charges incurred in connection therewith shall be paid by Novaspect unless authorized in advance by Novaspect.

13. **SAFETY WARNINGS/COMPLIANCE WITH LAWS.** Buyer accepts and assumes all liability and responsibility for all safety warnings in connection with the Goods and for compliance of the Goods with all federal, state and local laws.

14. **INSTALLATION.** Buyer shall be responsible for receiving, storing, installing, starting up and maintaining the Goods. If requested by Buyer, Novaspect shall provide a quotation for services to assist Buyer in these functions.

15. **BUYER SUPPLIED DATA.** Notwithstanding anything contained herein, to the extent that Novaspect has relied upon any specifications, information or representation of Buyer, whether relating to the operating conditions of Buyer or any other state of affairs impacting the selection or design of the Goods, the provision of the Services or the preparation of the Proposal, which specification, information or representation proves to be inaccurate, Novaspect shall have no liability to Buyer or persons claiming under Buyer resulting from such inaccuracy. In the event of such inaccuracy, Novaspect and Buyer shall modify the Services and/or the selection of the Goods to accommodate the true state of affairs and shall modify the Proposal accordingly including, without limitation, adjusting the Payments and re-establishing time deadlines.

16. **SOFTWARE AND COMPUTER PROGRAMS.** Buyer acknowledges and agrees that Buyer's right to use any software or firmware constituting part of the Goods shall be governed by, and subject to the conditions of, a separate software license agreement. Buyer acknowledges and agrees that all title to the software or firmware constituting part of the Goods shall remain vested in the manufacturer of such software or firmware or the licensor thereof and shall be furnished to and used by Buyer only after execution of and subject to such separate license agreement. Buyer's sole and exclusive remedy with respect to any software or firmware provided hereunder shall be limited to the warranties, if any, of the manufacturer or licensor of such software or firmware. Buyer shall have no right to alter, modify, copy or prepare derivative works of any software or firmware except in accordance with such license agreement.

17. **HIRING OF EMPLOYEES.** Buyer agrees that during the execution of the Services by Novaspect, and for a period of twelve (12) months after completion of the Services, Buyer will not directly or indirectly individually or as a shareholder, investor, advisor, partner, member, manager, owner, director, officer, employee, consultant or agent of any corporation, partnership, limited liability company, or any other entity (a) solicit, encourage or have contact with any of Novaspect's employees for the purpose of encouraging them to end their employment with Novaspect; (b) hire any employee of Novaspect; (c) solicit, encourage or have contact with any of Novaspect's contractors or their employees for the purpose of encouraging them to end their relationship with Novaspect; or (d) hire any Novaspect contractor or employee of a Novaspect contractor.

If Buyer breaches this Section 17, in addition to any and all other remedies available to Novaspect in law or in equity, Buyer shall pay as damages, and not as a penalty, \$125,000 for each breach. The parties agree that the foregoing damages shall not preclude Novaspect from obtaining any further damages in law or in equity in

connection with any and all breaches of this Section 17. In addition, Buyer agrees that in the event Novaspect institutes or becomes involved in any action to enforce or defend this Section 17, Novaspect shall be entitled to recover from the Buyer its reasonable attorneys' fees and costs related to such action.

18. **FORCE MAJEURE.** Novaspect shall not be liable for any failure to perform resulting from acts of God, war, riot, fire, explosion, accident, flood, sabotage, the shortage of or inability to obtain from anticipated sources adequate materials, components, parts or Goods, or transportation facilities, compliance with governmental requests, law, regulations, orders or actions, the breakage or failure of machinery or apparatus, national defense requirements or any other event beyond the reasonable control of Novaspect; or in the event of labor trouble, strike, lockout or injunction affecting Novaspect or its supplies, suppliers or transporters which event makes impractical the provision of the Services or the manufacture, procurement, transportation, delivery, acceptance or use of the Goods. Novaspect shall give written notice to Buyer with reasonable promptness after the occurrence of any such event.

19. **RELATIONSHIP OF PARTIES.** The relationship of the parties shall be that of independent contractors and not as partners or joint ventures. Each party is and is intended to be, engaged in its own and entirely separate business.

20. **NOTICES.** All notices and other communications given hereunder shall be in writing and deemed to have been given when (i) personally delivered, (ii) one business day after delivery to a nationally recognized overnight courier service, (iii) upon the written confirmation of receipt following the transmission of a teletype or (iv) three days after being mailed by certified mail, postage prepaid, to the addresses of Novaspect or Buyer as set forth in the Proposal or to such other addresses as either party may request by notice given in accordance with this paragraph.

21. **GOVERNING LAW; JURISDICTION AND VENUE/LIMITATION PERIOD.** This Agreement shall be governed by and construed in accordance with the laws of the State of Illinois. NOVASPECT AND BUYER IRREVOCABLY AGREE THAT ALL ACTIONS OR PROCEEDINGS IN ANY WAY, MANNER OR RESPECT, ARISING OUT OF OR FROM OR RELATED TO THIS AGREEMENT OR ANY DOCUMENT, INSTRUMENT OR TRANSACTION IN CONNECTION HERewith SHALL BE HEARD OR LITIGATED EXCLUSIVELY IN COURTS HAVING SITUS WITHIN THE CITY OF CHICAGO, COUNTY OF COOK, STATE OF ILLINOIS. NOVASPECT AND BUYER CONSENT AND SUBMIT TO THE PERSONAL JURISDICTION OF ANY LOCAL, STATE OR FEDERAL COURT LOCATED WITHIN SAID CITY, COUNTY AND STATE AND IRREVOCABLY WAIVE ANY RIGHT TO TRANSFER OR CHANGE VENUE OF ANY SUCH ACTION OR PROCEEDING OR OBJECT TO THE JURISDICTION OF ANY SUCH COURT OVER THE PARTIES HERETO. NO ACTION OTHER THAN AN ACTION FOR UNPAID PAYMENTS UNDER THIS AGREEMENT MAY BE BROUGHT BY EITHER PARTY MORE THAN TWO YEARS AFTER THE CAUSE OF ACTION HAS ACCRUED.

22. **COLLECTION/ENFORCEMENT EXPENSES.** In addition to any other amounts due hereunder, Buyer shall reimburse Novaspect for all costs and expenses (including reasonable attorneys' and paralegals' fees and expenses) incurred by Novaspect in collecting any amount due to Novaspect or enforcing any provision of this Agreement.

23. **GENERAL PROVISIONS.** Except as expressly set forth herein, any waiver by any party of its rights under this Agreement shall be in writing and signed by the party waiving such right. The failure of either party to enforce any of the provisions of this Agreement or any rights in respect thereto, or to exercise any election herein provided, shall not waive such provisions, rights or elections or subsequent breaches thereof. No course of dealing shall be deemed to constitute a continuing waiver of any breach or default or right or remedy hereunder. Buyer shall not assign its rights or obligations under this Agreement to any party without Novaspect's prior written consent. This Agreement shall be binding upon and inure to the benefit of the parties and their respective representatives, successors and permitted assigns. Except as otherwise stated herein, termination of this Agreement shall not release either party from any liability or obligation which has theretofore accrued and remains to be performed as of the date of such termination.



## RESOLUTION

BE IT RESOLVED by the Public Utility Board of the City of Rochester, Minnesota, to approve a purchase order agreement with Emerson Novaspect for

Control System Software Support Services at the Silver Lake Plant

The amount of the agreement to be SEVENTY-SEVEN THOUSAND SEVEN HUNDRED SEVENTY-NINE AND NO/100 DOLLARS (\$77,779.00).

Passed by the Public Utility Board of the City of Rochester, Minnesota, this 27<sup>th</sup> day of May, 2008.

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President

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Secretary